Anatolie Stati & ors v The Republic of Kazakhstan

Day 1

March 26, 2018

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Monday, 26 March 2018

(10.30 am)

(Proceedings delayed)

(10.40 am)

MR JUSTICE KNOWLES: Good morning.

MR MALEK: Good morning.

MR JUSTICE KNOWLES: Can I just mention that I am joined by colleague on the bench who is here for the purpose of observation only and will take no part in the decision-making, but of course he's most welcome.

MR MALEK: Most welcome from the Bar as well.

MR JUSTICE KNOWLES: Thanks.

Application by MR MALEK

MR MALEK: Your Lordship knows the representation in this case. I appear with my learned friends Mr Harris, Mr Wee and Mr Kennelly, and my learned friends Mr Sprange and Mr Bhalla appear on behalf of the Statis.

So far as the materials are concerned, your Lordship should have the bundles. There have been a couple of additional statements over the weekend bringing you up-to-date on the DC proceedings.

MR JUSTICE KNOWLES: Yes, I have read those quickly if that helps.

MR MALEK: Yes. Your Lordship should also have two skeletons from us, one on Wednesday and one on Friday.

MR JUSTICE KNOWLES: Yes, thank you.

MR MALEK: And a skeleton from my learned friends. There is also a chronology from our side. Then there was another document that we handed up, or passed to your Lordship's clerk this morning, annex 1 updated. Do you have that one?

MR JUSTICE KNOWLES: Yes, thank you, but not in hard copy.

MR MALEK: Yes. If I can hand that up now.

MR JUSTICE KNOWLES: In fact, I haven't got any of the material over the week end in hard copy, so ...

MR MALEK: Okay, we will make sure that is done, but if I could just hand that up now. (Handed)

MR JUSTICE KNOWLES: Thanks.

MR MALEK: I don't know if your Lordship had time to look at it but what we have done is just add another column to set out our position.

MR JUSTICE KNOWLES: Thank you.

MR MALEK: There are bundles of authorities from both sides and a transcript is being taken, and so far as timing is concerned, I have discussed this with my learned friend and, subject to anything that your Lordship has going say, we are going to divide up the time today.

MR JUSTICE KNOWLES: Okay.

MR MALEK: So I will be finishing about 12.30, and reserving a bit of time for a reply. That is how we propose to

deal with it.

MR JUSTICE KNOWLES: Thank you.

MR MALEK: As far as the structure of my argument is concerned, I am going to break it down into six parts. First of all, a short overview of the issues. Secondly, to look at the procedural background, looking at the English proceedings and the various foreign proceedings. The third topic is the Notice of Discontinuance, to look at the reasons as to why that has been issued. Then the fourth topic is whether or not the State of Kazakhstan has a freestanding claim which is unaffected by the Notice of Discontinuance. Then the fifth point is whether the court should make an order setting aside the Notice of Discontinuance. Then the last topic is costs, although I suspect by the time I get to that your Lordship might feel that that might be better left for later.

There is also one other point that is floating around, which concerns the status of the documents that we have received, whether or not we are free to use them, but I will deal with that point shortly if it remains in dispute.

So far as the introduction is concerned, there is really very little to say, because your Lordship knows that the main issue for the court is whether there

should be a trial of the fraud issue that was the subject of your previous decision. In essence, what the Statis say is no, at the same time as saying they, I'm quoting from their skeleton, "relish the opportunity to proceed to trial with respect to the fraud allegations". That is paragraph 3.6. They say they don't have the financial resources for a trial, and because they have attached assets of some 28 billion for a $500 million claim, they say the English proceedings are otiose and futile and, therefore, they want to walk away from these proceedings.

Just pausing there. In most cases, a party receiving a Notice of Discontinuance might think that that is a cause for celebration, the proceedings are over, and the party gets its costs. But we say that this is really an exceptional case; it was an exceptional case before your Lordship on the previous occasion and it remains exceptional. We will explore the reasons as to why it is exceptional, but we say that this is a case where the trial date should be held, namely October/November this year. The court has already decided that justice requires a trial of the fraud issue. This is not a case of proceedings ending because the claimant accepts that its allegations, the subject matter of the proceedings, are not well-founded

and will not pursue them; on the contrary, the claimant accepts that the disputes between the parties remain but prefers them to be decided elsewhere. That, we say, is abusive forum shopping.

