THE HIGH COURT

COMMERCIAL

[2023] IEHC 195

[No. 2016/9981 P.]

BETWEEN

TRAFALGAR DEVELOPMENTS LIMITED, INSTANTANIA HOLDINGS LIMITED, KAMARA LIMITED AND BAIRIKI INCORPORATED

PLAINTIFFS

AND

DMITRY MAZEPIN, OJSC UNITED CHEMICAL COMPANY URALCHEM, URALCHEM HOLDING PLC, EUROTOAZ LTD, ANDREY GENNADYEVICH BABICHEV, YULIA BOLOTNIKOVA, BELPORT INVESTMENTS LTD, MILKO EMILOV MINKOVSKI, ANDROULA CHARILAOU, DMITRY KONYAEV AND YEVGENIY YAKOVLEVICH SEDYKIN AND BY ORDER JSC KHIMAKIVINVEST AND AKTUM LIMITED LIABILITY COMPANY

DEFENDANTS

JUDGMENT of Mr. Justice Denis McDonald delivered on 24th April 2023

The application before the court

1. This judgment addresses an application by the twelfth named defendant (who I shall refer to as *"Kai"*), made pursuant to O.12, r. 26, seeking to discharge the order previously made by me on 25th January 2022 granting liberty to the plaintiffs to serve notice of an amended concurrent plenary summons in these proceedings on Kai at its registered address in Russia, namely 2 Presnenskaya Embankment, 34-11 (34th Floor), Moscow, 123112 Russian Federation. That order was made on foot of an *ex parte* application by the plaintiffs on the basis

that Kai was a necessary or proper party to these proceedings for the purposes of O. 11, r. 1(h). Kai submits that the plaintiffs have failed to establish that Kai is a necessary or proper party to these proceedings. Kai further submits that, when all relevant factors are taken into account, the plaintiffs have failed to demonstrate that Ireland is the appropriate jurisdiction to hear and determine this claim against Kai. In such circumstances, Kai contends that the court, in the exercise of its jurisdiction under O. 11, r. 2 and 5 ought to decline jurisdiction in this case against it.

Background

2. The background to these proceedings is very fully described in the judgment of Barniville J. (as he then was) in *Trafalgar Developments Ltd v. Mazepin* [2022] IEHC 167. That judgment addresses a previous unsuccessful challenge to the jurisdiction of the Irish courts brought by the first, second, third, sixth and tenth defendants (who I shall refer to as *"the existing UCCU defendants"*). I should explain that the acronym UCCU is derived from the name of the second defendant, a Russian company alleged to be controlled by the first named defendant, Mr. Mazepin who is also alleged to exercise control over each of the third, sixth and tenth defendants. As described in more detail below, the plaintiffs' case is that the existing UCCU defendants have acted in concert with the remaining defendants to damage the plaintiffs' interests in a large Russian company called OJSC Togliattiazot (*"ToAZ"*). The plaintiffs contend that this has been orchestrated by the first named defendant, Mr. Mazepin, who they claim exercises control not only over the other UCCU defendants but also over Kai. In this context, it should be noted that four of the existing UCCU defendants are nationals or companies incorporated in the Russian Federation. Where appropriate to do so, I will refer to those defendants as *"the Russian UCCU defendants".* The third named defendant, Uralchem Holding plc (*"Holding"*), is a Cypriot company. Given its establishment in an EU Member State, the jurisdiction asserted against Holding is different to that asserted against the Russian

UCCU defendants or against Kai and, for that reason, it is unnecessary to consider its position further.

3. I should explain that, in pursuing these proceedings against the Russian UCCU defendants, the plaintiffs relied on O. 11, r. 1(h) which, as noted above, is the same basis for asserting jurisdiction against Kai. They did so on the basis of a contention that the Russian UCCU defendants were necessary or proper parties to the proceedings brought in this jurisdiction against the fourth named defendant (who I shall refer to as *"Eurotoaz"*) which is incorporated in Ireland. Previously, Eurotoaz and the fifth named defendant, Mr. Babichev (a director of Eurotoaz who resides in Russia), had sought to dismiss or strike out the action against them on the basis that it was bound to fail or, alternatively, that it constituted an abuse of process. In addition, insofar as Mr. Babichev is concerned, he also sought an order staying the proceedings against him on the ground that Ireland was not the appropriate forum to hear the dispute against him (which lawyers refer to as the *forum non conveniens* ground). Those applications were rejected by Haughton J. in *Trafalgar Developments Ltd v. Mazepin* [2017] IEHC 721. In turn, the decision of Haughton J. was upheld by the Court of Appeal in *Trafalgar Developments Ltd v. Mazepin* [2019] IECA 218. Thereafter, the existing UCCU defendants (both Russian and Cypriot) contested jurisdiction but their application was rejected by Barniville J. in 2022. The approach taken by Barniville J. will be examined in more detail below. Before doing so, I should explain, in broad terms, the nature of the claim made by the plaintiffs.

4. The plaintiffs are companies incorporated in a number of jurisdictions in the Caribbean. In the proceedings prior to the joinder of Kai, they claimed that the defendants have conspired together with a view to depriving the plaintiffs of shares that they held in ToAZ. As pleaded in the amended statement of claim, the plaintiffs maintained that they held the shares in ToAZ as owners. However as discussed further below, the case now made by the plaintiffs is that they

held the shares as trust managers on behalf of other entities. ToAZ is said to be the largest producer of ammonia in Russia (principally for use as fertiliser). Prior to the events described below, the plaintiffs held 70% of the shares in ToAZ while UCCU was a minority shareholder. According to the second amended statement of claim delivered in the proceedings, the defendants have allegedly engaged in a conspiracy comprising a series of unlawful acts designed to wrest the shares from the plaintiffs and place them at the disposal of Mr. Mazepin or a company under his control. In para. 60 of his judgment delivered in March 2022, Barniville J. summarised the elements of the alleged scheme of conspiracy. These included the alleged making of unlawful threats to the effect that improper legal proceedings would be brought against the owners of the shares in the event that the plaintiffs were not prepared to allow their shares in ToAZ to be sold to the defendants at an undervalue; bringing multiple unfounded civil actions in the Russian courts; making multiple unfounded criminal complaints to the Russian authorities; deploying false evidence in support of the actions and complaints made by them; procuring oppressive and unjust court orders against the plaintiffs and securing improper arrest warrants. It is further alleged that the conspiracy involved putting undue and unlawful pressure on judges, criminal investigators and judicial officers in Russia with a view to making improper and unfounded adverse orders against ToAZ and its officers and shareholders. The plaintiffs claim that all of this was done with a view to forcing the plaintiffs to sell their shares in ToAZ to the defendants or their nominees at an undervalue or ensuring that a Russian court would make an award of damages in favour of one or some of the defendants such that the plaintiffs' shares in ToAZ would have to be sold to satisfy those damages. It is important to highlight that all of these allegations (together with the further allegations described below) are strenuously denied by the existing UCCU defendants and by Kai who allege that the plaintiffs (and those in control of the plaintiffs) have themselves been engaged in significant wrongdoing. However, for the purposes of this application, I believe that I must focus on the claims made

by the plaintiffs. At this point, as the judgment of Barniville J. has made clear, it would be inappropriate to reach any view as to the merits of the conflicting claims made in these proceedings. A key consideration on an application of this kind is whether the plaintiffs have made out a good arguable case against the defendants.

5. The plaintiffs complain about a number of civil and criminal proceedings taken in Russia against their interests. These include civil and criminal proceedings taken against ToAZ on the basis (which the plaintiffs claim to be entirely false) that ToAZ had failed to provide UCCU with a list of its shareholders contrary to UCCU's rights as a shareholder (*"the Shareholder List proceedings"*). UCCU also made a very serious complaint that those in control of ToAZ had been guilty of embezzlement. This claim was originally made in the context of the Shareholder List proceedings. It was alleged that those in control of ToAZ had diverted funds from it through the sale of its products to affiliated parties at a gross undervalue. UCCU contended, in those proceedings, that the motivation for the failure to provide the shareholder list was to assist in the concealment of this alleged embezzlement. However, this complaint of embezzlement was subsequently severed from the Shareholder List proceedings and new criminal proceedings were initiated against officers and persons who were claimed to be associated with ToAZ . These included Mr. Sergei Makhlai who was alleged by the complainants to be the owner of the majority interest in the ToAZ shares. The relevant criminal case against the officers and shareholders of ToAZ was initiated by the Office of Criminal Investigations of the Investigation Committee of the Russian Federation in the Samara region. The complaint was made pursuant to Article 159(4) of the Criminal Code of the Russian Federation. The plaintiffs also allege that, on 15th February 2013, UCCU filed notice within the Article 159(4) proceedings of an intended related civil claim. This was advanced on the basis that, if the criminal complaint was upheld, UCCU would seek compensation for losses

allegedly suffered by it as a shareholder in ToAZ as a result of the alleged diversion of assets from ToAZ.

6. The Komsomolsky District Court made an order freezing the shares held by the plaintiffs in ToAZ in February 2013. That freezing order was appealed by the second, third and fourth named plaintiffs but, in April 2013, the appeal was dismissed. The plaintiffs claim that, after many years of investigation, the substantive Article 159(4) proceedings began in the Komsomolsky District Court in March 2018. It should be noted, in this context, that this chronology of events is significantly disputed by the existing UCCU defendants and by Kai. They contend that UCCU was recognised as a plaintiff by a decision of the Russian investigators of 15th February 2013 and that, as a consequence, the civil claim was, as a matter of Russian law, in being since 2013. According to the plaintiffs, Judge Kirillov of the Komsomolsky District Court initially rejected an application by UCCU to join the plaintiffs as civil defendants to the Article 159(4) proceedings. However, on 4th October 2018, UCCU lodged a fresh application to join the plaintiffs as defendants to its damages claim in those proceedings on the grounds that they were not subject to the jurisdiction of a Russian criminal court. That application was dealt with by Judge Kirillov on 15th November 2018 and the plaintiffs contend that Judge Kirillov, on the basis of a brief oral ruling from the bench acceded to the application despite having previously held that the plaintiffs were not subject to the jurisdiction of a Russian criminal court. The plaintiffs claim that this is an entirely surprising outcome in the circumstances and that it is illustrative of the approach taken in favour of the UCCU defendants in the Russian courts.

7. Thereafter, the plaintiffs allege that evidence was given in the Russian proceedings against them without any opportunity being given to them to appear and defend themselves or to meet that evidence and notwithstanding that the proceedings were never properly served on the plaintiffs. In addition, the plaintiffs contend that the damages claim was heard out of turn

prior to the conclusion of evidence in the criminal trial. It was heard in May 2019 and the plaintiffs contend that the presentation of defence evidence was interrupted very abruptly on 16th May 2019 on the application of UCCU. Lawyers for UCCU made an application for the termination of the proceedings at that stage. Judge Kirillov granted UCCU's application and terminated the hearing of the damages claim and directed that the proceedings should move to closing submissions, notwithstanding objection by defence counsel. Subsequently, closing arguments in the Article 159(4) proceedings commenced on 17th May 2019 and concluded on 18th June 2019 and the judgment of Judge Kirillov was delivered on 5th July 2019. In that judgment, Judge Kirillov found that the parties against whom the proceedings were brought (which included Mr. Sergei Makhlai) were guilty of the criminal acts alleged. In addition, the plaintiffs and Mr. Makhlai were found liable for damages in the full sum claimed by UCCU and UCCU was declared to be the *"recoveror"* in respect of the civil damages claim on behalf of itself and ToAZ. It should also be noted that Judge Kirillov found that the plaintiffs and the companies who appointed them as trust managers of the ToAZ shares were controlled by Mr. Sergei Makhlai or by his father.

8. The plaintiffs claim (and this claim is supported by expert evidence as to Russian law, albeit that such evidence is strongly disputed by the defendants' Russian law experts) that there were grave violations of fair procedures in the Russian proceedings just described and a material denial of the rights of the plaintiffs in their capacity as defendants to those proceedings. The findings of Judge Kirillov in the Article 159(4) proceedings were appealed by a number of parties to the Samara Court of Appeal. The plaintiffs also sought to appeal those findings. The plaintiffs' applications were out of time but they were nonetheless permitted by the Court of Appeal to participate in the appeals by making submissions in support of the grounds of appeal filed by the other appellants. The decision of Judge Kirillov was upheld. However, the plaintiffs contend (and again this is supported by evidence from their experts as to Russian law

which, in turn, is disputed by the experts retained by the defendants) that the Samara Court of Appeal blatantly ignored the breaches of procedure that the plaintiffs contend took place in the course of the trial before Judge Kirillov. It is also alleged by the plaintiffs that the Samara Court of Appeal, in reaching its conclusion, ignored the defence evidence. Once the Samara Court of Appeal judgment was delivered on 26th November 2019, the judgment of Judge Kirillov of 5th July 2019 became enforceable as a matter of Russian law and UCCU became entitled to issue writs of execution in respect of that judgment. As noted above, it is part of the plaintiffs' case that it was an inherent part of the alleged conspiracy that the existing defendants would seek to obtain a money judgment that would force the sale of the ToAZ shares.

9. In the meantime, the plaintiffs, in March 2019, brought an application in these proceedings before the court seeking an injunction restraining UCCU from proceeding with the damages claim advanced by it against the plaintiffs in Russia. In the course of the hearing of that application on 27th June 2019, an undertaking was given by the existing UCCU defendants not to take any steps between then and the determination of these proceedings to execute or enforce or to authorise the execution or enforcement by any third party of any judgment obtained in the Article 159(4) civil claim. By the terms of that undertaking, UCCU agreed and undertook that it, its servants, agents, nominees, shareholders, assignees or representatives *"will not take any steps or do anything directly or indirectly… to execute or enforce, or to authorise or to cause or permit or facilitate or assist or solicit the execution or enforcement by any third party of any judgment in the Article 159(4)… proceedings… against the Plaintiffs' assets… (which for the avoidance of doubt shall include the shares in ToAZ which each of the Plaintiffs hold as trust managers) or as against the Plaintiffs"*. The undertaking also made clear that it did not prevent UCCU or its affiliates from taking any steps to maintain or defend the continuation of the freezing orders which already attached to the ToAZ shares.

