Neutral Citation Number: [2024] EWHC 1749 (Comm)

Case No: CL-2022-00351

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

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

Date: 12th July 2024

Before :

SIMON COLTON KC
SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

LAKATAMIA SHIPPING COMPANY LTD	**Claimant**
- and -	
	Defendants
(1) NOBU SU / HSIN CHI SU (aka SU HSIN CHI; aka NOBU MORIMOTO)	
(2) CHANG TAI-CHOU	
(3) ARNAUD ZABALDANO	

- -
- -

S.J. PHILLIPS KC and JAMES GOUDKAMP (instructed by **Hill Dickinson LLP**) for the **Claimant**
The First Defendant in person
The Second and Third Defendants did not appear and were not represented

Hearing date: 13 June 2024
Further written submissions received: 5 July 2024
Draft judgment circulated: 8 July 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 12 July 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Simon Colton KC:

Introduction

1. This is the latest instalment in the long-running saga arising out of a breach of contract claim brought by Lakatamia Shipping Co Ltd (**Lakatamia** or the **Claimant**) against the First Defendant (**Mr Su**). Judgments were entered in that claim in November 2014 and January 2015. In the 9½ years since, the judgment sum is largely unsatisfied. Indeed, with interest and costs which have accrued in the meantime, I am told that, after some recoveries, more than US$ 60 million is now owed.

2. The hearing before me was the largely undefended trial of a claim against Mr Su, the Second Defendant (**Mr Chang**), and the Third Defendant (**Maître Zabaldano**) arising out of Mr Su's breach of a freezing order (the **Freezing Order**) which was intended to prevent the dissipation of his assets prior to judgment. Mr Su cannot dispute such breach: Sir Michael Burton GBE previously committed Mr Su to 21 months' custody for numerous breaches of the freezing order: see *Lakatamia Shipping Co Ltd v Su* [2019] EWHC 898 (Comm). Those breaches included failing to disclose Mr Su's interests in two Monaco properties – Villa Rignon and Villa Royan (the **Villas**) – and the dissipation of the proceeds of sale of the Villas, which were held for the company which owned them, Cresta Overseas Ltd (**Cresta Overseas**). The proceeds (the **Cresta Overseas Monies**) were, as the evidence in the present case demonstrates, paid away to a company named UP Shipping Corporation (**UP Shipping**). In the present trial, the central issue is whether Mr Chang and Maître Zabaldano have any liability arising out of the events in question.

3. In previous proceedings, after a trial to which none of the current Defendants were party, Bryan J decided that a number of individuals and companies had unlawfully conspired with each other to breach the Freezing Order by concealing the Cresta Overseas Monies from Lakatamia. The Claimant describes this conspiracy as the '**Principal Conspiracy**'. In the present proceedings, the Claimant alleges it has been the victim of a further unlawful conspiracy, essentially parasitic on the Principal Conspiracy, between Mr Su, Mr Chang and Maître Zabaldano, to dissipate the Cresta Overseas Monies and thereby injure

Lakatamia (the **Subsidiary Conspiracy**). The Claimant brings claims against all three Defendants for unlawful means conspiracy; and against Mr Chang and Maître Zabaldano for the so-called *Marex* tort (named after the decision of Knowles J in *Marex Financial Ltd v Sevilleja* [2017] EWHC 918 (Comm), [2017] 4 WLR 105).

Preliminary matters: the conduct of the trial

4. The proceedings were served on the various defendants in July 2022. None of the defendants ever served an Acknowledgment of Service indicating an intention to defend the case on the merits, but nonetheless Lakatimia did not seek default judgment. Rather, as was its right, Lakatimia decided to pursue the claims to trial.

The position of Mr Su

5. Although Mr Su never formally acknowledged service, he did appear remotely, representing himself, at various pre-trial hearings, including the Case Management Conference before Bright J in January 2024. On 26 April 2024, Cockerill J ordered that unless Mr Su were to file a CPR-compliant defence by 13 May 2024, Mr Su would be debarred from defending the proceedings. A document was filed, but on 23 May 2024 Foxton J decided that this did not comply with the requirements of the CPR, and struck it out. Nonetheless, Foxton J decided that it would be open to Mr Su at trial to advance a case that Maître Zabaldano believed that the Villas were not affected by the Freezing Order, and that Mr Chang believed the Villas were family owned, save that Mr Su would not be permitted to adduce witness oral evidence in respect of such a case, without the prior permission of the court. For the purpose of seeking such permission Mr Su was to comply with the order for disclosure made at the CMC, and provide the court with a copy of any witness statement he sought permission to adduce. Any application for such permission was to be made on paper by 4pm on 4 June 2024.

6. On 4 June 2024, an application was made by Mr Su, accompanied by his third witness statement, but Foxton J decided that Mr Su had not complied with the order for disclosure, and so Foxton J would not give permission for Mr Su to adduce witness evidence. Nonetheless, Foxton J decided it would be a matter for the trial judge to decide the extent of Mr Su's participation in the trial.

7. In the event, I decided at the outset of the trial that I would permit Mr Su to argue that the evidence adduced by Lakatamia did not meet the burden of proving that Maître Zabaldano and Mr Chang had the necessary states of mind to be liable for the torts alleged. In making this decision, I bore in mind the observations of Fancourt J in *Byers v Samba Financial Group* [2020] EWHC 853 (Ch) at [121]-[124] that there is no 'standard' or 'usual' response of the court where a defence has been struck out, but the court "*must have regard to the circumstances of the individual case and do what is necessary and proportionate to mark the seriousness of the breach of its order in a way that is consistent with the interests of justice and the overriding objective*". I decided that allowing Mr Su to make arguments on this narrow issue, but not to adduce evidence of his own, was most consistent with the interests of justice and the overriding objective.

8. At the outset of the trial, Mr Su also sought to adjourn the trial. For reasons I gave orally, I refused that application.

The position of Mr Chang

9. Mr Chang never acknowledged service of the proceedings, nor played any part in them. Nonetheless, I have received a certificate of service showing that Mr Chang was served at his last known residence in Taiwan. He may not have received further materials relating to the case, but, according to evidence from the Claimant's solicitor, Mr Conor O'Brien (**Mr O'Brien**), that appears to be because Mr Chang has refused delivery of materials sent to his address, and not made arrangements with the courier to accept such materials elsewhere.

The position of Maître Zabaldano

10. Maître Zabaldano acknowledged service on 27 September 2022, declaring an intention to contest jurisdiction. That jurisdiction challenge was rejected by Bryan J on 21 July 2023: *Lakatamia Shipping Co Ltd v Su* [2023] EWHC 1874 (Comm) (the **Jurisdiction Judgment**). Thereafter, Maître Zabaldano decided he did not wish to take any further part in the proceedings, setting out reasons for this in a letter from his solicitors, Mishcon de Reya LLP, on 25 October 2023. Nonetheless, I was told by Mr O'Brien that materials for the case continued to be sent to Maître Zabaldano, although couriers were apparently turned away when

they attempted to make deliveries, and Maître Zabaldano's email server was apparently configured to refuse emails from the Claimant's solicitors concerning these proceedings.

The evidence relied on by the Claimant

11. The Claimant submitted that the court should proceed with trial in the absence of Mr Chang and Maître Zabaldano pursuant to CPR 39.3(1). In circumstances where I was satisfied that the Claimant has made proper efforts to correspond with these Defendants and to inform them of the trial date, I was satisfied that this was the right course for me to take.

12. As the Claimant accepts, even where proceedings are undefended, the court "*still ha[s] to be satisfied on the balance of probabilities that the claim is made out*": *CMOC Sales & Marketing Ltd* [2018] EWHC 2230 (Comm) (***CMOC***) at [12] (HHJ Waksman QC). Here, the allegations are serious. As such, although the standard of proof remains the balance of probabilities, cogent evidence is required in order to meet that standard. (The Claimant submitted the evidence had to be "*compelling*", which may go further than is warranted.)

13. The Claimant told me it relied on "*the documentary evidence in the trial bundles, on the witness statements that have been made on its behalf, and on the averments made in its statements of case (duly certified by statements of truth)*". As to this:

    (a) At the CMC, Bright J ordered that "*Documents included within the trial bundle shall be adduced in evidence and shall hence form part of the evidence in the trial of the action*". There was, therefore, no doubt that the Claimant could rely on materials in the trial bundle. But the trial bundle was, in my judgment, of a grossly excessive size: for a hearing with a time estimate of one day, I was presented with a 'trial bundle' consisting of 33 volumes, together with a 109-page 'consolidated index', in addition to an 8-volume 'core bundle'. In the course of my pre-reading (using a reading list prepared by Counsel for the Claimant, together with a lengthy skeleton argument) and oral submissions by Mr Phillips KC on behalf of the Claimant, I was taken to, or asked to read, only a minuscule portion of these documents. Contrary to the explicit direction of Bright J, it is plain that the

bundle did not contain "*only documents… that are necessary for the hearing*" (Commercial Court guide, Appendix 7, para 5).

(b) As for "*the witness statements made on [the Claimant's behalf]*", there were no trial witness statements served by the Claimant. The Claimant opted not to call any witnesses to give evidence, but relied instead on certain witness statements, mostly of the Claimant's solicitors, served in the course of Maître Zabaldano's jurisdiction challenge. Very little of the evidence in these statements was first-hand knowledge of the witness, or even information derived from any natural person on behalf of the Claimant. Rather, these statements mostly served to collate evidence from documents obtained by the Claimant.

(c) As for "*averments made in [the Claimant's] statement of case*", I sought the assistance of the Claimant's Counsel on the effect of CPR 32.6(2), which provides that "*At hearings other than the trial, a party may rely on the matters set out in – (a) his statement of case…*" (emphasis added). As to this:

(i) One might infer from this language that, at the trial, a party may not rely on its statement of case as evidence of the matters set out – in other words, that statements of case are inadmissible as evidence at the trial. This is somewhat counter-intuitive, since in civil proceedings very little is automatically inadmissible, and it would be surprising if a document which has been formally verified as true in the current proceedings were to fall into that small category of inadmissibility.

(ii) In terms of authority on this point, the Claimant pointed me to *Lighting and Lamps UK Ltd v Clarke* [2016] EWCA Civ 5 at [42] where, having cited CPR 32.6, Vos LJ observed, without criticism, that the claimants had proved their case "*by presenting both their statement of case verified by a statement of truth, and also their witness statements*". In addition, in *Raffermati v Capello Hair Designs Ltd* [2017] EWHC 3134 (Ch) at [59]-[62], Zacaroli J put

CPR 32.6 in the wider context of CPR 32: CPR 32.2 provides that at trial, the "*general rule*" is that any fact which needs to be proved by the evidence of witnesses is to be provided by oral evidence given in public, and such evidence will be in the form of witness statements; but "*nothing in rule 32.2 or rule 32.6 prevents a witness giving oral evidence at trial by way of confirming the accuracy of a previously served statement of case, particularly one verified by a statement of truth from the very witness called to give evidence*".

(iii) DJ Langley sitting in the Central London County Court in *Wells v Chorus Law* (2018 WL11617243, 16 August 2018) held at [10] that Particulars of Claim were "*inadmissible*" at trial. In *Kimathi v The Foreign and Commonwealth Office* [2018] EWHC 2066 (QB), Stewart J held at [35]: "*If facts have been proved as required by Rule 32.6, then there is no need to attempt to rely on Statements of Case; if they have not been so proved, then, at trial, the Statements of Case (unless adopted in oral evidence) do not prove those facts.*" In reaching his conclusion, Stewart J cited *Arena Property Services Ltd v Europa 2000 Ltd* [2003] EWCA Civ 1943 at [18], where Arden LJ held that an allegation of an easement in a Part 20 claim "*does not assist since an allegation so verified is not evidence for the purposes of the trial (see CPR 32.6(2))*".

(iv) In *Aegean Baltic Bank SA v Renzlor Shipping Ltd* [2020] EWHC 2851 (Comm) (Adrian Beltrami QC), the court had to consider the position where a defendant had been debarred from calling evidence, but had previously filed a defence verified by a statement of truth. The judge held at [29] that he "*would not exclude the possibility that a pleading with an appropriate statement of truth could constitute hearsay evidence in accordance with CPR 33.2*" – but noted the point did not arise in that case because the defendant had been precluded from adducing even hearsay evidence.

(v) Drawing the threads together, it seems to me that the correct position is as follows:

(1) CPR 32.6 has no relevance, either way, to the question of what evidence may be called at trial. CPR 32.6 deals only with hearings other than the trial.

(2) Rather, the general rule, as set out in CPR 32.2, is that any fact which needs to be proved by the evidence of witnesses at trial is to be proved by the witnesses' oral evidence given in public, subject to any provision to the contrary contained in the CPR or elsewhere, or subject to any order of the court.

(3) Accordingly, if no order otherwise is made, and there is no contrary provision in the CPR or elsewhere, a statement of case, even if verified by a statement of truth, will not be evidence at trial.

(4) But if, for example, (i) the court makes an order that all documents in the trial bundle shall form part of the evidence (as occurred here), or (ii) the parties so agree, and the court is informed of such agreement, pursuant to section J.8.6 of the Commercial Court guide, or (iii) a witness expressly adopts a statement of case as part of their evidence, or (iv) the court allows a party to rely on a statement of case as evidence, or (v) in relation to Part 8 claims, CPR 8.5(7) applies, then a statement of case may be relied on as evidence as the truth of its contents. A statement of case is not inadmissible at the trial; but it is not evidence unless and until it is adduced as evidence in some way.

(vi) In the event, in the present case, it seems to me that there is little weight to be given to the contents of the Particulars of Claim: many of the facts alleged are beyond dispute, such as the existence of the Freezing Order; other facts – most significantly, the states of mind of Maître Zabaldano and Mr Chang – are outside the knowledge of the Claimant, and the pleaded allegations are based only on inferences. Whether such inferences are properly drawn is a question for me as the trial judge.

14. In addition to the underlying documentary material, numerous judgments from other proceedings involving Lakatamia and Mr Su were included in the trial bundle.

