THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 218

Record No. 2018/23

Whelan J.
McGovern J.
Costello J.

IN THE MATTER OF ARTICLE 26(1) OF COUNCIL REGULATION (EU) NO.1 2015/2012

BETWEEN

TRAFALGAR DEVELOPMENTS LIMITED, INSTANTANIA HOLDINGS LIMITED, KAMARA LIMITED AND BAIRIKI INCORPORATED
PLAINTIFFS/RESPONDENTS

- AND –

DMITRY MAZEPIN, OJSC UNITED CHEMICAL COMPANY URALCHEM, URALCHEM HOLDING PLC, EUROTOAZ LIMITED, ANDREY GENNADYEVICH BABICHEV, YULIA BOLOTNIKOVA, BELPORT INVESTMENTS LIMITED, MILKO EMILOV MINKOVSKI, ANDROULA CHARILAOU, DIMTRY KONYAEV AND YEVGENIY YAKOVLEVICH SEDYKIN

DEFENDANTS/THE FOURTH AND FIFTH NAMED DEFENDANTS ARE THE APPELLANTS

JUDGMENT of Ms. Justice Costello delivered on the 18th day of July, 2019.

1. This is an appeal against the judgment and order of the High Court (Haughton J.) delivered on the 23rd November, 2017 refusing to dismiss the plaintiffs' action against the fourth and fifth named defendants (the appellants, Eurotoaz or Mr. Babichev as appropriate) pursuant to the inherent jurisdiction of the Court on the basis that the action is frivolous and vexatious, factually unsustainable and bound to fail.

The Statement of Claim

2. It is appropriate first to consider the case as pleaded by the plaintiffs and then to examine the decision of the High Court.

3. Proceedings issued and a statement of claim was delivered on the 9th November 2016. It states that the plaintiffs are companies incorporated in various Caribbean islands and that together they own approximately 70% of the shares in OJSC Togliattiazot (ToAZ), a Russian company, which is a fertilizer producer and the largest producer of trade ammonia in Russia. The plaintiffs claim that the defendants actively participated in an unlawful, corrupt and oppressive scheme, orchestrated by the first named defendant, Mr. Mazepin, to wrest control of ToAZ from the plaintiffs (the "Scheme"). Their claim is for damages for conspiracy and for declaratory and injunctive relief in respect of the pleaded conspiracy. They have pleaded both lawful means and unlawful means conspiracy against the defendants. The conspiracy is referred to as a Scheme to damage and injure the plaintiffs and the Scheme is summarised in paras. 5-12 of the statement of claim. It is said that the Scheme is led by Mr. Mazepin and that he controls the second named defendant (UCCU) which owns a minority interest in ToAZ. The methods employed in giving effect to the Scheme over a number of years are set out in para. 6 as follows:-

> *"(a) Making direct and indirect unlawful threats against shareholders and officers of ToAZ and persons perceived to be connected with ToAZ, to the effect that improper legal proceedings would be brought against them if the Plaintiffs' ToAZ Shares were not sold to the Defendants at an undervalue;*
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> *(b) Repeatedly bringing multiple unfounded civil actions, inter alia, in the name of Eurotoaz Limited ('Eurotoaz'), a company registered in Ireland, against officers of and persons perceived to be connected with ToAZ in Russia, including fraudulent claims that Eurotoaz was entitled to shares in ToAZ;*
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> *(c) Repeatedly making multiple unfounded criminal complaints in Russia, inter alia, in the name of Eurotoaz, against ToAZ officers and persons perceived to be connected with ToAZ in Russia;*
>
> *(d) Uttering false evidence and procuring and deploying false evidence against ToAZ, its officers and persons perceived to be connected with ToAZ, in criminal and civil legal proceedings referred to herein;*
>
> *(e) Producing forged or sham documents against ToAZ, its officers and persons perceived to be connected with ToAZ in such legal proceedings;*
>
> *(f) Procuring oppressive and unjust court orders against the Plaintiffs to include, inter alia, improper and unlawful freezing orders against the Plaintiffs' ToAZ Shares and dividends on false pretexts;*
>
> *(g) Procuring improper arrest warrants and Interpol Red Notices against officers and individuals perceived to be connected to ToAZ;*
>
> *(h) Illegally procuring the suspension of the Chairman of ToAZ from the board of ToAZ;*

(i) Purporting to remove ToAZ's lawful directors and replace them with nominees of the Defendants through unlawful means, namely the use of false evidence and/or documents;

(j) Unlawfully purporting to pass Board Resolutions which would de facto empower the nominee Directors on the Board to dilute the ToAZ shares or misappropriate some or all of them; and

(k) Putting undue and unlawful pressure on judges, criminal investigators, court-appointed experts, and judicial officers in Russia to make improper and unfounded adverse orders against ToAZ, its officers and shareholders."

4. It is pleaded that the purpose of the actions is to cause such catastrophic damage to ToAZ and its business that the plaintiffs would be forced to sell their shares in ToAZ to the defendants, or their nominees, at an undervalue because the shares would be worthless in the hands of the plaintiffs. In the alternative, the purpose is to ensure that a Russian court would make an enormous and unjustified damages award in favour of certain of the defendants and order that the plaintiffs' ToAZ shares be sold to satisfy that award. The defendants, it is alleged, would then ensure that a purchaser, owned or controlled by them, would purchase the plaintiffs' ToAZ shares at an undervalue. It is also pleaded that the purpose of the actions is to deprive the plaintiffs of the rights attached to their shares in ToAZ on a false pretext.

5. It is alleged that the defendants, in carrying out the Scheme, have succeeded in causing, and continue to cause, catastrophic loss to the plaintiffs, including the effective expropriation of the plaintiffs' ToAZ shares, the almost total loss in value attributable to the plaintiffs' ToAZ shares, the deprivation to the plaintiffs of dividend payments in connection with the plaintiffs' ToAZ shares and the inability, fully, to exercise the rights associated with, or to deal in, the shares.

6. It is pleaded that each of the acts were committed, not as an end in themselves, but to facilitate the Scheme. Further, if the acts were lawful they nonetheless were carried out with the:-

"…wholly unlawful and singular aim of enabling the defendants or their nominees to acquire the plaintiffs' ToAZ shares at the greatest undervalue achievable…"

7. At para. 37 the statement of claim pleads that the Scheme is properly understood as part of an internationally well recognised phenomenon known as "raider attacks". Paragraph 38 describes "raider attacks" as follows:-

"Raider attacks typically involve the so-called "raider" acquiring a minority shareholding in the company that is the target of the attack. Thereafter, a series of improper civil and criminal lawsuits are repeatedly issued on behalf of, or at the behest of, the raider against the target in order to devalue the company's stock; unlawful pressure is placed on judicial authorities to bring regulatory and tax prosecutions against the principals of the target; and searches and seizures of confidential information are made at the target's offices. Ultimately, the raider procures the freezing of the shares, dividends and cash in the target with the result that the business collapses and effective control is wrested from the owners of the target company."

8. The statement of claim sets out the alleged illegal acts the plaintiffs say the defendants, and each of them, committed, or permitted to be committed, in furtherance of the Scheme. These include threats issued by Mr. Mazepin and Mr. Konyaev to Mr. Zivy, a beneficial owner of minority shares in ToAZ, and Mr. Ruprecht, who is employed by and associated with ToAZ's trading partner, Ameropa. They made plain it was the intention that UCCU take control of ToAZ by any means.

9. It is said that from in or about late 2008 the defendants, or one or more of them, participated in a course of action whereby multiple civil claims and criminal complaints were launched against ToAZ or its officers. The actions were in furtherance of the Scheme and the aim and purpose of these actions was to render it impossible for ToAZ, its officers or the plaintiffs to withstand the acquisition of ToAZ by Mr. Mazepin and his accomplices.

10. Eurotoaz Limited ("Eurotoaz") is said to have been central to the Scheme. It is pleaded that it conducted a campaign of vexatious litigation based on false and/or sham evidence. It claims to be the owner of shares in ToAZ, a claim not accepted by ToAZ or the defendants. Eurotoaz has instituted proceedings seeking to establish its right to certain shares in ToAZ. The statement of claim sets out the details of five separate complaints to both criminal and regulatory bodies made by Eurotoaz between 2009 and 2010 seeking to establish its claimed right to the shares in ToAZ which were all either dismissed or not pursued by the relevant bodies. Originally, in the first Eurotoaz criminal complaint, it said it became the owner of the shares in June, 1994 pursuant to an agreement called "Agreement 7-AI". This claim was not true as the party to that agreement was in fact a joint Russia-Hungarian enterprise Eurotoaz SRVP ("Eurotoaz Hungary"), not Eurotoaz. In relation to the second complaint, described in the statement of claim as the second Eurotoaz criminal complaint, it is said that Eurotoaz deployed false evidence. As this plea is central to the arguments of the appellants on this motion, it is appropriate to set out paras. 62-66 of the statement of claim in full:-

"62. On the 9th March, 2010 Mr Sedykin, who by power of attorney has acted on behalf of Eurotoaz in the prosecution of the First Eurotoaz Criminal Complaint, said in a formal investigative interview in the context of the Second Eurotoaz Criminal Complaint that Eurotoaz's asserted shareholding in ToAZ had been transferred to it from Eurotoaz Hungary on 25 November 1995. Mr Sedykin, for the first time, notwithstanding that the proceedings had been commenced 5 months previously, provided documents in the form of:

(a) a purported letter dated 25 November 1995 sent by Eurotoaz to ToAZ Invest (the entity responsible for maintaining the register of shareholders in ToAZ) noting the change in ownership and requesting a change in ToAZ's register of shareholders to record the transfer; and

(b) a purported undated response from ToAZ Invest noting the transfer and that the shares had been reissued.

63. Mr Evgeniy Korolev, the Director of ToAZ Invest in November of 1994, who also subsequently became a director of ToAZ, said on 15 March 2010 in an interview with Russian authorities that he had not seen the letter purportedly sent to him on 25 November 1995 until February 2010, when it was submitted as evidence in the Second Criminal Complaint and that he doubted that he had sent the purported reply, which lacked a reference number, date and stamp which as matter of routine practice is used in official correspondence.