10. On the basis of that undertaking, the plaintiffs believed that no steps could be taken by the existing UCCU defendants to act on foot of any writs of execution that might be issued in respect of the judgment of Judge Kirillov against the shares held in ToAZ. However, subsequently, on 22nd December 2020, the solicitors for UCCU informed the plaintiffs' solicitors that an application had been made by the Prosecutor's Office in Russia to Judge Kirillov which they understood was for the purpose of revoking the writs of enforcement given to UCCU. The hearing was scheduled to take place on 30th December 2020. This caused concern to the plaintiffs. They instructed their Russian lawyers to apply to the Russian court in advance of its proposed hearing on 30th December 2020 to see and familiarise themselves with the relevant court materials on foot of which the court hearing was to proceed. However, that application was refused by Judge Kirillov. He proceeded with the hearing on 30th December 2020 and resolved to revoke the writs of execution which had issued against the plaintiffs in favour of UCCU. Instead, he ordered that the District Court would send the writs directly to the bailiff for execution. In the course of his written judgment, Judge Kirillov stated that the effect of his decision was that UCCU would not breach its obligations to this Court under the undertaking described above. Judge Kirillov also said that the writs of execution would be sent for enforcement not by UCCU but by the court. Although the plaintiffs appealed the decision of Judge Kirillov, this appeal was dismissed. It should be noted that UCCU also appealed the decision but the plaintiffs contend that it did so only in a *"half-hearted"* manner and did not make arguments that it could reasonably and ought properly to have made in opposition to the application. There were a number of appeals (including an appeal to the Supreme Court of Russia), all of which were unsuccessful. Thereafter, in March 2021, the writs of execution were returned by UCCU to the Russian court and they were then sent by the District Court directly to the bailiff for enforcement. Later, on 13th August 2021, Mr. Sergei Makhlai was declared bankrupt in Russia on the application of UCCU. The plaintiffs believe that this was done on

the basis of the damages awarded against Mr. Makhlai in the civil claim brought in connection with the Article 159(4) criminal proceedings. The plaintiffs also contend that UCCU is the only creditor active in Mr. Makhlai's bankruptcy. After Mr. Makhlai was declared bankrupt, his bankruptcy administrator took control of a bank which was 100% owned by Mr. Makhlai. This was done by the bankruptcy administrator replacing the supervisory board of the bank. The bank was also the plaintiffs' share depository in respect of the shares held in their names in ToAZ. According to the plaintiffs, the role of the bank as share depository involves maintaining records evidencing the shareholdings held by its account holders in the relevant company (in this case, ToAZ). The plaintiffs say that they were concerned that the bankruptcy administrator had decided to take control of the bank rather than simply selling the bank as a means of realising assets in the bankruptcy of Mr. Makhlai in the normal way. Around the same time, UCCU (which was, at the time, a minority shareholder in ToAZ) applied to ToAZ to convene extraordinary general meetings of the shareholders of ToAZ with a view to passing resolutions to remove the board of ToAZ and replace it with a new board made up entirely of UCCU representatives. Given that the plaintiffs held 71% of the shares in ToAZ, the plaintiffs maintain that UCCU could have had no hope of passing the proposed resolution unless the plaintiffs were disabled from voting their shares at the general meeting. The plaintiffs contend that it had become clear to them at this point that UCCU would only be able to pass the resolutions proposed by it if Mr. Makhlai's bankruptcy administrator misappropriated the plaintiffs' shares held by the bank as depository and purported to vote the shares at UCCU's behest. Notwithstanding a number of applications to the Russian courts by the plaintiffs and a number of attempts by the plaintiffs to deal with the depository bank, Mr. Makhlai's bankruptcy administrator voted the shares at the general meeting in favour of UCCU's resolutions. In that way, the board of ToAZ was replaced with members who, as noted above, the plaintiffs contend are representatives of UCCU.

11. Subsequently, the plaintiffs became aware from an article published in the Russian media that Mr. Makhlai's bankruptcy administrator proposed to auction the plaintiffs' shares in ToAZ. That auction took place on 18th February 2022 and Kai was the successful bidder. However, the plaintiffs allege that Kai is not an independent third party but that it is controlled by Mr. Mazepin and that it was acting in concert with the other parties to the alleged conspiracy. In this context, the plaintiffs contend that the sole shareholder of Kai since January 2021 is a company called Bazovaya Khimicheskya Kompaniya Uralchem LLC (*"Bazovaya"*). In turn, the plaintiffs allege that the sole shareholder of Bazovaya is Mr. Mazepin. In addition, UCCU transferred most of the shares held by it in ToAZ to Kai. Against that backdrop, the plaintiffs maintain that Kai is plainly a part of the UCCU group and is also under the ultimate control of Mr. Mazepin. They contend that the acquisition of the shares by Kai is the culmination of the object of the alleged conspiracy to expropriate their shares in ToAZ and that Kai is a party to the conspiracy involving the other defendants to deprive them of their shares. It was on that basis that the plaintiffs brought their application to the court under O. 11 seeking leave to serve the proceedings on Kai outside the jurisdiction in reliance on O. 11, r. 1(h).

12. It should be noted that, previously, the plaintiffs had also relied on O. 11, r. 1(h) insofar as their claim against the Russian UCCU defendants are concerned. The Russian UCCU defendants challenged the assertion of Irish jurisdiction against them. The basis for asserting jurisdiction against the Russian UCCU defendants was very comprehensively examined by Barniville J. in his judgment delivered in March 2022 in relation to that challenge. In that judgment, Barniville J. examined the relevant principles applicable under O. 11, r. 1(h) and the principles applicable to a challenge to jurisdiction. Having set out the relevant principles, Barniville J. then examined whether the case against the existing UCCU defendants was a proper one for service out of the jurisdiction for the purposes of O. 11, r. 5. I have found the approach taken by Barniville J. to be very helpful for present purposes and I therefore propose

to examine it in some detail both in so far as the identification and application of the relevant principles are concerned.

The applicable principles

13. As noted above, the relevant principles are comprehensively examined by Barniville J. in his judgment on the application brought by the Russian UCCU defendants to challenge jurisdiction. In that judgment, Barniville J. drew attention to the relevant provisions of O. 11. As in the case of Kai, the basis on which the plaintiffs invoked Irish jurisdiction against the Russian UCCU defendants was O. 11, r. 1(h). That sub-rule provides that service out of the jurisdiction may be allowed by the court where:-

> *"any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."*

14. It is not enough to show that a person outside the jurisdiction is a proper party to the claim against a party duly served within the jurisdiction. As Barniville J. noted, O. 11, r. 2 and r. 5 are also highly relevant in considering whether an Irish court should assume jurisdiction over a foreign defendant domiciled in a country other than an EU Member State or a State party to the Lugano Convention. Order 11, r. 2 requires the court to have regard to *"the amount or value of the claim or property affected and to the comparative cost and convenience of proceedings in Ireland, or in the place of the defendant's residence…"*.

15. In addition, O. 11, r. 5 provides that an application for leave to serve out of the jurisdiction must be supported by an affidavit:-

> *"stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a citizen of Ireland or not, and where leave is asked to serve a summons or notice thereof under r.1 stating the particulars necessary for enabling the Court to exercise a due discretion in the manner in r.2 specified; and no leave shall*

> *be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order."*

Although these provisions of O. 11, by their own terms, apply to an application by a plaintiff for leave to serve proceedings on a defendant outside the jurisdiction, it is clear from the judgment of Barniville J. that, where a defendant (as here) makes an application to the court under O. 12, r. 26 to set aside service of notice of proceedings on foot of an order made under O. 11, the burden of proof remains on the plaintiffs to establish all of the matters that are required to be established in order to secure Irish jurisdiction as against that defendant. Thus, the plaintiffs, on the present application, bear the burden of establishing that this is an appropriate case for service on Kai out of the jurisdiction. They accordingly have the burden of proving that the case against Kai falls within O. 11, r. 1(h). They also bear the burden of showing that Ireland is a *"convenient"* venue for the hearing of the proceedings for the purposes of O. 11, r. 2. As part of the latter requirement, the plaintiffs must, in accordance with the requirements of O. 11, r. 5, place sufficient evidence before the court to exercise its discretion under O. 11, r. 2. In his judgment of March 2022, Barniville J., having conducted a detailed analysis of the relevant Irish case law, concluded that the relevant standard to be applied is whether the plaintiff has a good arguable case on the merits as against the foreign defendant and that there is a good arguable case that the cause or causes of action relied upon by the plaintiffs come within O. 11, r. 1(h). He highlighted that, in accordance with the decisions of the Supreme Court, caution must be exercised by the court where it is sought to require a foreign defendant to defend a claim against it in Ireland. However, he also drew attention to the observations of Clarke J. (as he then was) in *Irish Bank Resolution Corporation Ltd (in special liquidation) v. Quinn* [2016] 3 I.R. 197 (*"the IBRC case"*) to the effect that there is a *"low barrier"* or a *"very low threshold"* to be surmounted for this purpose. In the *IBRC* case, Clarke J. said that it was not necessary for the plaintiff to establish, on affidavit, a *prima*

facie case. What the plaintiff is required to put forward is sufficient evidence on affidavit to allow a court to conclude that, both on the law and on the facts, the case was reasonably capable of being proven. At p. 215, Clarke J. said:-

> *"The low barrier is designed to exclude imposing on defendants the obligation to come to Ireland to defend cases which have no prospect of being capable of being proven. The bar needs to be seen in the light of that underlying requirement…"*

16. Having carefully considered all of the relevant case law, Barniville J. summarised the approach to be taken in paras. 172-173 of his judgment as follows:-

> *"172. …In assessing whether the plaintiffs have a good arguable case on the merits, I must bear in mind the care, caution and circumspection referred to by Fennelly J. in Analog. I must carefully consider the affidavit evidence and submissions put forward by the parties including the affidavit evidence put forward by the Russian UCCU defendants. I must consider whether there is a sound basis for the plaintiffs' contention that the UCCU defendants are necessary or proper parties to the case against Eurotoaz. I must in that context consider whether there is reality in law and in fact to the case the plaintiffs make against Eurotoaz and must be satisfied that the joinder of Eurotoaz was not a "mere device" to get the Russian UCCU defendants before the court. I must also be satisfied that there is a substantial element to the claim against Eurotoaz and against the Russian UCCU defendants.*
>
> *173. In carrying out these tasks I must take into account and apply the guidance given by Clarke J. in IBRC v. Quinn. I must consider the pleadings and affidavit evidence (including that adduced by the UCCU defendants) and must be satisfied that the plaintiffs' claim falls within O. 11, r. 1(h) and is one which is*

shown to be "reasonably capable of been proven". I must refrain from resolving disputed issues as to the substance of the case (whether of fact or law) unless such is necessary to determine whether the plaintiffs' claim (whether as against Eurotoaz or as against the Russian UCCU defendants) is "reasonably capable of been proven". In that regard, while I must assess the UCCU defendants' affidavit, the fact that a plaintiff's allegations are denied on affidavit or by submissions is not conclusive or even relevant unless they demonstrate that the claim is unstateable. I must not engage in an assessment of the relevant strengths of the respective parties. I must be satisfied that the plaintiffs' claim falls within one of the paragraphs of O. 11, r. 1 and that it is not an unstateable claim which has no reasonable prospect of being capable of proof. It seems to me that I must be satisfied that that is so, both in relation to the claims against Eurotoaz and in relation to the claims against the Russian UCCU defendants. Both of those claims must be reasonably capable of proof. However, I must proceed on the basis that there is a "low bar" a "low barrier" and a "very low threshold" as Clarke J. has stated. I must be satisfied that the Russian UCCU defendants are not being brought to Ireland to defend proceedings which have "no prospect of being capable of been proven". I must bear in mind that it is not necessary for the plaintiffs to establish a prima facie case and it is enough if they put forward sufficient evidence on affidavit to persuade the court that their case, on the law and on the facts, is "reasonably capable of being proven". I must do my best to assess the evidence and submissions by reference to these criteria."

<u>The approach taken by Barniville J. in applying the relevant principles to the case made against the Russian UCCU defendants</u>

17. Having identified the relevant approach to be taken, Barniville J. then considered whether the plaintiffs had demonstrated that they had a good arguable case on the merits as against Eurotoaz and against the existing UCCU defendants and whether they had a good arguable case that their claim fell within the ambit of O. 11, r. 1(h). As noted above, the existing UCCU defendants had argued that the joinder of Eurotoaz had been a mere device to secure Irish jurisdiction against them. Having examined the evidence, the submissions and the case pleaded in the statement of claim, Barniville J. came to the conclusion that the plaintiffs had established a good arguable case against Eurotoaz and that the claim against it was not a mere device to secure Irish jurisdiction. He also concluded that the plaintiffs had a good arguable case against the Russian UCCU defendants. Those are important findings in the context of the present application. While Kai was not a party to the application brought by the Russian UCCU defendants, the findings made by Barniville J. were based upon a careful and thorough examination of the case made against Eurotoaz and the case made against the Russian UCCU defendants. Subject, of course, to the outcome of the Russian UCCU defendants' appeal to the Court of Appeal, these proceedings will, therefore, go forward to trial as against Eurotoaz and the existing UCCU defendants. Furthermore, these findings by Barniville J. seem to me to engage the principle described by Clarke J. in *Worldport Ireland Ltd. (in liquidation)* [2005] IEHC 189 (which I shall refer to as *"the Worldport principle"*) that a judge of first instance ought usually to follow the decision of another judge of the same court unless one of the exceptions identified by Clarke J. in that case applies. Those exceptions are: (a) where the earlier decision was not based upon a review of significant relevant authority; (b) where there is a clear error in the judgment; and (c) where there have been material developments in the

jurisprudence of the court in the relevant area of law since the earlier judgment was delivered. Plainly, none of those exceptions could be said to apply to the judgment of Barniville J.

18. Barniville J. next considered whether the Russian UCCU defendants are proper parties to the case against Eurotoaz for the purposes of O. 11, r. 1(h). In para. 194 of his judgment, Barniville J. came to the conclusion that they are proper parties to the case against Eurotoaz. In para. 194, he said:-

> *"Additionally, I am satisfied that the plaintiffs have pointed to significant factors to connect the case being made against Eurotoaz with the case which the plaintiffs wish to make against the Russian UCCU defendants… Whilst there are allegations made in the amended statement of claim in respect of which it is said there is supporting affidavit evidence, and the correctness or otherwise of those allegations is a matter for the trial, I have no doubt the plaintiffs have demonstrated a "good arguable case" that the Russian UCCU defendants are "proper" parties to the case against Eurotoaz. Conspiracy with the same objective is alleged against the two sets of defendants. The alleged connecting factors are potentially significant, including the circumstances in which it is alleged that UCCU/Mr. Mazepin acquired beneficial ownership of Eurotoaz in December 2011 with UCCU having acquired its shareholding in ToAZ in 2008 with the alleged campaign of vexatious litigation being commenced by Eurotoaz in 2009 and continued in the period after Benstock acquired Eurotoaz in 2011, as is apparent from the "Chronology of Eurotoaz Proceedings" provided to the court by the plaintiffs during the hearing. That chronology shows that Eurotoaz's litigation continued after December 2011 and further proceedings commenced thereafter (including the filing of a further civil claim by Eurotoaz with the Arbitrazh Court of the Samara Region against ToAZ in October 2014 …)."*

19. In para. 195 of his judgment, Barniville J. said that he was satisfied that, if the existing UCCU defendants were present in the jurisdiction, they would have been sued alongside Eurotoaz in the proceedings. He also said that he accepted that the plaintiffs would proceed with their case against Eurotoaz even if the existing UCCU defendants were successful in their challenge to Irish jurisdiction. These findings also seem to me to be important in the present context. Even though Kai was not a party to the application, the findings appear to me to again engage the *Worldport* principle and that they should accordingly be followed by me in circumstances where none of the established exceptions to the principle applies.

20. In the context of the challenge by the Russian UCCU defendants, Barniville J. also addressed the requirements of O. 11, r. 2 and 5. In considering this issue, Barniville J. had regard to some of the authorities dealing with *forum non conveniens*. While the burden of proof is different in a case where a defendant challenges Irish jurisdiction on that ground, the case law on *forum non conveniens* is nonetheless of assistance in circumstances where, in effect, the plaintiff has the burden of proving that Ireland is the convenient forum for the determination of the claim against Kai. As explained in the case law, "*convenience*", in this context, means *"fitness, propriety and suitableness"* to quote from the language used by Fitzgibbon L.J. in *McCrea v. Knight* [1896] 2 I.R. 619 at p. 626. More recently, the courts have focused on whether Ireland can be said to be the *"appropriate"* forum to hear and determine the claim against the foreign defendant *"more suitably in the interests of all of the parties and the ends of justice"*. Thus, Murphy J. in the Supreme Court in *Intermetal Group Ltd v. Worslade Trading Ltd* [1998] 2 I.R. 1 approved the following statement of the law given by Lord Gough in *Spiliada Maritime Corporation v. Cansulex Ltd* [1987] 1 A.C. 460, at p. 476:-

> *"…The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in*

which the case may be tried more suitably in the interests of all the parties and the ends of justice."