(a) Counsel for the Claimant submitted that:

> "Lakatamia accepts that findings made in the various judgments do not bind the Defendants. However it does not follow from this that the prior judgments are unimportant. The relevant principles in this regard were expounded in *JSC BTA Bank v Ablyazov* [2016] EWHC 3071 (Comm) at [24] per Laurence Rabinowitz QC:
>
> "(1) 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), [25] (Eder J)".

(b) I accept and adopt the principles summarised by Mr Rabinowitz QC in *Ablyazov*. However, it was apparent from the submissions made to me, in writing and then orally, that the application of such principles was not well understood by the Claimant. In particular, I note the following:

(i) It is not the case that findings excluded in accordance with the principle of *Hollington v Hewthorn* [1943] QB 587 merely, as the Claimant put it "*do not bind*" the Defendants. Rather, such findings are inadmissible. They cannot be relied on against those Defendants who were not party to the earlier proceedings. It was wrong for the

Claimant's Counsel repeatedly to invite me to have regard to the factual conclusions in the judgment of Bryan J in *Lakatamia v Su* [2021] EWHC 1907 (Comm) (the ***Madam Su* judgment**), and to read lengthy extracts from the *Madam Su* judgment as part of my pre-reading, in circumstances where Maître Zabaldano and Mr Chang were never party to those proceedings, and the claim against Mr Su had been stayed before trial as a result of his bankruptcy (albeit, the bankruptcy order was subsequently annulled).

(ii) On the other hand, however, the principle in *Hollington v Hewthorn* does not, so far as I am aware, extend to proceedings between the same parties. Findings in such proceedings are not automatically excluded from later proceedings. On the contrary, the doctrines of cause of action estoppel and issue estoppel may preclude a party from challenging the same cause of action, or a finding on a common issue, in later proceedings between the same parties: see the summary of Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] AC 160 at [17]. As a result, in the present case, for example, it was not open to Mr Su to dispute that he had breached the Freezing Order, in light of the prior determination of Sir Michael Burton GBE that Mr Su had done so, in proceedings between Lakatamia and Mr Su.

15. A related issue, which arose as a result of the way in which the Claimant put its case in writing, was the reliance to be placed on the Jurisdiction Judgment. As part of his challenge to the jurisdiction, Maître Zabaldano disputed that there was a serious issue to be tried against him. Bryan J rejected that argument, occasionally in trenchant terms. The Claimant submitted that the "*findings*" made by Bryan J were "*perhaps not strictly binding on Maître Zabaldano*" but "*nevertheless of considerable significance*". As I indicated to Mr Phillips KC when he opened the case orally, I do not accept this characterisation. This is for the following reasons:

(a) First, and self-evidently, a conclusion that a factual allegation raises a serious issue to be tried is not comparable to a finding of fact after a trial.

(b) Second, this is especially so where, unlike at trial, the rule in *Hollington v Hewthorn* does not prevent at an interlocutory stage the use of findings in other litigation (see *Sabbagh v Khoury* [2014] EWHC 3233 (Comm) (Carr J) at [202]-[206]). Bryan J in the Jurisdiction Judgment was entitled to, and did, have regard to his own findings in the *Madam Su* judgment. As explained above, such findings are inadmissible at the trial of the action.

(c) Third, Bryan J was told in the course of the Jurisdiction Application that two individuals – a Mr James Garrett and a Mr Toby Owles – would be called to give evidence at trial. In particular, Bryan J was told that Mr Garrett "*is of considerable importance… he is the principal independent witness capable of providing evidence relevant to the causes of action asserted*". In the event, however, Mr Garrett and Mr Owles were not called, and I received no evidence to explain their absence.

16. That leads on to the question of adverse inferences. As regards Mr Garrett and Mr Owles, although the court was told they would be called, and their absence is unexplained, I draw no adverse inference from their absence in circumstances where the Defendants never actively defended the proceedings. (I would be inclined to suggest that the Claimant had thereby adopted a sensible and proportionate approach to the litigation, had it not been for the size of the trial bundle, which I have already mentioned, and the amount of costs incurred in pursuing this undefended claim, leading to a 1-day trial, which the summary schedule puts at £1.19 million.) More significant, however, is the question of whether I should draw adverse inferences against the Defendants from their failure to give disclosure. As to this:

(a) The Claimant submitted that I should draw adverse inferences against the Defendants from their failure to give disclosure, citing three authorities on the point: *Miah v Miah* [2020] EWHC 3374 (Ch) at [41]; *Prest v Petrodel Resources Ltd* [2013] UKSC 32, [2013] 2 AC 415 at [85]; *Earles v Barclays Bank plc* [2009] EWHC 2500 (Mercantile).

(b) I readily accept that I can draw adverse inferences against Mr Su, in circumstances where he has engaged with the proceedings, and been given repeated opportunities to give disclosure, but failed to do so.

(c) But, as I suggested to Mr Phillips KC the position of Maître Zabaldano and Mr Chang is somewhat different: they have not (in Maître Zabaldano's case, since his unsuccessful jurisdiction challenge) participated in the proceedings at all. Mr Phillips KC's response was that these Defendants could not be in a better position from having not participated in the proceedings at all, than they would have been if they had participated in the proceedings and failed to give disclosure. I do not accept this. In my judgment, Mr Phillips KC's response misunderstands the nature of an adverse inference: an adverse inference is not drawn to penalise a party for breaching a court order, but because, as a matter of "*ordinary rationality*" (to use the language of Lord Leggatt in *Royal Mail Group Ltd v Efobi* [2021] UKSC 33, [2021] 1 WLR 3863 at [41]) a party's failure to give disclosure which they could and should have given may indicate that that party knew that if they had given such disclosure, it would undermine their case or support the other side's case. I note that in *Lakatamia Shipping Co Ltd v Tseng Yu Hsia* [2023] EWHC 3023 (Comm) (***Tseng***), yet another related case, Foxton J at [25] described it as "*far from obvious*" that an adverse inference should be drawn from a non-participating defendant's failure to provide disclosure or to give evidence.

(d) As a matter of ordinary rationality, I am not persuaded that the absence of Mr Chang and Maître Zabaldano means that I can infer that they control documents which, if disclosed, would support the Claimant's case. I have no information at all as to why Mr Chang did not engage in the proceedings, but it may have been (for example) because he lacked the funds to do so, or because he was concerned that engaging in the proceedings would be treated, in the country where he resides, as submission to the jurisdiction of the English court. As for Maître Zabaldano, his solicitors set out a statement of his reasons for non-participation in a letter of 25 October 2023. These may be summarised as a combination of believing that the Claimant

> engaged in forum shopping to bring a claim that would fail in the Monegasque courts; that the claim lacked any evidence; and that engaging in the English court process would expose Maître Zabaldano to the risk of being ordered to breach his rules of professional secrecy. Specifically, "*as a matter of Monegasque private international law, the claims present a wholly insufficient basis on which any court except a Monaco court should accept jurisdiction*". I cannot say whether any or all of these are the true reasons for Maître Zabaldano's non-engagement in the proceedings, but, again, I am not persuaded that I can infer from his non-engagement, and hence his failure to give disclosure, that if he were to have given disclosure such disclosure would have supported the Claimant's case.

17. As part of my pre-reading, I was invited by the Claimant to read various witness statements served by or on behalf of Maître Zabaldano in the course of the jurisdiction challenge. Many of the factual matters set out in those statements are relied upon by the Claimant as being correct and supportive of the Claimant's case. It was not suggested that I should not admit these documents as evidence, to be weighed in the balance, and I have considered them as part of the evidential material. Indeed, I have had regard to them in considering what defences Maître Zabaldano would have raised, had he participated in the proceedings. I understand it to be accepted by the Claimant that this was the appropriate course to take, since the Claimant itself addressed Maître Zabaldano's putative defences in its arguments.

18. Consistently with this, the Claimant accepted as applicable the statement of HHJ Waksman QC in *CMOC* at [13] that "*Where the trial is not attended by one of the parties, there is still an obligation of fair presentation which is less extensive than the duty of full and frank disclosure on a without notice application. Mr Justice Cresswell in Braspetro Oil Services v FPSO Construction Inc [2007] EWHC 1359 (Comm) said as follows, that he required the claimant to draw to the attention of the court: 'points, factual or legal, that might be to the benefit of [the defendant]'.*" However, I regret that, in some regards, I found that the Claimant fell short of such obligation. In particular:

(a) As indicated at paragraph 15 above, I was invited to treat inadmissible matters as being "*of considerable significance*". This formed a significant part of my pre-reading.

(b) The Claimant's skeleton stated: "*Mr Garrett, who attended the meeting, telephoned Maître Zabaldano immediately after it, see Gardner 1st, ¶37 [1/11/76]*" (emphasis added). This was a reference to the evidence of Russell Gardner, the Claimant's solicitor (**Mr Gardner**). However, that was not the evidence of Mr Gardner. Mr Gardner's evidence was: "*Mr Garrett – who was present at the meeting – has told me, and I believe, that he was in telephone contact with Maître Zabaldano during the course of the day*" (emphasis added). The difference is significant, in circumstances where there is evidence that Mr Garrett only learned of the Freezing Order in the course of the day-long meeting, and so may not have known of it at the time he was in contact with Maître Zabaldano, if such contact was earlier in the day.

(c) The Claimant's skeleton also stated: "*It is indisputable that Mr Chang knew that Mr Su owed the Judgment Debt at the relevant time. On 19 May 2015, he signed a letter addressed to the Court of Appeal in connection with Mr Su's efforts to appeal against the Cooke Judgments [6/59/164]*". On inquiry, it turned out this was a document which did not bear Mr Chang's signature. In any event, a letter addressed to the Court of Appeal in May 2015 would not render it "*indisputable*" that Mr Chang had particular knowledge in February 2017. While such forensic hyperbole may have its place in contested trials, I struggle to see how it can be consistent with the obligation of fair presentation to which the Claimant accepted it was subject.

Written submissions following trial

19. In the course of preparing this judgment, a number of legal issues occurred to me which had not been dealt with by Counsel for Lakatamia, or Mr Su, in the course of the trial. (I make no criticism of the parties for this.) As a result, I invited both sides to provide further assistance on these points. I received detailed further

written submissions from both Mr Su and the Claimant, to which I have had regard in preparing this judgment.

The claims brought by the Claimant: the law

Applicable law

20. I treat the applicable law of the claims advanced by the Claimant as being English law. In this regard, I follow the decision of Foxton J in *Tseng* at [16]:

> "As Lord Leggatt stated in *FS Cairo (Nile Plaza) LLC v Brownlie* [2021] UKSC 45; [2021] 3 WLR 1011 at [113], the default rule is that "if a party does not rely on a particular rule of law even though it would be entitled to do so, it is not generally for the court to apply the rule of its own motion." Where foreign law is not pleaded, English law applies. No party has pleaded that foreign law applies nor adduced any evidence to that effect. English law therefore applies to the issues in these proceedings. I can see no reason why a party who chooses not to participate in proceedings should be in a better position than a party who participates, but chooses not to dispute the application of English law, in this respect."

Unlawful means conspiracy

21. Again, I gratefully adopt the analysis of Foxton J in *Tseng* at [18] (itself deriving from the earlier *Madam Su* judgment and the Jurisdiction Judgment of Bryan J):

> "18. The relevant principles were again accurately and comprehensively set out at [76]-[115] of the [Madam Su] Judgment. I gratefully adopt that analysis. In short, Lakatamia must show the elements of unlawful means conspiracy as stated by Cockerill J in *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) at [94] :
>
> "The elements of the cause of action are as follows:
>
> i) A combination, arrangement or understanding between two or more people. It is not necessary for the conspirators all to join the conspiracy at the same time, but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of: *Kuwait Oil Tanker* at [111].
>
> ii) An intention to injure another individual or separate legal entity, albeit with no need for that to be the sole or

predominant intention: *Kuwait Oil Tanker* at [108]. Moreover:

> a) The necessary intent can be inferred, and often will need to be inferred, from the primary facts – see *Kuwait Oil Tanker* at [120-121], citing *Bourgoin SA v Minister of Agriculture* [1986] 1 QB: '[i]f an act is done deliberately and with knowledge of the consequences, I do not think that the actor can say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them'.
>
> b) Where conspirators intentionally injure the claimant and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests: *Lonrho Plc v Fayed* [1992] 1 AC 448, 465-466; see also *OBG v Allan* [2008] 1 AC 1 at [164-165].
>
> c) Foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention: *OBG* at [166].

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

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

iv) Concerted action (in the sense of active participation) consequent upon the combination or understanding: McGrath at [7.57].

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

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

19. Further, as Bryan J noted in *Lakatamia Shipping Co Ltd v Su* [2023] EWHC 1874 (Comm) at [106] :

"(1) Dishonesty is not itself an element of the tort, see *Arcelormittal USA LLC v. Ruia* [2020] EWHC 3349 (Comm), at [27 (3)].

(2) Justification is not a defence, see, for example, *Palmer Birch v. Lloyd* [2018] EWHC 2316 (TCC); [2018] 4 WLR 164, at [192]–[193]; the [Madam Su Judgment], at [81]; *Seneschall v. Trisant Foods Ltd* [2023] EWHC 1029 (Ch), at [151]–[160]. Justification cannot be a defence since the element of unlawful means connotes the absence of justification, see *JSC BTA Bank v. Khrapunov* [2018] UKSC 19; [2020] AC 727 at [10] …

(3) The combination element requires that 'at least one of' (but not necessarily all of) the conspirators will use unlawful means – see *Revenue and Customs Commissioners v. Total Network SL* [2008] UKHL 19; [2008] 1 AC 1174, at [213]. Thus, there is no requirement that all of the conspirators will use unlawful means. It is also unnecessary that the combination be, for example, contractual in nature, or that it be an express or formal agreement, see *Kuwait Oil Tanker Co SAK v. Al Bader (No.3)* [2000] 2 All ER (Comm) 271 (CA), at [111].

(4) The element of unlawful means comprises conduct lacking 'just cause or excuse' (see *JSC BTA Bank*, at [10]). Contempt of court and steps taken to prevent the enforcement of judgments constitute unlawful means (see at [16]).

(5) The intention to injure need not be the defendant's predominant intention, see *JSC BTA Bank*, at [13]. Nor need he or she act maliciously in the sense that harm to the claimant need not be the end sought.