64. In his interview on 9 March 2010 with Russian investigative authorities investigating the Second Criminal Complaint, Mr Sedykin said he informed Mr Galantai, who he described as the owner of both Eurotoaz Hungary and Eurotoaz, of the

work he had performed in relation to the claims of Eurotoaz. In a further interview on 19 May 2010, Mr Sedykin made a number of assertions about the actions of the Mr Galantai or his representative, but when asked whether he could contact Mr Galantai so as to ask him to attend an interview, he said he was unable to give notice to Mr Galantai. Mr Sedykin then refused to answer questions about how he communicated with Mr Galantai, claiming that he had received threats and was concerned for his own safety, although he admitted he had not reported such threats to law enforcement agencies.

65. It is to be inferred that when it became apparent that Eurotoaz could not pass off Agreement 7-AI as a genuine agreement made with it rather than Eurotoaz Hungary, [as asserted in the first criminal complaint]it manufactured the purported letters of 25 November 1995 and the alleged response of ToAZ Invest in order to provide a false basis for asserting that Eurotoaz had an interest in ToAZ in the first Eurotoaz criminal complaint.

66. The same methods - that is to say the creation of and reliance upon false or sham documents - employed in the Eurotoaz Complaints were also used by UCCU to support criminal proceedings against ToAZ and ToAZ Corp. in connection with [another complaint]…"

11. The plaintiffs plead that Eurotoaz also conducted a campaign of vexatious civil litigation based *inter alia* on the same evidence they say it falsely relied upon in the second Eurotoaz criminal complaint. In essence, they say that Eurotoaz has falsely claimed that it was entitled to 44,541 of the issued shares of ToAZ which were formerly held by Eurotoaz Hungary, a separate legal entity based in Budapest. In May 2010, after the first Eurotoaz criminal complaint had been dismissed, Eurotoaz instituted its first civil claim against ToAZ and its registrar (ToAZ Invest) in the Arbitrazh Court of the Samara Region seeking an order that the ToAZ share register be amended to correct an alleged mistake, namely the alleged failure to replace Eurotoaz Hungary with Eurotoaz on the Register of Shareholders. The claim was dismissed on the 17th July, 2012 and went through various stages of appeal (including a remittal to the court of first instance) and on the 2nd March 2016, the Supreme Court of the Russian Federation dismissed the cassation appeal which sought to review the case on the discovery of new facts.

12. Eurotoaz brought a second civil claim in October, 2014 seeking the acknowledgement of shareholders rights for Eurotoaz and the payment of dividends. The claim was based on one of the alleged false premises in the third Eurotoaz criminal complaint i.e. that ToAZ failed to pay dividends to Eurotoaz on shares that Eurotoaz allegedly owns. The claim has been dismissed at first instance and on appeal.

13. It is pleaded that Eurotoaz and Mr. Babichev (the fifth named defendant and director of Eurotoaz) knowingly acquiesced or caused false documents to be relied upon in support of the Eurotoaz campaign of vexatious litigation against ToAZ. In paras. 83 and 84 of the statement of claim the plaintiffs plead as follows:-

"83. In adducing evidence based upon Agreement 7-AI, the letter of 25 November 1995 and the undated response of ToAZ Invest, which the defendants know to be false evidence and/or false or sham documents, Mr Sedykin [the agent prosecuting the claim on behalf of Eurotoaz] wrongfully and unlawfully gave false evidence.

84. Further, Mr Sedykin knowingly and dishonestly participated in the prosecution of claims which were advanced on wholly false premises, first, that Eurotoaz had obtained shares [in ToAZ] through Agreement 7-AI and then, subsequently, that it had exchanged letters with ToAZ Invest demonstrating a transfer of shares from Eurotoaz Hungary."

14. It is also pleaded that Eurotoaz and Mr. Babichev pursued the third Eurotoaz criminal complaint relying upon the alleged correspondence with ToAZ Invest which Mr. Babichev, the director of Eurotoaz, must have known to be false.

15. It is alleged that the unlawful actions of Eurotoaz are continuing, and that further criminal complaints and civil claims arising "*out of the same demonstrably false factual allegations that it has been deprived of the status of a shareholder*" in ToAZ have been initiated. It pleads that the attempts to continue to litigate matters already heard and determined by the Russian courts are unlawful and an abuse of process. It is expressly pleaded that the continued actions, if lawful (which the plaintiffs deny), are in furtherance of a conspiracy designed to injure or cause financial loss to the plaintiffs by defrauding them of the plaintiffs' ToAZ shares.

16. The plaintiffs also allege that UCCU is engaged in a campaign of vexatious litigation supported by false evidence. In 2011 and 2012 UCCU initiated both civil and criminal proceedings against ToAZ and its officers claiming to have suffered losses of over US $200m as a result of ToAZ allegedly having failed to supply UCCU with a list of the shareholders in ToAZ to which UCCU, as a shareholder, was entitled. The plaintiffs plead that the claim was always entirely false and that the Arbitrazh Court found in December, 2011 that ToAZ had supplied the Shareholder List to UCCU, as requested. Despite this, UCCU pursued the civil and criminal complaints and used false documents and testimony to support its claim for the loss that it never actually suffered.

17. The civil claim based upon the Shareholder List was dismissed by the Arbitrazh Court in December, 2011. On the 25th October, 2011, UCCU made a criminal complaint to the Russian Investigative Authorities (RIA) in the Samara region to initiate criminal proceedings against the management of ToAZ and its management service company ToAZ Corp. on the ground of an alleged failure to allow UCCU to inspect the Shareholder List. It is alleged that the RIA seized certain documents from ToAZ's offices, its bankers and trading partners, which were then used by the RIA to initiate a criminal complaint against officers of ToAZ and Mr. Zivy and Mr. Ruprecht under Art.159 (iv) of the Russian Federation Criminal Code. It is pleaded in para. 93 that these further criminal investigations and proceedings were abusive as, under Russian law, the judgment of the Arbitrazh Court in favour of ToAZ had the effect of precluding any criminal charge in relation to the same matters.

18. In February, 2013, UCCU indicated that if the criminal case brought pursuant to a complaint by UCCU, the Art.159 (iv) criminal case, was upheld, that it would seek civil compensation for alleged losses suffered as a shareholder in ToAZ as a result of the diversion of funds from ToAZ. The estimated losses were pleaded to be US$55m.

19. The plaintiffs plead at para. 113 of the statement of claim that the Art.159 (iv) criminal case, and the associated damages claim to be brought by UCCU, have been used as a pretext for making oppressive, unjust and hugely damaging orders involving the freezing of the plaintiffs' shares in ToAZ and the freezing of property and cash belonging to ToAZ, the issuing of criminal charges together with domestic and international arrest warrants against key officers of ToAZ and its associated trading partner, Ameropa, and the suspension of Mr. Sergei Makhlai (the former CEO of ToAZ) from the ToAZ Board of Directors.

20. It is pleaded that the total value of the funds and property which were the subject of freezing orders is over US $600m. In addition, the Russian authorities have frozen the plaintiffs' ToAZ shares and those of the Swiss shareholders represented by Mr. Zivy

and Mr. Ruprecht which together amount to over 80% of the ToAZ shares with a value of over US$2 billion. The claim in whose aid these measures have been taken is for US$55m.

21. It is pleaded that false and criminal charges have been laid against a Mr. Vladimir Makhlai, Mr. Sergei Makhlai, Mr. Korolev, Mr. Ruprecht and Mr. Zivy as part of the Scheme and that pre-trial detention orders were made against these individuals. They were placed on the Russian domestic wanted list and the Russian authorities procured that Interpol Red Notices were issued. It is pleaded that these were politically motivated and the issuance of these orders was procured by a Mr. Mazepin being the "*very steps intimated by Mr Mazepin at Zurich airport in June 2013*". The Basmanny District Court suspended Mr. Sergei Makhlai from the board of ToAZ on the 24th September, 2015. It is pleaded that the orders were oppressive, unjust, improper and unlawful.

22. It is also alleged that, as part of the Scheme, ToAZ has been subjected to "*unjust, procedurally unfair and improper conduct of transfer pricing tax cases*" instigated against ToAZ by Mr. Mazepin and/or UCCU.

23. It is alleged that in November 2015, Mr. Sedykin, on behalf of Mr. Mazepin and/or UCCU, forged sham minutes of ToAZ shareholders and ToAZ board meetings and other documents, purporting to replace the Directors of ToAZ with Mr. Sedykin and other "*nominees of Mr Mazepin*", to remove ToAZ Invest as a body managing the affairs of ToAZ and to form a commission to "*restore*" ToAZ's shareholder register, including the shares allegedly acquired by Eurotoaz.

24. Having pleaded that the defendants have thereby occasioned the plaintiffs to suffer loss and damage the plaintiffs claim the following reliefs:-

> *"152. A declaration that the defendants their servants or agents have wrongfully and unlawfully conspired to defraud and injure the plaintiffs by wrongfully divesting the Plaintiffs of their shareholdings or the benefit of their shareholdings in ToAZ and/or to cause catastrophic damage to the value of their shareholdings.*
>
> *153. Further or in the alternative, a declaration that the defendants their servants or agents have and each of them has, in concert and on the basis of a shared understanding, carried out unlawful acts with the purpose or aim of injuring the plaintiffs and are therefore guilty of conspiracy by unlawful means.*
>
> *154. A declaration that the eleventh named defendant has no right or interest to convene, preside over, record, or act upon any meeting of the general body of shareholders of, or Board of Directors of, ToAZ and further from holding himself out or acting in whatever manner qua board member of ToAZ.*
>
> *155. A declaration that the eleventh named defendant has no right or entitlement to sit on the Board of Directors of ToAZ or to procure the resignation of all board members purported to have been appointed by purported resolution of the shareholders dated the 22nd November 2015.*
>
> *156. Damages for conspiracy.*
>
> *157. Damages for intentionally causing the plaintiffs loss by unlawful means.*
>
> *158. Damages for tortious interference with the plaintiffs' contractual and business relationships.*
>
> *159. If necessary, injunctive relief preventing the defendants continuing any of the aforementioned wrongful acts and/or interfering with the plaintiffs' rights as declared by this Honourable Court.*
>
> *160. Interest pursuant to Statute.*
>
> *161. All necessary and consequential orders including orders as to accounts and enquiries as this Honourable Court shall deem meet.*
>
> *162. Costs."*

Application of the fourth and fifth named defendants to dismiss proceedings

25. Eurotoaz and Mr. Babichev characterised the plaintiffs' case against them as an allegation that they conspired with the other defendants to participate in, and that they have participated in, "raider attacks" against ToAZ, in which the plaintiffs are the majority shareholders. They say that the plaintiffs' assertion that Eurotoaz is participating in the "raider attacks" is that it has pursued litigation in Russia which it knows is without merit and has relied in that litigation upon forged documents.