21. In *Intermetal*, Murphy J. also approved the following passage from the judgment of Bingham L.J. (as he then was) in *Harrods (Buenos Aires) Ltd* [1992] Ch 72, at p. 124:-

"The words I have emphasised make clear, as does the reference to justice, that a broad overall view must be taken: the primary task is not to decide which forum is advantageous or disadvantageous to any particular party. The court should look first to see what factors there are, taking this broad overall view, which point in the direction of another forum…: at that stage it is connecting factors (including convenience, expense, availability of witnesses, governing law, place of residence and place of business) which must be considered:…If it is shown that there is some other available forum which prima facie is clearly more appropriate for the trial of the action a stay will ordinarily be granted unless on a consideration of all the circumstances justice requires that a stay should not be granted."

22. Barniville J. also referred to the approach taken by the Supreme Court in *Analog Devices v. Zurich Insurance* [2002] 1 I.R. 272. In that case, referring to *Spiliada,* Fennelly J., at p.p. 287-288, explained that, in the context of an application under O.11, the plaintiff has the burden of establishing that Ireland is the *forum conveniens* (i.e. the appropriate forum to try the case). Fennelly J. adopted the explanation of that term given by Lord Goff in *Spiliada* in the passage quoted in para. 20 above namely the forum in which the case can be suitably tried in the interests of all parties and the interests of justice. That is the approach which Barniville J. then took in considering whether Ireland was the appropriate forum to try the case against the Russian UCCU defendants. It is clear from his judgment that he considered that, at first sight, there were a very great number of factors that suggested that Russia was a more convenient forum for the hearing of the case against the Russian UCCU defendants than Ireland. The vast

majority of events in issue in the proceedings have occurred in Russia. The main protagonists are based in Russia. Most of the documents in issue are in the Russian language. All of the judgments given by the Russian courts are in Russian. A very substantial number of the witnesses who would be required to give evidence in the proceedings will give evidence in the Russian language. The court will also have to hear extensive evidence in relation to Russian law and Russian legal procedures. All of those factors were identified by Barniville J. as pointing in the direction of Russia as the more appropriate forum for the determination of the dispute against the Russian UCCU defendants. On the other hand, Barniville J. was concerned that, if these proceedings were to be pursued before the Russian courts, some of the witnesses for the plaintiffs would be unable to travel to Russia and that there was no facility for the giving of their evidence remotely. He also identified that fragmentation was a very significant countervailing factor which weighed in favour of Irish jurisdiction. In this context, Barniville J. referred to the guidance given by Clarke J. in the *IBRC* case in relation to the weight to be given to fragmentation. In the *IBRC* case, Clarke J. highlighted a passage from Dicey Morris & Collins on *The Conflict of Laws* (15th Ed., 2012, at p. 553) in relation to the factors relevant to the issue of convenience. Among the factors is *"whether the claim is part of a larger overall dispute which would be damaged by being fragmented"*. This was expanded upon by Clarke J., in para. 71, as follows:-

> *"Finally, there is the question of cases, of which this is clearly one, where the applicant is but one defendant and where a stay being granted on the proceedings insofar as they relate to that applicant will necessarily lead to the case which the plaintiff wishes to bring being fragmented. It may be possible to look at fragmentation as being one of the practical factors which might make it less appropriate to stay the proceedings in favour of the alternative forum or, at a minimum, may allow the plaintiff to establish that the alternative forum is not clearly or distinctly more appropriate. It might also be possible*

that a fragmentation of the case might give rise to the risk of injustice which would allow a court properly to retain jurisdiction even though the alternative forum might, so far as determining the case made against the defendant who sought the stay was concerned, be considered to be clearly more appropriate. Whichever of those approaches may be appropriate in a particular case there can be little doubt but that fragmentation can be an important factor depending on all of the circumstances of the case in question."

23. Having cited what was said by Clarke J. in the *IBRC* case, Barniville J. continued, at para. 266 of his judgment, to say:-

> *"Clarke J. explained that the weight to be attached to fragmentation would depend on the extent to which the case against the defendant seeking the stay was distinct from the case against the other defendants. If the case against the two sets of defendants were relatively distinct, then the weight to be attached to fragmentation would not be particularly great (para. 72). However, if the claims were inextricably bound up with each other then a stay of the proceedings against one of the defendants could give rise to significant problems by making it "significantly more difficult and expensive for the plaintiff to have to attempt to prove the case in two different jurisdictions" (para. 73). Clarke J. continued:*
>
> > *'That might well involve having to prove aspects of the case twice with the obvious risk of inconsistent decisions. <u>That latter factor might in itself be regarded as putting justice at risk in a way which would warrant declining a stay even though the alternative forum, looked at from the narrow perspective of the case as against the applicant defendant, might have considerable advantages</u>.' ... (emphasis added)"*

24. Barniville J. observed, at para. 267 of his judgment, that the issue of fragmentation was of particular relevance to the application before him. In paras. 269 to 270, he referred to the observation by Clarke J. in the *IBRC* case that the weight to be attached to the fragmentation of claims would depend on all of the circumstances of the case. Nonetheless, it was not to be elevated to a principle that necessarily outweighed all other factors. Barniville J. stressed that, in any individual case, much will depend on the claims being made in the proceedings and the extent to which the claims against the different sets of defendants are clearly linked. Depending on all of the circumstances, the risk of fragmentation might be decisive.

25. In the context of the case against the Russian UCCU defendants, Barniville J. held that fragmentation was a particularly important factor. At para. 303, he explained that this was so because of the close connecting factors between the case which the plaintiffs make against Eurotoaz and Mr. Babichev and the case made against the other defendants including the Russian UCCU defendants. He held that there are both practical and other reasons why it would be fundamentally unjust to require the plaintiffs to proceed against the Russian UCCU defendants in Russia or not at all. Barniville J. said that this injustice stems from the fact that the cause of action alleged is conspiracy. He said that, even if the difficulties in securing the attendance of key witnesses in Russia did not exist, it would plainly be unjust to require the plaintiffs to run parallel conspiracy actions in Russia and Ireland. At para. 310, he held that the fragmentation of the conspiracy case was sufficient, in itself, to conclude that justice required that the plaintiffs should be permitted to proceed with their claim against the Russian UCCU defendants in Ireland.

26. Barniville J. also made clear that, even if he was wrong in his conclusions on the effect of fragmentation, there were a number of other reasons which justified a finding that Ireland is the appropriate forum for the hearing of the case against the Russian UCCU defendants. He came to that alternative conclusion notwithstanding that the vast majority of the factors arising

in the proceedings appeared, on their face, to point in the direction of Russia as the more appropriate forum for the determination of the dispute. In this context, he identified that a number of key witnesses for the plaintiffs could not safely travel to Russia to give evidence. While the Russian UCCU defendants highlighted that the plaintiffs could bring their claim in the Russian Arbitrazh courts while remaining outside Russia, this was not a sufficient answer to the plaintiffs' concerns about proceeding in Russia. In coming to that view, Barniville J. drew attention to the expert evidence before him that there was no real possibility of witnesses giving their evidence from outside Russia via remote video technology. He came to the conclusion that key witnesses would probably be unable to attend any trial of the proceedings against the UCCU defendants in Russia and that this was a very significant factor pointing to the appropriateness of the Irish courts as the proper forum in the interests of all of the parties and in the interests of justice. A further factor identified by Barniville J. in favour of continuing the proceedings in Ireland is that discovery and cross-examination would not be available in Russia. He highlighted the evidence available that, in Russia, there are restrictions on a party obtaining evidence in the form of documents from an opposing party, He also drew attention to the very confined way in which cross-examination of witnesses is permitted. In para. 320, he held that, in the context of a highly contested conspiracy claim (in which there are substantial factual disputes) these procedural limitations are not *"mere minor procedural differences"* but are relevant to the issue as to the appropriateness of the Irish courts as the proper forum for resolution of the case and that they are *"significant to the court's assessment as to where the case can best be tried in the interests of justice"*. Given the extent of the factual dispute between the parties, one can readily see why the facility of cross-examination would be of very great utility in seeking to resolve that dispute.

The application made on behalf of Kai

27. Given the very comprehensive consideration of the matter by Barniville J. insofar as the Russian UCCU defendants are concerned, I have to say that I was surprised when counsel for Kai first informed me, in the course of a case management listing, that Kai intended to bring its own challenge to the jurisdiction. I should explain that counsel for Kai is also counsel for the existing UCCU defendants and is instructed by the same firm of solicitors representing the existing UCCU defendants. In response, counsel drew attention to the fact that any consideration of O. 11 issues involves the exercise of a discretion by a judge and he stressed that Kai would rely on additional evidence that was not before Barniville J. on the challenge by the existing UCCU defendants.

28. In response, I expressed the view that, while the court must exercise a discretion under O. 11, this discretion is centred on the requirements of O. 11 and, in particular, the requirements of O. 11, r. 2 and O. 11, r. 5. I also drew attention to the way in which I am required, in accordance with the *Worldport* principle, to follow the decision of a previous High Court judge save in very particular circumstances (none of which is relevant here). Accordingly, if the case sought to be made by Kai on its application to contest jurisdiction was to be no more than a re-run of the case previously made by the existing UCCU defendants before Barniville J., I expressed the view that it was impossible to understand how the discretion of the court under O. 11 is likely to be exercised any differently to the way in which it had been exercised by Barniville J. I stressed that it made no sense to devote the scarce resources of this Court to a hearing in such circumstances unless there was some evidence (relevant to the exercise of the court's discretion under O. 11) advanced by Kai that was not put before the court by the existing UCCU defendants that might potentially alter the equation. For that reason, I indicated to counsel for Kai that, once Kai's application was filed, it would be necessary to give further

consideration to whether there was, as he had suggested, some further evidence available to Kai that was not before Barniville J.

29. Accordingly, in exercise of the court's powers under O. 63A, I listed the matter before me to consider what evidence could be said to be new over and above the evidence previously considered by Barniville J. I also directed that a document should be prepared on behalf of Kai that would identify precisely, by reference to specific materials (whether in the form of affidavits or exhibits) what is alleged by Kai to constitute new evidence now relied upon over and above the evidence that was before Barniville J. A document was subsequently prepared by Kai which set out four issues by reference to which new evidence was said to be available which could potentially lead the court to a different conclusion, in the exercise of its discretion, to that reached by Barniville J. After hearing argument from the parties, I concluded that Kai could proceed with an application by reference to the following:-

(a) In the first place, Kai makes the case that, in the period since the hearing of the application by Barniville J., the plaintiffs have engaged in forum shopping in that, in the intervening period, they have participated in a number of different proceedings in Russia. Thus, it was contended on behalf of Kai that, contrary to the conclusion reached by Barniville J. that a refusal of jurisdiction by the court would lead to fragmentation, the plaintiffs have, by participating in a number of proceedings before the Russian courts, created further fragmentation;

(b) Secondly, Kai maintains that the hearing before Barniville J. proceeded on the basis that the plaintiffs claimed to be owners of the shares. Kai contends that, since then, the plaintiffs' case has changed significantly in that the plaintiffs now concede that they are trust managers of the shares on behalf of other entities.

30. For completeness, it should be noted that I did not permit Kai to argue two matters in respect of which there was no material new evidence which could be said to be relevant to the exercise of the court's powers under O. 11. These were:-

(a) It was suggested by Kai that the case against Eurotoaz had *"just faded out of the picture"* since the hearing before Barniville J. In those circumstances, it was submitted that there was an additional basis (not in existence at the time of the hearing before Barniville J.) on which Kai could contend that Eurotoaz was no more than a mere device. I rejected that argument in circumstances where the main activity in the proceedings in recent years has been in relation to a number of interlocutory applications. It is unsurprising that Eurotoaz has not featured in those applications because it is not a relevant respondent in respect of the particular interlocutory relief that was claimed. However, there is no evidence to suggest that the plaintiffs are not proceeding with the substantive case against Eurotoaz. In those circumstances, I could see no basis upon which it could be said that there was any material new evidence to justify the court taking a different decision in respect of Kai's challenge to jurisdiction to that taken by Barniville J. in relation to the challenge to jurisdiction taken by the existing UCCU defendants.

(b) It was also contended on behalf of Kai that, having regard to the experience since the jurisdiction hearing before Barniville J., the scale and cost of litigation in Ireland (relative to Russia) was vastly in excess of what had been contemplated at the time of the hearing before Barniville J. I rejected that argument on the basis that any fair reading of the judgment of Barniville J. clearly demonstrates that the scale of the litigation was apparent at the time of the jurisdiction challenge by the existing UCCU defendants.

31. I now turn to the two issues identified in para. 30 above. I will address those issues in the same order, dealing first with the case made by Kai that, since the hearing of the application by Barniville J., the plaintiffs have engaged in forum shopping through their participation in a number of proceedings in Russia. I will then deal with the issue that arises in relation to the change in the way in which the plaintiff have described their interest in the ToAZ shares.

The submissions of the parties in relation to forum shopping

32. Counsel for Kai drew attention to the different ways in which the plaintiffs have participated in a variety of proceedings in Russia. In the first place, he drew attention to the fact that the plaintiffs appealed the judgment of Judge Kirillov of July 2019. While they were late with their appeal, they were still allowed participate in the appeal taken by other parties. The Samara Court of Appeal upheld the criminal convictions and the civil award of damages. There was then an appeal to the Court of Cassation which held a number of court hearings between September 2021 and March 2022. The appeals were dismissed by the Court of Cassation on 21st March 2022.

33. Counsel for Kai submitted that, as a consequence of the determination of the appeals both by the Samara Court of Appeal and the Court of Cassation, the case made by the plaintiffs that the proceedings in Russia are tainted by procedural unfairness *"completely falls away"*. Counsel submitted that the plaintiffs chose to litigate the issue of fairness in Russia which he argued was the most appropriate forum for that purpose and the fairness and integrity of the trial before Judge Kirillov has now been definitely upheld. Counsel submitted that, in effect, the plaintiffs are inviting the Irish courts to conclude, contrary to what has already been determined through an *"exhaustive appeal process"* that the trial was procedurally unfair such that the subsequent auction of shares was unlawful *"despite the fact that all the appeal courts in Russia have held exactly the opposite"*.