(6) It is enough that harm to the claimant was the means by which the defendant sought to achieve his or her end, i.e., that the defendant knew (or turned a blind eye to the fact) that injury to the claimant would ensue - see *ED&F Man Capital Markets Ltd v. Come Harvest Holdings Ltd* [2022] EWHC 229 (Comm) 487, [500]. In *The Eurysthenes* [1977] Q.B. 49 (CA) at 68, Lord Denning M.R. said that 'If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry – so that he should not know it for certain – then he is to be regarded as knowing the truth'.

(7) The damage requirement calls for proof of 'damage caused by the conspiracy', *Palmer Birch v. Lloyd*, supra, at [239]."'

22. One issue which occurred to me at trial, not directly covered in the foregoing, is the extent to which defendants to a claim of unlawful means conspiracy must, in order to be found liable, know of the unlawfulness of the means used. In this regard, Mr Phillips KC helpfully took me to *Racing Partnership Ltd v Done Bros (Cash Betting) Ltd* [2020] EWCA Civ 1300, [2021] Ch 233 (***Racing Partnership***), which decides that in order to establish liability the claimant must prove that the defendants (and each of them) knew the facts which rendered the means unlawful, but need not show that the defendants knew that the means are – as a matter of law – unlawful. In short, ignorance of the law is no defence: see at [139]-[147] (Arnold LJ) and [171] (Phillips LJ). I note that Lewison LJ dissented on this point (at [213]-[265]) but I am bound by the decision of the majority.

The Marex tort

23. Once again, I gratefully adopt Foxton J's summary from *Tseng*:

> "20. The *Marex* tort is a relatively new cause of action, but its existence and requisite elements are sufficiently established at first instance, in particular by the [Madam Su] Judgment which I am satisfied I should follow. I gratefully adopt Bryan J's summary of the relevant principles at [116]-[131] of the [Madam Su] Judgment, and at [126] in particular:
>
> "…the elements of the *Marex* tort are:
>
> (1) The entry of a judgment in the claimant's favour,
>
> (2) Breach of the rights existing under that judgment,
>
> (3) The procurement or inducement of that breach by the defendant,
>
> (4) Knowledge of the judgment on the part of the defendant, and
>
> (5) Realisation on the part of the defendant that the conduct being induced or procured would breach the rights owed under the judgment."
>
> 21. "Further principles" are set out at [127]:
>
> "…the following further principles apply to the *Marex* tort:-

(1) It suffices that the defendant intended to violate the claimant's rights under the judgment. The defendant does not need also to intend thereby to damage the claimant. As Judge Russen QC stated in *Palmer* at [174]:

'In order for liability to be established under the inducement tort, the result intended by the defendant must be a breach of contract. But that is both necessary and sufficient and there is no need for the claimant to go further by establishing an intention to cause damage …'

See also, in this regard, *OBG Ltd v. Allan* [2007] UKHL 21; [2008] 1 AC 1 per Lord Hoffmann at [8].

(2) Just as it is unnecessary for a defendant in a claim for inducing a breach of contract to know the details of the contract provided that they had 'the means of knowledge' (*Emerald Construction Co Ltd v. Lowthian* [1966] 1 W.L.R. 691, 700 per Lord Denning M.R.), it is inessential that the defendant to a claim for the *Marex* tort has actual knowledge of the contents of the judgment.

(3) In this regard blind-eye knowledge is sufficient. Thus, as was said by Lord Denning in *Emerald Construction* at page 700, 'it is unlawful for a third person to procure a breach of contract knowing, or recklessly, indifferent whether it is a breach or not'.

(4) '[A]ny active step taken by the defendant having knowledge of the covenant by which he facilitates a breach of that covenant' falls within the ambit of the tort: see *British Motor Trade Association v. Salvadori* [1949] Ch. 556, 565 per Roxburgh J.

(5) There is no need to establish 'spite, desire to injure or ill will' on the part of the defendant, see Clerk & Lindsell on Torts, at para 23.57.""

24. There is an issue as to what it means for a party to 'intend to violate the claimant's rights under the judgment' and – specifically – whether such intention is established if the defendant believes they are entitled to violate such rights: I deal with that issue at paragraph 104 below. There is also an issue as to whether Bryan J was correct to express the view that there is no defence of justification to the *Marex* tort: I deal with that issue at paragraph 106 below.

The claims brought by the Claimants: the facts

25. I make the following findings of fact, on the basis of the documents in the trial bundle to which I have been taken. To be clear, the universe of documents I have considered is limited to (i) documents referred to in the Claimant's skeleton argument; (ii) documents on my pre-reading list; (iii) documents to which I was taken by Mr Phillips KC in the course of the trial; and (iv) documents referred to on the face of documents in categories (i)-(iii) above. Where I say there is 'no evidence' of any factual allegation, this is on the basis that there was no evidence within these categories of material. I do not regard any other documents, outside these categories, has having been adduced as evidence in the trial.

The original English proceedings

26. On 19 August 2011, Blair J made the Freezing Order against Mr Su, as well as various companies legally or beneficially owned by him and/or other family members (the **Su Companies**). The Freezing Order was made in proceedings commenced by Lakatamia against Mr Su and the Su Companies. The Freezing Order was continued, with inconsequential variations, and has been in full force and effect at all material times since.

27. In two judgments of November 2014 and January 2015 respectively, Cooke J entered judgments against Mr Su and the Su Companies in sums totalling in excess of US$ 47.6 million (the **Cooke Judgments** and the **Judgment Debt** respectively). Mr Su and the Su Companies sought permission to appeal from the Court of Appeal. Permission to appeal was granted, on condition that security was provided in respect of the Judgment Debt. Security was not provided, and the appeal lapsed on 12 June 2015.

28. Neither Mr Su nor the Su Companies has voluntarily discharged any part of the Judgment Debt. As at the date of Mr Gardner's first witness statement, served in support of the Claimant's application for permission to serve proceedings out of the jurisdiction, in excess of US$ 60 million remained due, including interest and sums due under numerous costs orders.

29. In February 2019, Mr Su was cross-examined as to his assets, an exercise which was repeated in September 2021, when it was adjourned and continued in March

2022. Separately, a search order was executed on 18 June 2020 at the London flat at which Mr Su was living at the time, resulting in many thousands of documents being passed to Lakatamia, which Lakatamia was given permission to use in these proceedings.

The Villas and their proceeds

30. In December 2010, Maître Giaccardi of GZ Avocats, a law firm he had co-founded with Maître Zabaldano, was instructed by Mr Su and Cresta Overseas in connection with the Villas. Maître Giaccardi has been in practice at the bar of Monaco since 1999. Between 2003 and 2008 he was a member of the Monegasque Parliament, and was elected Chairman of the Monaco Bar in 2021-2023. Maître Zabaldano has been in practice since 2001, and in 2017 became the Trustee-rapporteur of the *Ordre des Avocats*, in charge of investigations and mediations arising from complaints filed against Monaco lawyers. Maître Zabaldano's evidence, which I have no reason to doubt, was that he had never been the subject of any disciplinary or regulatory proceedings.

31. On 22 December 2010, Barclays Bank plc (**Barclays**) agreed to lend up to €25 million to Cresta Overseas, across three loans. The stated purpose of the loans was "*Equity property belonging to the Borrower, known as 'Villa Rignon' located in Monaco (Principality), 14 rue Bel Respiro, for the purpose of purchasing an adjoining property known as 'Villa Royan' located 12 rue Bel Respiro*". The loan agreement was signed by Mr Su on behalf of Cresta Overseas, and guaranteed by Mr Su personally. The Claimant submits, and I accept, that this supports the allegation that Mr Su was the beneficial owner of the Villas.

32. The evidence of Maître Giaccardi and of Maître Zabaldano (in witness statements served in the course of Maître Zabaldano's jurisdiction challenge) is that Maître Zabaldano did not work on the Cresta Overseas file at that time. This evidence is challenged by the Claimant. The Claimant points to a Word file (the **Word File**) which, in 2012, set out a 2012 draft resolution of Cresta Overseas. The metadata of the Word File show it was first created on 22 December 2010 by Maître Zabaldano. The Word File has a total editing time of 30 minutes. The Claimant submits that I can infer from this (i) that the Word File was always a board resolution for Cresta Overseas (such that it required only minimal work in 2012

to generate a board resolution for Cresta Overseas), and therefore (ii) that Maître Zabaldano had worked for Cresta Overseas (and Mr Su) in 2010. I accept, on the balance of probabilities, that such inferences are to be drawn. In particular I reject the evidence of Maître Zabaldano that this must be "*an old document I had created in 2010 as a general template or for another client*", evidence which is confirmed by Maître Giaccardi: the coincidence of timings – the document being created on 22 December 2010 – renders such an explanation implausible. I do not, however, ascribe much significance to this. It may be that Maître Zabaldano provided no more than a few minutes of assistance to a colleague, more than a decade earlier, which would readily be forgotten. I do not therefore find here any basis for a greater rejection of his evidence.

33. In July 2011, Maître Zabaldano left GZ Avocats, and Cresta Overseas remained a client of Maître Giaccardi, at the successor firm, Giaccardi Avocats.

34. On 13 May 2013, Mr Su, who had been the director of Cresta Overseas, resigned from that role, appointing his 18-year-old daughter, Ms Airi Morimoto (**Ms Morimoto**) to replace him.

35. In October 2014, a lawyer at Giaccardi Avocats emailed Mr Su and others, explaining advice previously given. This included:

> "You ask yourself why we did not change the structure of the ownership before the entry in force of the new law relating to the registration fees, in order to replace CRESTA by a Monegasque civil company.
>
> Please be informed that we were instructed by Nobu in December 2010 with the existing ownership structure, his purpose being at that time to keep the whole property for himself."

The Claimant submits that this is good evidence of Mr Su's having the ultimate beneficial ownership of the Villas, and I accept that submission.

36. By 2015, Cresta Overseas had defaulted on the loan from Barclays, and Barclays sought to enforce its security. Maître Giaccardi could not act for Cresta Overseas because his firm, Giaccardi Avocats, was Barclays' lawyer in Monaco; accordingly, Maître Zabaldano was retained by Cresta Overseas.

37. On 19 February 2015, Maître Zabaldano issued a Letter of Engagement to Cresta Overseas, care of Mr Garrett. The stated purpose was "*assisting you in the auction procedure filed by Barclays Bank plc Monaco*".

38. On 16 March 2015, Barclays issued proceedings in the Monaco court against Cresta Overseas, seeking the auction of the Villas to enable Barclays to recoup its loans.

39. On 24 March 2015, Mr Su, in his capacity as director of Portview Holdings Ltd (**Portview Holdings**), the sole shareholder of Cresta Overseas since June 2007, signed a power of attorney in favour of Mr Garrett, "*to sign the Letter of Engagement to authorize the Zabaldano Avocat Défenseur in assisting Cresta in the auction procedure filed by Barclays Bank plc Monaco*". In their written submissions, the Claimant's Counsel wrote: "*Maître Zabaldano was, unsurprisingly, well aware of the Power of Attorney as he cited it in written submissions that he filed with the Monaco court [7/5/80]*". However, while there is indeed reference in the reasons of the Monaco court to a fax from Maître Zabaldano, "*accompanied by a special power of attorney granted to Jame Garrett, legal representative of Cresta Overseas Ltd*", there is no indication that this is the same power of attorney. On the contrary, the 24 March 2015 power of attorney was for the limited purpose of signing the Letter of Engagement; by contrast, the power referred to in the March 2016 ruling of the Monaco court was described as being issued on 17 March 2016 for the purpose of withdrawing the appeal. I conclude that this was not the same power of attorney.

40. Mr Garrett did not sign the Letter of Engagement. Rather, on 9 April 2015 Mr Chang replaced Ms Morimoto as sole director of Cresta Overseas, and the Letter of Engagement was accepted, on behalf of Cresta Overseas, by Mr Chang on 21 April 2015.

41. According to the Particulars of Claim, on 14 April 2015, Lakatamia's solicitors wrote to Mr Su's then solicitors, drawing attention to the fact that Lakatamia had become aware of the Villas, which Mr Su had failed to disclose in breach of the Freezing Order. Lakatamia also wrote to Barclays, stating that Mr Su was subject

to the Freezing Order, owed the Judgment Debt, and had an interest in Cresta Overseas.

42. On 5 May 2015, Terraceview Holdings Ltd (**Terraceview**) paid US$ 11,200 to Maître Zabaldano. The underlying evidence gives no indication as to the purpose of this, but the Claimant submits that this was payment of Maître Zabaldano's fees. According to information published by the ICIJ Offshore Leaks Database, Mr Su is (or was) director and shareholder of Terraceview, and Mr Chang is (or was) director. Mr Su's ownership is apparently confirmed by an email from a representative of Mr Su, one Ms Sara Chao (**Ms Chao**), from 2014. The Claimant has drawn to my attention that, in the *Madam Su* judgment, Bryan J found that Terraceview belonged to Madam Su rather than Mr Su. I do not consider it necessary to resolve this issue.

43. On 18 June 2015, Mr Garrett consented to act as director of Cresta Overseas "*with immediate effect*", although I note that the register of directors in the trial bundle does not show this.

44. On 30 September 2015, Maître Geraldine Gazo, acting for Lakatamia, wrote to Maître Joëlle Pastor-Bensa, lawyer for Barclays. She informed Maître Pastor-Bensa that Lakatamia had obtained a High Court judgment against Mr Su and various companies; that the judgment "*is currently being appealed, but the said appeal does not affect the World-Wide Freezing Injunction obtained by my Clients on 6 October 2011*"; that it appeared that Mr Su had an interests in Cresta Overseas; and, "*For all relevant purposes my Clients wish to draw your Client's attention to the penal notice that appears on the first page of the said Order of 6 October 2011: 'Any other person who knows of this Order and does anything which helps or permits any of the Defendants to breach the terms of this Order may also be held in contempt of Court and may be sent to prison, fined or have their assets seized*". I note, however, that the Freezing Order also contained at paragraph 17 the usual provision (the *Babanaft* proviso: see *Babanaft Co SA v Bassatne* [1990] 1 Ch 13 (CA) (***Babanaft***)) concerning 'Persons outside England and Wales':

> "(1) Except as provided in sub-paragraph (2) below, the terms of this Order do not affect or concern anyone outside the jurisdiction of this Court.
>
> (2) The terms of this Order will affect the following persons in a country or state outside the jurisdiction of this Court –
>
> (a) the Defendant or their officers or agents appointed by power of attorney;
>
> (b) any person who –
>
> (i) is subject to the jurisdiction of this Court;
>
> (ii) has been given written notice of this Order at his residence or place of business within the jurisdiction of this Court; and
>
> (iii) is able to prevent acts or omissions outside the jurisdiction of this Court which constitute or assist in a breach of the terms of this Order; and
>
> (c) any other person, only to the extent that this order is declared enforceable by or is enforced by a court in that country or state."