26. Eurotoaz and Mr. Babichev contend that if the pursuit of the litigation in Russia is genuine, the allegation of participation in the "raider attacks" falls away. The plaintiffs' case is that the pursuit of the litigation is not genuine because it is said to be based on forged documents. If the documents upon which the plaintiffs rely can be shown not to be forged documents, then the case that the litigation is not genuinely being pursued must fail. Eurotoaz and Mr. Babichev maintain that they have established, on the basis of undisputed or indisputable facts or documents, that this is so. They argue that Eurotoaz has demonstrated that the forgery claim cannot succeed and when one considers the balance of the claim it is clear that, shorn of the forgery claims, the balance of the plaintiffs' claim cannot succeed either.

Decision of the High Court

27. The judgment carefully analyses the statement of claim on pages 4-18. The trial judge identifies the affidavits of Mr. Babichev as central to the application. He notes that Mr. Babichev asserts that Eurotoaz owns shares in ToAZ acquired by a transfer order dated the 25th November, 1995 and that Mr. Babichev relies on documentation exhibited in his affidavits which he contends is authentic, and which it is contended demonstrably undermines the plaintiffs' claims that false or sham documents were deployed in the civil and criminal claims in Russia to assert Eurotoaz's entitlement to shares in ToAZ. The trial judge notes that Mr. Babichev asserts that the civil and criminal proceedings were brought in Russia with a legitimate aim of establishing this share entitlement. On the basis of expert evidence, it was asserted that there was no rule of law empowering a Russian court to strike out repeated claims on the grounds that they were an abuse of process or under principles equivalent to those enunciated in *Henderson v Henderson*. It was therefore argued that the "raider attacks" comprising alleged campaigns of vexatious civil and criminal complaints could not form the basis of an action for damages for conspiracy.

28. In paras. 8, 9 and 10 the trial judge sets out the applicable legal principles, referring to the cases of *Jodifern Ltd. v Fitzgerald* [2000] 3 IR 321, *Salthill Properties Ltd. v Royal Bank of Scotland* [2009] IEHC 207, *Lopes v Minister for Justice Equality & Law Reform* [2014] IESC 21, *Keohane v Hynes* [2014] IESC 66 and *Moylist Construction Ltd. v Doheny* [2016] IESC 9. At para. 11 he notes that he is bound by these principles in approaching the application. He then states:-

> *"While the court in considering documentation in a strike out application is generally asked to do so in the context of undisputed documents where there is some dispute as to construction or legal effect, the present case is unusual in that the plaintiff's [sic] base their claim on the vexatious deployment of what they claim to be false or sham documentation. The fourth and fifth named defendants assert that these documents are authentic and demonstrably show Eurotoaz's entitlement to shares in ToAZ. It does appear from the passage cited at paragraph 3.9 of the judgment of Clarke J. in Salthill that it may be appropriate for the court to consider 'the existence or construction of documents'. Accordingly, in the exercise of the inherent jurisdiction the documentation as presented by the defendants on affidavit will be considered."*

29. At pages 27-31, he carefully sets out all of the documents upon which Eurotoaz and Mr. Babichev rely as their basis for their claim to strike out the plaintiffs' proceedings. He lists seventeen purported copy documents, with translations from Russian, upon which Mr. Babichev relies in support of the appellants' application. These include, Agreement 7-A1 dated 15th June, 1994 whereby Hungarian-Russian joint Enterprise "Eurotoaz" with an address in Budapest, Hungary purported to buy 44,541 shares being 10% of the share capital in ToAZ; a transfer order dated 25th November, 1995 purporting to show that "Eurotoaz Limited" registered in Ireland on 29th March, 1995, and having a postal address in Switzerland, have "*formed and signed the transfer order… to transfer shares from "Eurotoaz*", *Hungary to "EUROTOAZ LIMITED", Ireland, in full, all 44,541 shares*.", the transferor is also referred to as Eurotoaz (Budapest); a copy letter dated 25th November, 1995 to Mr. Korolev from Eurotoaz Limited; a letter dated 24th January, 1996 purportedly signed by Mr. Korolev, as Director of ToAZ Invest, to Mr. Galantai of Eurotoaz Limited, informing him "*on the basis of your letter dated November 25, 1995, shares of Hungarian-Russian joint enterprise "EUROTOAZ" with postal address [in Budapest] are transferred in the register of shareholders to the personal account of "EUROTOAZ LTD" with postal address [in Switzerland]"*; certificate number CO-17347 issued on the 21st February, 1996 purporting to be a share certificate in respect of registered shares in ToAZ granting voting rights in respect of 44,541 votes and referencing "*EUROTOAZ LIMITED, DUBLIN, IRELAND*" and "*Letter of HRJE "EURO-TOAZ" dated November 25, 1995*"; an "Issue Prospectus" dated 7th October, 1997 purporting to list Eurotoaz Limited with an address in Switzerland as the owner of 8.806% of the shares in ToAZ; copy annual accounts of Eurotoaz Limited for the year ended 31st December, 1997 and subsequent years up to year ended 2010 and; an email sent on the 29th September, 2006 to Mr. Aidan Scollard of Farrell Grant Sparks with attached translated Agreement 7-A1 and share certificate dated 21st February, 1996.

30. He also referred to a forensic report of BSI Cybersecurity dated 4th September, 2017 prepared for the appellants' solicitors which concluded that the email of 29th September, 2006 to Mr. Scollard was sent on that day and that the accompanying attachment was last modified on the 28th August, 2006.

31. The trial judge concluded that for a number of reasons the appellants failed to satisfy him that the respondents' claim should be struck out on the basis of the documentation*, or* ***the effect of the documentation as asserted by Mr. Babichev in his affidavits or the inferences that he asks the court to draw***. (emphasis added)

32. Firstly, he concludes that, as the application is not an interlocutory application, Mr. Babichev must confine himself to such facts as he personally could prove and to state his means of knowledge. His first involvement with Eurotoaz was in November, 2011, therefore, he is not in a position to prove any of the documents which it is asserted came into being before that date. The trial judge points to the fact that no original documentation was exhibited and Mr. Babichev did not state his "*means of knowledge*" in relation to the documents. He then holds that the documents were neither receivable nor admissible on the basis of the decision in *Primor Plc v Stokes Kennedy Crowley* [1996] 2 IR 459 and *Leopardstown Club Ltd. v Templeville Developments Ltd*. [2010] IEHC 152. At para. 20 he concludes:-

> *"Fundamentally, therefore, the defendants have failed to adduce receivable and admissible documentary evidence to prove their case for a strike out. This is no mere technicality. There are express pleas in the statement of claim alleging that the documents relied upon to support Eurotoaz's shareholding claim, and to support in turn what are said to be vexatious civil and criminal complaints, are false/sham. In light of this is was incumbent on the fourth and fifth named defendants to adduce and prove receivable and admissible documentary evidence in support of their case, and to satisfy the court as to the authenticity of this documentation on the basis of credible evidence. This they have singularly failed to do."*

33. The trial judge did not accept the arguments of the appellants that the statement of claim necessarily involved an allegation that the purported letter of 25th November, 1995 and the alleged responses of ToAZ Invest were manufactured in 2010; that the expert evidence established that the email sent on the 29th September, 2006, attaching a copy of Agreement 7-A1 and the translation of the share certificate, was genuine and therefore, these documents ***and the documents to which they referred*** could not have been forged in March, 2010 if they existed in September, 2006. The trial judge accepted that the plaintiffs would be entitled to cross-examine the author of the report and held that there was some "*albeit perhaps limited*" scope for undermining the report on cross-examination should the plaintiffs wish to do so. He, therefore, held that the evidence adduced by the appellants did not satisfy the test colloquially expressed by Clarke J. in *Moylist Construction Ltd*. as being a "*slam dunk*".

34. The trial judge referred to the submission by counsel for the plaintiffs suggesting that the statement of claim might be amended by extending the pleas relating to the creation of false or sham documents back in time to the year 2006 or earlier. He noted that no application to amend the statement of claim was pursued and at para. 23 of his judgment he held:-

> *"…but had I been of the view that the proceedings should be struck out as against these defendants but could be 'saved' by an amendment, I would have been disposed to consider granting a suitable amendment. It remains a matter for the plaintiffs as to whether they choose to apply for an amendment in the normal way."*

35. The trial judge then went on to state that even if the copy documents were admissible he was still not persuaded that they:-

> *"constitute incontrovertible proof that [Eurotoaz] acquired a shareholding in ToAZ, or that it has an entitlement to a shareholding in ToAZ at the present time."*

He referred to inconsistencies and contradictions between the documents relied upon and the accounts of the basis upon which Eurotoaz claimed to have acquired the shares and concluded that:-

"they are such that it cannot be said that based on these copy documents the plaintiffs' case is 'bound to fail'."

36. He also pointed to the fact that Mr. Babichev, and before him Mr. Sedykin, had failed to persuade any of the Russian courts of Eurotoaz's claim to be entitled to a shareholding in ToAZ. He noted that it was evident from court rulings that the Russian courts had raised issues over the authenticity of the documents relied upon by Eurotoaz, Mr. Babichev and Mr. Sedykin, and, that these were the very documents relied on in the present case and said to have been obtained by Mr. Babichev in some unidentified manner as a result of criminal investigations instigated by Mr. Sedykin, and later by Mr. Babichev. In particular, the trial judge noted that the Arbitration Court of Samara on the 21st April, 2015 held that the document referred to in these proceedings as the transfer order "*has no legal force and fails to confirm circumstances referred to by the claimant to justify his claims."* The court found that the prospectus did not assist Eurotoaz as it referred to "Eurotoaz Limited [Switzerland]", not Ireland.