34. Counsel for the plaintiffs referred to para. 305 of the judgment of Barniville J. in which he identified why fragmentation was of such importance in the context of the case against the Russian UCCU defendants and the remaining defendants at that point in time. Counsel contrasted the position that existed at that time and the present position. At that point, the proceedings in Russia were at a relatively early stage. In contrast, the present position is quite different. The proceedings in Russia have been concluded. In this context, in the course of his oral submissions, counsel for Kai put the point very graphically as follows:-

> *"Now, that was where he was dealing with a case where the proceedings in both jurisdictions were still… ex hypothesi in their early stages, hadn't yet proceeded and hadn't been concluded and in a sense, you would try to avoid irreconcilable judgments by saying 'Well, we'll proceed in this one particular*
>
> *jurisdiction' and then in the hope that the other presumably would defer to it. But in the present case where we are now, a couple of years on and where we're dealing specifically with the case against KAI, the risk of irreconcilable judgments is something which exclusively derives from the Irish court assuming, if it does, jurisdiction over KAI.*
>
> *The Plaintiffs have already litigated the critical issue which is the foundation of their claim against KAI and KAI's alleged role in the conspiracy. That role was the purchase of the shares at the allegedly unlawful auction. But that story is at an end. That issue has been litigated through the appeal processes in Russia and it's been dismissed. The only irreconcilable judgment that would arise would be if the Irish courts were to assume jurisdiction over KAI on the issue and then, remarkably, or perhaps almost impossibly because of considerations of comity, come to a diametrically opposite conclusion, not on some arcane point of law, but on the basis that the foreign court,*

whose trial processes have been upheld and vindicated through their own appeal procedures, would be damned by a foreign court - in other words, an Irish court – as not meeting ... what; fundamental standards of fairness or Irish procedural standards or Russian procedural standards or whatever standard it is that the Irish court might be invited to apply in that almost impossible exercise? It's an astonishing and, as far as I can tell, unprecedented ask of an Irish

court. Almost impossible to conceive how an Irish court would usurp the sovereignty of another State in that way…"

35. Counsel submitted that I must take the case as it currently stands. Counsel stressed that there is no evidence before the court here that the Court of Cassation in Russia did not act fairly and did not act independently. Counsel for Kai also argued that, in contrast to the position at the time the jurisdiction challenge was heard by Barniville J., the type of fragmentation envisaged by Barniville J. in his judgment of March 2022 does not arise. Counsel submitted that, if the court declines jurisdiction against Kai, the plaintiffs will still be at liberty to pursue the claims against Eurotoaz and Mr. Babichev and against the existing UCCU defendants. In the course of his oral submissions, counsel said:-

"If I can put it another way ... : The Plaintiffs actually don't need to sue KAI for the purpose of their conspiracy claim against the other Defendants ... . If their case is that there was something unlawful about KAI's participation in the auction and that this is part and parcel of UCCU's and the related Defendants' general conspiracy and that the UCCU Defendants and KAI being said to be part of UCCU or the UCCU Group, that UCCU procured KAI to bid at the auction and so forth and that's part of the conspiracy, that KAI is acting in concert with the First or Second Defendants - and that's expressly what they plead ... at paragraph 41 of the Amended Statement of Claim - well, that's simply a piece of evidence that they can adduce and, if substantiated, the

Plaintiffs will say it supports their claim for damages for conspiracy against the UCCU Defendants."

36. Counsel submitted that, even without the joinder of Kai to the proceedings, the plaintiffs can still point to the history of what they contend happened to the shares held by them in ToAZ and the fact that UCCU is allegedly behind the acquisition of those shares by Kai *"as part and parcel of their conspiracy claim and their damages claim, they don't actually need KAI as a defendant to make that case or to make the criticism that they make about KAI's participation in the auction"*.

37. It was urged by counsel for Kai that, in circumstances where the plaintiffs have *"litigated their critical issue in their case against Kai in another court"*, the issue of fragmentation now favours Kai rather than the plaintiffs. Counsel suggested that, in reality, the plaintiffs do not like the outcome in Russia *"and they're shopping around for another jurisdiction in which they can relitigate that issue again"*. Insofar as the availability of witnesses and limitations on discovery and cross-examination are concerned, counsel argued that they are no longer of any importance in circumstances where the case against Kai rests on the alleged unlawfulness of the trial before Judge Kirillov and the judgments of both Judge Kirillov and the appeal courts in Russia. Counsel highlighted, in this context, that all of the documentary evidence in the trials is available and there is no need to cross-examine anyone to have the issue resolved. Counsel for Kai also emphasised that the relief now claimed against Kai in the amended statement of claim is an order directing the return of the ToAZ shares to the plaintiff. Counsel characterised this relief as an attempt to reverse the outcome of the auction conducted by the bankruptcy trustee which he said was *"precisely the aim and the object of various proceedings which the Plaintiffs brought in Russia…the Plaintiffs brought a number of applications, all of which were designed to achieve the return of the shares, either by blocking the enforcement procedure through trying to get the writs of enforcements that had*

been issued by the courts revoked or to have the shares excluded from Mr. Makhlai's bankruptcy estate on the basis that he wasn't the beneficial owner of the shares". Counsel again noted that all of plaintiffs' complaints had been rejected not only by the Samara Commercial Court but also by the Commercial Court of Appeal and that there was an appeal to the Court of Cassation pending. For completeness, it should be noted that this is not a complete list of all of the Russian proceedings. There were also a number of other proceedings and appeals but I do not believe that it is necessary to list them all, save to note that there was extensive engagement by the plaintiffs with the Russian courts.

38. Against the backdrop of the extensive participation by the plaintiffs in various proceedings and appeals in Russia, it was submitted by counsel for Kai that there was no substance to the argument advanced on behalf of the plaintiffs that they could not bring claims or participate in proceedings in Russia. Counsel argued that the plaintiffs had not only participated in proceedings in relation to the sale of shares and in relation to the claim made in the Article 159(4) proceedings, but they had also participated in the proceedings described in para. 37 above and also in an appeal from an order made by the Arbitrazh Court of the Samara Region on 19th November 2021 (made on the application of UCCU and Kai) directing the early holding of an extraordinary general meeting of the ToAZ shareholders. Counsel argued that the plaintiffs' participation in the Russian proceedings demonstrates that they are *"well able to ventilate and agitate the issue concerning the true ownership of the shares and whether Judge Kirillov's judgment is so infirm to support the argument that the auction by the trustee in bankruptcy was unlawful"*.

39. In the course of his submissions, counsel also addressed the case made by the plaintiffs that the cause of action in these proceedings is different to the case made by them before the Russian courts. He highlighted the averment made by Mr. Jordaan on behalf of the plaintiffs that they had only participated in the Russian proceedings *"defensively"*. Counsel for Kai

submitted that it is necessary to keep in mind the substance of the issues that were argued in the Russian courts, namely the issue of the lawfulness of the judgment given by Judge Kirillov and the lawfulness of the auction procedure. Counsel said that this is exactly the case now made in these proceedings. Counsel rejected the suggestion that the actions taken by the plaintiffs in the Russian courts were defensive in nature. To the contrary, counsel submitted that the plaintiffs had *"proactively participated"* in the proceedings in Russia.

40. The case was also made on behalf of Kai that comity of courts is a very important consideration. While it may not have been at the same level of significance at the time of the hearing before Barniville J., counsel argued that, in contrast, the position now was that the Russian proceedings have been concluded. They are no longer *"merely pending"* but have reached a stage where virtually all of the avenues of appeal have been exhausted. Counsel submitted that comity, therefore, arises quite acutely in the present context.

41. When it came to his turn to make oral submissions, counsel for the plaintiffs strongly rejected the suggestion made by counsel for Kai that the case against Kai reduces itself to a simple question as to whether the shares have in some way been improperly obtained by Kai. Counsel for the plaintiffs emphasised that there is a wide range of matters pleaded in the amended statement of claim. Counsel for the plaintiffs submitted that the very outcome predicted by the plaintiffs at the time the matter was argued before Barniville J. has come to pass. The course of action threatened by Mr. Mazepin at the outset of the conspiracy has now been consummated. Counsel argued that Kai's involvement in the process has been *"intimate"*. Counsel referred, in this context, to the fact that UCCU had transferred its existing shareholding to Kai. Kai then obtained clearance to bid at the auctions of the shares held by the bankruptcy administrator. Those auctions took place in December 2021 and January 2022 and they resulted in Kai obtaining the ToAZ shares previously held by the plaintiffs. This was a critical step in UCCU obtaining control of ToAZ. The shares acquired by Kai in that way were used to ensure

that UCCU could obtain control of the board of ToAZ. Counsel suggested that it was clear that UCCU and Kai were acting in concert. Counsel for the plaintiffs argued that Kai was a central participant in the alleged conspiracy involving Mr. Mazepin and the existing UCCU defendants. Counsel highlighted the difficulties which he said would arise for the plaintiffs if Kai was not a party to the proceedings against the pre-existing defendants:-

> *"So if the Court just contemplates for a moment an action in which we continue and we don't have KAI in the case, the Court can see immediately the difficulties that are likely to arise and that would be said by the Defendants to arise if we succeed in that claim. They'll say you're not entitled to recover damages against a party that's absent. That's obvious. But, equally, you're not entitled to secure relief in respect of the shares.*
>
> *What, one asks rhetorically, will one do with the claim for an injunction?*
>
> *The Court will also recall that KAI has given an undertaking to this Court not to dispose of the shares pending full trial. And so unless KAI is involved, Judge, well, then Mr. Mazepin, through his various entities, is free to dispose of the shares as he wants. UCCU, the connected company, is free to dispose of the shares as they want. Contrary entirely to the spirt, of course, of the undertaking given to Mr. Justice Barniville at the conclusion of the second injunction hearing. So the claim against KAI is that they are a part of the conspiracy as a whole, but the Court can see that they are a central part of the conspiracy at the relevant* [point] *and a central defendant for the purpose of the claim."*

42. Counsel for the plaintiffs argued that it made no sense to hive off the trial against Kai and say that the claim against Kai should be addressed in Russia. He submitted that this was particularly so where there is such an intimate connection between Kai and UCCU. Counsel

argued that Kai cannot plausibly make a case that fragmentation does not weigh in favour of Ireland as the appropriate forum. He submitted that, in order to make that case, Kai has to argue for the proposition that it is appropriate that there should be fragmentation of the conspiracy trial and that the facts of the conspiracy should be tried in Ireland as against the pre-existing defendants but somewhere else insofar as Kai is concerned. Counsel also urged that it is wrong to suggest (as counsel for Kai attempted to do) that one should look solely at the case made against Kai. Counsel highlighted, in this context, the test under O. 11, r. 1(h). That test requires the court to consider whether Kai is a necessary or proper party to an action against another person duly served within the jurisdiction. Thus, the court must inevitably look at the case made against that other person. Counsel also referred to the observation made by Barniville J., at para. 310 of his judgment, that the question is whether *"Ireland is the more appropriate forum for the case* ***against all the Defendants*** *in the interests of the parties and the interests of justice"* (emphasis added).

43. Counsel for the plaintiff also rejected the suggestion that the plaintiffs had not raised any issue in these proceedings about the way in which the Russian appeals were addressed by the relevant appeal courts. He referred, in particular, to the seventh report of the plaintiffs' Russian law experts, Mr. Alexander Vaneev and Ms. Valeriya Alferova at paras. 242 to 275. I do not believe that it is necessary to replicate that material here. It is sufficient to observe that, in their report, the experts draw attention to a significant number of points which they say evidence a propensity on the part of the Samara Court of Appeal to ignore what they describe as material breaches of procedure by Judge Kirillov which they suggest gave rise to significant unfairness. It is true, however, that the plaintiffs have not placed an expert report before the court in respect of the subsequent decision of the Court of Cassation. The only explanation offered by counsel for the plaintiffs for the failure to address it was that: *"the Cassation Court judgment is on 1st March and there hasn't … been an outing between the parties upon which*

the merits or demerits of that could have been argued since then …”. I have to say that, in circumstances where Kai's motion to challenge jurisdiction was not filed until 13 May 2022, I do not understand how that submission can be said to explain the fact that the plaintiffs have not addressed the Court of Cassation's decision.

44. Complaints are also made by the plaintiffs about alleged manipulation by UCCU of the legal and administrative system within Russia to have the shares transferred from the plaintiffs to the bankruptcy administrator of Mr. Makhlai and the subsequent sale of those shares to Kai, an affiliate of UCCU and the subsequent convening of the extraordinary general meeting of ToAZ to which the plaintiffs' representatives were refused admission. Counsel submitted that these form further elements of the same conspiracy previously alleged against the existing UCCU defendants and Eurotoaz. Counsel argued that very similar considerations arise in the case against Kai as had previously arisen in relation to the existing UCCU defendants. Counsel drew attention, in particular, to para. 303 of the judgment of Barniville J. (to which I have previously referred at para. 25 above) where he said:-

> *"First and most significantly, if the UCCU defendants were to succeed in their application, the plaintiffs, if they wish to pursue their claim against the Russian UCCU defendants, would have to do so in the Russian courts. At the same time they would have their claim against Eurotoaz and the other defendants over which the Irish courts indisputably have jurisdiction, including Mr. Babichev, Ms. Charliaou, Belport and Mr. Sedykin. For reasons outlined earlier, I am satisfied that there is a clear connection between the case which the plaintiffs make against Eurotoaz and Mr. Babichev arising from the alleged campaign of vexacious litigation in Russia and the case they make in the amended statement of claim against the Russian UCCU defendants. Put simply, it is said that both sets of defendants are party to a conspiracy or scheme which has the objective of enabling Mr. Mazepin/UCCU to acquire the plaintiffs' shares in ToAZ at*

an undervalue. It is said that both sets of defendants are co-conspirators in that alleged conspiracy."

45. Counsel submitted that all one has to do is to change the names of the parties in that passage to reflect present circumstances. At the time he delivered his judgment in March 2022, Barniville J. was addressing, in the context of O. 11, r. 1(h) the position of the Russian UCCU defendants, on the one hand, and Eurotoaz and the other defendants, on the other hand. Barniville J. concluded that there was a clear connection between both sets of defendants in circumstances where they were all alleged to be co-conspirators together. Counsel for the plaintiffs submitted that the position is even stronger when one comes to consider the position of Kai. The case against it is that it is also a co-conspirator with the existing defendants but that it occupies a key position in that conspiracy where it is the party that has taken control of the ToAZ shares. If Kai were to succeed in the present application, it would force the plaintiffs to bring proceedings against a key member of the alleged conspiracy in Russia while pursuing every other member of the alleged conspiracy here in Ireland.

46. In this context, counsel for the plaintiffs highlighted what was said by Barniville J. in para. 305 of his judgment, where he said:-

"...There are both practical and other reasons why, in my view, it would be fundamentally unjust to require the plaintiffs to proceed against the Russian UCCU defendants in Russia or not at all. Most of those stem from the fact that the plaintiffs' is one alleging a conspiracy. To require the plaintiffs to run what is the same, or at least a very closely related case alleging the same conspiracy in two jurisdictions, would both in principle and on the facts of this case be unjust. Even if the difficulties concerning the attendance of key witnesses on which the plaintiffs rely (and which I will separately deal with) did not exist, having to run a conspiracy case in two jurisdictions involving many of the same witnesses would, in my view, be unjust and

would require the plaintiffs unnecessarily to incur the costs of doing so in both jurisdictions. It would also create the real possibility of irreconcilable judgments between the courts of the two jurisdictions."

47. Referring in particular to paras. 306 and 307 of the judgment of Barniville J., counsel for the plaintiffs submitted that the absence of Kai from these proceedings would have similar consequences for the plaintiffs, namely potential implications arising from the identification provisions of the Civil Liability Act 1961, the inability of the plaintiffs to obtain discovery from Kai as a non-party under O. 31 and the fact that key witnesses for the plaintiffs could not safely give evidence in Russia (a factor specifically recognised by Barniville J. in para. 311 of his judgment).

48. Counsel for the plaintiffs rejected the suggestion that the plaintiffs were free to pursue Kai in Russia. Counsel submitted that the observations made by Barniville J. in para. 309 of his judgment are particularly relevant in this context:-

"…The idea that, in light of all that is said by the plaintiffs to have occurred in Russia, the plaintiffs could simply proceed, or have proceeded, against the Russian UCCU defendants in Russia without any problems is stretching credibility beyond breaking point. I am satisfied that it is the plaintiffs' entitlement to bring their case in Ireland against the remaining defendants and the fact that they could potentially have proceeded against all parties in Russia does not undermine their decision to proceed in Ireland or the weight to be attached to that decision.