I shall turn later to the significance of the *Babanaft* proviso.

45. On 30 September 2015, Maître Gazo sent Maître Zabaldano a copy of the letter sent to Maître Pastor-Bensa, "*In my Clients' interests*". Maître Zabaldano's evidence is that he took note of the letter and its attachments, but found no relevance of it "*to what we were doing for Cresta in Monaco as against Barclays, which was to prevent the Villas from being sold*". He thought the Freezing Order was of no consequence because the letter was merely copied to his firm and because Lakatamia's lawyers never set out how he should act as a result of the English decisions, "*or how we could legitimately act in defiance of our instructions from Cresta*".

46. Up until 21 October 2015, unsuccessful efforts were made by Cresta Overseas to refinance the Barclays loans. Cresta Overseas wished to discharge its loans using payments from a third party, but Barclays refused to accept money from anyone other than Cresta Overseas itself. As part of justifying this, on 20 October 2015, Maître Pastor-Bensa, on behalf of Barclays, noted in a letter to Maître Zabaldano: "*In the most recent submissions of the Lakatamia Shipping Company and the*

information that they provide on the situation of its debtor, there could be no question of my client taking part in the realisation of an act which could constitute a fraud against the rights of a creditor". Maître Zabaldano responded noting, in particular, that "*the decision which [your client] invokes has no force for execution in Monaco and… in no way concerns the company [Cresta Overseas]*". Maître Pastor-Bensa responded, "*My client must draw the consequences of the voluntary intervention of the Lakatamia Shipping Company, which now intends to assert its rights before the courts of Monaco and which can now demonstrate a definitive decision in Great Britain*".

47. Also on 20 October 2015, according an affidavit I have been shown of Mr Jean-Philippe Flament, a businessman based in Monaco, there was a full-day meeting in Monaco involving Mr Flament, Mr Rolf Wikborg and Mr Arne Fredly (who were contemplating providing funds to Cresta Overseas to repay Barclays), Mr Garrett, and – at times – Mr Su. Mr Garrett would often leave the room to consult with Mr Su, but Mr Su was present during the part of the meeting when the Lakatamia litigation was discussed. Mr Flament expressed his surprise to Mr Su at learning only then that the Cooke Judgments were in fact final and no longer under appeal, and that there was a freezing order. Mr Su showed Mr Flament a document recording a purported transfer of beneficial ownership in Cresta Overseas to his daughter, Ms Morimoto, a day or two beforehand. After some discussion, Mr Flament, Mr Wikborg and Mr Fredly decided that, in view of the finality of the Cooke Judgments and the Freezing Order, they could not proceed with the transaction. Mr Flament also recorded that Mr Garrett said that he had not been aware of the Freezing Order before the meeting of 20 October 2015, and that Mr Garrett was at all times following the instructions of Mr Su, who "*had ultimate power to control Cresta*". According to the Claimant's solicitor, Mr Gardner, Mr Garrett told him that Mr Garrett was in telephone contact with Maître Zabaldano "*during the course of the day*". The Claimant submits that it is "*inconceivable*" that Mr Garrett did not tell Maître Zabaldano why the negotiations failed, but I do not accept that: first, it is unclear when Mr Garrett spoke to Maître Zabaldano; second, there is no evidence that the relationship between Mr Garrett (or Mr Su) and Maître Zabaldano was such that Maître Zabaldano would be told why negotiations had failed, rather than just that they

had done so. Maître Zabaldano's evidence was that he and his firm were not directly involved in any of the discussions concerning the refinancing transaction, but (in his witness statement for the jurisdiction challenge), notes only that he does not accept everything Mr Gardner says, "*and will respond in detail if it becomes necessary for me to do so*".

48. Also on 20 October 2015, Lakatamia applied to intervene in the proceedings between Barclays and Cresta Overseas in Monaco. In its application, Lakatamia recited the Cooke Judgments, the failure of Mr Su's appeal, and the Freezing Order (and its attached penal notice), and submitted that "*according to the fragmented information available*" to it, Cresta Overseas appeared to be controlled by Mr Su, and Lakatamia could be prejudiced if the auction went ahead with money paid to Cresta Overseas, "*funds which could ultimately benefit Mr Nobu Su, and this in defiance of the World-wide Freezing Injunction delivered on 6 October 2011*". This application was rejected the next day, on the basis that the materials relied on by Lakatamia had not been translated into French, and were therefore excluded from the proceedings, leaving Lakatamia with no document to support its claims or arguments.

49. The Villas were sold on 21 October 2015. The purchase price was €65.1 million. The full sale price was transferred by the successful buyer in November 2015 to the account of the *Caisse de Dépôts et Consignations* (**CDC**). Maître Zabaldano explains that this was usual procedure for a court-ordered sale, to ensure that all creditors received their share of sale proceeds. Barclays began the process of seeking distribution of the sale proceeds.

50. The large majority of the sale proceeds were ultimately distributed in February 2017. There was not an agreement between the parties as to how much Barclays was entitled to by way of interest for late payment since 6 November 2015, so around €3 millon was retained in the CDC pending resolution of that dispute. However, it was ordered, most significantly, that €34.6 million odd be paid to Barclays; and that €27,127,855.01 be paid to Maître Zabaldano as lawyer for Cresta Overseas, into an account held by him at the counters of CFM Indosuez Wealth Management (his **client account**).

51. On 21 February 2017, according to Maître Zabaldano, Mr Chang instructed Maître Zabaldano to transfer all the remaining cash proceeds from the sales of the Villas from his client account to UP Shipping, save for a retainer of approximately €200,000 which Maître Zabaldano was instructed to keep as a retainer to continue acting on behalf of Cresta Overseas in its dispute with Barclays. There is indeed, in the bundle, an email of 21 February 2017 from 'TC' to Maître Zabaldano, cc'ing Mr Garrett, 'Sara' and 'Business1', reading: "*dear sir: a decision was made today for the fund of cresta to be transferred from your account to up shipping corporation. please refer to the attached document signed by me, tai chou chand, and accordingly process the fund to be transferred to up shipping corporation*". Maître Zabaldano replied the same day, cc'ing others in his office, to Mr Garrett: "*Dear James, Could you please sign it as well and return it to us?*".

52. According to Maître Zabaldano, he was told that Mr Garrett was no longer a director, and so Maître Zabaldano accepted the instruction signed by Mr Chang alone, in his capacity as director of Cresta Overseas. I accept the submission of the Claimant that Mr Chang did so at the direction of Mr Su: that is consistent with the evidence showing Mr Su to be (via Portview Holdings) the ultimate beneficial of Cresta Overseas; with Mr Flament's evidence concerning Mr Su's control of Cresta Overseas (see paragraph 47 above); and with Mishcon de Reya's letter on behalf of Maître Zabaldano describing Mr Chang as "*only ever a functionary*" who "*appears to have been little more than someone to whom Mr Su gave instructions*". (The Particulars of Claim assert that "*Mr Chang was a businessman in his own right as well as an employee of the Su family*", but I was shown no evidence to support that proposition. On the contrary, Counsel for the Claimant quite properly drew to my attention that Jacobs J previously refused a freezing order against Mr Chang, because Jacobs J was not satisfied that Mr Chang had any assets.)

53. Ms Chao sent an email to Mr Garrett on 21 February 2017, the contents of which are not in evidence. Mr Garrett replied: "*I understand that my resignation is necessary and Tai Chou Chang will be the one director of Cresta. I will process this asap and Fortus can provide an advisory role to Cresta/TC for Monaco/property matters*". Ms Chao responded: "*We understood your intention*

further. Please can we process the unanimous agreement to transfer funds from lawyer between you and Mr Chang of directors of Cresta Overseas Limited today, then we will process the resignation procedure as per your instruction. If you are not any comments, we will send the instruction to Zabaldano". Mr Garrett replied: "*I am no longer a Director of Cresta Overseas Ltd so this is not within my authority*". The Claimant asserts that Mr Garrett was unprepared to approve the transfer in view of the Freezing Order, and this is why he resigned his directorship of Cresta Overseas. I do not consider I need resolve this question, since Mr Garrett's state of mind is not directly relevant to any point I need to decide. Maître Zabaldano's evidence was that he did not know why Mr Garrett had resigned, and there is nothing to gainsay that.

54. On 23 February 2017, Maître Zabaldano gave effect to Mr Chang's instruction. He directed his bank to transfer the money held in his client account for Cresta Overseas to UP Shipping. This was a sum which, converted into US dollars, was in the amount of US$ 26,712,911.68. The SWIFT confirmation shows the details of payment as "*Cash proceeds of the sale of Villa Rignon*", paid to Citibank.

55. The Claimant's skeleton argument reads: "*Mr Su was kept updated regarding the transfer. Thus on 24 February 2017, he sent a text message to a colleague of his in which he said 'We have money. Clean money' [7/16/122]*". This document reference was to a table of WhatsApp messages, running to some 50 pages, involving different people communicating with Mr Su, and the cited line follows two previous messages: "*Incoming: Where is the money coming from – what country. It's a court sale. Outgoing: Via New York. US dollar. Incoming: U make my life impossible. Outgoing: We have money. Clean money*". An earlier exchange with the same interlocutor read: "*Incoming: When u receive euros 10 mill from Monaco lawyers. Outgoing: Monday. But I am not sure it will go as smooth as 27. Our offer must they go court after receive 7mill cash. I cannot guaranty date*". This reference to receiving "*27*" (million euros) from Monaco lawyers is, I accept, evidence of Mr Su being kept apprised of the receipt of funds from Maître Zabaldano's account.

56. A Citibank statement, bearing the same account number as that shown on the SWIFT notification, shows US$ 26,712,851.68 being received from Maître

Zabaldano on 1 March 2017, and then rapidly being paid out to a range of recipients including, I note, Maître Zabaldano himself (in the sum of US$ 200,055), and Mr Chang. The payment to Maître Zabaldano of around US$ 200,000 appears inconsistent with his evidence that he retained such sum from the amount transferred to UP Shipping: see paragraph 51 above. Others who received payments from UP Shipping included Wikborg Sons Ltd and Arne Fredly (compare paragraph 47 above), and various lawyers in a range of jurisdictions.

57. On 6 July 2017 – notably, this was some months after the events said to give rise to the claims in these proceedings – the Monaco courts recognised the Cooke Judgments.

58. On 11 October 2017, an email was sent from 'Business1' to Berkin Ataun (an accountant at Maître Zabaldano's firm), cc'ing Ms Chao, regarding Cresta Overseas: "*Please remit 35000 euro back to us. Sara will send you bank account. Nobu*". Ms Chao replied: "*As instructed, please find the below account detail for your reference*" – giving the details of UP Shipping's account with Citibank. The next day, Maître Zabaldano's firm provided a copy of the SWIFT transfer confirming such payment had been made. A bank statement from UP Shipping shows US$ 41,057.50 received from Maître Zabaldano on 13 October 2017. The evidence of Maître Zabaldano is that he was not informed of these dealings at the time; the evidence of another lawyer in Maître Zabaldano's firm, Valerie Zoccola (**Ms Zoccola**) is that she believes she would have called Mr Chang, as the director of Cresta Overseas, to confirm the transfer before authorising it.

59. On 5 December 2017, Mr Chang sent Mr Su an email, with the subject 'take over my job', beginning: "*at your request and by your order on november 30 2017, I shall resign my job in the end of december 2017. Accordingly please assign right person to be the successor director/supervisor for each company…*". UP Shipping is mentioned in the list of current directorships. Cresta Overseas is not listed (although there is an "*etc.*" indicating the list is not exhaustive). The email ends: "*finally I thank you for the job offered to me during the past years*".

60. On 15 March 2018, Mr Su met with Maître Zabaldano. This is evidenced by a WhatsApp exchange between them. Maître Zabaldano's evidence is that "*I did not meet with Mr Su in my capacity as his lawyer but as that of Cresta regarding new instructions I received from Cresta…*". Maître Zabaldano declined to say more in his evidence, citing obligations of professional secrecy.

61. On 16 April 2018, Mr Su emailed a representative of Barclays in Monaco, copying Ms Zoccola, requesting (among other things) all bank statements for Cresta Overseas. He wrote: "*Regarding Cresta Overseas I assume that you will need the same but signed by M. Cheng or James Garret or from my lawyer which were sent you long time ago but no reply*". Maître Zabaldano replied: "*I guess that even though I am in Cc of your e-mail below, you are not referring to me when you talk about 'your lawyer' as I am Cresta's which I understand you no longer are the UBO of nor the legal representative*". Mr Su forwarded this to an associate, Ms Hedvig Baqué, a former employee of Barclays who was assisting Mr Su (**Ms Baqué**): "*We need to be careful on this*". The Claimant submits that this exchange shows that "*Maître Zabaldano… well knew that Mr Su had been Cresta Oversea's beneficial owner (and, for that matter, still was, though it evidently suited Maître Zabaldano to pretend otherwise…)*". I agree that this shows that Maître Zabaldano knew that Mr Su had been UBO of Cresta Overseas. It is of no direct relevance what Maître Zabaldano's state of mind was in April 2018, and so I make no finding either way on the remainder of the Claimant's submission.