37. He also referred to a recent decision of the Russian Federation District Court of Samara where Mr. Sedykin was found guilty of forging documents relating to general meetings and board meetings of ToAZ for personal gain and developing a criminal conspiracy for fraudulently acquiring ordinary shares in ToAZ and ToAZ property. The trial judge noted that the Russian court had occasion to revisit Mr. Sedykin's claims that Eurotoaz was entitled to shares in ToAZ due to structural reorganisation of Eurotoaz SRVP. The court took substantially the same view as that taken by the Arbitration Court of Samara in its decision of 21st April, 2015. Secondly, it emerged that Mr. Sedykin had an agreement with Eurotoaz since 2009 pursuant to which he is entitled to 50% of all shares and dividends of ToAZ recovered by his actions on behalf of Eurotoaz. The court concluded that Eurotoaz Limited, Dublin, Ireland has no evidence of title to the shares.

38. The trial judge addressed arguments concerned with Russian Federation law. He noted that five expert reports were exhibited which ranged over various aspects of Russian law relevant to (1) whether the making of repeated criminal and civil complaints, and undertaking repeated litigation of the same complaints, can ever be unlawful in the Russian Federation and/or the foundation for an action in tort, and (2) whether an injunction restraining vexatious litigation granted by an Irish court at full hearing would be enforced in Russia. At para. 41 of his judgment the trial judge said that there were two opposing views and that it was not the function of the court on this application to attempt to resolve the differences. He held:-

> *"These are disputes of law, and disputes concerning the application of the law to the facts, that are classically matters for the trial judge. First, it is sufficient for the Plaintiff's (sic) defence of this application that there is before the court an expert view of Russian Federation law such that repeated vexatious civil litigation along with other legal or non-legal actions undertaken by co-conspirators could be tortious under the Russian Civil Code, and could attract full compensation for harm suffered. Secondly, there is one expert's view that an Irish court at full hearing could grant an injunction restraining vexatious litigation, and that this could be enforced in Russia. These matters are not therefore grounds upon which the plaintiff's claims, or any of them, or any of the reliefs sought, should be struck out."*

For these reasons, Haughton J. refused the application.

Arguments on Appeal

39. The appellants confined their appeal to a submission that the trial judge ought to have dismissed the proceedings against them pursuant to the inherent jurisdiction of the court on the basis that the claim against them was bound to fail. They did not appeal the decision of the High Court to refuse the reliefs sought in the notice of motion on any other ground.

40. They argue that the plaintiffs' claim is that the appellants conspired with the other defendants to participate in "raider attacks" against ToAZ. It is alleged that they have pursued litigation in Russia which they know is without merit and which is based upon forged documents. The appellants submit that if the pursuit of the litigation in Russia is genuine, then the allegation of the participation in the "raider attacks" falls away. If the appellants can show that the plaintiffs' case as to false documents cannot succeed, then the plaintiffs' case as to the improper purpose of the litigation also must fall away.

41. Paragraph 65 of the statement of claim is central to the allegation against the appellants: the allegation that they forged the letter of the 25th November, 1995 and the response thereto of January, 1996. If the appellants can demonstrate that these documents were not forged in the period that they are alleged to have been forged in para. 65 of the statement of claim, then the central allegation falls away. If this allegation falls away, then the appellants argue that the case that the litigation is vexatious must fail and therefore, in effect, there is nothing left of the claim in conspiracy against the appellants.

42. The appellants claimed that the allegation of the plaintiffs that the appellants manufactured documents between the 9th July, 2009 and March, 2010 could not succeed based on four facts said to be uncontested and incontestable:

> (1) Each of the complaints made by Eurotoaz, including that made on the 9th July, 2009, referred to and relied upon the share certificate of 21st February, 1996 in the name of Eurotoaz Limited;
>
> (2) The share certificate referred to the letter of the 25th November, 1995 from Eurotoaz SRVP, one of the alleged forged documents;
>
> (3) Eurotoaz Limited could show that the share certificate (referring to the letter of 25th November, 1995) had been forwarded to its auditors in September 2006;
>
> (4) A ToAZ prospectus issued by ToAZ in 1997 identified Eurotoaz Limited as a shareholder in ToAZ.

The appellants relied upon an affidavit exhibiting an un-contradicted forensic report which demonstrated that a copy of a translation of the share certificate was forwarded to Eurotoaz's auditors in 2006. Mr. Korolev, a former director of ToAZ Invest and of ToAZ, did not deny the authenticity of the prospectus in which Eurotoaz Limited was referred to as a shareholder in ToAZ and nor did any other deponent. It was said, therefore, that the High Court judge erred in his conclusion that the appellants had not established that the allegation of a forgery as pleaded in para. 65 of the statement of claim was bound to fail.

43. The appellants argue that the trial judge misunderstood the case advanced by the appellants on the motion and believed that Mr. Babichev exhibited copies of the share certificate and the prospectus in order to "*prove*" that the letter of the 25th November, 1995, and the response of ToAZ Invest to that letter in January, 1996, were genuine documents. Rather, the appellants argued, that, by reference to the copy share certificate and the copy prospectus, documents which they said could not be disputed, the allegation of forgery in respect of the letter of the 25th November, 1995 and the ToAZ Invest response of January, 1996 could not succeed.

44. The appellants submit that the trial judge's decision that the prospectus was inadmissible was clearly an error. They argued that

the document was before the court with a confirmation by Mr. Korolev, who had direct knowledge of its provenance. They argued that Mr. Korolev proved that it was authentic. In relation to the share certificate, they say that the expert report exhibited by Mr. Glynn, solicitor, verified the authenticity of the email sent to Eurotoaz's auditors in 2006 with insignificant qualifications. This email attached a translated copy of the share certificate. The appellants argue that the trial judge erred in finding that the unchallenged report of the expert was not a "*slam dunk*" and demonstrated that the trial judge applied the wrong standard of proof in the circumstances of the case.

45. The appellants argue that the trial judge erred in law in ruling that the documents exhibited by Mr. Babichev in his affidavits were neither receivable nor admissible documentary evidence to support their application. They alleged that he further erred in holding that they had not established the authenticity of the documents on the basis of credible evidence.

46. They argue that the trial judge wrongly found that once the plaintiffs asserted that the disputed documents were forged, the onus then shifted to the appellants to prove that they were genuine and that the onus was on the appellants to show "*incontrovertible proof*" that Eurotoaz Limited was the owner of the disputed shares in ToAZ.

47. The appellants argued that the trial judge was in error when he held that he was entitled to take into account the possibility that the plaintiffs' claim might have been capable of being saved by amendment. In the absence of an actual application to amend the statement of claim, and having regard to the fact that the allegation sought to be dismissed was an allegation of fraud, the trial judge erred in proceeding on the basis that he could disregard the fact that the pleaded case was bound to fail in the circumstances where it might be saved by a possible amendment.

48. The appellants submit that the trial judge erred in finding that there were two different views before the court in respect of law relating to *res judicata* in Russia. They said that the experts were *ad idem* in relation to the position in respect of *res judicata*; that it did not apply in Russia.

49. The appellants argued that the trial judge failed to analyse the ingredients of the tort of conspiracy. Had he done so, it would have been clear that if the plaintiffs' case of forgery of documents cannot succeed, as the appellants say they have shown, then the claim of conspiracy will be unachievable. They argue that, while the case is pleaded as both lawful and unlawful means conspiracy, really it is an unlawful means conspiracy case only, notwithstanding the pleadings. This is because lawful means conspiracy has no prospect of succeeding. The shares are worth more than US $110m. It would be impossible to show that Eurotoaz claimed the shares solely for the purposes of the Scheme and not for their intrinsic value, as would be required to establish a case of lawful means conspiracy in this case.

The Legal Principles Applicable to Applications to Strike Out Proceedings Pursuant to the Inherent Jurisdiction of the Court

50. Since *Barry v. Buckley* [1981] IR 306, it has been recognised that the court has an inherent jurisdiction to strike out, or stay proceedings, if they are frivolous or vexatious or are bound to fail. The jurisdiction exists to ensure that an abuse of the process of the courts does not take place. All the authorities emphasise that it is an exceptional jurisdiction to be exercised sparingly and only adopted when it is clear that the proceedings are bound to fail and not where the plaintiff's case is very weak (*Keohane v. Hynes* [2014] IESC 66 and *Sun Fat Chan v. Osseous Ltd*. [1992] 1 IR 425). In *Jodifern Ltd. v. Fitzgerald* [2000] 3 IR 321, Barron J. said at p. 333:-

> *"In my view, a defendant cannot succeed in an application to strike out proceedings upon the basis that they disclose no reasonable cause of action or are an abuse of the process if the Court, on the hearing of such application, has to determine an issue for the purpose of deciding whether the plaintiff will succeed in the action. It is not the function of the court to determine whether the plaintiff will succeed in the action.*
>
> *The function of the Court is to consider one question only, was it proper to institute the proceedings? This question must be answered in the light of the statement of claim and such i**ncontrovertible** evidence as the defendant may adduce. If the claim could never have succeeded, then the proceedings should be struck out. **There is no room for considering what evidence should be accepted or how it should be interpreted**. To do the latter is to enter on to some sort of hearing of the claim itself."* (emphasis added)

51. As Murray J. pointed out in *Jodifern*, there is no such thing as a summary trial in our rules of procedure (save as provided for in the Rules of the Superior Courts which do not apply in this case). In *Moylist Construction Ltd. v. Doheny* [2016] IESC 9, Clarke J. stated:-

> *"Depriving the parties of a full trial in whatever form is appropriate to the proceedings concerned is a departure from the norm, and one which should only be engaged in when it is clear that there is no real risk of injustice in adopting that course of action."*

At para. 5.9, he cautioned that the court must avoid slipping into the error of giving the defendant "*the type of summary disposal which our procedural law does not provide for and which Murray J. cautioned against in Jodifern. Such issues, by analogy with McGrath, cannot safely be dealt with in the confines of a motion on affidavit*."