49. Counsel for the plaintiffs also rejected the case made by Kai that the same points as arise against Kai in these proceedings in Ireland have already been conclusively decided by the courts of Russia. Counsel for the plaintiffs emphasised that the case made against Kai in these proceedings is that Kai is a party to the alleged conspiracy. Counsel for the plaintiffs essentially made two points. In the first place, he highlighted that any steps taken by the plaintiffs in the

Russian courts were designed to defend their position. He argued that the *"unspoken proposition"* on Kai's part appeared to be that *"the cost to my client of being allowed to bring a conspiracy claim in Ireland is that we simply have to sit by and let KAI and UCCU do whatever it is they want do in Russia"*. Counsel submitted that this must be wrong in principle. Secondly, he submitted that the individual steps taken by the plaintiffs before the Russian courts are quite different to the case now made in these proceedings. None of the steps taken in the Russian courts address an allegation of conspiracy. Counsel for the plaintiffs acknowledged that, in these proceedings, the plaintiffs seek a mandatory injunction for the return of the ToAZ shares, but he emphasised that this was necessary in order to redress the impact of the alleged conspiracy. Counsel also stressed that, not only is there no allegation of conspiracy advanced in the Russian proceedings but no damages were claimed by the plaintiffs there. Nor has any case been made in Russia in respect of tortious interference with the plaintiffs' contractual and business relationships or in respect of unjust enrichment. In this context, counsel referred to the differences between the proceedings in both jurisdictions as described by Mr. Menno Jordaan in his affidavit of July 2022.

50. Against that backdrop, counsel submitted that the conspiracy case is not answered by the fact that there have been judgments in Russia on which the UCCU defendants have been successful. In this context, counsel for the plaintiffs referred to the findings made by Barniville J. in paras. 311 to 315 of his judgment. Counsel also referred to what was said by Barniville J. in paras. 316 to 320 of his judgment in relation to the absence of cross-examination and discovery in Russian proceedings. As noted in para. 26 above, while Barniville J, accepted that relatively minor procedural differences between two competing jurisdictions would not be determinative, he, nonetheless. expressed the view that, in the context of an action alleging conspiracy (including allegations of personal threats to key witnesses), the procedural limitations in Russia carry significantly more weight.

51. Counsel for the plaintiffs also submitted that the plaintiffs would suffer a very significant injustice if they were forced to proceed against Kai in Russia. Not only would it lead to the fragmentation already discussed but, in addition, the central witnesses for the plaintiffs would be unable, for all of the reasons previously explained by Barniville J., to travel to Russia give evidence there.

52. Counsel for the plaintiffs also made the point that, although Kai had been limited to raising two additional new issues which had not been pursued before Barniville J., these issues are to be weighed in the balance against all of the factors identified by Barniville J. Counsel argued that the real procedural difficulties in running a case in Russia (as identified by Barniville J.) would plainly outweigh the points made now by Kai even if there was any merit in those points (which counsel submitted there was not).

53. In his replying submissions, counsel for Kai highlighted that, although the plaintiffs' experts as to Russian law criticise the Samara Court of Appeal, no criticism whatsoever has been advanced in respect of the decision of the Court of Cassation. On that basis, counsel for Kai submitted that there is an *"unimpeachable decision"* of a foreign jurisdiction upholding the criminal convictions of Mr. Makhlai and determining that he and others had engaged in fraudulent activity at the expense of ToAZ. He submitted that this activity forced the UCCU parties to take steps to try to protect their shareholding. Counsel for Kai also maintained that nothing has been alleged against Kai *"beyond the fact that it participated in the auction and has now obtained the shares and then participated in the EGM"*. Counsel stressed that no case is made that Kai somehow assisted in procuring that the shares were brought into the bankruptcy estate of Mr. Makhlai. Counsel argued that Kai is not a necessary party to the Irish proceedings for the purposes of establishing that Kai was the party who bid and obtained the shares. Counsel said that there was no dispute that Kai applied to the relevant Russian authority for the ability to bid at the auction and that they are now the owner of the shares. In light of the

fact that there was no dispute about that issue, the difficulties that Barniville J. found to be persuasive in the case made against the existing UCCU defendants do not apply either at all or with the same force insofar as the case against Kai is concerned.

54. Counsel for Kai reiterated the case previously made by him in opening the application that the issue as to ownership of the shares has been conclusively decided by the Russian courts. He said:-

> *"What* [counsel for the plaintiffs] *says is 'Well, we, the Plaintiffs, have never brought a conspiracy claim in Russia and we haven't sought damages against anybody in Russia'. But that is to confuse the rubric of a particular cause of action that is framed in the Irish proceedings with the underlying fundamental facts and evidential propositions that have to be established for the purpose of establishing the conspiracy claim and the damages claim. And the fundamental evidential proposition that has to be established to support a claim against KAI is that the Kirillov judgment and, therefore, of necessary, the Samara Court of Appeal judgment and the Court of Cassation judgment are so fundamentally flawed or corrupt or decisions given by biased judges or whatever it may be, that those judgments should be simply disregarded by the Irish Court. Because if those judgments don't suffer from those infirmities then the issue has been conclusively decided as to the ownership, the true ownership of the shares, the fact that Mr. Makhlai, Mr. Ruprecht and Mr. Zivy and their colleagues have been guilty of a massive fraud on this company, that has been conclusively decided in a foreign jurisdiction in the absence of some suggestion that the ultimate appeal court somehow was a judgment that is so corrupt that it should be set aside. And there just is no such case made."*

It will be necessary, in due course, to consider the submissions made on both sides. Before doing so, I should first set out the arguments of the parties on the second issue which was the subject of debate.

The arguments of the parties in relation to the abandonment of the claim by the plaintiffs to ownership of the ToAZ shares

55. As noted above, the second basis on which Kai seeks to distinguish the current position from that considered by Barniville J. is that the plaintiffs are no longer maintaining that they are owners of the ToAZ shares. In making this case, Kai has highlighted the manner in which the application before Barniville J. was previously run. In this context, it is clear from the second amended statement of claim that the plaintiffs claimed to be owners of the relevant shares in ToAZ. This is expressly pleaded in para. 14 to 17 of that statement of claim. That is also the way in which the plaintiffs were described in the affidavits sworn on behalf of the plaintiffs in the course of the proceedings before Barniville J. This is confirmed by the way in which Barniville J., at various points in his March 2022 judgment, refers to the plaintiffs as owners of the ToAZ shares. Kai also drew attention to the manner in which, in a number of affidavits sworn on behalf of the plaintiffs, the deponents stated that the plaintiffs owned 70% of the shares in ToAZ and frequently referred to the shares as *"their shares"*. In contrast, the plaintiffs have, more recently, in a separate application, sought to join additional plaintiffs to the proceedings and to further amend the second amended statement of claim so as to delete the references to ownership of the shares and to replace those references with a statement that the shares were held by the plaintiffs as trust managers. Counsel for Kai argued that there is a very significant difference between an owner of shares and a trust manager of shares. Counsel for Kai, in the course of his oral submissions, suggested that it was extraordinary that the plaintiffs could:-

> *"still ask this Court… to assert a jurisdiction over a foreign defendant who has no connection with Ireland, vis-à-vis a dispute about participation in a Russian auction in a Russian bankruptcy procedure that has no connection with Ireland, for the purpose of asserting ownership rights to the shares in the sense of obtaining the return of the shares, but simultaneously saying we aren't actually the owners and we're not actually going to tell you who the owners are. And somebody else is giving us on instructions and that person is not before the Irish court and that person is not allowing us to disclose to you who he is. But he, through us, nonetheless wants the Court to exercise its discretion to bring before the jurisdiction of the Irish court, this foreign company in Russia who would be entitled to look across the Euros and say, this is a land of which I know nothing, of whose people I know nothing and of whose courts I know nothing and why am I being brought before them? At the behest of people who want to assert rights in shares but won't tell you who is entitled to the rights of* [those] *shares."*

56. Counsel for Kai rejected the suggestion that Kai and the existing UCCU defendants were always aware of the true position in circumstances where they had access to some of the trust management agreements and had the benefit of Russian law advice as to their meaning and legal effect. Counsel argued that, at the time of the hearing before Barniville J., the plaintiffs were still asserting that they were not only trust managers but also owners. In those circumstances, counsel said it was unsurprising that the Russian UCCU defendants had not raised the issue at that stage. He said: *"... we can hardly be blamed, in circumstances where ... we would have said, well they say they're the owners as well and they clearly mean something different by owners to Trust Managers."* He also argued that, in any event, it does not matter that the point was not raised by the Russian UCCU defendants before Barniville J. He argued that it was sufficient that the matter had never been considered as a discretionary factor that went into the *"baking ingredients of the cake"* when the discretionary factors were

considered by Barniville J. Counsel also submitted that it is now a significant discretionary factor for a court, asked to exercise an exorbitant jurisdiction over a foreign defendant *"by people who will not come clean and will not explain who in fact is controlling this litigation"*. Counsel submitted that this was now a *"powerful discretionary factor"*.

57. These arguments were, in turn, rejected by counsel for the plaintiffs. He drew attention to the way in which, in advance of the hearing of the Russian UCCU defendants' jurisdiction challenge, UCCU had made a number of specific statements regarding the status of the plaintiffs as trust managers in the course of the Article 159(4) proceedings. He also referred to the affidavits of James Walfenzao and Karyn Harty sworn in June 2018 on behalf of the plaintiffs in which the plaintiffs' status as trust managers is mentioned. That said, those affidavits also say that the plaintiffs are suing in their capacity as *"**owners** and trust managers"* (emphasis added) of the shares.

58. Counsel for the plaintiffs submitted that the Russian UCCU defendants knew about the trust managers' status of the plaintiffs and chose not to ventilate the issue before Barniville J. Counsel for the plaintiffs also drew attention to the sixth expert report of Mr. Alexander Vaneev, a Russian lawyer practising in Moscow, who referred to a number of provisions of the Russian Civil Code which, he suggested, demonstrates that, as trust managers, the plaintiffs have the right to bring any action in court to protect the property held by them in trust management. Counsel also highlighted that, in the replying evidence of Mr. Vladimir Nikolaevich Melnikov (a Russian lawyer acting as expert on behalf of Kai), he did not significantly seek to challenge what was said by Mr. Vaneev. The furthest he went was to say that:-

> *"there is a view in the Russian judicial practice that the law expressly permits fiduciary managers to bring only actions in rem unless the management agreement provides*

otherwise. I note that the Plaintiffs' management agreements do not provide for the Plaintiffs' right to claim damages of declaratory relief."

59. Counsel for the plaintiffs made clear that he was not suggesting that Kai was estopped from raising the issue as a consequence of the failure of its sister companies to raise the point in the previous jurisdiction hearing before Barniville J. Instead, he submitted that the fact it had not been raised before Barniville J. demonstrates that the point has no merit. He also submitted that the report of Mr. Vaneev demonstrates that it has no merit.

60. In response, counsel for Kai submitted that the plaintiffs were trying to *"reinvent history"* and he highlighted the way in which, in previous applications, the plaintiffs' purported status as *"owners"* was relied upon. Counsel for the plaintiffs continued to maintain that there is an obvious difference between the status of a party as owner of shares and as trust manager of shares. He argued that the plaintiffs have fundamentally shifted their position. Counsel concluded his submissions on this issue by making clear that, insofar as Kai is concerned, the question of the plaintiffs' status is relevant in respect of both aspects of the relevant O. 11 test. First, it was relevant at the initial *"gateway"* point insofar as the application of O. 11, r. 1(h) is concerned. Secondly, it is a matter that goes to the discretion of the court. Insofar as the *"gateway"* point is concerned, counsel maintained that plaintiffs have no standing because they have no proprietary or beneficial interest in the shares. Insofar as the discretion of the court is concerned, he submitted that the failure to explain who has a proprietary interest in the shares is a very significant factor when it comes to the exercise of the discretion of the court on an application of this kind.

<u>Determination of the issues</u>

61. Having outlined the respective submissions of the parties, I now seek to apply the principles explained in the judgment of Barniville J. and to determine the issues on that basis.

Is Kai a proper party to the action against Eurotoaz?

62. The first issue to be determined is whether the case properly falls within O. 11, r.1(h). Is Kai a proper party to the action properly brought against Eurotoaz (being the party duly served within the jurisdiction)? In this context, it has previously been held by Barniville J., that the plaintiffs have demonstrated that they have a good arguable case on the merits as against Eurotoaz and the Russian UCCU defendants and that they have also demonstrated that they have a good arguable case that the Russian UCCU defendants are proper parties to the case made against Eurotoaz. In para. 194 of his judgment (quoted in para. 18 above), he identified that the connecting factors included the circumstances in which it is alleged that UCCU/Mr. Mazepin acquired beneficial ownership of Eurotoaz in December 2011 against the backdrop of UCCU's acquisition of its shareholding in ToAZ in 2008 together with the commencement of the alleged campaign of vexatious litigation by Eurotoaz in 2009 and the subsequent pursuit of the litigation in Russia after December 2011. As noted in para. 195 of his judgment, Barniville J. concluded that, if the Russian UCCU defendants were present in the jurisdiction, they would have been sued alongside Eurotoaz in these proceedings. Barniville J. also accepted that the plaintiffs would proceed against Eurotoaz even if the Russian UCCU defendants were successful in their challenge to the jurisdiction.

63. For the reasons which I have already explained, I believe these findings of Barniville J. must be accepted for the purposes of the present application. But it does not necessarily follow that similar findings can be made in so far as the case against Kai is concerned. It is necessary to separately examine whether Kai is a proper party to the case against Eurotoaz, being the relevant defendant *"duly served within the jurisdiction"*. It is therefore necessary to consider the terms of the case which the plaintiffs make against Kai. In the second amended statement of claim, it is alleged that Kai is a member of the UCCU group and, as noted in para. 11 above, it is specifically alleged that it is wholly owned by Bazovaya which, in turn, is wholly owned

by Mr. Mazepin. In para. 145 of the affidavit of Mr. Jordaan grounding the application to join Kai as a defendant to these proceedings, Mr. Jordaan refers in this context to a note in Kai's financial statements for 2020 which discloses Bazovaya's position as sole shareholder of Kai. In the same affidavit, Mr. Jordaan draws attention to the way in which Mr. Mazepin indirectly owns 95% of the shares in UCCU and is chief executive officer of that company. He also highlights that Kai is included in the list of affiliates of PJSC Uralkali which is owned as to 88.47% by UCCU. This evidence seems to me to establish at least a good arguable case that Kai is ultimately controlled by Mr. Mazepin and that he is accordingly in a position to direct how it should act.

64. The second amended statement of claim also details the steps which have taken place both in this jurisdiction and in Russia since the jurisdiction hearing before Barniville J. These include the judgment of Judge Kirillov in July 2019, the giving of undertakings to the court in these proceedings in March 2019 and March 2021, the revocation of the writs of execution against the plaintiffs in March 2021 and the commencement of enforcement proceedings against the plaintiffs by the Russian court bailiff in the same month. These and other events are also described in detail in Mr. Jordaan's affidavit grounding the application to join Kai to these proceedings and grounding the application under O. 11. It seems to me that Mr. Jordaan's affidavit supports the allegations made in the statement of claim. Moreover, there is no significant dispute between the parties in relation to this element of the claim.

65. It is also alleged in the second amended statement of claim that, in June 2021, Kai (as owner of the 9.75% of the shares in ToAZ), applied to the Russian Federal Monopoly Service (*"FAS"*) for clearance to purchase the plaintiffs shares in ToAZ. In para. 148 of his affidavit, Mr. Jordaan says that the figure of 9.75% coincides with the number of shares formerly held by UCCU in ToAZ although the relevant transfer did not occur until November 2021. In para.