62. On 30 November 2018, Mr Su again met with Maître Zabaldano. This is evidenced by an email from Mr Su that day to certain associates, including Ms Baqué, which also requests urgently a "*Cresta corporate board resolution tonic Lin is sole director after TC Chang*". Ms Baqué replies saying "*We also need to confirm if Tonic Lin is also the Beneficial Owner of Cresta or 'only' the Director*". Mr Su forwards to an associate: "*See Passport. Tonic Uob. Ultimate owner More*". That leads to a response including: "*Cresta (BVI) -> PortView -> TopCo Moco. We don't have 'TopCo Moco' info on hand, so we don't know who is the shareholder. But TC is the company director*". Again, in his evidence for the jurisdiction challenge, Maître Zabaldano cited professional secrecy in

refusing to say more about this meeting than that he was instructed by Cresta Overseas. Maître Zabaldano emphasised that he continued to act for Cresta in its dispute with Barclays, which resulted in judgments of the Monaco Court of Appeal and Supreme Court in 2019 and May 2020 respectively, the latter being "*shortly before I ceased to act for Cresta*".

63. On 27-28 February 2019, Mr Su was cross-examined as to his assets before Sir Michael Burton GBE. He was asked about the €27 million paid to Maître Zabaldano in February 2017. His evidence was: "*I already resigned of Cresta. TC Chang handle the case*". He believed the money went back to his family, on his mother's instruction.

64. On 6 March 2019, Lakatamia issued proceedings against Mr Su, Madam Su, Portview Holdings and Cresta Overseas. In the course of these proceedings, Madam Su never disputed that Mr Su was the 100% owner of the Villas.

The claims brought against by the Claimants: conclusions

Factual matters other than the states of mind of the individual Defendants

65. The Claimants submit that the following matters are established on the evidence:

    (a) Maître Zabaldano transferred the Cresta Overseas Monies to UP Shipping's bank account on Mr Chang's instruction, and the Cresta Overseas Monies were thereafter further dissipated upon UP Shipping's receiving them;

    (b) Mr Su was subject to the Freezing Order and owed the Judgment Debt at the time of the transfer;

    (c) Mr Su was the beneficial owner of the Cresta Overseas Monies and, as such, the Cresta Overseas Monies fell within the scope of the Freezing Order;

    (d) The transfer of the Cresta Overseas Monies to UP Shipping was thus a breach of the Freezing Order; and

    (e) Had the Cresta Overseas Monies remained in Monaco, Lakatamia would have been able to enforce the Cooke Judgments against them in

circumstances where the Cooke Judgments were recognised in Monaco on 6 July 2017.

66. I accept these submissions. Each of these matters is, in my judgment, amply justified by the evidence I have described in paragraphs 26 to 64 above. In particular, I accept that – whether the registered shareholder of the company ultimately owning Cresta Overseas was Mr Chang or Ms Morimoto or someone else – such person was merely a nominee for Mr Su, who was the ultimate beneficial owner of Cresta Overseas and of the Cresta Overseas Monies.

The claims against Mr Chang

Mr Chang's state of mind

67. In an introductory paragraph to the Jurisdiction Judgment, Bryan J observed: "... *[N]o one is suggesting that the case against Mr Su and Mr Chang is anything other than a strong one. The undisputable evidence is that both those individuals knew full well of the Blair Freezing Injunction and Cooke Judgments…*". I do not know what evidence Bryan J had in mind, but I do not interpret this to mean that any such evidence could not be disputed at trial. In any event, I am not bound by any such observation.

68. As it is, I am not satisfied that it is more likely than not that Mr Chang knew, at the time he ordered the transfer of the Cresta Overseas Monies to UP Shipping, that Mr Su was bound by the Freezing Order. The evidence suggests that Mr Chang did what he was told by Mr Su: compare paragraphs 52 and 59 above. But there is no evidence as to the extent to which Mr Su kept Mr Chang informed of what he was doing, or why he was doing it. The Claimants point out that Mr Chang swore an affidavit of assets on behalf of one of Mr Su's companies that was bound by the Freezing Order on 13 October 2011, but (i) that was more than 5 years earlier; (ii) that affidavit makes no reference to the Freezing Order; and (iii) that affidavit makes no reference to Mr Su (other than, in the heading, as a co-defendant of the company on behalf of whom Mr Chang swears the affidavit).

69. Similarly, I am not satisfied that it is more likely than not that Mr Chang knew that Mr Su owed the Judgment Debt at the relevant time. The Claimant submits that on 19 May 2015 Mr Chang signed a letter addressed to the Court of Appeal

in connection with Mr Su's efforts to appeal against the Cooke Judgments, but (i) that letter is in fact unsigned (with Mr Chang's name simply printed at the bottom); (ii) the letter itself discloses no real understanding of the relevant court process, referring only to the ability of Great Vision Management Ltd to pay a certain sum; and (iii) in any case this was 18 months or so before the relevant time. Again, in the absence of any evidence showing that Mr Su kept Mr Chang informed about the litigation in which he was involved, I have no basis for concluding that Mr Chang had the requisite knowledge.

70. I am, however, satisfied that the Claimant has established that it is more likely than not that Mr Chang knew at the relevant time that Mr Su was the ultimate beneficial owner of Cresta Overseas: Mr Chang was the director of Cresta Overseas and of Portview Holdings, and took his instructions from Mr Su.

Conclusion on the claims against Mr Chang

71. In circumstances where, in my judgment, it is not established that Mr Chang knew of the Freezing Order, the Cooke Judgments or the Judgment Debt at the relevant time (i.e., in or about February 2017), I do not consider that the elements of either the unlawful means conspiracy claim, or the *Marex* tort claim, are made out. Accordingly, these claims fail as against Mr Chang.

The claims against Maître Zabaldano

Maître Zabaldano's state of mind

72. I am satisfied that it is more likely than not that, at the time Maître Zabaldano ordered the transfer of the Cresta Overseas Monies to UP Shipping, he knew that Mr Su was bound by the Freezing Order, and that the Judgment Debt had not been discharged. I reach this conclusion for the following reasons:

    (a) In his evidence Maître Zabaldano accepted that he had seen, and considered, Cooke J's judgment of 5 November 2014 and the Freezing Order in September 2015, although he said he did not attach any significance to them. Maître Zabaldano also accepted that Lakatamia's lawyers had referred to the Freezing Order and the Cooke Judgments in application to the Monaco court in October 2015.

(b) Maître Zabaldano said that in February 2017, when ordering the transfer of the Cresta Overseas Monies, he did not know that the Judgment Debt remained unsatisfied and the Freezing Order remained effective. He simply had no concern about it, it having, in his view, no significance to his task. He said he did not know or suspect that the instruction to transfer the monies involved unlawful conduct: "*Lakatamia's claim did not even cross my mind when I executed the instruction from Cresta as I had no reason under Monaco law to remind myself about it or to take it into account*".

(c) In January 2018, after the Cooke Judgments had been registered in Monaco, Lakatamia's solicitors wrote to Maître Zabaldano, in his capacity as lawyer for Cresta Overseas, seeking payment of the sums due under the Cooke Judgments. Maître Zabaldano responded denying that Cresta Overseas had any obligation under those judgments, but he did not express any surprise at the fact of their existence.

(d) On balance, in circumstances where (i) Maître Zabaldano did know of the Cooke Judgments and the Freezing Order in 2015, and (ii) Maître Zabaldano does not contend that he was ever told that the Judgment Debt had been paid, or the Freezing Order discharged thereafter, I am satisfied that it is more likely than not that, at the time of directing the transfer of the Cresta Overseas Monies, Maître Zabaldano knew that the Judgment Debt remained outstanding and the Freezing Order remained in place.

73. I am also satisfied that it is more likely that Maître Zabaldano's knew of Mr Su's ultimate beneficial ownership of Cresta Overseas at the relevant time.

(a) It seems clear that Maître Zabaldano knew that Mr Su was at some stage the UBO of Cresta Overseas: that is the plain meaning of his email of 16 April 2018 cited at paragraph 61 above.

(b) In his witness statement, Maître Zabaldano's evidence was that he did not know at the time of the transfer that Mr Su was the UBO of Cresta Overseas, but "*on the contrary, Ms Zoccola and I were informed that the UBO was an individual who was not Mr Su, and this was confirmed by documents*

that we received". He produced no evidence to support this, citing obligations of professional secrecy.

(c) Although Maître Zabaldano has declined to identify this other person, it would be consistent with Mr Flament's evidence for Maître Zabaldano to have been shown a document identifying Mr Su's daughter, Ms Morimoto, as the UBO since October 2015: see paragraph 47 above.

(d) However, in correspondence on Maître Zabaldano's behalf, on 28 February 2022, Mishcon de Reya wrote:

> "(1) Before transferring the Sale Proceeds from his firm's client account in February 2017, the bank from which the Sale Proceeds were transferred required certain KYC information. This was in order that the bank could make the payment in compliance with its anti-money laundering obligations.
>
> (2) Consequently, Cresta (through an employee from Zabaldano Avocats) confirmed to the bank the identity of the UBO of each of Cresta and UP Shipping. Cresta identified the UBO of both companies as an individual who was neither Mr Nobu Su nor Madam Su and supplied the bank with documents to substantiate that position.
>
> (3) In particular, the following documents were provided by Cresta to be sent to the bank:
>
> > (a) A certificate of incumbency from the registered agent of the ultimate parent company of Cresta, which certified as at 27 February 2017 that the sole shareholder of this ultimate company was an individual who was not Mr Nobu Su nor Madam Su.
> >
> > (b) A copy of UP Shipping's Register of Shares which showed the sole shareholder was the same person as the owner of the ultimate parent company of Cresta, i.e. an individual that was neither Mr nor Madam Su.
>
> (4) The bank accepted those documents as adequate for its KYC purposes and effected the transfer of the Sale Proceeds to UP Shipping."

(e) Maître Zabaldano later clarified the position concerning these documents. His evidence in his second witness statement was that the documents concerning Cresta Overseas were requested by his assistant in anticipation of any request the bank might have, but in the event the bank did not require

these documents. That is why the certificate of incumbency was dated after the transfer had already gone ahead.

(f) Among Mr Su's documents found following execution of a search order in June 2020 (see paragraph 29 above) was a certificate of incumbency of 'TopCo Moco Limited', as at 27 February 2017, showing Mr Chang as shareholder and (since 22 June 2015) director of the company. The Claimant submits "*Clearly, it is this certificate of incumbency to which MdR was referring given both its date and the fact the UP Shipping's register of shares recorded Mr Chang as its sole shareholder*". I accept this submission, in light of the later email (see paragraph 62 above) which shows TopCo Moco Ltd as the shareholder of Portview Holdings. However, as noted in sub-paragraph (e) above, Maître Zabaldano did not have this document at the date he authorised the transfer from his client account.

(g) I accept Maître Zabaldano's evidence that, at the time of the transfer, he had been shown documents showing someone other than Mr Su was the registered owner of shares in companies ultimately owning Cresta Overseas. However, on the evidence I have seen, there are only two viable candidates to be that person: Ms Morimoto, or Mr Chang. Whichever it is, while Maître Zabaldano may have been satisfied that that person was the registered holder of the shares in the relevant company, I do not consider it likely that he would have thought that they held the shares outright, rather than as nominee for Mr Su: one was Mr Su's daughter; the other his "*mere functionary*". I consider it more likely than not that Maître Zabaldano would have regarded the person, correctly, as a nominee for Mr Su.

(h) For these reasons, in my judgment, Maître Zabaldano is more likely than not to have known that the UBO of Cresta Overseas – and, therefore, the person ultimately interested in the Cresta Overseas Monies – was Mr Su.

74. In consequence of these findings, I am satisfied that Maître Zabaldano knew that the transfer of the Cresta Overseas Monies would place Mr Su in breach of the Freezing Order, and would hinder Lakatamia's ability to enforce the Cooke Judgments.

75. However, there is one further element of Maître Zabaldano's state of mind on which I consider it necessary to make a finding. I am satisfied, on the materials I have seen, that Maître Zabaldano honestly believed himself entitled – indeed, obliged – to transfer the Cresta Overseas Monies to UP Shipping. I reach this conclusion for the following reasons:

(a) Maître Zabaldano's repeated contention in his evidence in the course of the jurisdiction challenge was that he did not believe the Freezing Order or Cooke Judgments affected or concerned him, unless and until such orders were registered in Monaco. He said that in October 2015 he did not find "*any relevance of* [the Freezing Order] *to what we were doing for Cresta in Monaco as against Barclays, which was to prevent the Villas being sold*". He said that "*The decisions were not against Cresta, but against Mr Su and several other companies (but Cresta was not listed among them)*", and "*As Lakatamia and its (three different) Monaco counsel must have known, no Monaco resident (and certainly no Monaco lawyer) is bound by any judgments and/or orders made by foreign courts until such time as they are declared enforceable in accordance with the applicable procedural rules in Monaco by a Monaco court*". That evidence is consistent with the contemporaneous correspondence he had with Barclays' lawyers: see paragraph 46 above.

(b) As noted at paragraph 57 above, the Cooke Judgments were not recognised or registered in Monaco until July 2017 – <u>after</u> Maître Zabaldano ordered the transfer of the Cresta Overseas Monies.

(c) Maître Zabaldano's contention makes sense. As I have found, Maître Zabaldano knew of Mr Su's interest in the Cresta Overseas Monies; he knew of the Freezing Order; and he knew of the Judgment Debt. But Maître Zabaldano also knew that Lakatamia was aware of Mr Su's interests in the Cresta Overseas Monies, and that Lakatamia was aware that Maître Zabaldano acted for Cresta Overseas: see paragraphs 44-45 above. There was nothing hidden in Maître Zabaldano receiving the Cresta Overseas Monies: that took place pursuant to an order of the Monegasque court. In the circumstances, it would have been exceptionally foolish for a senior

lawyer, with a hitherto unblemished record (see paragraph 30 above), to have paid away the Cresta Overseas Monies, unless he believed he was entitled to do so.

(d) Maître Zabaldano's evidence was that he believed he was obliged to follow his client's instructions; in the circumstances, I accept that evidence. The Claimant says it is nonsensical to suggest that a Monegasque lawyer can be obliged to assist their client to commit a fraud, and relies on expert evidence saying so, and points out that Maître Zabaldano was entitled to approach the English court for guidance if he was in doubt. But I do not accept that Maître Zabaldano's evidence is nonsensical. Rather, in circumstances where the Freezing Order and Cooke Judgments had not been recognised or registered in Monaco, and where Lakatamia had taken no steps in Monaco since October 2015 to restrain any actions of Maître Zabaldano despite knowing of his involvement with Cresta Overseas, I accept the evidence of Maître Zabaldano that he believed that his duty to act on his client's instructions was not overridden by any other duty. I note that Maître Zabaldano's understanding of his legal position is supported by his own expert, although in circumstances where neither expert was called at trial, and where there was no expert meeting nor joint statement produced, I am reluctant to weigh the credibility of the competing positions.