52. In *Lopes v. Minster for Justice, Equality & Law Reform* [2014] IESC 21, Clarke J. stated:-

> *"2.5 It is also important to remember that a plaintiff does not necessarily have to prove by evidence all of the facts asserted in resisting an application to dismiss as being bound to fail…all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may, at trial, be possible to establish the facts which are asserted and which are necessary for success in the proceedings. Any assessment of the credibility of such an assertion has to be made in the context of the undoubted fact, as pointed out by McCarthy J. in Sun Fat Chan (at p. 428), that experience has shown that cases which go to trial often take unusual turns on the facts which might not have been anticipated in advance."*

53. In *Keohane v. Hynes* [2014] IESC 66, Clarke J. stated:-

> *"6.9 …it is important to emphasise the significant limitations on the extent to which a court can engage with the facts in an application to dismiss on the grounds of being bound to fail. In cases where the legal rights and obligations of the parties are governed by documents, then the court can examine those documents to consider whether the plaintiff's claim is bound to fail and may, in that regard, have to ask the question as to whether there is any evidence outside of that documentary record which could realistically have a bearing on the rights and obligations concerned. Second, where the only evidence which could be put forward concerning essential factual allegations made on behalf of the plaintiff is*

documentary evidence, then the court can examine that evidence to see if there is any basis on which it could provide support for a plaintiff's allegations. Third, and finally, a court may examine an allegation to determine whether it is a mere assertion and, if so, to consider whether any credible basis has been put forward for suggesting that evidence might be available at trial to substantiate it. While there may be other unusual circumstances in which it would be appropriate for the court to engage with the facts, it does not seem to me that the proper determination of an application to dismiss as being bound to fail can, ordinarily, go beyond the limited form of factual analysis to which I have referred."

54. The question for the Court on an application to strike out proceedings in reliance on the court's inherent jurisdiction was described by Clarke J. in *Lopes* as:-

> *"…can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merit…"*

Discussion - The Basis for Dismissing the Appeal

55. There was no real dispute between the parties as to the principles of law applicable to the motion or the identification of those principles by the trial judge. The appeal related to the application of those principles to the facts asserted by the appellants and the evidence before the trial judge.

56. As the trial judge dismissed the application on the basis that there was no evidence properly before the court in support of the appellants' motion, the first matter to be considered is whether the trial judge was wrong to exclude the documentary evidence exhibited by Mr. Babichev. The appellants argued that he erred in rejecting the evidence and that he misunderstood their argument and the reliance placed by them upon the documents at the hearing of the motion and thereby fell into error.

57. The onus lies upon the appellants to show that the respondents' case against them is bound to fail. They accept that this is a high threshold. The evidence advanced in support of the motion comprised of the affidavits of Mr. Babichev as to fact, the affidavits of Professor Maggs as to the law of the Russian Federation (which of course is a matter of fact to be proved at trial), and the affidavits of Mr. Glynn, solicitor, exhibiting the report of BSI Cybersecurity and Information Resilience (Ireland) Ltd, analysing files provided by Grant Thornton (successor to Farrell Grant Sparks).

58. Mr. Babichev states explicitly that his involvement with Eurotoaz did not arise until November, 2011. He can give no direct evidence of events prior to that date. It is common case that this is not an interlocutory application, but is a final application. Order 40, r.4 of the Rules of the Superior Courts provides that:-

> *"Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, and shall state his means of knowledge thereof, except on interlocutory motions."*

A deponent cannot give hearsay evidence on affidavit on an application for a final order (*McKenna v. AF* [2002] 1 IR 242, p. 246). In *Director of Corporate Enforcement v. Bailey* [2007] IEHC 365, at p. 11, Irvine J. stated:-

> *"Order 40, r.4 appears almost mandatory in its terminology when referring to non-interlocutory matters, and seems to be designed to ensure that there is no falling short of proper evidential proof when proceedings are to be disposed of on affidavit rather than by way of oral evidence."*

Irvine J. went on to observe:-

> *"It is clear that the evidence supporting any alleged wrongdoing at a hearing which is dealt with on affidavit must be just as admissible as evidence which would be given to a court by a witness at an oral hearing."*

On appeal, Fennelly J. stated that there was no question but that this was a correct statement of the law [2011] IESC 24.

59. The Supreme Court recently considered the issue of affidavit evidence and the status of documents exhibited by deponents in the case of *RAS Medical Ltd. t/a Park West Clinic v. Royal College of Surgeons of Ireland* [2019] IESC 4. The Chief Justice, with whom O'Donnell, MacMenamin, Dunne and Finlay Geoghegan JJ. agreed, restated certain first principles:

> (1) The factual issues in all court proceedings are determined on the basis of evidence properly before the court.
>
> (2) This applies whether the evidence is presented by a witness giving sworn oral testimony in court or by affidavit evidence.
>
> (3) It applies to documentary evidence as well as oral testimony (assuming the documents have not been admitted into evidence by agreement of the parties).
>
> (4) Exhibiting a document in an affidavit does not turn the document into evidence properly before the court.

60. At para. 6.14, Clarke CJ. stated that it was:-

> *"…inappropriate for either party to place documents before a judge without either the documents being proved in the normal way or a clear agreement being reached as to the basis on which the documents are being presented."*

61. The Chief Justice continued at paras. 6.16 and 6.17 as follows:-

> *"6.16 … A document which is exhibited is, prima facie, evidence. In such a case it is not merely a question of discovered documents being handed to the judge on some basis which, for the reasons which I have identified, ought to be made absolutely clear. Rather, the document concerned is itself a piece of evidence exhibited in an affidavit which may properly be considered by the judge unless there is some legitimate basis for suggesting that the document is not admissible or is admissible only for limited purposes.*
>
> *6.17 That being said it is particularly important to emphasise that the mere fact that a document is exhibited in an affidavit does not, in and of itself, turn that document into admissible evidence. As already noted, discovered documents*

are not evidence of anything unless properly placed before the court and proved in the ordinary way."

62. The Chief Justice reiterated the significance of the rule against hearsay and the requirement that a document be both receivable in evidence and be admissible into evidence. At para. 6.21, he held:-

> *"… In order to be receivable a document must be proved as to its authenticity. However, the mere fact that a document is proven to be authentic does not mean that, for example, its contents may be admissible evidence as to their truth for that may offend the rule against hearsay. But that distinction does not provide a shortcut to establishing the authenticity of a document…the fact that such documents might then be receivable would not, without more, make the contents of such a document admissible evidence as to its truth."*

63. It is thus clear that if a party wishes to rely on the truth of the contents of a document, that party must establish that the document is both receivable as evidence and if it is not receivable, it cannot be accepted as evidence before the Court. The party must also then prove the contents of the document without offending the rule against hearsay. Clarke CJ. expressly endorsed the analysis of Edwards J. in *Leopardstown Club Ltd. v. Templeville Developments Ltd*. [2010] IEHC 152. At paras. 5.27 and 5.28 Edwards J. noted that one of the few remaining vestiges of the so-called "*best evidence rule*" is the "*primary evidence rule*" which must, in general, be satisfied in relation to documents produced in civil litigation before they will be receivable as evidence. The primary evidence rule and the main exceptions thereto were explained by O'Flaherty J. in *Primor plc. v Stokes Kennedy Crowley* [1996] 2 IR 459, at p. 518, as follows:-

> *"The best evidence rule operates in this sphere to the extent that the parties seeking to rely on the contents of a document must adduce primary evidence of those contents i.e. the original document in question. The contents of a document may be proved by secondary evidence if the original has been destroyed or cannot be found after due search. Similarly, such contents may be proved by secondary evidence if production of the original is physically or legally impossible."*

64. No agreement was reached between the parties regarding the admissibility of the documents exhibited by Mr. Babichev. That being so, Mr. Babichev was required to prove the documents in the normal way. Mr. Babichev exhibited no original documents in his affidavits. He exhibited copies of copies, the provenance of which was not clearly identified. Counsel for the appellants relied upon the decision of the Supreme Court in *Ulster Bank Ireland Ltd. v. O'Brien* [2015] IESC 96, in support of the submission that the best evidence rule referred to in *Leopardstown Club Ltd*. was "*essentially gone*" and that the copy documents exhibited by Mr. Babichev were admissible in evidence.

65. That case concerned an application by the plaintiff for summary judgment pursuant to the provisions of Ord. 37 of the Rules of the Superior Courts. Laffoy J. held that Ms. Murray, the deponent on behalf of the plaintiff, "*could and did 'swear positively to the relevant facts to establish the plaintiff's claim'*" as required by O. 37 of the Rules of the Superior Courts. While she exhibited statements of account which the defendants allege were inadmissible hearsay evidence by reason of the failure to comply with ss. 4 and 5 of the Bankers' Books Evidence Act 1879, as amended, Laffoy J. held that in fact the bank did not have to take advantage of the Act of 1879, as amended, to establish its entitlement to judgment in the sum claimed because the bank put evidence before the High Court, which was not contradicted, which she found showed that the plaintiff was entitled to summary judgment in the sum claimed.

66. Charleton J.'s decision addressed the evidential arguments of the appellants. At para. 13, Charleton J. stated:-

> *"It is to be remembered that in the 1870s, what was then known as the best evidence rule, to the effect that proof must be offered in accordance with the best evidence available, was then current. Hence, copies could not be made of gigantic banking ledgers but, rather, they had to be produced in court. The best evidence rule has, since that time, weakened and ultimately, it has ceased to exist in favour of a test as to whether the evidence offered is admissible or inadmissible Whether there might be better evidence of an event or transaction, merely goes to the weight that might be given particular testimony."*

67. The *ratio* of his decision was based, not upon the admissibility or otherwise of the statements of account, but on the exception to the rule against hearsay, that of an admission against interest. He concluded at para. 23 as follows:-

> *"As a matter of law, where circumstances indicate that a reasonable person would have responded to an allegation in the context of an appropriate commercial relationship where money is due, but does not so respond, an admission may be set up. The court may act in that situation."*

It is thus clear that the decision in *Ulster Bank* was based upon the conclusion of the Supreme Court that there was sufficient evidence adduced by the deponent on behalf of the bank to satisfy the requirements of Ord. 37. In the circumstances, the failure of the appellants to respond to the demand and the claim by the bank that the monies were due and owing, amounted to an admission that the monies claimed were due and owing. It therefore follows that the extract from the judgment of Charleton J. relied upon by the appellants in this case is an obiter statement by the judge and thus not binding in this case on this court.