152 of Mr. Jordaan's affidavit, the following connecting factors are identified (and these are also pleaded in the second amended statement of claim):

(a) Kai shares its registered address in Moscow with UCCU and with Uralchem-Trans LLC, an UCCU subsidiary;

(b) Kai is not a well-known or established entity in the fertiliser or chemicals industry or in Russia generally. Its recorded balance sheet position in its 2019 financial statements equates to €3,187 and it has only one employee (its chief executive officer). It is alleged in the second amended statement of claim that, accordingly, it did not have the financial capacity to engage in the purchase of the ToAZ shares and that it can be inferred that it is a *"stalking horse"* for the alleged scheme to wrest control of ToAZ from the plaintiffs;

(c) Mr. Gorshkov, the chief executive officer of Kai has strong links to UCCU and the Uralchem group and was formerly a director of UCCU.

66. The second amended statement of claim (and this is supported by the affidavit of Mr. Jordaan) thereafter describes the way in which the bankruptcy administrator took control of the depository bank and subsequently took control of the plaintiffs' shares in what the plaintiffs allege was an unlawful manner, the auction of the shares in Mr. Makhlai's bankruptcy, the convening of the extraordinary general meetings of ToAZ, the action taken before the Russian Arbitrazh courts in relation to those meetings, the exclusion of the plaintiffs' Russian lawyers from the meetings and the passing of resolutions at the meetings by which the entire board of ToAZ was replaced with UCCU nominees. It is alleged that this is how UCCU gained control of ToAZ and took ownership of the plaintiffs' shares in it. The second amended statement of claim also highlights that, as early as 29 November 2021 (which was two days after the membership of the board was replaced) Mr. Mazepin attended a meeting of the administration, shop managers and the trade union committee of ToAZ despite having no role in ToAZ and

gave assurances to staff about his commitment to positive change within the organisation. The involvement of Mr. Mazepin in this meeting is also addressed in para. 132 of Mr. Jordaan's affidavit.

67. It is further alleged in the second amended statement of claim (and this is also addressed in para. 179 of Mr. Jordaan's affidavit) that Kai could have had no hope of acquiring the shares in ToAZ without the support of UCCU. In light of what is said by Mr. Jordaan in that regard and in light of the evidence described in para. 65(b) above, I am of the view that the plaintiffs have established a good arguable basis for this element of the claim. It seems to me to follow that the plaintiffs have established a good arguable basis for the allegation that Kai's acquisition of the shares is being advanced for the benefit of UCCU and Mr. Mazepin. Given the findings previously made by Barniville J. that the plaintiffs have demonstrated a good arguable case for the alleged conspiracy, it also seems to me to follow that the plaintiffs have established a good arguable case that the acquisition of the shares by Kai represents the culmination of the alleged scheme of conspiracy the purpose of which is to expropriate the plaintiffs' shares in ToAZ.

68. I am, of course, conscious that the plaintiffs' allegations of wrongdoing on the part of the defendants are strenuously denied both by the existing UCCU defendants and by Kai. However, at this stage of the proceedings, I cannot determine, on the basis of the conflicting affidavit evidence before the court, who is right and who is wrong. Any determination of the truth or falsity of the claims made could only be determined at a full trial at which the witnesses on both sides would be cross-examined and all relevant documents would be before the court following discovery. That is why, as Barniville J. has explained, the test to be applied, on an application of this kind, is whether the plaintiffs have established a good arguable case on the merits against Kai and whether the plaintiffs have established a good arguable case that Kai is a necessary or proper party to the case against Eurotoaz. For the reasons summarised in paras. 65 to 67 above, I am of the view that the plaintiffs have established a good arguable case on

the merits that Kai was a party to an alleged conspiracy involving the Russian UCCU defendants to take the shares held by the plaintiffs in ToAZ which is the same alleged conspiracy which is alleged to involve Eurotoaz and in respect of which Barniville J. has already held that the Russian UCCU defendants are proper parties to the case against Eurotoaz.

69. I have not lost sight, in this context, of the *"gateway"* argument made on behalf of Kai that the plaintiffs, as mere trust managers, have no proprietary or beneficial interest in the ToAZ shares and that, accordingly, they have no standing to maintain these proceedings. This is an issue addressed in the sixth report of Mr. Vaneev, the Russian law expert put forward by the plaintiffs whose views are strongly contested in the eleventh affidavit of Mr. Melnikov, the Russian law expert retained by Kai and who has previously submitted evidence on behalf of the existing UCCU defendants. Mr. Vaneev explains that there are three forms of ownership recognised by Russian law in respect of uncertified securities such as the ToAZ shares in issue. These comprise: (a) *sobstvennik* (a person with absolute proprietary rights to the shares); (b) *pravoobladatel* (a person who has the uncertified securities recorded on his personal or depo account) and (c) *vladeletcz* (which is a collective term covering the other two forms). According to Mr. Vaneev, all three of these terms can be translated as *"owner"*. Mr. Vaneev further explains that, under Russian law, trust management does not entail the transfer of absolute proprietary rights to the trust manager but he says that, subject to any limitations in the trust management agreement, Article 1020(1) of the Russian Civil Code gives the trust manager the rights of the person having the absolute proprietary rights over the shares. In para. 17 of his report, he says that, as the ToAZ shares were registered in the plaintiffs' depo accounts opened for them as trust managers, they exercised the ownership rights. He also says in para. 21 of his report that, in light of Articles 1012(2) and 1020(1) of the Russian Civil Code, the trust managers have the right to bring any court action to protect the property transferred into trust management. He also relies on Article 1020(3) of the Russian Civil Code in this context.

In addition, he expresses the view that the plaintiffs should still be able to pursue the claim made by them in these proceedings notwithstanding the fact that the shares have been transferred by Mr. Makhlai's bankruptcy administrator. In para. 33, he expresses the opinion that an involuntary sale/alienation of an asset should not entail termination of the trust manager's right to challenge such sale/alienation in court. Earlier, in para. 29 of his report, Mr. Vaneev maintained that to suggest otherwise would be contrary to the *"very idea of Article 1020(3) ... which enables the trust manager to protect the rights of property held in trust management against any violation."*

70. The approach taken by the plaintiffs is strongly criticised in Mr. Melnikov's eleventh affidavit. He says that Mr. Vaneev's attempt to make use of *"a Russian language nuance"* under which an owner may sometimes be read as embracing a *"possessor"* is a misleading approach. He also makes the point that, when the plaintiffs previously pleaded that they were owners of the shares in the second amended statement of claim, they used that word in its normally understood meaning in English. Mr. Melnikov makes the further point that the issue of the validity of the sale by the bankruptcy administrator was upheld by the Russian courts and that the plaintiffs' appeal was rejected. He suggests that the plaintiffs are attempting to relitigate that issue in Ireland which he says (in somewhat surprising terms for an expert) *"should not be allowed".* While it seems inappropriate for an expert to go that far, I bear in mind that the same point is made by counsel for Kai as part of his submissions and I will therefore deal with the impact of the decisions of the Russian courts at a later point in this judgment when I come to address the O. 11, r. 2 and r. 5 issues.

71. With regard to Mr. Vaneev's views in relation to Article 1020(1) and 1020(3) of the Civil Code, Mr. Melnikov says that there is a view in Russian judicial practice that, in the absence of more extensive powers conferred by the trust management agreement, the law limits the powers of fiduciary managers to bring court proceedings solely to taking actions *in rem.*

He notes that the management agreements here do not purport to entitle the plaintiffs to claim damages or to seek declaratory relief.

72. There is a very significant difference between the views expressed by the Russian law experts on both sides. For similar reasons to those explained at para. 68 above, I am not in a position at this stage to determine who is wrong and who is right. In particular, notwithstanding the trenchant views to the contrary expressed by Mr. Melnikov, I cannot conclude that the views expressed by Mr. Vaneev are plainly wrong. He has put forward his opinion based on his interpretation of the Russian Civil Code. His view is plausible and appears to me to provide a good arguable basis to suggest that the plaintiffs have always had a right to pursue these proceedings notwithstanding that their interest in the ToAZ shares is solely as trust manager. As noted above, Mr. Vaneev has also provided a good arguable basis to suggest that, in their capacity as trust managers, the plaintiffs can, as a matter of Russian law, also be described as owners albeit that they do not have an absolute proprietary interest in the shares. In addition, Mr. Vaneev has put forward a good arguable basis to support a conclusion that the sale of the shares by the bankruptcy administrator does not deprive the plaintiffs of their ability to continue to pursue these proceedings. In those circumstances, it seems to me to follow that I cannot, at this point in the proceedings, accept the submission made by counsel for Kai that the plaintiffs have no standing to maintain these proceedings.

73. So far, I have found that the plaintiffs have established that they have a good arguable case on the merits as against Kai that it was a party to a conspiracy with the existing UCCU defendants to unlawfully take control of the plaintiffs' shares. I have also found that the plaintiffs have a good arguable case that they continue to be entitled to pursue these proceedings notwithstanding the forced sale of the shares. But it is important bear in mind that, for the purposes of O. 11, r. 1(h), the plaintiffs must go further and show that they have a good arguable case that Kai is a proper party to the action properly brought in Ireland against

Eurotoaz. In that context, Barniville J. has already held that Eurotoaz has not been joined in these proceedings solely as a device to secure jurisdiction. In substance, he has therefore found that the action is properly brought against Eurotoaz in this jurisdiction or at least that there is a good arguable case to that effect. For similar reasons to those previously explained by me in respect of other aspects of the judgment of Barniville J., I believe that this finding should be followed by me on the basis of *Worldport* principles. Barniville J. also found that the plaintiffs had made out a good arguable case that the Russian UCCU defendants were proper parties to the case against Eurotoaz for the purposes of O. 11, r. 1(h). In doing so, he identified a number of significant factors to connect the case made against Eurotoaz with the case advanced against the Russian UCCU defendants. It therefore remains for me to consider whether a similar conclusion can be reached for the purposes of O. 11, r. 1(h) in so far as Kai is concerned. Is it also a proper party to the case against Eurotoaz?

74. It is important to keep in mind that Kai is alleged to be a party to the same conspiracy which, according to the case made by the plaintiffs culminated in the events described in paras.65 to 67 above. In para. 6 of the second amended statement of claim, it is alleged that the defendants are led in the alleged conspiracy by Mr. Mazepin. It is also alleged in the same paragraph that the conspiracy involved the bringing of unfounded civil actions and criminal complaints in the name of Eurotoaz against officers of ToAZ and others connected with ToAZ including an allegedly fraudulent claim that Eurotoaz was entitled to the ToAZ shares in issue. Even prior to the joinder of Kai to the proceedings, the statement of claim contained allegations that the purposes of these actions at the suit of Eurotoaz (and other alleged wrongdoing on the part of the defendants) was to ensure that a Russian court would make *"an enormous and unjustified damages award in favour of certain of the Defendants and an order that the Plaintiffs' ToAZ shares be sold to satisfy that award.* ***The Defendants would then ensure that a purchaser owned or controlled by them would purchase the Plaintiffs' ToAZ shares at an***

undervalue"(emphasis added). As noted earlier, that is what the plaintiffs now say has, in substance, transpired as a consequence of: (a) the judgment of Judge Kirillov, (b) the steps taken to enforce that judgment by the Russian court, (c) the bankruptcy of Mr. Makhlai at the behest of UCCU, (d) the steps taken by the bankruptcy administrator to take control of the shares and (e) the sale of those shares by the bankruptcy administrator to a company (Kai) which is controlled by Mr. Mazepin.

75. The role alleged to have been played by Eurotoaz in the alleged conspiracy is addressed further in para. 27 of the second amended statement of claim where it is pleaded that Eurotoaz is controlled by Mr. Mazepin. The basis for this allegation is further developed in para. 81 of the second amended statement of claim. By way of example, it is alleged that in defamation proceedings brought by ToAZ against Eurotoaz in the High Court here in Ireland, an in-house lawyer at UCCU swore an affidavit in which she confirmed that she was familiar with the books and records of Eurotoaz and was in a position to make an affidavit of discovery in those proceedings on its behalf. In addition, it is alleged that, in June 2013, Mr. Mazepin told Mr. Makhlai that he had bought Eurotoaz.

76. It is also pleaded in para. 43 that, among others, both Eurotoaz and the existing UCCU defendants are linked through a common relationship with Mr. Mazepin and that each have played an active role in the alleged conspiracy in pursuit of a common understanding reached with Mr. Mazepin. In paras. 57 to 60, it is alleged that a number of threats were made by or on behalf of Mr. Mazepin that he was prepared to use whatever means possible (including the prosecution of vexatious civil claims and malicious criminal complaints in Russia) to wrest control of ToAZ from the plaintiffs. In para. 63, it is alleged that a campaign of vexatious litigation was commenced by Eurotoaz in July 2009. Particulars of the civil litigation and the criminal complaints are then set out in paras. 64 to 69. In para. 70, it is alleged that Eurotoaz deployed false evidence in support of one of these criminal complaints and this allegation is

developed further in paras. 71 to 73 and in paras. 75 to 80. It is then alleged in para. 74 that similar methods were used by UCCU to support criminal proceedings against ToAZ in connection with the Shareholder List proceedings. In para. 90, it is alleged that the alleged falsity of the claims made by Eurotoaz was known by the eleventh named defendant, Mr. Yevgeniy Yakovlevich Sedykin who it is also alleged to have acted under a power of attorney on behalf of Eurotoaz in advancing the allegedly vexatious litigation and criminal complaints.

77. The second amended statement of claim addresses what transpired in relation to each of the proceedings and complaints brought by Eurotoaz and explains that they were dismissed by the Russian courts. However, in para. 95, it is alleged that, despite the dismissal of the claims, Eurotoaz is continuing its campaign of litigation with further criminal complaints in 2014 and further civil claims in 2015. The Shareholder List proceedings and the Article 159 (4) proceedings (which are both alleged to have been initiated at the behest of UCCU) are then addressed in paras. 99 to 140. In para. 141, it is alleged that Mr. Mazepin and UCCU have also been behind unjustified tax investigations of ToAZ. Some particulars are provided in paras. 142 to 144 of alleged improper pressure placed on individual judges in Russia but Eurotoaz is not specifically identified in that context. In paras. 147 to 155, a case is made that, in furtherance of the alleged conspiracy, Mr. Sedykin was responsible for drawing up a series of false documents in November 2015 purporting to evidence the holding of board meetings of ToAZ which never took place and the passing of board resolutions to recognise Eurotoaz as the owner of shares in ToAZ to which it had no entitlement. It is specifically alleged in para. 155 that all of these steps were undertaken by Mr. Sedykin on behalf of Mr. Mazepin and/or UCCU. Thereafter, the second amended statement of claim addresses what is alleged to be the improper joinder of the plaintiffs to the civil damages claim contrary to Russian law for the purposes of obtaining a money judgment that could then be executed against the ToAZ shares. The judgment of Judge Kirillov is pleaded; the undertakings given to the High Court here are

described and the subsequent steps taken by Judge Kirillov to revoke the execution order are all addressed. The role alleged to have been played by Kai is then set out and it is alleged that the auction of the shares was based on a false pretext and was unlawful. As noted earlier, this is all alleged to be a part of the same conspiracy which had (so it is alleged) the object of wresting the ToAZ shares from the plaintiffs. This is alleged to have been the shared aim of all of the defendants in carrying out the individual wrongful acts allegedly performed by them as pleaded in the statement of claim.