We also say, as we will develop, the timing of this Notice of Discontinuance is extraordinary. This is not a case where the claimant has made a decision early in the proceedings that it does not wish to pursue the claim, and before the court has looked at the underlying merits of the claim. As you know, the Notice of Discontinuance was issued after the proceedings were fought out for some time; there was a very heavy application before the court; your Lordship gave a substantial and carefully reasoned judgment, finding a prima facie case of fraud; the Court of Appeal has rejected the application for permission to appeal; we have had extensive pleadings and requests for particulars; and, as your Lordship knows, the towel was thrown in just days before the revised disclosure deadline, after the parties had been working on the basis of a common assumption that there would be a trial of the fraud issue in October/November this year.

We say that the reasons given for abandoning London are plainly false. Once that is appreciated, we are left with the real reason, that they don't have an

answer to the fraud and they don't want this court to look further into it.

We also say that there are vital interests of the court that are in play here, involving the integrity of the court processes. If the Notice of Discontinuance stands, the court will not scrutinise the ex parte order obtained by the Statis that kicked off these proceedings and what we say is a fraudulent claim.

That is why we say it is an exceptional case. It is even more exceptional when one realises that the Statis have attained attachments over assets in London, 22 billion, under a global custody agreement between Bank of New York Mellon and the Central Bank of Kazakhstan.

That was an English contract, and we say that —— and of course there is a stay in relation to enforcement in this country, but they have basically, by using foreign attachments, have been able to block assets vastly in excess of their claim, and assets which this court has actually held in the case of AIG v Government of Kazakhstan, Mr Justice Aikens as he then was, are subject to sovereign immunity.

So we say that is a further factor making this case exceptional, and it may be that they are going to deploy what might be regarded as a "Get out of Jail" card,

undertaking that they will not proceed with any further enforcement in England whether in this action or future actions, but what is striking is that they don't undertake to release the attachments over the assets held in London. Of course, if their case was credible, that they had a claim for 500 million, why do they need to attach assets vastly in excess of their claim?

That is all I wanted to say by way of an introduction and, as your Lordship knows, there are three issues:

There is the case management issue, which is can we proceed with our claim for declaratory relief pleaded in the points of claim.

The second point is whether the Notice of Discontinuance should be set aside, so that the issue of whether this arbitration award can be enforced in England is determined by the English court.

Then, thirdly, there is the question of costs considerations.

The second topic is what I have described as the procedural background, and the purpose of this section of my submissions is to set the background to the various proceedings that are in play here. There are three aspects: there is the English proceedings, these proceedings; there are the foreign proceedings; and then

there is the Commercial Court Bank of New York Mellon proceedings, which I will deal with very briefly at the end.

Now, if your Lordship turns to our skeleton, I think I can take the background points relatively quickly.

Clearly the starting point is your Lordship's judgment of 6 June, and the background is set out there at paragraphs 1 to 10 and 13 to 49 and I am not going to repeat that. But just before we go any further, you will have noted that a number of allegations have been made in evidence, although not carried through into their written submissions, that effectively you have been misled on the previous hearing. But since the skeleton doesn't develop any of those points, I am not going to go into those in oral submission, other than to invite your Lordship to have regard to what we say in our second skeleton, where we address those points, and I don't propose to say anything at this stage in response. I will see whether or not they are live, but what we have done in that second skeleton is to deal with the points that have been made against us and answered them, in my respectful submission. So I am not proposing to say anything more at this stage.

Now as far as the background is concerned, going back to the skeleton, we summarise at paragraph 6 and 7

the principal points that we say emerge from the decision below.

At 7.3 we cite your Lordship's finding that it will do nothing for the integrity of arbitration as a process or its supervision by the courts or the New York Convention or for the enforcement of arbitration awards in various countries if the fraud allegations in the present case are not examined at a trial and decided on their merits, including the question of the effect of the fraud where found. The interests of justice require that examination.

What, in essence, we say is that what your Lordship said there still stands.

Paragraph 8 deals with the direction that was given in terms of the way forward, and that is the order of 27 June, which is at paragraph 8.