68. In my view, there is no indication that Charleton J. intended to overrule the well-established authority of *Primor plc*. I am reinforced in my view that this was not the intention of the Supreme Court in the case of *Ulster Bank* by reason of the fact that the third judge in that court, MacMenamin J. formed part of the court in *RAS Medical Ltd*., which judgment was delivered three years later. *RAS Medical Ltd*. does not support the proposition that the best evidence rule is "*essentially gone*". Indeed, it is to be noted that in his own concurring judgment in *Ulster Bank*, MacMenamin J. summarised the situation in that case as follows: if a plaintiff's deponent is the author of a letter of demand (as in that case), there can be no question of hearsay evidence and so the plaintiff's case was not based on hearsay. If there was no response to the letter of demand, the plaintiff's case is proved. I, therefore, do not agree with the argument of the appellants that the decision in *Ulster Bank v. O'Brien* has the radical impact on the rules of evidence they contended on this appeal.

69. The final point relevant to the issue of the admissibility of the documentary evidence in this case is that ***the disputed documents are all unauthenticated copies***. Copy documents are hearsay and a copy is generally considered secondary evidence and proof is required that it is a true copy of the original if it is to be admitted; *R v Collins* (1960) 44 CR App R 170, *R v Betterest Vinyl Manufacturing Ltd* (1989) 42 BCLR 198, [1990] 2 WWR 751.

70. It is also important to state that a deponent is required to set out, in his or her affidavit, the evidence which it is sought to be put before the court. It is not sufficient to simply incorporate by reference the contents of exhibits. In *Murphy v. Greene* [1990] 2 IR

566, Finlay C.J. explained that:-

> *"With regard to any matter which…involves the submitting of affidavit evidence to the Court for the purpose of it exercising a jurisdiction, the facts relied upon must be actually and clearly deposed to in an affidavit and not by reference to any other written document."*

71. What, then, are the implications of the above principles to the evidence advanced on behalf of the appellants, and in particular, Mr. Babichev's evidence?:

> (i) He may not give evidence which offends the rule against hearsay;
>
> (ii) He cannot give evidence in relation to events prior to his involvement in Eurotoaz commencing in November 2011;
>
> (iii) The fact that he has exhibited documents does not mean that they are evidence properly before the court;
>
> (iv) He cannot rely upon the contents of any of the documents he exhibits as proof of the truth of the contents of the documents;
>
> (v) Copy documents are hearsay and cannot be admitted in evidence unless it is proved that they are true copies of the originals.

It follows that the trial judge was correct in concluding that none of the documents exhibited by Mr. Babichev are, in fact, properly in evidence before the court.

72. The appellants' case on the motion is based upon an analysis of the statement of claim and their argument that the case as pleaded is bound to fail by reference to certain facts which Mr. Babichev has sought to prove. This necessarily involves them relying on the alleged existence of the documents and the alleged truth of the contents of the documents for the purpose of establishing their case on this motion. The case cannot be advanced, much less meet the threshold of motions of this type, without relying on the existence and contents of the copy documents exhibited by Mr. Babichev. As these are not in evidence before the court, the application fails *in limine*. Their application must fail on the basis that they have not proved their case by reference to admissible evidence. In my judgment, the trial judge was correct to exclude from the evidence the copies of the Prospectus, the Share Certificate, the purported Transfer Order of 25th November, 1995, the purported reply thereto of January, 1996, as well as the documents apparently recovered by the Russian Investigative Authorities from the apartment of the common law wife of Mr. Makhlai, exhibited by Mr. Babichev, on the principles I have discussed. Mr. Babichev could give no direct evidence in relation to the events in question as they all predated, sometimes by decades, his involvement in Eurotoaz. This meant that there was no evidence before the court to support the appellants' central allegation.

73. The foregoing analysis applies regardless of the fact that a central allegation in the case against the appellants is the allegation of forgery. It seems to me that a party against whom allegations of forgery have been made would be well-advised to ensure that it complies with the rules of the law of evidence, *a fortiori*, on a motion of this kind. This the appellants have singularly failed to do. In the event, the result cannot come as a surprise to the appellants as these very same documents upon which they rely in this motion were held not to be admissible in the courts in Russia, as was remarked on by the trial judge, and which I discuss below.

74. The appellants have adduced no evidence to substantiate their claim that the plaintiffs' case against them is bound to fail. There was no error in the court below in so concluding. On this basis, I dismiss the appeal.

Discussion of the substantive arguments of the appellants on the motion

75. Notwithstanding my conclusion that the appeal should be dismissed on the basis that the appellants have not adduced the evidence required to succeed on their motion, I nonetheless feel that it is appropriate to address the substantive arguments advanced. In so doing, it is important to bear in mind certain principles previously outlined. The court may not engage in assessing the evidence advanced by either parties. Usually motions of this nature are heard on the basis of agreed or admitted facts. This is not the case in this motion. There is very limited scope to assess facts in these circumstances. The question the court must address is: whether it was proper to institute the proceedings? The question must be answered in the light of the statement of claim and such "*incontrovertible evidence as the defendant may adduce*" as was held by Barron J. in *Jodifern*. This test, of course, is binding upon this court. In *Lopes* Clarke J. says that "*if, however, it can be established that there is no credible basis for suggesting that the facts are as asserted and that, thus, the proceedings are bound to fail on the merits*" then it is appropriate for the court to dismiss the proceedings. Also in *Lopes* he said that all that a plaintiff needs to do is to put forward a credible basis for suggesting that it may at trial be possible to establish the facts which are asserted and which are necessary for success in the proceedings.

76. The appellants' case is that if they can show that the allegation of forgery is bound to fail, then the allegation of engaging in vexatious litigation in Russia must fail. If that allegation falls away, in essence, no claim against the appellants remain. They say that they can show that the allegation of forgery, as pleaded, cannot be proved by the respondents or, to put it in the language of *Lopes*, there is no credible basis for suggesting that the facts are as asserted.

77. In advancing this case they rely upon several documents, copies of which were exhibited by Mr. Babichev, in support of this submission. The appellants say the trial judge did not properly assess their arguments by reference to the documents themselves and he failed to analyse the impact of the documents on the pleaded case of the respondent.

78. The first document is the copy of the prospectus of ToAZ dated 1st October, 1997. The appellants argue that Mr. Korolev "*confirmed in unequivocal terms…that the Prospectus was a genuine document issued during a period of when he was the Director of ToAZ Invest and was directly involved in the management of ToAZ*". They say this by reference to a statement given under caution in 2010 to the RIA which he exhibited in his affidavit sworn in these proceedings. They also rely upon the affidavit of the plaintiffs' solicitor, Ms. Karyn Harty, who avers that the prospectus "*identified Eurotoaz as a shareholder in ToAZ*". The appellants submit that the plaintiffs cannot deny that ToAZ listed Eurotoaz as a shareholder in this prospectus. At the very least, this amounts to objective evidence that Eurotoaz claimed to be a shareholder prior to 1st October, 1997. This is completely inconsistent with the suggestion that Eurotoaz started pursuing an unjustified and unmeritorious claim to the shares in ToAZ in 2009 as part of the Scheme.

79. It is important to note that Mr. Korolev does not in fact confirm that the content of the prospectus are true. The translation of the statement made by Mr. Korolev on 15th March, 2010 records that he said as follows:-

> *"I really do not understand the point of E.Y. Sedykin's claims, because if EUROTOAZ, as represented by Director Galantai,*

wants to transfer its 4,275,936 shares to the business account of EUROTOAZ LIMITED then it can do so at any time by submitting the required documents…[h]owever, I do not recall that EUROTOAZ has sent [the then registrar] any documents to the present time with a demand to transfer shares of [ToAZ] to the business account of EUROTOAZ LIMITED."

80. The investigator provided Mr. Korolev with certain copy documents and he was invited to comment upon them. These included the prospectus, the transfer order of 25th November, 1995, the reply thereto of January, 1996, and the share certificate 21st February, 1996. He said as follows:-

"The copy of the letter dated 25/11/1995, which is addressed to me from Galantai, I received approximately after 25/02/2010. Sedykin personally brought this copy to [the registrar company]. I never saw the original of this letter, and before February 2010 Sedykin never referenced this letter when addressing [the registrar]. I would also like to explain that this copy of a letter has no indications that it was received by anybody, including by me. I would also like to draw attention to the fact that this letter lacks notes about any attached documents. Due to the passage of time, I cannot confirm whether I composed or signed the letter addressed from me to Galantai, a copy of which has now been presented to me for review. Additionally, I find it unlikely and strange that the letter lacks a reference number, date, and stamp. Accordingly, I doubt that the signature in this letter belongs to me. I am familiar with the copy of the prospectus provided to me for review. This document contains public information available to all. I do not know if the information contained in this document is reliable. [With regard to the share certificate] [s]ince Autumn 2009 Sedykin has repeatedly sent [the registrar] copies of this document. I am unaware of the nature of this document. I can confirm that at present such certificates are not being issued. Whether such certificates were issues in the 90s of the last century, I do not know."

81. This statement cannot amount to an acceptance by Mr. Korolev that the fourth named defendant/appellant in these proceedings is in fact the same company as that entered in the copy of the prospectus exhibited by Mr. Babichev, or that this statement is binding upon the respondents.

82. Furthermore, there are decisions of the Russian courts, to which I shall refer below, which have held that Eurotoaz Hungary was reorganised and, in one version of events, it was called Eurotoaz Limited. The prospectus does not identify the address of Eurotoaz as an address in Ireland, but rather gives an address in Switzerland. The reorganised company, Eurotoaz Hungary also had an address in Switzerland. In my judgment, the exhibit of the copy of this prospectus together with the statement under caution of Mr. Korolev in 2010 does not amount to "*incontrovertible evidence*" that Eurotoaz, one of the appellants herein, was listed as a shareholder in ToAZ in 1997, and so it does not meet the test set in *Jodifern*.

83. The second document which was relied upon in the appeal is the accounts of Eurotoaz for the year ended 1997. Again, it was submitted that the accounts corroborated Eurotoaz's assertion that it was, and claimed to be, the owner of the shares in ToAZ long before the conspiracy alleged by the plaintiffs. Page 16 of the copy of the accounts exhibited by Mr. Babichev comprises a closing trial balance as of 31st December, 1997. It specifically lists its investment in ToAZ and makes provisions for losses on the investment. The first page of the directors' report and financial statements lists the contents of the document and runs from pages 1 to 15. There is no page 16 listed in the directors' report and financial statements. It is also apparent that the type face on page 16 is different to the typeface in the rest of the document. It seems to me that if these accounts were said to constitute "*incontrovertible evidence*" that, as of the date of the preparation of the accounts for the year end 1997, which state that Eurotoaz owned shares in ToAZ, it would be necessary for the auditor who prepared these statements of account to explain these anomalies and to verify that page 16 was a contemporaneous document which formed part of the accounts. In my opinion, therefore, these copy accounts by themselves, without further evidence, cannot satisfy the test in *Jodifern*.