(e) In reaching this conclusion I have in mind that Maître Zabaldano gave evidence stating in clear terms, "*As it happens, I did **not** know at the time of the transfer that Mr Su was the UBO of Cresta*", evidence which I consider more likely than not to be false. Nonetheless, I do not consider that this element of false evidence (even in combination with other elements of Maître Zabaldano's evidence which I have concluded to be wrong) undermines the overall thrust of Maître Zabaldano's evidence that he genuinely believed he was entitled, and obliged, to act in the manner that he did.

The claim in unlawful means conspiracy

76. On my findings, Maître Zabaldano agreed to make the transfer of the Cresta Overseas Monies, following an instruction of Mr Chang which Maître Zabaldano

knew came from Mr Su. Maître Zabaldano knew of the Freezing Order and the existence of the Judgment Debt. He knew that Mr Su had an interest in the Cresta Overseas Monies, and that the transfer would be in breach of Mr Su's obligations under the Freezing Order.

77. I am bound by authority – see paragraph 22 above – to hold that Maître Zabaldano can be liable for unlawful means conspiracy even though (as I find) he honestly believed that he was entitled to do what he did. While Lewison LJ disagreed in *Racing Partnership* (at [213]-[265]), the majority decision binds me.

78. Nonetheless, a separate question, which was not mentioned by the Claimant's Counsel, but on which I sought further assistance, was whether the *Babanaft* proviso in the Freezing Order precluded Maître Zabaldano having any liability in tort for his actions. To repeat, this proviso states that (save for certain exceptions):

> "the terms of this Order do not affect or concern anyone outside the jurisdiction of this Court."

79. In post-hearing written submissions, Lakatamia accepts that there is no evidence to suggest that Maître Zabaldano (nor, indeed, Mr Chang) were within the jurisdiction of the court at the time when any relevant act occurred. I observe that this distinguishes the case from *JSC BTA Bank v Ablyazov (No.14)* [2018] UKSC 19, [2020] AC 727 (***Ablyazov (No.14)***) where it was assumed that the relevant combination or understanding was entered into in England: at [4].

80. Counsel for the Claimant nonetheless argued that an element of the Subsidiary Conspiracy did take place in England – because damage is an element of the tort, and this was suffered (in the form of a reduction in the value of the Judgment Debt) in England. I accept that damage was, indeed, suffered here, and that – for the purposes of bringing these proceedings in 2022 – Bryan J held that this loss was sufficient to meet the requirements of the relevant jurisdictional gateway. However, that does not, in my judgment affect whether Maître Zabaldano was, or was not "*outside the jurisdiction of this Court*", within the meaning of the *Babanaft* proviso at the time of his actions in 2017. On my findings, therefore, Maître Zabaldano was entitled to take the benefit of the proviso.

81. Counsel for Lakatamia then argued that I am bound by Supreme Court authority to conclude that the *Babanaft* proviso has no effect on a claim in unlawful means conspiracy in the present circumstance. Counsel submitted:

> "The Supreme Court has already addressed this issue, directly and in the clearest terms, in [*Ablyazov (No.14)*]. At [23]–[24], Lord Sumption and Lord Lloyd-Jones (with whom the rest of the Supreme Court agreed) said (emphasis supplied):
>
> 'At first sight, there is more to be said for the argument that a right of action for conspiring to breach a freezing order injunction would expose foreigners to liability notwithstanding the standard proviso in such orders that their terms "do not affect or concern anyone outside the jurisdiction of this court". **But the proviso is irrelevant to the position of a party in contempt, such as Mr Ablyazov, who is by definition subject to the jurisdiction of the court. A claim in conspiracy will normally allege conspiracy with the respondent to a court order to breach his obligations under the order, as it does in this case.**
>
> We conclude that the Bank's pleaded allegations disclose a good cause of action for conspiracy to injure it by unlawful means'".

82. There are multiple difficulties with this submission. First, the passage cited from *Ablyazov No.14* was considering something entirely different – namely, whether there was a preclusionary rule preventing persons in contempt of court being exposed to anything other than criminal penalties at the discretion of the court: see at [18]. For this reason, the passage did not consider the position of the alleged assister (Mr Khrapunov, akin to Maître Zabaldano in the present proceedings), but the position of the alleged contemnor (Mr Ablyazov, akin to Mr Su in the present proceedings). As a result, this reasoning was not considering the impact of the *Babanaft* proviso on someone outside the jurisdiction, but rather its impact on someone within the jurisdiction of the court. In any event, as I have noted, in *Ablyazov (No.14)* the Supreme Court specifically noted that it was assumed that the alleged combination or understanding had taken place within the jurisdiction: see paragraph 79 above.

83. Counsel for Lakatamia next pointed out that in the *Madam Su* judgment, Bryan J held:

> "107. In Madam Su's Opening Submissions it was asserted that '*in circumstances where the [Blair Freezing Order]*

> *expressly directs third parties outside England and Wales to ignore it (per Babanaft), this must preclude claims against the same foreign third parties for assisting a breach of a freezing order via claims in unlawful means conspiracy*'. Such an argument was made before the Supreme Court in *JSC BTA Bank v. Ablyazov (No.14)* [2018] UKSC 19; [2020] A.C. 727 and expressly rejected – see [23]-[24]. It was also rejected by the Court of Appeal. As Sales LJ stated [2017] Q.B. 853 at [51]: '*Although it might not be right to subject a person located abroad who benefits from the Babanaft proviso to personal penal sanctions equivalent to those involved in enforcement of the criminal law, they should not be permitted to participate in deliberate unlawful action to undermine the court's order and defeat the rights of a claimant without being exposed to civil liability to pay compensation*."
>
> 108. I would also note that even if a person having the benefit of the Babanaft proviso may not be liable for contempt if they assist a person bound by a freezing order to breach it "*if [they] are shown to have deliberately assisted [the person bound] to defeat … the injunction by the production of false documents that would seem to me to be unlawful means without any reliance on a contempt having been committed*" per Waller LJ in *Surzur Overseas Ltd v. Koros* [1999] 2 Lloyd's Rep. 611 (CA) at 620.
>
> 109. I have no hesitation in accepting that the above principles accurately reflect English law and have been definitively so decided. In the event, Madam Su in her Written Closing Submissions acknowledged that I may consider myself bound by *JSC BTA Bank* (as I do, and as I am). Whilst Madam Su reserved her position in this regard, I note that the point has already been determined at the highest appellate level."

84. For the reasons set out in paragraph 82 above, I respectfully disagree with Bryan J's conclusion that he was bound to decide this question in accordance with the decision of the Supreme Court in *Ablyazov (No.14*). I also disagree, if this is what Bryan J intended, that the Court of Appeal in *Ablyazov (No.14*) [2017] EWCA Civ 40, [2017] QB 853 previously resolved this question in a manner binding on lower courts. Rather, at [56], Sales LJ (with whom Gloster and Beatson LJJ agreed) held:

> "Turning to the position of a co-conspirator who is not himself subject to the court's order, again I do not think that there is any floodgates objection to imposition of liability. The co-

> conspirator will only become liable if, with knowledge of the obligations imposed by the order on the addressee of the order, he deliberately counsels, procures or assists in the violation of those obligations by the addressee. This means that, unlike in the situation addressed by the House of Lords in *Barclays Bank*, civil liability is imposed on a narrow basis and only in circumstances broadly equivalent to those in which the co-conspirator would himself be liable for contumacious breach of the court order under the principle of accessory liability in *Seaward v Paterson* [1897] 1 Ch 545 (subject to the *Babanaft* proviso, if it applies): see, in that regard, the contrast emphasised in *Barclays Bank* [2007] 1 AC 181 between the negligence claim in that case and the circumstances in which a third party bank would be liable in contempt for breach of the freezing order at paras 29–30 (Lord Hoffmann) and paras 63–64 (Lord Rodger). As I have observed, if the *Babanaft* proviso applies, that may well be a good reason why the co-conspirator should be exempt from personal penal sanction for contempt of court, but it does not follow that he should be immune from civil action for compensation for his participation in what has been done, which is so obviously unlawful vis-à-vis the claimant. In the case of a freezing order, if a co-conspirator has indeed deliberately helped the addressee of the order to hide his assets covered by that order or in some way render them immune from execution, thereby inflicting loss on the claimant, I consider that it is strongly arguable that justice is in favour of the imposition of civil liability on the co-conspirator to be liable to pay compensation to the claimant."

85. I do not read the last sentence – "*I consider that it is strongly arguable…*" – as deciding the point in question. Rather, the Court of Appeal was considering only whether there was a good arguable case that the breaches of the freezing order alleged qualified as relevant unlawful means. In my judgment, notwithstanding the obvious persuasive effect of the Court of Appeal's reasoning, it remains open to a first instance judge, hearing the trial of a case in unlawful means conspiracy, to conclude that such breaches did not so qualify.

86. I have not found the question an easy one to resolve, but in my judgment the presence of the *Babanaft* proviso does preclude liability of Maître Zabaldano for unlawful means conspiracy in this case.

87. As a starting point, it seems to me to be a strong thing to hold a person liable for involvement in breach of a freezing order in circumstances where the court has previously, in the freezing order itself, stated the terms of the order "*do not affect or concern*" such person. The *Babanaft* proviso is expansive in its language – it

does not, on its face, limit itself to excluding liability for contempt of court. That language would be apt to mislead if a person could, nonetheless, be held liable for combining with the respondent to the order with a view to helping or permitting the respondent to dissipate assets in breach of the order. It is in my judgment inconsistent with such a proviso to hold a person, who has the benefit of the proviso, liable for such conduct.

88. I can see that the position would be different if the defendant in question were to have engaged in independently wrongful conduct – such as the production of false documents to deceive the English court as in *Surzur Overseas Ltd v Koros* [1999] 2 Lloyd's Rep 611. As Waller LJ held in that case at p620 (cited by Sales LJ in *Ablyazov (No.14)* at [50]): the production of false documents "*would seem to me to be unlawful means without any reliance on a contempt having been committed*". But that is not the present case: there is no suggestion that the conduct of Maître Zabaldano would have constituted unlawful means, but for the contempt of Mr Su which it assisted.

89. I have well in mind the observation of Sales LJ in *Ablyazov (No.14)* at [56] that "*if the Babanaft proviso applies, that may well be a good reason why the co-conspirator should be exempt from personal penal sanction for contempt of court, but it does not follow that he should be immune from civil action for compensation for his participation in what has been done, which is so obviously unlawful vis-à-vis the claimant*". I can see that it would be possible to conclude that liability for contempt is excluded by the *Babanaft* proviso, but not tortious liability. As against that, however, I consider there are two significant considerations.

90. First, the language of the *Babanaft* proviso is not so limited. It provides: "*the terms of this Order do not affect or concern anyone outside the jurisdiction of this Court*". The proviso does not, on its face, distinguish between tortious liability and liability for contempt.

91. Second, I have regard to the purpose and policy of the *Babanaft* proviso. In *Babanaft* itself, Neill LJ held (at 40G):

> "I am satisfied that it is wrong in principle to make an order which, though intended merely to restrain and control the actions

> of a person who is subject to the jurisdiction of the court, may be understood to have some coercive effect over persons who are resident abroad and who are in no sense subject to the court's jurisdiction."

92. In the same case, Nicholls LJ held (at 43D and following):

> "*Third parties*
>
> But there is a troublesome point here concerning third parties. An injunction, as an order of the court, can affect the conduct of persons other than the defendant in the proceedings against whom the order is made. This was a matter considered in the recent Spycatcher litigation: *Attorney-General v. Newspaper Publishing Plc*. [1988] Ch. 333. For the purposes of the present appeal it is sufficient to note that it is well established that a person who knowingly assists in the breach of a court order is himself in contempt of court: see, for example, *Seaward v. Paterson* [1897] 1 Ch. 545 and, in the context of a Mareva injunction, *Z Ltd. v. A-Z and AA-LL* [1982] Q.B. 558. This principle is one of the strengths of a Mareva order, but it is the application of this principle to an injunction in respect of overseas assets such as I have described above that causes difficulty.
>
> Take the present case. After the judge made the order under appeal on 19 April 1988, the plaintiffs' solicitors gave notice of the order to numerous overseas banks and other organisations. In some of their telexes the plaintiffs' solicitors strongly advised the recipients that, before allowing the defendants to deal with any of the defendants' assets held by them, they should check with the plaintiffs' solicitors directly to see that the defendants had given the requisite notice. There is no question of the solicitors having acted improperly in taking these steps. These matters were ventilated before the judge, and on 20 April 1988 he declined to place any restraint on dissemination of notice of the injunction by the plaintiffs' solicitors. In so doing the judge recognised that, inevitably, he was having to feel his way in a new situation, no similar worldwide injunction having been ordered previously even after judgment. But a consequence of the plaintiffs taking these steps was that, so far as the English court was concerned, if a French or Swiss bank, or other person to whom notice was given, thereafter parted with money or some other asset of either defendant without proper advance warning having been given to the plaintiffs' solicitors, the bank or other person would or might be in contempt of the English court. Indeed, it was precisely for this purpose that the notice of the injunction was being given to third parties. By thus affording the plaintiffs a possible sanction against third parties the plaintiffs' position was intended to be fortified.

> This is not an acceptable situation. It would be wrong for an English court, by making an order in respect of overseas assets against a defendant amenable to its jurisdiction, to impose or attempt to impose obligations on persons not before the court in respect of acts to be done by them abroad regarding property outside the jurisdiction. That, self-evidently, would be for the English court to claim an altogether exorbitant, extraterritorial jurisdiction.
>
> In *Crown Central Petroleum Corporation v. Ibrahim* (unreported), 27 April 1988, Hobhouse J. sought to avoid this difficulty by accepting from the plaintiff an undertaking not to serve notice of a post judgment restraint order in respect of assets outside the jurisdiction on any person other than the defendant (and, in that case, another person who was a party to the action) and his legal representatives. This, in practice, would go a long way towards resolving the difficulty, but in my view it does not go far enough. This form of order is still unsatisfactory in respect of a third party who may learn of the existence of the order without being formally notified by the plaintiff's solicitors.
>
> To meet this difficulty I can see no alternative but to grasp the nettle firmly, and write into the order, which applies only to property outside the jurisdiction, an express provision to the effect that nothing in the relevant part of the order is to affect any person other than the defendants personally. This will remove any extraterritorial vice which otherwise the order might have, or be thought to have. The order will be binding only on the conscience of the defendants."