Paragraph 9 deals with the refusal of permission to appeal.

Then the various steps taken to take this case forward to the trial that your Lordship has directed are set out in the skeleton at paragraph 10; and, as recorded there, the trial is listed with a time estimate of eight days, commencing on 31 October this year. The variation steps are set out in paragraph 10.

Then we come to the Notice of Discontinuance, which

is referred to at paragraph 11, and the point that we make there is that it was effectively unannounced; no explanation was given at the time. And the timing of it is of interest; it was served after the Statis issued their application seeking an extension of the disclosure deadline, three days before the Statis were due to provide disclosure.

As far as the legal consequences of a Notice of Discontinuance, we refer in a footnote, footnote 3, to three consequences, which your Lordship can see are set out there.

I don't know whether your Lordship has seen the Notice of Discontinuance but it is in bundle D at page 83. The court was informed on the same day, and that is bundle D/84, and our response is at page 85. We will have to look at the motivation this Notice of Discontinuance in a moment.

That is all I wanted to say by way of background to the English proceedings.

So far as the foreign proceedings are concerned, these proceedings are relevant to two points that have been raised before you. First of all, the utility of the declaratory relief sought by Kazakhstan and Kazakhstan's own interest in the determination of the fraud claim. This is described as a private interest

but there is also a public interest, but that consideration is of less importance in this context.

Now as far as the evidence about these foreign proceedings are concerned, the one development that has not been covered is, of course, the decision in the DC enforcement proceedings. Those developments are summarised in Mr Kirtland's statement of 25 March. He is the lead counsel for Kazakhstan in the US proceedings, and you have also got the statement of Mr Dzhazoyan of 25 March, which was also prepared over the weekend.

What Mr Kirtland explains, I don't know if we have got a copy to hand up ... (Handed)

I have also put the first statement in, not because I am intending to refer to it but only because it is referred to in the body of the evidence. So that is his second statement.

In summary, as Mr Kirtland explains, the DC court has denied the State's motion for reconsideration by which the State sought to introduce the fraud allegations as a defence in the enforcement proceedings and granted the Statis' petition for the confirmation of the award, effectively permitting them to enforce the award in Washington.

Now, the two points to make in relation to that

decision are these:

First, the DC's court decision to refuse the State's permission to raise the fraud allegations was, we submit, based on an incorrect basis. That is covered by Mr Kirtland in his evidence and I don't propose to repeat what he says there.

The second point is that the court's decision is one which the State can appeal as of right; and Mr Kirtland's evidence confirms that the State will be appealing this decision.

Now the consequences, as far as the issues for this court are concerned, really come down to two points.

First of all, the DC court confirms that as presently stand the DC court has not considered, and will not consider, the State's fraud allegations. So unless and until the decision of the DC court is overturned on appeal, the DC court will not be considering Kazakhstan's fraud allegations and that means, in summary, that there is no possibility of the DC court adjudicating upon Kazakhstan's fraud allegations before this court in such manner as to give rise to an issue estoppel that will be binding on this court; and a judgment of this court examining the fraud allegations will not carry any weight or significance in relation to the DC enforcement proceedings.

However, the position will, as we have explained, be different in relation to the separate RICO proceedings and the Southern District New York enforcement case, in which a judgment of this court examining the fraud allegations could have a significant impact. That is Mr Carrington's second statement at paragraph 26.

The second point, and importantly, the fact that the DC court has refused to examine the fraud allegations and granted the Statis' petition for the confirmation of the award makes it all the more important, we submit, that the court examines these allegations at trial.

The court has concluded on the evidence that there is a prima facie case that the award was procured by fraud, and the effect of the DC court's decision is that the Statis have been, in effect, granted permission to enforce their efforts to enforce the award, an award which this court has found on a prima facie basis to have been procured by fraud. We submit that outcome cannot be right and, as your Lordship said, and I quote:

"... do nothing for the integrity of arbitration as a process or its supervision by the courts or the New York Convention."

So what we submit is that the court should therefore not be dissuaded by the decision of the DC court from ordering the trial of the fraud allegations and that

that should proceed. To the contrary, we submit even if the powers of the DC court are so limited as to permit the enforcement of the award on the facts of this case without subjecting the fraud allegations to scrutiny, this court has already recognised that the powers of the English court are not so limited.