84. The appellants placed great emphasis on the purported transfer order of 25th November, 1995 and the purported reply thereto of 24th January, 1996 from Mr. Korolev of ToAZ Invest. I say "*purported*" because the plaintiffs say that these documents are sham documents and the appellants say that they are genuine documents and that they can show that the documents existed prior to October 2009, when the plaintiffs say that the Scheme to take control of ToAZ commenced. In particular, they say that they have "*incontrovertible evidence*" that the documents existed prior to the date the plaintiffs say the documents were fraudulently created.

85. Mr. Korolev, whose statement under caution in 2010 I have quoted above, in his affidavits sworn in these proceedings has denied that these are authentic documents. At the very least he has pointed to anomalies which call for an explanation. The need to explain these inconsistencies and anomalies is underlined by the fact that the appellants have only ever produced copies of these documents and have never produced any originals.

86. It is to be borne in mind that the plaintiffs say that these documents are forgeries and that there was no reference to these documents before Mr. Sedykin delivered the copy documents to ToAZ Invest in February, 2010 as part of the second Eurotoaz criminal complaint. Mr. Sedykin has advanced a patently false basis for Eurotoaz's alleged ownership of the shares based on Agreement 7-AI. This agreement is dated 15th June, 1994 and clearly was between ToAZ and Eurotoaz Hungary, not Eurotoaz. It was entered into before Eurotoaz was incorporated in 1995. Mr. Sedykin is now a convicted forger in relation to documents produced to acquire shareholders' rights in ToAZ for his personal gain, as well as that of Eurotoaz. The provenance of these documents is unclear. Mr. Babichev says he obtained them from Mr. Galantai , a former director of Eurotoaz, who in turn obtained them from Mr. Sedykin but Mr. Sedykin alleges he obtained them from Mr. Galantai.

87. The appellants say that the purported transfer order of 25th November, 1995 can be shown to have existed in 1996 and in 2006 by reference to the share certificate issued on 21st February, 1996 by ToAZ to Eurotoaz. It is necessary, therefore, to consider the copy share certificate and translation upon which the appellants rely in these proceedings.

88. It is important to note that the plaintiffs have not challenged the validity of the share certificate number 17347 issued on 21st February, 1996 to Eurotoaz Dublin, Ireland. The grounds for issuing the certificate are stated to be "*Letter of HRJE "EURO – TOAZ" dated November 25, 1995*". The appellants say that the certificate relates to the letter they describe as the transfer order. The letter the appellants say is a genuine copy of the transfer order and which the plaintiffs say is a forgery reads as follows:-

"To the chairman of ToAZ Invest, Mr. E. Korolev, November 25 1995, Budapest.

Dear Mr. Korolev,

I hereby inform you that due to the structural reorganisation of Joint Enterprise Eurotoaz, for future activities the firm Eurotoaz is moving from Hungary (Budapest) to Switzerland (Fribourg) and will officially be EUROTOAZ LIMITED with

mailing address:

Ch.des Primeveres 45

P.O. Box 363

CH-1700 Fribourg

(Switzerland)

Registered at

Dublin 2,

2 Clanwilliam Terrace

Ireland

under Registration Number 231 172

On the basis of what has been stated above, please make a corresponding record (change) in [ToAZ]'s register (i.e. from Joint Enterprise Eurotoaz, Hungary) to transfer the shares to Eurotoaz Limited.

Best Regards,

EUROTOAZ LIMITED

[signature] D. Galantai, General Director

[signature]Mr. Baudet, Chairman of the Management Board"

89. The document is not on headed notepaper and it does not purport to be sent by Eurotoaz Hungary or HRJE EURO-TOAZ.

90. The appellants' case was based on the link they made between the letter cited above dated 25th November, 1995, referred to as the transfer order, and the share certificate number 17347. At the very least, there is an issue as to whether the letter of 25th November, 1995, from Eurotoaz, is the same letter referred to in the share certificate in the box headed "*grounds for issuing*" which refers to a letter from HRJE EURO-TOAZ, which may well be Eurotoaz Hungary but which would appear not to be Eurotoaz. This is a matter which is required to be established by evidence and it cannot be said that the appellants have absolutely established the link between the two documents which they assert. Of course, this is not to say that they may not succeed in making this link at trial, I merely point out that the evidence before the court in respect of this alleged link could not be described as "*incontrovertible*". The appellants are required to meet this threshold based upon the decision in *Jodifern*. It is a difficult threshold to satisfy especially in the circumstances of this case, as the letter of the 25th November, 1995 is said to be a forgery which was first produced by Mr. Sedykin in response to Mr. Korolev's statement to the Russian authorities in respect of the first criminal complaint which I have cited above.

91. While it will be a matter ultimately to be determined at the plenary hearing, it must also be borne in mind that Mr. Sedykin has been convicted of forgery in the Russian Federation in relation to subsequent attempts by him to wrest control of ToAZ from the then existing board in 2015 and to secure the entry of Eurotoaz on the share registry of ToAZ, clearly the issue of the authenticity of these documents will be keenly tested.

92. The fifth document which was relied upon by the appellants on the appeal to establish the fact that the plaintiffs would be unable to prove their pleaded case in forgery against them, was an email sent from Ms. Benfeld to Mr. Scollard of Farrell Grants Sparks on 29th September, 2006, which attached a copy of a translation of the share certificate number 17347 and a copy of a translation of Agreement 7-AI. The appellants rely on this email not to establish that Eurotoaz is the owner of the shares, nor to establish that the share certificate is a valid and genuine document. They do so to show that the document existed in 2006 prior to any alleged conspiracy and, therefore, it was not forged in furtherance of the conspiracy. The email attaches a translation of the share certificate, but no copy of the original. It does not attach a letter from Eurotoaz Hungary of 25th November, 1995. What is attached to the email is a translation of Agreement 7-AI of 15th June, 1994 which was the agreement between ToAZ and Eurotoaz Hungary, whereby Eurotoaz Hungary acquired the shares in ToAZ. This is also the agreement upon which Mr. Sedykin first asserted that Eurotoaz Limited became the owner of shares in ToAZ. It suggests that, as of 2006, the auditors of Eurotoaz were being told that Eurotoaz acquired the shares in ToAZ on foot of Agreement 7-AI. The email cannot prove that the purported transfer order of 25th November, 1995 existed as of that date, contrary to what is urged by the appellants on this motion, as no copy of that document was attached to the email. As I have explained above, the link between the share certificate and the purported transfer order is required to be established in evidence and the email does not alter this fact. Therefore, it cannot establish the existence of the purported transfer order in September, 2006.

93. The plaintiffs have not asserted that the share certificate in the name of Eurotoaz Limited issued on the 21st February, 1996 is a forgery. However, in the circumstances of this case, that does not amount to incontrovertible proof that Eurotoaz Limited, the fourth named defendant herein, either was, or claimed to be, a shareholder in ToAZ in 1996. This is because there are documents which indicate a degree of confusion as to whether Eurotoaz Hungary was sometimes also referred to as "Eurotoaz Limited". The interpretation contended by the appellants is not the only possible interpretation of the document as the verdict of 28th July, 2017 in the trial of Mr. Sedykin in the District Court of Samara shows. The court found that the purported transfer order was not, in fact, a transfer order at all, but the document attested "instead to reorganization of EUROTOAZ SRBP (sic) by merging with Romex and further liquidation". In its written verdict the court held:-

"[Mr Sedykin] provided the court with an affidavit in which he stated that on 21 November, 1995, an agreement of sale and purchase of 10% of [ToAZ] shares was entered into between the Irish company EUROTOAZ LIMITED and Eurotoaz SRVP. On 21 November, 1995, another agreement was concluded on transfer of debt amounting to USD 20,000,000 from

EUROTOAZ SRVP (Hungary) to EUROTOAZ LIMITED, Ireland. However, Sedykin has not provided the court with the following: agreement of purchase and sale of 10% of [ToAZ] shares dated 21.11.1995 between the Irish company EUROTOAZ LIMITED and EUROTOAZ SRVP and agreement dated 21.11.1995 on transfer of debt amounting to 20 million US dollars from EUROTOAZ SRVP to EUROTOAZ LIMITED, Dublin, Ireland, as well as the evidence of their transfer to the register. In addition, the court has not accepted as a valid proof of title of EUROTOAZ LIMITED, Dublin, Ireland, to the corresponding shares of [ToAZ]: a copy of Certificate No. SO-17347 dated 21.02.1996 signed by V.N. Makhlay [sic], head of [ToAZ], and K.I. Tupeyeva, chief accountant of the enterprise, bearing the seal of [ToAZ]…

…it was established by the court that EUROTOAZ LIMITED, Dublin, Ireland has no evidence of title to the shares."

94. It is clear, therefore, that there are significant concerns as to the evidence adduced by, or on behalf of, Eurotoaz in relation to its claim to own the shares. The courts in Russia have rejected copies of documents as inadmissible or insufficient evidence and rejected its claims because only copy documents, and not originals, were submitted. In the decision of the 21st April, 2015 of the Arbitration Court of Samara District the court held that:-

"…the court cannot take into account as suitable evidence for this dispute copies of the transfer order dated 25 November, 1995…and Certificate SO-17347 dated 21.02.1996…because only copies were submitted. Also the claimant failed to submit evidence confirming that above documents were transferred to registrar Financial and Investment Company ToAZ-INVEST and [ToAZ] (except in certificates, signed letters, etc.)

In addition, the transfer order dated 25.11.1995…specifies that [ToAZ] shares in the amount of 44,541 (10% of equity capital shares) shall be transferred to EUROTOAZ LIMITED (Ireland) from EUROTOAZ Limited Liability Trade and Partnership (Hungary).

However, case materials are missing documents to confirm that EUROTOAZ Limited Liability Trade and Partnership (Hungary) and Joint Russian-Hungarian Commercial Enterprise EUROTOAZ are the same legal entity…

The disputed transfer order is missing some of the documents specified above, in particular, it is missing the reasons for transferring ownership rights to the security.