78. It is true that the alleged involvement of Kai in the alleged conspiracy is at a later point in the chronology than the alleged involvement of Eurotoaz but, in the context of the tort of conspiracy, it is at least arguable that the conspirators need not all join at the same time. The conspiracy alleged in the second amended statement of claim is claimed to have taken place over a relatively lengthy period running from at least 2008 and culminating in the acquisition of the shares in 2022. It is not alleged that all of the defendants were involved in every individual wrongful activity but it is alleged that they all combined together in seeking to secure the same ultimate end, namely the acquisition of the shares by a party controlled by Mr. Mazepin. On the basis of the affidavit evidence before the court and the case made in the statement of claim, I believe that the plaintiffs have made out a good arguable case that both Eurotoaz and Kai are parties to the same alleged conspiracy to injure the plaintiffs by taking the ToAZ shares from them by means of the various allegedly malicious or wrongful steps described in the statement of claim. In expressing that view, I bear in mind the finding previously made by Barniville J. in para. 194 of his judgment that the plaintiffs have pointed to significant factors to connect the case being made against Eurotoaz with the case made against the Russian UCCU defendants. I also bear in mind the findings previously made by me in para. 67 above that the plaintiffs have established a good arguable case that Kai's acquisition of the shares was for the benefit of UCCU and Mr. Mazepin and that the acquisition represents

the culmination of the alleged scheme of conspiracy. The latter findings plainly involve a strong connecting factor between the case previously made against the Russian UCCU defendants and the case now made against Kai. Given the connecting factors between the case against Eurotoaz and the case against the Russian UCCU defendants, on the one hand, and the connecting factors between the case against UCCU/Mr. Mazepin and the case against Kai, on the other hand, there is an obvious connecting factor linking the case against Kai with the case against Eurotoaz. While Kai and Eurotoaz are alleged to have been involved in different aspects of the alleged conspiracy, they are both alleged to be party to the same conspiracy and the common object of the acts alleged against them was to procure or to assist in procuring that control of the shares in issue would pass to Mr. Mazepin or a company controlled by him. The methodology alleged to have been used by Eurotoaz (namely the bringing of what is alleged to be malicious complaints and unfounded litigation) is also strikingly similar to that alleged to have been adopted by the Russian UCCU defendants with whom I have held there is at least an arguable case that Kai was working in tandem.

79. In light of the considerations identified in para. 78 above, it seems to me to be self-evident that, if Kai was within the jurisdiction, it would undoubtedly have been joined as a co-defendant to the case made against Eurotoaz. The fact that Kai was involved in a different element of the conspiracy to Eurotoaz would make no difference. As Barniville J. noted in para. 192 of his judgment, the observations of Clarke J. in para. 45 of his judgment in the *IBRC* case are relevant. In that case, the relevant defendant, Mecon, was incorporated in Dubai. Mecon was alleged to be party to a broad conspiracy or plan to place assets charged in favour of IBRC beyond its reach so as to frustrate IBRC's attempts to realise the assets in discharge of debts secured on those assets. Mecon was alleged to have been involved in the conspiracy solely in relation to one category of assets namely shares held in a company incorporated in India which owned a valuable property asset in Hyderabad. The overall conspiracy alleged was much more

extensive and involved a considerable number of parties. Nonetheless, Clarke J. observed at para. 45: *"... it is difficult to see how a credible argument could be put forward to suggest that sub-rule (h) ... is not met. As noted by the trial judge the overall claim brought against the various defendants ... relates to an allegation of a broad conspiracy ... to place assets beyond the reach of IBRC ... The specific allegation against Mecon is that the share transfer involving Mecon formed part of that general conspiracy ... Whether that is so is a matter for the trial. Given that Mecon allegedly formed a central part **of at least one aspect of that plan** ... then it is very difficult indeed to see how Mecon could not be regarded as a proper party to these proceedings generally in circumstances where the proceedings have been properly brought against at least some of the defendants who are undoubtedly within and amenable to this jurisdiction."* (emphasis added).

80. Likewise, in the context of the conspiracy alleged by the plaintiffs here, I am of the view that Kai is a proper party to the case in conspiracy brought against Eurotoaz and that, accordingly, the case against Kai falls within the ambit of O. 11, r. 1(h).

Is Ireland the appropriate forum in which to try the case against Kai in the interests of all the parties and the ends of justice?

81. That does not dispose of the matter. There is a further hurdle that the plaintiffs must surmount. They must establish, to the good arguable standard, that the case against Kai is a proper one for service out of the jurisdiction within the meaning of O. 11, r. 5. This, in turn, involves a consideration of the factors outlined in O. 11, r. 2. The plaintiffs must show, again to the good arguable standard, that Ireland is the appropriate forum for the hearing of the case against Kai such as to justify the court exercising its discretion under O. 11, r. 2 to permit the proceedings to proceed in this jurisdiction. The relevant test has already been described in paras. 20 to 22 above; is Ireland the appropriate forum in which the case against Kai can be more suitably tried in the interests of all partis and the interests of justice.

82. As noted in paras. 32 to 40 and 52 to 53 above, Kai argues that there is no plausible basis on which the court could conclude that Ireland is the appropriate forum in which to litigate the case against it. Kai submits that, in contrast to the position when the Russian UCCU defendants' challenge was heard by Barniville J., the proceedings in Russia have now progressed to a conclusion. The plaintiffs chose to participate in those proceedings and could not now credibly argue (as they had previously done before Barniville J.) that they could not bring their claim in the Russian courts. Moreover, the issues of the fairness of the proceedings before Judge Kirillov and the lawfulness of the sale of shares have now been definitively determined against the plaintiffs in the Russian courts. Kai argues that, accordingly, the issue of fragmentation now weighs in favour of Russia. Furthermore, comity now looms much larger than it did before Barniville J. The Russian proceedings are no longer pending (as they had been at the time of the hearing before Barniville J.) The appeal process has been wholly exhausted in so far as findings of Judge Kirillov are concerned and is largely completed in relation to most of the other issues. Kai has also emphasised that the plaintiffs have placed no expert evidence before the court criticising the decision of the Russian Court of Cassation upholding the findings of Judge Kirillov. Against that backdrop, Kai maintains that it would be wholly improper for an Irish court to effectively review the court processes of a foreign sovereign country and that, to do so, would involve the usurpation of the sovereignty of another State. As noted in para. 37 above, counsel for Kai has submitted that the reality is that the plaintiffs do not like the outcome of the Russian court proceedings and that they are shopping around for another jurisdiction in which to relitigate the issues. Kai contends that it does not matter for this purpose that the cause of action (i.e. conspiracy) in the Irish proceedings has not been raised by the plaintiffs in the Russian proceedings. Kai argues that the key allegations underlying the conspiracy claim have been conclusively determined in Russia. The Russian courts have upheld the fairness and lawfulness of the proceedings before Judge Kirillov. Those

courts have also determined the issues relating to ownership of the shares and the lawfulness of the extraordinary meeting of the ToAZ shareholders and the lawfulness of the sales process undertaken by Mr. Makhlai's bankruptcy administrator. Thus, for example, the order sought in these proceedings for the return of the shares directly conflicts with the order made by the Russian courts upholding the auction process.

83. Kai has also made the case that the refusal of Irish jurisdiction in respect of the case against it will not affect the plaintiffs' ability to pursue their case against the remaining defendants. The plaintiffs will be able to rely on the record of the proceedings before the Russian courts (including all of the documentary evidence placed before those courts) and will not need to cross-examine witnesses or seek discovery; the record will speak for itself.

84. In addition to the *"forum shopping"* arguments summarised in paras. 82 to 83 above, Kai also maintains that, as noted in paras. 55 to 56 and 60, the fact that the plaintiffs are no more than trust managers of the shares represents a significant new factor that was not revealed to Barniville J. and now alters the equation in favour of refusing jurisdiction. Counsel for Kai said that it was extraordinary that the plaintiffs would seek to assert jurisdiction in respect of a claim to a return of shares (which they do not own) against a foreign defendant who has no connection with Ireland while, at the same time, refusing to disclose the identity of the true owner of the shares.

85. The countervailing arguments put forward by the plaintiffs have been summarised in paras. 42 to 52 and 57 to 59 above and it is unnecessary to repeat them here. But it is always important to keep in mind that the burden of proof lies on the plaintiffs albeit that they do not have to go further than the standard of good arguability. It is also, of course, necessary to bear in mind that the court must exercise caution in any case where it is sought to secure Irish jurisdiction against a foreign defendant and that the court should carefully consider all relevant factors (in particular those factors enumerated in O. 11, r. 2) in any determination as to whether

or not, in the interests of all parties and in the interests of justice, Ireland is the appropriate forum to hear and determine the claim against that defendant.

86. As Barniville J. observed at para. 296 of his judgment, the vast majority of the factors in play in these proceedings point in the direction of Russia as the appropriate forum. Virtually all of the relevant events occurred in Russia. Most of the witnesses are likely to be Russian: many of them are based in Russia (at least on the defendants' side). Most of the documents are in the Russian language. Many of the issues require evidence to be given as to Russian law and as to Russian civil and criminal procedure. Those considerations apply with somewhat greater force in respect of Kai. Its involvement in the proceedings will require some additional Russian evidence to be given that was not contemplated at the time Barniville J. heard the equivalent application by the Russian UCCU defendants. This will involve evidence as to the various court proceedings, applications and appeals that have taken place in Russia since then and the extent of the active participation of the plaintiffs in those matters. These include the action taken by the court bailiff at the direction of Judge Kirillov, the attempts by the parties to overturn that direction, the appeals to the Court of Appeal and the Court of Cassation, the bankruptcy proceedings against Mr. Makhlai, the steps taken by his bankruptcy administrator in relation to the shares and the legality (or otherwise) of those steps, the sale of the shares, the court action taken to stop that sale, the related appeals, the steps taken in relation to the holding of the general meeting of ToAZ shareholders and the court action taken in relation to the holding of that meeting. Thus, there is an even higher preponderance of factors pointing in the direction of Russia now than there was at the time the previous application was heard by Barniville J.

87. Nevertheless, the countervailing factors identified by Barniville J. seem to me to still carry significant weight in favour of Irish jurisdiction in so far as the claim against Kai is concerned. These include the fragmentation of the conspiracy claim in the event that the case against Kai cannot be made in the same set of proceedings as the claim against all of the

remaining alleged conspirators. In this context, for the reasons explained in more detail below, I do not accept that the issue of fragmentation now weighs against Ireland as the appropriate forum. I appreciate that, in light of the decisions taken by the Russian courts in the intervening period, it may be fanciful to think that the plaintiffs could maintain a conspiracy claim against Kai in Russia. On that basis, the factors outlined in para. 305 of Barniville J.'s judgment may no longer apply. However, the factors identified by Barniville J. in paras. 306 to 308 of his judgment continue to apply with at least the same force as against Kai as they did against the Russian UCCU defendants. These include: (a) the potentially very serious implications arising under the Civil Liability Act 1961 from the absence of a concurrent wrongdoer as a defendant; and (b) the inability of the plaintiffs to obtain non-party discovery against Kai notwithstanding that discovery may be very important in seeking to prove the plaintiffs' case that the steps taken by Kai to acquire the shares were done on behalf of Mr. Mazepin/UCCU. In addition to the factors identified by Barniville J., there is a further factor which seems to me to be particularly relevant in the context of Kai. The denial of the ability to pursue Kai in these proceedings would mean that, even if they were successful in their proceedings as against the remaining defendants, the plaintiffs would lose the opportunity to secure effective relief in relation to the loss of the shares. While the plaintiffs would be able to obtain declarations and damages against the remaining defendants, they would be unable to obtain an order against the holder of the shares for the return of those shares. The fact that Kai is now the holder of the shares in ToAZ seems to me to be a particularly strong factor which weighs in favour of Ireland as the appropriate forum in which to try the case against Kai. If the plaintiffs are correct in their contention that the steps taken by Kai represent the culmination of the conspiracy, the absence of Kai from the proceedings against the other alleged co-conspirators would be striking. In the interests of all parties, there is obvious merit in having all alleged co-conspirators pursued in a

single set of proceedings. To paraphrase Lord Goff in *Spiliada,* there is a strong case to suggest that this must be in the interests of all parties and that it promotes the doing of justice.

88. In addition to the factors summarised in para. 87 above, the further factors outlined by Barniville J. in paras. 311 to 320 of his judgment also continue to apply. If the plaintiffs were to bring a claim in Russia against Kai in respect of its role in the alleged conspiracy (assuming that such a claim is possible), the claim would be subject to all of the very significant disadvantages described by Barniville J. in the context of a claim in Russia against the Russian UCCU defendants. These include the fact that key witnesses for the plaintiffs would be unable to travel to Russia for a trial and there is no real possibility of their evidence being given remotely. Both Haughton and Barniville J.J. have found this to be a very significant factor pointing to the appropriateness of an Ireland as the proper forum. In this context, I reject the argument made on behalf of Kai that the case could readily proceed against the existing defendants in this jurisdiction in Kai's absence and that its role could be decided by reference to the documentary evidence in the Russian proceedings. In my view, that argument fails to take account of the fact that Kai is now the holder of the shares and that it therefore constitutes a key defendant in relation to the relief sought to remedy the wrong done by the alleged conspiracy – namely the order sought for the return of the shares. In the event that the plaintiffs succeed in their case, that is the only form of relief that is capable of restoring the plaintiffs to their previous position as majority shareholders in ToAZ with all of the powers of control that such a position carries. Kai's argument also fails to take account of the important role that discovery is likely to have in revealing the nature of the role played by Kai and in deciding whether the plaintiffs are wrong or right in their contention that the acquisition of the shares was the culmination of the alleged conspiracy. For similar reasons, cross-examination of witnesses will also assist in relation to those issues. Thus, the procedural limitations in Russia described by Barniville J. in paras. 316 to 320 of his judgment (namely the absence of discovery

and the significant restrictions on cross-examination) are equally relevant to the case against Kai as they were to the case against the Russian UCCU defendants.

89. In my view, the factors outlined in paras. 87 to 88 above plainly outweigh the considerations identified in para. 86 and clearly demonstrate that, if these were the only relevant matters to be taken into account, Ireland would be the appropriate forum to try the case against Kai by reference to the *Spiliada* test as approved in Ireland in *Worslade* and *Analog Devices*. But, as summarised in paras. 82 to 84 above, Kai relies on a number of additional factors which it contends decisively shift the balance against Ireland.

90. Kai points first to the way in which the plaintiffs chose to participate in the proceedings before the Russian courts and initiated their own applications and/or appeals to a number of those courts. Kai says that this completely undermines the case previously made to Barniville J. that the plaintiffs could not bring their claim before the Russian courts. I cannot accept this argument. It does not follow that, because the plaintiffs have been able to pursue a number of applications or appeals before the Russian courts or to defend steps taken against them there, they can likewise pursue the claim made in these proceedings in those courts. The claim that is made in these proceedings will require the evidence of a number of key witnesses who Barniville J. has held would not likely be able to attend a trial in Russia. This is addressed in paras. 311 to 315 of his judgment. These witnesses include Mr. Sergei Makhlai, his father Mr. V. Makhlai, Mr. E Koralev, Mr. Andreas Zivy and Mr. Beat Ruprecht. The second amended statement of claim readily demonstrates why their absence would significantly undermine the plaintiffs' ability to prove their case at trial. It is an inherent element of the plaintiffs' case that threats were made by Mr. Mazepin and Mr. Konyaev in 2012 and 2013 that Mr. Mazepin wished to acquire control of ToAZ and that, for this purpose, ToAZ would find itself beset with criminal complaints and consequential claims for compensation which would ultimately lead to the forced auction of its assets and bankruptcy and, furthermore, that criminal proceedings

would be initiated against Mr. Sergei Makhlai and others. These threats are addressed in paras. 57 to 61 of the second amended statement of claim. The threats are alleged to have been made on a number of occasions in 2012 and 2013 to Mr. Zivy, Mr. Ruprecht and Mr. Sergei Makhlai. It will be immediately seen that these alleged threats are an important element of the conspiracy claim which is expressly pleaded in paras. 54 and 56 of the second amended statement of claim as a conspiracy to injure the plaintiffs. In order to succeed in that element of the plaintiffs' claim, it is necessary to prove that there was an intention to injure the plaintiffs. Thus, the evidence of Messrs. Zivy, Ruprecht and Makhlai will be key to the pursuit of the conspiracy claim. As Barniville J. has already held, it is unlikely that they can travel to Russia for this purpose. Their absence would create a very significant impediment to the plaintiffs' ability to prove their case in Russia. In these circumstances, I do not believe that the position has changed in any significant way since the hearing before Barniville J. and I therefore do not accept that the plaintiffs' participation in the proceedings in Russia in the intervening period alters the balance in favour of Ireland as the appropriate forum in which to try the case against Kai.