So we submit that the recent decision only heightens the importance of a court examining the fraud allegations to a trial.

If no trial occurs, this will only increase the likelihood of the Statis being likely to profit from the enforcement of an award that this court has found, on a prima facie basis, to have been procured by fraud, and that cannot be right.

Now, as far as the evidence about the other proceedings, there is really four general points to make before we look at the detail of those proceedings as set out in annex 1.

The first is that the Statis' evidence concerning what has been decided in certain jurisdictions, namely Sweden and the United States, is simply wrong in the light of your judgment; and we have made the references there at the back of our skeleton submission where that point is developed.

The second point is that the evidence before you

concerning the relevance of an English judgment in the various foreign proceedings does not, with one exception, reveal any disagreement on the central proposition that an English judgment addressing the fraud allegations will carry some weight in those proceedings, and the difference between the parties is how much weight the judgment will have and whether it will have any weight in the Belgium courts, since the Statis take the position that the Belgian court would simply ignore a judgment of this court dealing with a fraud, a proposition which we dispute.

The third reason that we look at the foreign proceedings is to deal with the likely progress of the foreign proceedings and in particular the likelihood of a foreign court determining the allegations before this court, and I will come back to that in a moment.

Now, where we have got to is that the first two points, namely what has been decided in the various jurisdictions and what is the relevance of the English judgment, that evidence has been summarised in annex 1 to the claimants' submissions.

If I could just ask your Lordship to have a look at it. The table hopefully speaks for itself. Your Lordship will see in the far right-hand corner our comments, which hopefully are backed up by references in

every instant to the evidence. Unless your Lordship wants me to go through them, I was just minded to ask your Lordship to have a look at it.

MR JUSTICE KNOWLES: Yes, thank you.

MR MALEK: The third set of proceedings is the Bank of New York Mellon proceedings. It is addressed in our evidence. Your Lordship has probably seen Mr Justice Popplewell's decision. We have got permission to go to the Court of Appeal and there is going to be a hearing in May, in accordance with the traditions of the financial lists, where matters are dealt with very promptly, so we are very grateful that that is going to be dealt with.

In essence, the dispute was about the question as to whether or not the Bank of New York Mellon had a defence to our claim based on force majeure. In essence, I am not going into the detail of it, our argument is that the foreign orders should not be given effect; they are orders made by foreign courts, which are not the proper law of the contract, they are not the place of performance, they are orders which the English court would not recognise as being competent under the rules of private international law.

The fact of the matter is that the relevant contract is between the Central Bank and Bank of New York Mellon

London branch, and of course, as your Lordship knows, for certain purposes, see the Libyan case, see the XAG case, the Mackinnon case, banks are treated as separate legal entities. So the central question that was addressed in that case was whether or not BNYM had a defence based on the in fact they were foreign orders, and our argument is that as a matter of construction there was no defence, and Mr Justice Popplewell held that we were wrong but that matter is going to the Court of Appeal.

So it does have limited relevance other than to the point which I mentioned earlier, is the reality of what is happening here, at least from the perspective of an English court, is that they are faced with a stay in London, what the Statis have done is to go to foreign courts to get foreign attachment orders affecting London assets and then to walk away from London. And we say that, frankly speaking, is unconscionable; and if they are going to walk away from London, it becomes even more unconscionable if they are going to maintain that they can hold freezing orders to the extent of some 22 billion in relation to those London assets. But that is all I am going say about that case for present purposes.

Now, the relevance of the evidence that we've just

looked at, quite apart from the headline points of our private interest in proceeding to judgment on the fraud claim and what we submit is the public interest in Kazakhstan's fraud allegations being examined at trial, the foreign proceedings comprise a further background factor which we submit justifies the continuance of the fraud allegations to trial, in accordance with your Lordship's directions.

There is four reasons that we wish to highlight by way of oral submissions.

The first point is that it is common ground in relation to every relevant jurisdiction, apart from Belgium, where there is a dispute, that an English judgment examining the fraud allegations could be accorded some weight or could provide some assistance to a foreign court faced with those same allegations.