It should be noted that the letter from Financial and Investment Company ToAZ-INVEST…that was submitted by the Claimant as evidence of rights to the disputed shares been transferred to [ToAZ] does not contain any information on the amount of transferred shares and personal accounts. It is missing the date and outgoing reference number; this letter is sent by fax and no original has been provided. Therefore, the court believes that since there is no entry in the register of [ToAZ] shareholders, this letter has no legal force and fails to confirm circumstances referred by the Claimant to justify his claims.

As is evident from the specified Report on third issue of securities and Prospectus of fourth issue of securities of [ToAZ], EUROTOAZ LIMITED (Switzerland) is specified as a shareholder with 8.806% share in [ToAZ Equity Capital], not EUROTOAZ LIMITED (Ireland) represented by the Claimant.

In the Report on investment programmes for [ToAZ] the same enterprise – EUROTOAZ – is listed as a counterpart both under the share purchase agreement No. 7-AI of ToAZ and under the Investment Contract dated 20.06.1994, but the Claimant submitted copies of these documents, one of which lists Joint Russian-Hungarian Commercial Enterprise EUROTOAZ as a counterpart (contract with the Property Fund of Samara District No. 7-AI dated 15.06.1994…) while the other lists Russian-Hungarian Enterprise EUROTOAZ LTD (contract with [ToAZ]) dated 20.06.1994)…

Taking into account the fact that EUROTOAZ LIMITED failed to submit any suitable evidence to confirm that it is a shareholder of [ToAZ] and owns [the shares] of [ToAZ]…and specifically, an excerpt from a personal account in the shareholder register of this Joint Stock Company, there are no reasons to uphold the claim for dividends under the disputed shares."

95. In light of my assessment of the arguments advanced by the appellants based on the evidence they have submitted (on the assumption that it is validly before the court and proves truth of the contents of each of the documents), it nonetheless seems to me that the appellants have not established, by reference to those documents and arguments, that the plaintiffs' case is bound to fail and, accordingly, ought to be dismissed.

96. I have reached this conclusion by analysing the arguments of the appellants and I have not addressed the alleged errors in the judgment of the High Court. It, therefore, remains to be seen whether the trial judge in fact erred in the manner alleged and, if so, the impact of any such error on the outcome of this appeal.

97. The appellants claim that the trial judge held that the onus lay on them to prove that Eurotoaz owned the shares in ToAZ. At para. 24 of his judgment the trial judge said that he was not persuaded that the documents exhibited by Mr. Babichev amounted to "*incontrovertible proof that the fourth defendant acquired a shareholding in ToAZ, or that it has an entitlement to a shareholding in ToAZ at the present time*". The appellants say that they did not seek nor were they required to prove either of these facts on the motion before the trial judge. This is so, but that does not mean that the trial judge, therefore, erred in his approach to the motion and that, as a result, his decision should be overturned by this court. Mr. Babichev clearly averred that Eurotoaz did acquire the shares in ToAZ, that the documents he relied upon were authentic and that the proceedings in Russia, brought by Eurotoaz, were legitimate and were in pursuit of the legitimate aim of establishing that it was entitled to the shares in ToAZ. The claim that it was the owner of the shares was certainly advanced to the court, even though it was not a matter upon which the court could, or was, required to rule on. The trial judge did not purport to make any such ruling. It also has to be borne in mind that the trial judge clearly stated at para. 13 of the judgment:-

"For a number of reasons the defendants have failed to satisfy me that the plaintiffs' claims should be struck out based on this documentation, ***or the effect of this documentation as asserted by Mr Babichev in his affidavits, or the inferences that he asks the court to draw****." (emphasis added)*

It seems to me, therefore, that the trial judge was alive to the distinction between the assertion that the documents were genuine, and that Eurotoaz is the owner and is entitled to be recognised as the owner of the shares in ToAZ, on the one hand, and the argument that the documents exhibited proved that the respondents could not succeed in their claim of forgery, and specifically the claim as pleaded in para. 65 of the statement of claim, on the other hand.

98. In any event, as the motion proceeded by way of affidavit and submissions, this court is in a position to assess the arguments advanced and any perceived error on the part of the High Court, as asserted by the appellants, has been more than adequately addressed on the appeal. Therefore, this ground of appeal is rejected.

99. It was alleged that the trial judge erred in his observations that the proceedings could be saved by an appropriate amendment, and it was pointed out that no such amendment had, in fact, been pursued by the plaintiffs. This ground of appeal does not assist the appellants. At para. 23, the trial judge says:-

> *"…but **had I been of the view** that the proceedings should be struck out as against these defendants but could be 'saved' by an amendment, **I would have been disposed** to consider granting a suitable amendment." (emphasis added)*

It is clear that the comment is *obiter* and is not the basis of the decision of the High Court. This court, on the basis of its own assessment of the evidence and arguments, has concluded that the appellants have not shown that the proceedings are bound to fail. It follows that the question of the possibility of amending the statement of claim to "*save*" the proceedings does not arise.

100. It was argued on appeal that the trial judge was in error in his approach to the uncontested expert report of BSI Cybersecurity. It was said that the plaintiffs were required to produce their own expert report contesting the findings of the report produced by the appellants if they wished to contest the evidence set out in that report. I do not accept this submission. It is premised on a fundamental misunderstanding of the basis upon which a motion to dismiss proceedings on the grounds that they are bound to fail must proceed. The plaintiffs are not obliged to prove their case in resisting the motion. This is not a form of summary trial. It is for the appellants to establish that the case is bound to fail. In considering whether the appellants have established this is so, the court is not entitled to assess or weigh the evidence, save to the very limited extent outlined in the most recent decisions of the Supreme Court in *Lopes* and *Moylist Construction Ltd*. This does not permit the court to accept the evidence of the forensic examination of the email in circumstances where the plaintiffs have not had an opportunity to test the evidence by cross-examination or to introduce their own evidence in relation to the email. This is undoubtedly their right as part of the normal conduct of a plenary trial. As has been already stated, they are not obliged to prove their case in resisting this motion. Also, as the trial judge observed, the report does not meet the threshold set by *Jodifern* or *Moylist Construction Ltd*. and, therefore, he was correct not to find that the case is bound to fail on the basis of this evidence.

101. The appellants argued that the trial judge failed to analyse the tort of conspiracy and, therefore, failed properly to address their arguments in relation to lawful and unlawful conspiracy. The argument was that if the litigation pursued in Russia was pursued for legitimate means (as asserted by the appellants), then the case in unlawful conspiracy falls away. They argued that, in essence, no case for lawful conspiracy had been made out and if one were to be pursued it could not succeed.

102. The plaintiffs argued that even if the appellants had engaged in entirely lawful conduct, which they vehemently disputed, this could never be an answer to their claim in conspiracy. They say this because motive and purpose play a central role in establishing whether the tort has been committed. They refer to *Beausang v Irish Life and Permanent plc* [2014] IEHC 1:-

> *"…as this claim [of alleged unlawful means conspiracy] turns on motive, this is accordingly a matter which cannot properly or fairly be resolved - save perhaps in the clearest of cases - in the absence of…an examination and cross-examination of witnesses."*

I accept the submissions of the plaintiffs. It is insufficient for the appellants to argue that because the shares themselves are inherently very valuable that, by definition, any claim of lawful means conspiracy cannot succeed. This court cannot make that assessment of evidence on the hearing of this motion, as was pointed out in *Beausang*, and certainly not in a case as complex as this case. This ground of appeal also must be rejected.

103. The appellants say that the trial judge erred in his assessment of the evidence of the law of the Russian Federation in relation to multiple causes of action. They say that, contrary to the finding of the trial judge, the experts retained by the parties were *ad idem* that the filing of multiple lawsuits does not amount *ipso facto* to an abuse of process in Russia. They say that the two experts confirmed that there is no Russian law equivalent of *res judicata* and principles such as the rule in *Henderson v Henderson* have no equivalents in Russian law.

104. The plaintiffs pointed to the fact that there was a lengthy exchange of reports between the experts engaged on both sides and say that there can be no doubt that there was a dispute between them as to Russian law concerning in particular the existence, or otherwise, of a doctrine of, or similar to, *res judicata* in Russia. The legal expert instructed by the plaintiffs identified the real issue as being whether repeat litigation could form the basis for a damages claim under Russian law. He unequivocally found that it could. This was not accepted by Professor Maggs who gave expert evidence on behalf of the appellants. Foreign law is a matter of fact which must be proved in the normal way. There is a dispute in relation to those facts. It follows that this is a matter which can only be resolved by a judge at trial. Therefore, the trial judge was correct in his assessment on this point and this ground of appeal also must be dismissed.

Conclusion

105. In essence, this application was misconceived and never had any prospect of success. The appellants engaged in extensive arguments in relation to the substance of the disputed facts. At all times the focus of the argument was too narrow. It cannot be definitively said by a court that the plaintiffs' case falls away if the allegation of forgery pleaded in the statement of claim, and in particular at paragraph 65, cannot be proved in the manner it is pleaded. The premise of the argument ignores the pleading in para. 6 of the statement of claim which identifies eleven methods allegedly employed by all of the defendants to give effect to the unlawful Scheme. The case against the appellants is clearly not confined to whether they produced, or relied upon, forged or sham documents, but extends to an allegation that they made multiple fraudulent claims that Eurotoaz was entitled to shares in ToAZ and, made multiple unfounded criminal complaints in the name of Eurotoaz against ToAZ officers and persons perceived to be connected with ToAZ in Russia. The appellants' submissions do not attempt to deal with the greater part of the plaintiffs' case against them. Mr. Babichev does not deny the central allegation that the appellants were active participants in a corrupt and unlawful scheme to wrest control of ToAZ from the plaintiffs, a scheme which was orchestrated by Mr. Mazepin.

106. The appellants adduced no admissible evidence to substantiate the arguments advanced in support of the application which, accordingly, must fail.

107. The substance of the arguments of the appellants do not meet the threshold required in an application to strike out proceedings on the basis that they were bound to fail.

108. The appellants have failed to identify any errors in the judgment of the High Court which would entitle them to succeed on this appeal.

109. For these reasons, I dismiss the appeal.