91. Next, Kai argues that the proceedings in Russia have now progressed to a conclusion and that the fairness of the process before Judge Kirillov has been upheld and the lawfulness of the sale of shares has been definitively decided against the plaintiffs. On that basis, Kai submits that the issue of comity is now of much greater importance than it was at the time of the hearing before Baniville J. I accept that, in cases of this kind, comity is a relevant factor. That was made clear by Fennelly J. in *Analog Devices* at p. 281. As Fennelly J. explained, that is why the court dealing with an application under O. 11 is required to proceed with caution. Indeed, it explains why O. 11 imposes significant evidential and legal requirements on any applicant seeking leave to serve proceedings outside the jurisdiction. In the words of Fennelly J., the *"international comity of courts have long required ... that our courts examine such applications with care and circumspection."* However, while care and caution are required,

comity does not represent an absolute bar on the maintenance of proceedings here against a foreign defendants even where the courts of another country have already rendered a judgment in relation to the case. This issue is addressed by Barniville J. in paras. 225 to 249 of his judgment. This part of his judgment addresses an argument made by the Russian UCCU defendants that the plaintiffs were prohibited by the *"act of state"* doctrine from making allegations in these proceedings about the propriety or legality of orders made by the Russian courts or other steps taken by those courts and it also addresses an alternative argument that the allegations offended the comity principle such that this could not be said to be a *"proper"* case for the purposes of O. 11, r. 5. Barniville J. pointed out that, while there was U.S. authority for the proposition that foreign judicial decisions constituted *"acts of state"* such that they could not be questioned in domestic courts, there was a significant body of U.K. decisions to the contrary. On the basis of those U.K. authorities, Barniville J. made clear at para. 231 of his judgment that an Irish court is not absolutely precluded from considering allegations of impropriety or improper conduct against foreign courts. Among the authorities cited by him was the decision of the Court of Appeal of England & Wales in *Yukos Capital Sarl v. OJSC Rosneft Oil Co. (no. 2)* [2014] QB 458. At p. 494 of the report, Rix L.J. explained that, in general, comity requires that the validity of the legislative or executive acts of a foreign state acting within its own territory should not be the subject of adjudication in the English courts. But he added that the position is different in so far as judicial acts of a foreign state are concerned. In the case of such acts, comity only cautions that such acts should not be challenged in the English courts without cogent evidence.

92. It seems to me to follow that the court cannot properly determine, at this stage of the proceedings, whether comity will ultimately prevent the plaintiffs from challenging the decisions of the Russian courts. In accordance with the authorities, the court, at this stage of the proceedings, is required to deal with the issues on the basis of a test of good arguability. It

is not involved in testing the cogency of the evidence or in assessing whether the plaintiffs evidence is sufficient to overcome the application of the comity principle. Those are matters to be explored at a later stage of these proceedings and Kai's right to rely on comity is unaffected by any decision reached by me on this application under O. 12, r. 26.

93. Against that background, I do not believe that it is fatal to the plaintiffs' position that they have not placed evidence before the court criticising the decision of the Court of Cassation upholding the judgment of Judge Kirillov and the judgment of the Samara Court of Appeal. Moreover, it is clear from the seventh report of Mr. Vaneev and Ms. Alferova (to which I have previously referred in para. 43 above) that there is expert evidence to support the plaintiffs' case that the Samara Court of Appeal ignored what are alleged to have been material breaches of procedure by Judge Kirillov leading to alleged significant unfairness in the process. Given the expert evidence that these alleged deficiencies were not remedied by the decision of the Court of Appeal upholding the approach taken by Judge Kirillov, it would appear to follow that the decision of the Court of Cassation upholding the approach taken by the Court of Appeal must likewise have left these alleged deficiencies unremedied.

94. The fact that the Russian courts have definitively determined a large number of issues against the plaintiffs gives rise to a further argument strongly made on behalf of Kai – namely that the plaintiffs are now bound by these decisions and cannot argue to the contrary in these proceedings. Kai also submits that it makes no difference in this context that the cause of action asserted by the plaintiffs in these proceedings is framed differently to the grounds of relief on which the plaintiff relied in the various Russian proceedings. These may well prove to be significant points at a later stage of these proceedings. There is authority for the proposition that issue estoppel can arise as a consequence of decisions taken by foreign courts. For example, it was held by a majority of the House of Lords in *Carl Zeiss Stiftung v. Rayner & Keeler (No. 2)* [1967] A.C. 853 that issue estoppel may arise where a number of conditions are

met. In broad terms those conditions are: (a) that the foreign court was a court of competent jurisdiction in relation to the party against whom the estoppel is asserted, (b) that the judgment was final and conclusive and decided on the merits, (c) that the parties to the domestic proceedings are the same as those before the foreign court, and (d) that the issues which arise in the domestic proceedings must equate with those decided by the foreign court.

95. However, I am of the view that it would be premature at this stage to express any view on the extent to which the issues decided by the Russian courts now bind the plaintiffs in so far as identical issues arise within the ambit of these proceedings in Ireland. Any decision on estoppel could only be made after more extensive evidence and after hearing full argument as to whether or not the *Carl Zeiss* criteria (or any other relevant criteria) have been met. It could not be made in the context of an application under O. 12, r. 26 or on the basis of the very limited argument on the issue made in the course of this application. Thus, it is not possible at this point to reach any conclusion on Kai's submission that the plaintiffs are engaged in forum shopping and that they are seeking to illegitimately relitigate the issues already determined against them in the Russian courts. Kai will, of course, be free to raise those points at an appropriate point in these proceedings.

96. That does not dispose of all of the arguments made by Kai in respect of the consequences which are said to flow from the extensive decisions made by the Russian courts. As previously noted, Kai also makes the case that those decisions now tilt the issue of fragmentation in the direction of Russia rather than Ireland. I have already said that I do not accept that argument. I will now explain why I have reached that view. It is clear from the case law that, in considering which is the appropriate forum for the purpose of trying proceedings against a foreign defendant, the court will look not only at the position of the individual foreign defendant but the interests of all parties and the interests of justice. It is also clear from the judgment of Clarke J. in the *IBRC* case that the potential for fragmentation of the plaintiff's

claim is a relevant factor in that context. In his judgment in that case, Clarke J. referred to the observation made by the authors of the 15th edition of *Dicey, Morris & Collins,* at p. 553, to the effect that, in carrying out an assessment of the appropriateness of a forum, the court should take into account *"whether the claim is part of a larger overall dispute which would be damaged by being fragmented."* The weight to be accorded to fragmentation will vary from case to case and Clarke J. emphasised that it should not be given a disproportionate weight. Nonetheless, in the particular circumstances of the case of conspiracy alleged in the *IBRC* case, he held that the case would be significantly impaired by fragmentation. In reaching that view, he explained, at p. 224, that it was part of IBRC's case that inferences could be drawn from the actions of each of the individual defendants as to the overall intent to injure IBRC. It is easy to see that the absence of the Dubai defendant, Mecon, from the proceedings would undermine IBRC's ability to draw those inferences.

97. Similarly, in this case, I believe that the fragmentation that would arise as a consequence of declining jurisdiction against Kai is readily apparent. As previously noted, it is now the holder of the shares. Thus, on the basis of the plaintiffs' case, Kai is the party who has taken the fruits of the conspiracy to injure the plaintiffs. According to the plaintiffs, the steps taken by Kai to acquire the shares represents the culmination of the alleged conspiracy and give concrete effect to the alleged threats by Mr. Mazepin and others, which have been pleaded from the outset. It has also been part of the plaintiffs' case from the outset that the methods used by the defendants were intended to ensure that a Russian court would make an allegedly unjustified damages award and an order that the shares be sold to satisfy the award. Kai's absence as a defendant would therefore be particularly significant in the context of the case made in these proceedings. It would leave the plaintiffs with a case against the alleged co-conspirators but, as noted in para. 88 above, without the ability to seek redress in the same set of proceedings in respect of the final act giving effect to the alleged conspiracy, namely the

taking of the shares into Kai's name. In my view, this illustrates why fragmentation is a factor to which significant weight must be given in the particular circumstances of this case and it also illustrates why the spectre of fragmentation continues to weigh in favour of Ireland as the appropriate forum to try the case against Kai.

98. I have not lost sight of Kai's argument that the extensive applications, proceedings, orders and judgments which have arisen in Russia mean that the issue of fragmentation should now be seen as pointing towards Russia as the more appropriate forum. In substance, Kai says that the Russian proceedings have already progressed to a conclusion and that the Russian courts have already decided the key issues involving Kai such that I would lead to very real fragmentation if the conspiracy claim against it is now to be pursued here. However, that argument presupposes that all of the relevant decisions taken by the Russian courts should be treated as valid and binding on the plaintiffs in respect of the conspiracy claim. As I have previously explained, I cannot determine on this application under O. 12, r. 26 whether that is so or not. A very careful analysis would have to be carried out by reference to the *Carl Zeiss* criteria (discussed in para. 94 above) before any such conclusion could be reached. That is a matter for a later stage of these proceedings. I cannot therefore presuppose that the plaintiffs are bound by those decisions. Furthermore, for the reasons outlined in para. 90 above, I have come to the conclusion that it is likely that key witnesses for the plaintiffs could not travel to Russia to give evidence there in support of a conspiracy case against Kai in that jurisdiction. This means that, in reality, the plaintiffs would not be able to pursue a conspiracy claim against Kai there. Thus, it is fanciful to characterise the upholding of Irish jurisdiction against Kai as giving rise to fragmentation of the proceedings in Russia. Moreover, the only jurisdiction in which conspiracy proceedings are in being is in Ireland and, accordingly, fragmentation is only relevant in the context of the proceedings here. I have already identified in para. 97 above why I believe that the spectre of fragmentation favours Ireland as the appropriate forum in which

the conspiracy claim can be pursued against all of the alleged co-conspirators including Kai as the recipient of the fruits of the alleged conspiracy.

99. For all of the reasons discussed in paras. 81 to 98 above, I have come to the conclusion that Ireland is the appropriate forum where the claim against Kai can most suitably be tried in the interests of all parties and the interests of justice.

Kai's contention that the court should, in the exercise of its discretion, decline jurisdiction on the basis that, contrary to the case made before Barniville J., the plaintiffs are not owners of the shares but are merely trust managers

100. As discussed in paras. 56 to 57 above, counsel for Kai also argues that, in the exercise of the court's discretion under O. 11, the court should decline jurisdiction against Kai in circumstances where it is no longer contended by the plaintiffs that they are owners of the ToAZ shares (in the sense in which ownership would be understood in Irish law) and where it is now accepted that they are trust managers. Counsel for Kai made the case that this represents a significant discretionary factor that should be taken into account. I accept that it should be taken into account at least to the extent of considering whether the plaintiffs in their capacity as trust managers can be said to have an arguable case to pursue the claim against Kai and the other defendants in respect of the alleged conspiracy and for the relief claimed. Having regard to the principles discussed in the judgment of Barniville J., this is plainly an issue which is relevant under O. 11.

101. As explained in paras. 69 to 72 above, I have come to the conclusion, on the basis of the report from Mr. Vaneev, that the plaintiffs have established a good arguable basis for their case that, in their capacity as trust managers, they continue to have the right to pursue each of the claims made in these proceedings. This includes their claim to an order against Kai for the return of the shares. In para. 26 of his report, he says that, as the plaintiffs are the persons *"from whose accounts the shares were illegally transferred to KAI's accounts, the Plaintiffs are*

entitled to claim them back. Thus, Russian law definitely requires the Plaintiffs' interest in preventing the loss of the shares and in claiming them back ...". While Mr. Vaneev's views are generally contested by the defendants' experts, those differences of view cannot be resolved on an application of this kind. It is therefore clear that the plaintiffs have established an arguable case that they are entitled to pursue the claim against Kai and the remaining defendants notwithstanding that they are not owners of the shares in the way in which ownership would be understood as a matter of Irish law.

102. Nonetheless, Kai has maintained that there are strong discretionary factors that justify the court in declining jurisdiction. Kai has argued that it is extraordinary that, notwithstanding the abandonment of the claim to ownership of the shares in the terms advanced in the second amended statement of claim, the plaintiffs would still ask the court to assert a jurisdiction over Kai which has no connection with Ireland in respect of events that occurred entirely in Russia. It is further contended that this is particularly so in circumstances where the plaintiffs will not tell the court who the real owners are. It was submitted by counsel for Kai that the *"failure"* to identify who has the proprietary interest in the shares should rank as a very significant factor in the exercise of the court's discretion.

103. I do not believe that the court should decline jurisdiction on discretionary grounds of the kind suggested by Kai. While I would not exclude the possibility that the court, in an appropriate case, might properly decline jurisdiction on grounds relating to the conduct or *bona fides* of a plaintiff, I believe that the discretion of the court under O.11 is generally exercised solely by reference to the factors identified in O.11, r. 2 and r. 5 and in the case law discussed in the judgment of Barniville J. There is nothing to suggest that, for example, the court's discretion under O. 11 is equivalent to that which governs the grant of equitable relief. Certainly, I was referred to no authority that supports the existence of an equivalent discretion under O.11.

104. I appreciate that it is puzzling that the plaintiffs should have prosecuted these proceedings up to recently on the basis of the pleaded case that they were, without any qualification, *"owners"* of the shares. But the fact remains that, on the basis of Mr. Vaneev's report, they have an arguable basis to continue to maintain the proceedings even in the lesser capacity of trust managers. Given that they continue to have an arguable basis to maintain the proceedings, they plainly satisfy the applicable test. In those circumstances, in the absence of any authority to suggest otherwise, I cannot see any proper basis on which to decline jurisdiction on this ground. That is not to say that the issues raised by Kai may not be relevant at a later stage of the proceedings. Along with the other defendants, Kai will have the opportunity in these proceedings to seek discovery of documents and to cross-examine the plaintiffs' witnesses and to explore at trial any issues which may affect the plaintiffs' entitlement to any of the relief claimed. Nothing I have said in this judgment is intended to cut across the defendants entitlement to do so.

Conclusion

105. For all of the reasons discussed in paras. 62 to 104 above, I will dismiss the application made by Kai under O. 12, r. 26 seeking to set aside the order made on 25th January 2022. I will list the matter before me on a hybrid basis on Wednesday, 3 May 2023 at 10.30 a.m. for the purposes of dealing with costs and any other issues that may arise under this judgment.

Practice direction HC 101

106. Finally, in accordance with the above practice direction, I direct the parties to file their respective written submissions (subject to any redactions that may be permitted or required under the practice direction) in the Central Office within 28 days from the date of electronic delivery of this judgment.