93. In *Derby v Weldon (Nos 3 and 4)* [1990] Ch 65 (CA), Lord Donaldson MR considered the interplay of three aspects of international law on the *Mareva* (freezing order) jurisdiction. He held (at 82C and following):

> "*(2) The effect on third parties*
>
> Here there is a real problem. Court orders only bind those to whom they are addressed. However, it is a serious contempt of court, punishable as such, for anyone to interfere with or impede the administration of justice. This occurs if someone, knowing of the terms of the court order, assists in the breach of that order by the person to whom it is addressed. All this is common sense and works well so long as the 'aider and abettor' is wholly within the jurisdiction of the court or wholly outside it. If he is wholly within the jurisdiction of the court there is no problem whatsoever. If he is wholly outside the jurisdiction of the court, he is either not to be regarded as being in contempt or it would involve an excess of jurisdiction to seek to punish him for that contempt. Unfortunately, juridical persons, notably banks,

> operate across frontiers. A foreign bank may have a branch within the jurisdiction and so be subject to the English courts. An English bank may have branches abroad and be asked by a defendant to take action at such a branch which will constitute a breach by the defendant of the court's order. Is action by the foreign bank to be regarded as contempt, although it would not be so regarded but for the probably irrelevant fact that it happens to have an English branch? Is action by the foreign branch of an English bank to be regarded as contempt, when other banks in the area are free to comply with the defendant's instructions?
>
> All this was considered in the *Babanaft* appeal [1990] Ch. Cas. No. 6 and gave rise to what is known as the '*Babanaft* proviso'…"

94. The position was summarised by Millett LJ in *Credit Suisse Fides Trust SA v Cuoghi* [1998] QB 818, 824E (CA):

> "The Mareva jurisdiction was established in 1975 as an exceptional remedy to prevent a foreign defendant from defeating any ultimate judgment by removing his assets from the jurisdiction. It was progressively extended, in 1979 to English defendants, in 1982 by restraining defendants from dissipating their assets within the jurisdiction as well as removing them from the jurisdiction, and finally in 1990 by restraining defendants from dealing with their assets both inside and outside the jurisdiction. This last step was taken in *Babanaft International Co. S.A. v. Bassatne* [1990] Ch. 13, in which the court was concerned not to make an unwarranted assumption of extraterritorial jurisdiction. It recognised that it would be wrong to make an order which, though purporting merely to restrain the actions of a defendant already subject to the jurisdiction of the court, might be understood to impose obligations upon persons resident abroad and not subject to its jurisdiction. This danger was avoided by including provisions in the order which made it clear that it was not to affect parties not subject to the jurisdiction of the court in respect of acts outside the jurisdiction save to the extent that the order might be enforced by the local courts. The jurisdiction to make such orders is now firmly established. It is exercised with caution, and a sufficient case to justify its exercise must always be made out; but such orders are nowadays routinely made in cases of international fraud and the conditions necessary in order to preserve international comity and prevent conflicts of jurisdiction have become standardised."

95. It seems to me that the policy of the *Babanaft* proviso would not be met if people outside the jurisdiction of the court were to be liable in tort simply for assisting (or combining) in a breach of a freezing order – i.e., without participation in some

independently unlawful act. In practical terms, this would mean that such persons would be coerced, or have obligations imposed on them, by the freezing order, just as much as if they were within the jurisdiction. In the present case, for example, the effect of the *Babanaft* proviso would mean that although Maître Zabaldano could not be held liable for contempt of court for assisting Mr Su to breach the Freezing Order, he could still be held liable for over US$ 26 million in damages. This would plainly have a coercive effect on his conduct.

96. As a countervailing argument, I can see that it might be said that a freezing order would be denuded of effect if people outside the jurisdiction could assist a respondent to freezing orders to breach such orders with impunity. However, I do not consider that this concern of itself justifies disregarding the *Babanaft* proviso. In *Babanaft* itself, Nicholls LJ recognised that the freezing order might be fortified by parties outside the jurisdiction being given notice of, and considering they would or might be bound by, the order – but still he regarded this as "*not an acceptable situation*", hence the proviso.

97. For these reasons, I conclude that the effect of the *Babanaft* proviso, for a person who benefits from it, is to preclude tortious liability from arising as a result of merely helping or permitting a person to breach the freezing order in question.

98. On my analysis, it would not matter whether the defendant in question had read or relied upon the *Babanaft* proviso itself: the fact and wording of the proviso, and its underlying policy, are sufficient to preclude tortious liability for those who have the benefit of it. However, to the extent it may be relevant, I accept Maître Zabaldano's evidence that he read the Freezing Order, and having done so he believed it did not affect him: see paragraphs 72(a), 72(b) and 75(a) above. For this additional reason, I consider he cannot be held liable in unlawful means conspiracy.

99. For these reasons, in my judgment, the effect of the *Babanaft* proviso is that Maître Zabaldano is not liable for conspiracy to breach the Freezing Order.

The Marex tort

100. The *Marex* tort raises different considerations. This claim focuses not on the Freezing Order, but on the Cooke Judgments and the Judgment Debt. The claim also engages the question whether Maître Zabaldano induced or procured a breach, rather than merely facilitating it. The argument advanced by the Claimant is that Maître Zabaldano, by the transfer of the Cresta Overseas Monies to UP Shipping, intentionally and knowingly induced a violation of Lakatamia's rights in the Judgment Debt.

101. It seems to me that, in this context, it does not matter that the transfer of the Cresta Overseas Monies was in breach of the Freezing Order: in order to establish the *Marex* tort, there is no need for any independent unlawfulness in the act said to constitute inducement. A third party who knowingly assists a judgment debtor to dissipate their assets so as to hinder enforcement of a judgment debt has, in principle, liability in the *Marex* tort – whether or not there is a freezing order in place. Accordingly, the issues around the *Babanaft* proviso do not, in principle, arise.

102. Taking the elements of the *Marex* tort in turn, it is clear that there has been the entry of a judgment – the Cooke Judgments – in Lakatamia's favour. There has also been a breach of the rights existing under those judgments, in that Mr Su has not paid the Judgment Debt to Lakatamia when it fell due.

103. As for whether there has been procurement or inducement of that breach by Maître Zabaldano, the evidence is that Maître Zabaldano did as he was instructed by Mr Su (through Mr Chang). Maître Zabaldano did not induce or procure Mr Su to take any step; rather, Maître Zabaldano was induced by Mr Su to take the steps which caused the breach. However, I accept that "*any active step taken by the defendant having knowledge of the covenant by which he facilitates a breach of that covenant*" may fall within the ambit of the tort (*British Motor Trade Association v Salvadori* [1949] Ch 556, 565 (Roxburgh J)), and Maître Zabaldano took such an active step when he instructed the bank to make the relevant transfer. Accordingly, I am satisfied that this element of the claim is sufficiently established.

104. Nonetheless, I consider that the necessary element of intention is missing. I reach this conclusion for the following reasons:

(a) In *Meretz Investments NV v ACP Ltd* [2007] EWCA Civ 1303, [2008] Ch 244 (***Meretz***), the Court of Appeal considered the intention requirement in the tort of inducing breach of contract. Arden LJ, with whom Toulson and Pill LJJ agreed, held at [124]-[127] that since the relevant defendants "*considered that they were entitled to cause [the first defendant] to breach its obligation*", this was "*sufficient to avoid liability for inducing breach of contract*".

(b) *Meretz* was followed by the Court of Appeal in *Allen v Dodd* [2020] EWCA Civ 258, [2020] QB 781. In the context of a claim for inducing breach of contract, Lewison LJ (with whom David Richards and Rose LJJ agreed) specifically held at that the reasoning of Arden LJ in *Meretz* was binding. He held:

> "23. In other cases, judges had said that if the defendant knew the facts, then a mistake about their legal consequences would not amount to a defence: *Greig v Insole* [1978] 1 WLR 302; *Pritchard v Briggs* [1980] Ch 338 (Goff LJ). But in *Mainstream* in this court Arden LJ specifically disagreed with that view on the basis that the law about mistakes of law had moved on. In *Mainstream Properties Ltd v Young* [2005] IRLR 964 she said at para 85:
>
> 'this court must ask whether the policy behind the tort of interference with contractual relations would be furthered if a defendant to a claim based on this tort were to be prevented from relying on a mistake he made on the law to explain why he took the action he did. In my judgment there is nothing in the policy of this tort that requires this bar. It is clearly important that the law should provide proper incentives to parties to familiarise themselves with the law, but if the bar under consideration does not now apply to the recovery of money paid under a mistake, it is difficult to see why it should apply to the economic tort of interference with contractual relations.'
>
> 24. She adhered to that view in *Meretz* [2008] Ch 244 , at paras 118 and 119. Both Pill and Toulson LJJ agreed with her. Her reasoning in Meretz therefore binds us. The potency of a misunderstanding of the law is also demonstrated by the

> outcomes in both *British Industrial Plastics* [1940] 1 All ER 479 and also *Mainstream* itself."

(c) The decision in *Racing Partnership*, which relates solely to a claim in unlawful means conspiracy, does not impact on this decision. On the contrary, citing *Ablyazov (No.14)*, Arnold LJ (re-)emphasised at [142] that it should not be assumed that common elements of the economic torts have the same content in each context.

(d) I consider that the same approach to intention should be taken as regards the *Marex* tort as is applied to the tort of inducing breach of contract. The requisite intention will be missing where the defendant honestly believed that he was entitled to induce the breach of a judgment or order. Here, for the reasons I have set out in paragraph 75 above, I consider that Maître Zabaldano did have such honest belief.

105. If I am wrong that such honest belief negatives the requirement for intention in the context of the *Marex* tort, I consider instead that Maître Zabaldano nonetheless has established a justification defence, as for the reasons that follow.

106. Starting first with the availability of the defence of justification in principle, I consider that such a defence is available, for the following reasons.

(a) The origin of the *Marex* tort is the decision of Knowles J in *Marex*, giving permission to serve a claim form out of the jurisdiction. The assumed facts were that Mr Sevilleja procured the transfer of money out of the bank accounts of the judgment debtor held in England, in the period immediately before, and shortly after, judgment was given by Field J in the Commercial Court. Without deciding the question, Knowles J concluded that Marex had the better argument for the existence of the tort. Knowles J observed at [20]:

> "Non-payment of a judgment debt is an actionable wrong. The courts have recognised "a principle that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained": per Lord Collins JSC in *Rubin v Eurofinance SA* [2013] 1 AC 236, para 9, and see further *Williams v Jones* (1845) 13 M&W 628, 633, per Pollock CB; *ED&F Man (Sugar) Ltd v*

> *Haryanto (No 3)* The Times, 9 August 1996, per Leggatt LJ and *Kuwait Oil Co SAK v Al Bader* [2008] EWHC 2432 at [8], per Teare J. This is the theoretical basis for the enforcement of foreign judgments at common law, but it is none the less a principle and not a fiction confined to that area of common law."

(b) In the *Madam Su* judgment, Bryan J observed many similarities between the *Marex* tort and the tort of procuring a breach of contract before continuing:

> "130. However, I consider that there is one difference between the tort of inducing a breach of contract and the Marex tort. In relation to the former, and whilst intentionally procuring a breach of contract is actionable independently of the motive or reason for so doing since the action depends upon breach of the claimant's right and is not based on the spite, desire to injure or ill will of the defendant (as already noted), some exception has been made on the ground of justification, albeit it has been recognised that '*it would be extremely difficult, even if it were possible, to give a complete and satisfactory definition of what is "sufficient justification"*' (*Glamorgan Coal Co v South Wales Miners Federation* [1903] 2 K.B. 545 at 573 CA, per Romer LJ). The defence of justification in relation to inducing a breach of contract has itself been recognised as being of "*fairly restricted ambit*" and "*narrow scope*" (see Clerk & Lindsell on Torts, at paras 23.59-23.60).
>
> 131. However, I do not consider that there is any scope for an equivalent defence in relation to the Marex tort. Whilst there may be limited circumstances in which it is reasonable to induce a breach of a contractual right (a right which by its very nature is a right created by contract) in the furtherance of, by way of example, a moral obligation, I cannot see any room for an equivalent defence in relation to rights established by due process and enshrined in a judgment. Whether that is so or not is academic in the present case, as it is not suggested that Madam Su would have any lawful justification if she (for example) encouraged or assisted Mr Su to violate Lakatamia's judgment rights."

(c) As Bryan J noted, the availability of the defence of justification was academic in the case before him. Bryan J's dictum in [131] is therefore *obiter*.

(d) At my request, Counsel for Lakatamia provided written submissions on the availability of this defence. They point out that in the Jurisdiction Judgment, at [172], Bryan J cited his earlier dictum. I accept that, but I note that this was only in the context of deciding whether there was a serious issue to be tried: so far as I can discern from the judgment, the correctness of the dictum was not even argued. The same is true as regards Foxton J's adoption of the principles in the *Tseng* judgment: see paragraph 23 above.

(e) The Claimant argues that Bryan J's dictum is, in any event, "*obviously correct*". The Claimant submits that there are no situations in which it could be justifiable intentionally and knowingly to violate rights established by a judgment. The Claimant submits that the *Marex* tort cannot be committed without also committing a contempt of court (citing *Attorney General v Punch Ltd* [2002] UKHL 50; [2003] 1 AC 1046 at [66] per Lord Hope), and there is no justification to liability for contempt of court. The Claimant submits that to admit justification as a defence to the *Marex* tort would be to accept that it can be reasonable deliberately to defy this Court's judgments and/or orders.

(f) However, it seems to me:

(i) It a strong thing to say that there can never be a justification for encouraging or assisting a judgment debtor to hinder enforcement of a judgment. While the circumstances justifying such conduct might be very limited, I would be reluctant to conclude that there can never be such a justification.

(ii) I note that the editors of Clerk & Lindsell comment on Bryan J's dictum at footnote 129 to §23-29:

> "With respect, we suggest that this conclusion may require re-evaluation if a case ever arises where a defendant can claim to have equal or superior rights to receive payment from a judgment debtor (a parallel to the situation where a defendant can most easily establish a justification for having procured a breach of contract)."

(iii) I note too the comment of the editors of Civil Fraud (1st edition) at §3-022A on Bryan J's dictum:

> "This is considered too broad a proposition. The inducer in the cases discussed in para.3-071 below may well have been entitled to rely on the defence even if the claimant's contractual rights against the contract breaker had been upheld by a judgment. Any other conclusion would entail a judgment elevating the status of the claimant's right vis-à-vis the inducer beyond that given to him by the contract, a conclusion which is difficult to support."

(iv) I understand Bryan J's reasoning in [131] of the *Madam Su* judgment to be that rights under a judgment have a special status, over and above private rights established under a contract, having been "*established by due process and enshrined in a judgment*". I can well see that such an analysis might preclude a defence of justification if the only reason for a defendant's actions were the existence of a contractual right or duty. And I can see that there might be no defence of justification available if someone within the jurisdiction of the English court were to rely solely on an order of a foreign court: again, in a notional hierarchy of rights or duties, the order of a foreign court would seem to fall below an order of the English court. But, as a corollary, it seems to me that a defence of justification could be available if a defendant, as in the present case, is outside the jurisdiction of the English court, where the English court's order has no special status, but the defendant is subject to some higher duty.

(g) I accept that, in the present case, it has been decided that the English court has jurisdiction over Maître Zabaldano in respect of these proceedings, and I have decided that the law applicable to the wrongs alleged against Maître Zabaldano is English law. However, that does not seem to me to be the same as deciding that, in the circumstances as they were for Maître Zabaldano in February 2017, I must treat an order of the English court – which, at the time, had not been registered in Monaco – as necessarily superior to Maître Zabaldano's obligations in Monaco.

107. For these reasons, I conclude that the defence of justification could be available in principle on the facts of the present case.

108. In its post-hearing written submissions, the Claimant argued that it was fatal to this point that Maître Zabaldano did not plead a defence of justification. However, it is in the nature of this case that the Claimant chose to pursue a trial against Maître Zabaldano, knowing he had not pleaded a defence, but accepting the need nonetheless to deal fairly with defences Maître Zabaldano might have advanced: see paragraphs 17 and 18 above. It might have been unfair to the Claimant for me to consider a putative defence that the Claimant had not had the opportunity to address, but the Claimant in its (pre-trial) skeleton dealt in some detail with the justification defence, arguing that "*this is absolutely no answer to Lakatamia's claims*". I do not agree with the Claimant's analysis in this regard:

(a) The Claimant cites Bryan J's dictum that justification is never a defence to the *Marex* tort. For the reasons I have set out, I do not consider that to be correct.

(b) Second, the Claimant argues that "*it is never justifiable to breach an injunction*", citing *Northamber plc v Genee World* [2022] EWHC 3562 (Ch) at [301]. However, in the context of the *Marex* tort it is neither necessary nor sufficient that there was a breach of the Freezing Order: the *Marex* tort is a claim about inducing breach of the Cooke Judgments. In any event, in light of the *Babanaft* proviso, I would not accept that a breach of an injunction (or inducing the breach of an injunction) can never be justified.

(c) Third, the Claimant argues that "*Maître Zabaldano has, by failing to defend the proceedings, chosen not to plead any case on Monégasque law. In the absence of any pleaded position in this regard, the content of Monégasque law is irrelevant*". I am not sure that is right. It is correct, of course, that the law applicable to the present claims is English law: see paragraph 20 above. That is why I have considered the elements of the *Marex* tort. But that does not mean that Monegasque law is irrelevant. At the CMC, Bright J gave permission to the parties to adduce into evidence and rely at trial upon the

> experts' reports (on Monegasque law) that were placed before Bryan J in the course of the jurisdiction challenge, and in various passages of its skeleton the Claimant invited me to have regard to such evidence. Nonetheless, as a matter of practicality, I will adopt the course I am invited to take by the Claimant, and not apply Monegasque law. Rather, I shall decide this question by 'reading across' English law principles, and consider by analogy whether a lawyer in England, instructed by his client to make a transfer, would have a defence of justification where such transfer would be inconsistent with an order of a foreign court of competent jurisdiction, but where such order had not yet been recognised or enforced in this jurisdiction.

109. In seeking to assess whether the defence of justification is made out in the present case, in the context of the *Marex* tort, I have regard to the scope of such defence in the context of the tort of procuring breach of contract.

(a) In *Glamorgan Coal Company Ltd v South Wales Miners' Federation* [1903] 2 KB 545, Romer LJ observed at 574:

> "When a person has knowingly procured another to break his contract, it may be difficult under the circumstances to say whether or not there was 'sufficient justification or just cause' for his act. I think it would be extremely difficult, even if it were possible, to give a complete and satisfactory definition of what is 'sufficient justification', and most attempts to do so would probably be mischievous. I certainly shall not make the attempt.
>
> … I respectfully agree with what Bowen L.J. said in the *Mogul Case*, when considering the difficulty that might arise whether there was sufficient justification or not: 'The good sense of the tribunal which had to decide would have to analyse the circumstances and to discover on which side of the line each case fell.' I will only add that, in analysing or considering the circumstances, I think that regard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and I think also to the object of the person in procuring the breach."

(b) In *Edwin Hill and Partners v First National Finance Corporation plc* [1989] 1 WLR 225 (CA), Stuart-Smith LJ cited from the judgment of

Romer LJ in the *South Wales Miners' Federation* case. He continued (at 230E, with citations omitted):

> "Mr. Judge submitted that in the *Glamorgan* case the supposed justification was a duty to act in what was conceived to be the interests of both parties to the contract and that accordingly Romer LJ's test or approach should be confined to such cases, and should not extend to cases where the interferer's conduct is sought to be justified by reference to some equal or superior legal right. But I cannot see that the proposition should be so limited; in my judgment the courts have over the years worked on this principle, holding that some cases fall on one side of the line, others on the other.
>
> Thus the following matters have been held not to amount to justification.
>
> 1. Absence of malice or ill will or intention to injure the person whose contract is broken...
>
> 2. The commercial or other best interests of the interferer or the contract breaker…
>
> 3. The fact that A has broken his contract with X does not of itself justify X in revenge procuring a breach of an independent contract between A and B. ...
>
> On the other side of the line justification has been said to exist where:
>
> 1. There is a moral duty to intervene, as for example in *Brimelow v. Casson* (1924) 1CH, 302 where it was held that the defendants were justified in their actions since they owed a duty to their calling and its members to take all necessary steps to compel the Plaintiff to pay his chorus girls a living wage so that they were not driven to supplement their earnings through prostitution.
>
> 2. Where the contract interfered with is inconsistent with a previous contract with the interferer.…
>
> This leads one to a consideration of the important case of *Read v. Friendly Society of Operative Stonemason*s [1902] 2 KB 88. At page 96 Darling J. said:
>
> "I think their sufficient justification for interference with plaintiff's right must be an equal or superior right in themselves, and that no-one can legally excuse himself to a man, of whose contract he has procured the breach, on the grounds that he acted on a wrong understanding of his own rights, or without malice, or bona fide, or in the best interests of himself, nor even that he

> acted as an altruist, seeking only the good of another and careless of his own advantage.'"

(c) Stuart-Smith LJ further held at 233F:

> "Justification for interference with the Plaintiffs' contractual right based upon an equal or superior right in the Defendant must clearly be a legal right. Such right may derive from property real or personal or from contractual rights. Property rights may simply involve the use and enjoyment of land or personal property. To give an example put in argument by the Vice Chancellor if X carries on building operations on his land, they may to the knowledge of X interfere with a contract between A and B to carry out recording work on adjoining land occupied by A. But unless X's activity amounts to a nuisance, he is justified in doing what he did. Alternatively, the law may grant legal remedies to the owner of property to act in defence or protection of his property; if in the exercise of these remedies he interferes with a contract between A and B of which he knows, he will be justified. If instead of exercising those remedies he reaches an accommodation with A, which has a similar effect of interfering with A's contract with B, he is still justified notwithstanding that the accommodation may be to the commercial advantage of himself or A or both. The position is the same if the Defendants' right is to contractual as opposed to a property right, provided it is equal or superior to the Plaintiffs' rights."

(d) In *OBG Ltd v Allan* [2007] UKHL 21, [2008] AC 1 Lord Nicholls expressly declined to elaborate on the defence, at [193]:

> "For completeness I mention, but without elaboration, that a defence of justification may be available to a defendant in inducement tort cases. A defendant may, for instance, interfere with another's contract in order to protect an equal or superior right of his own, as in *Edwin Hill & Partners v First National Finance Corpn plc* [1989] 1 WLR 225."

(e) In *Northamber plc v Genee World Ltd* [2024] EWCA Civ 428, Arnold LJ recorded at [67] that Counsel for the respondent:

> "did not challenge the correctness as a matter of law the judge's conclusion… that the pursuit by IES of its own economic interests was insufficient to amount to lawful justification. On the contrary, he accepted that IES needed to establish an equal or superior legal right to that asserted by Northamber."

(f) I note that these authorities generally focus on the defendant having an "*equal or superior right*". However, it seems to me that justification may

also be established if the defendant is subject to an "*equal or superior*" duty requiring him to take the steps he takes. Hence, for example, it would be a defence to a claim for inducing breach of contract if the defendant were to have acted as directed by a court order. This is consistent with Porter J in *De Jetley Marks v Greenwood* [1936] 1 All ER 863, 873:

> "The good cause which excuses the procurement of a breach of contract must be something more than a belief by the servants or agents of a company that the company might become insolvent if the contract were not broken. To allow such causes to be sufficient would be to excuse the procurement of a breach where a breach itself could not be justified. Whatever be the ground upon which the action of those who induce others to break their contracts may be excused, I cannot find that they exist in the present case. The justification must, I think, involve an action taken as a duty, not the mere protection of the defendants' own interests. (See *Brimelow v Casson*, *South Wales Miners' Federation v Glamorgan Coal Co*, *Read v Friendly Society of Operative Stonemasons*, and *Pratt v British Medical Association*.)"

110. Returning to the facts of the present case, in my judgment, if the claim in the *Marex* tort were otherwise made out, Maître Zabaldano would nonetheless succeed in his defence of justification. I reach this conclusion for the following reasons:

(a) At common law, a judgment of a foreign court would (only) be of equivalent nature to a debt: compare per Lord Collins in *Rubin v Eurofinance*, cited by Knowles J in *Marex* at [20] (paragraph 106(a) above). I treat this to be the (limited) nature of the right violated by Maître Zabaldano in the present case in February 2017, in Monaco, at a time when the Cooke Judgments had not been registered or recognised there.

(b) Maître Zabaldano can be taken to have had a contractual, and professional, duty to comply with his client's instructions, if lawfully given and consistent with professional conduct requirements: compare *Minkin v Landsberg* [2015] EWCA Civ 1152, [2016] 1 WLR 1489 at [38(i)] (Jackson LJ). A direction to make a payment, on behalf of Cresta Overseas, from Maître Zabaldano's client account to UP Shipping, a connected company, was, on its face, lawfully given.

(c) As I have found, Maître Zabaldano believed that he was entitled, and indeed obliged, to comply with the instruction given. Moreover, it is not alleged, and I do not find, that there was any personal animus, spite or ill-will by Maître Zabaldano directed at Lakatamia.

(d) It may be relevant, in this context, that the payment ordered was, to Maître Zabaldano's knowledge, in breach of the Freezing Order. But, as previously discussed, the Freezing Order stated on its face that it did not affect or concern people in the position of Maître Zabaldano, and he did not believe that he was affected by it.

(e) The Claimant argues that Maître Zabaldano had been warned in October 2015 that the work he was doing for Cresta Overseas might amount to a fraud on creditors, given Mr Su's debt to Lakatamia. But I consider that ignores the separate corporate personality of Cresta Overseas, and the absence of any order in Monaco to restrain the actions of Cresta Overseas.

(f) Taking a step back, I consider that a lawyer should not find himself liable in tort for having followed his client's instructions, simply on the basis that 18 months earlier he had been informed that a third party had obtained a foreign judgment against his client's owner, which that third party had (to the lawyer's knowledge) taken only a single, unsuccessful, step to have recognised in the lawyer's jurisdiction. In my judgment, the correct analysis in such a situation is that the lawyer, if he believed himself to be acting properly, would lack the necessary to intention to be liable for the *Marex* tort; but if I am wrong about that, I consider the defence of justification would instead provide the relevant route to excuse the lawyer from liability.

Conclusion on the claims against Maître Zabaldano

111. For these reasons, I conclude that both claims against Maître Zabaldano fail.

The claim against Mr Su

112. That brings me, finally, to the claims against Mr Su.

113. I accept – as has, in any event, previously been found by Sir Michael Burton GBE in proceedings between Lakatamia and Mr Su – that Mr Su knowingly

participated in breaches of the Freezing Order by directing Mr Chang to cause Maître Zabaldano to transfer of the Cresta Overseas Monies to UP Shipping.

114. However, that does not make Mr Su party to an unlawful means conspiracy. It takes (at least) two to conspire, and on the findings I have made neither Mr Chang or Maître Zabaldano participated in an unlawful means conspiracy. Accordingly, there was no 'Subsidiary Conspiracy', and so Mr Su is not liable in unlawful means conspiracy.

Quantum

115. In light of my findings, the question of quantum does not arise. However, in case this case go further, I would record only that, had I found either the unlawful means conspiracy or the *Marex* tort claims to be made out, I would have concluded that the loss to the Claimants was the sum paid away to UP Shipping, namely US$ 26,712,851.68. I am satisfied that Mr Su had the entire beneficial interest in Cresta Overseas, and that, but for the transfer to UP Shipping of the Cresta Overseas Monies, those funds would have been available to satisfy, in part, the Judgment Debt.

Conclusion

116. Accordingly, I dismiss all the claims advanced in these proceedings.