That is, we submit, unsurprising in the light of your Lordship's finding at paragraph 80 of the June judgment, and I quote:

"No court has decided the question whether there has been the fraud alleged, and if the trial does go ahead the English court will subject the fraud allegations to a high degree of scrutiny with the benefit of disclosure, which is an important feature in a case of this kind of nature."

So our first submission is that this is all self-evident and a matter of common sense and provides one reason for the trial to go ahead.

The second point that we make is that the submission that a trial of the fraud allegation should not go ahead because it has been overtaken by decisions made in foreign courts is misconceived. On the evidence, while the likely timing of any foreign judgment on the fraud allegations is disputed, it is clear, we submit, from the objective facts explained earlier, and as seen from that schedule, that the relevant foreign proceedings are all at a much earlier stage than the English proceedings. We submit that the evidence does not support the conclusion that there is any reasonable likelihood of any relevant foreign court determining the fraud allegations before the English court.

In any event, the possibility of a foreign court determining these fraud allegations was fully addressed by your Lordship's earlier order, made on 27 June 2017, which provided at paragraph 18 for a liberty to apply. It is also reflected in your Lordship's decision at paragraph 96, where your Lordship gave a general liberty to apply in order to bring the court up-to-date with any kind of developments.

So, in effect, your Lordship has written in

a mechanism for dealing with this and we say that that mechanism is the appropriate one; and the possibility, which we say is unlikely, of a foreign court moving first on the fraud allegations should not deter this court from directing that these allegations should continue to a trial.

The third point is that the Statis' overreaching submission that the progress they have been making in these foreign proceedings explains their decision to discontinue is, in our submission, a false one, and it is also incomplete. Because England is the only forum where the fraud allegations have been considered on a prima facie basis and where the Statis have been found on a prima facie basis to have committed the fraud that has been uncovered by Kazakhstan.

What we submit is that the stated intention to discontinue in England and continue in foreign proceedings, raising the same allegations that arise here, is an example of cherry-picking or abusive forum shopping. What we submit, and we will develop this in a moment, is that as a matter of public policy an award creditor who has been found on a prima facie basis to have obtained the award by fraud should not be entitled to pick and choose jurisdictions in which to commence enforcement, only to remain free to discontinue and

withdraw the moment that an examination of that fraud looks to be nearing.

Then the last point to make here is that we come back to the point that we have touched upon already, which is that any progress made by the Statis in the foreign enforcement proceedings, such as that embodied in the recent DC court, in fact only heightens the importance of this court examining Kazakhstan's fraud allegations at a trial. If no trial occurs, this will only increase the likelihood of the Statis being entitled to profit from the enforcement of an award that this court has found to have been procured by fraud on a prima facie basis.

That is all I wanted to say on that topic, and just to highlight that we have given a summary of the points that we say emerge from this factual background in the conclusion at B4 at paragraph 20. If I could just ask your Lordship to just glance through that again, just to remind your Lordship of the points that we say emerge from the background. (Pause)

MR JUSTICE KNOWLES: Thank you. Thanks.

MR MALEK: Topic 3 is the Notice of Discontinuance. This is an important topic and I am going to cover two points. First of all, what was the motivation behind the claimants serving a Notice of Discontinuance, and is

their explanations for serving the Notice of Discontinuance credible?

As we have seen, the starting point is that the Notice of Discontinuance was not accompanied with any explanation. It was unannounced and unexplained.

Two explanations have been given in response to this application. First of all, the lack of funds; and secondly, there is no benefit to the claimants of enforcing the award in England. Those are the two reasons that have to be considered.

Now, the first reason, lack of funds, is dealt with in our submissions at paragraphs 24 onwards.

As you see there, their first explanation was that, and I am quoting from the evidence, they were:

"... practically unable to pursue enforcement in England any further for lack of funds."

There is no documentary support for anything that is said. In the skeleton argument, in an attempt to explain their reasons for seeking to discontinue the proceedings, the Statis assert at paragraph 3.5, and I quote:

"Their funders have carved out the English proceedings from their arrangements."

That proposition is not supported by the evidence. If one looks carefully at what Mr Jozoyan says, he

merely states that the Statis' latest funding carves out England and Wales from the jurisdictions where the ECT award is being enforced; and that is paragraph 51 of his second statement. It doesn't specify whether the English proceedings have been carved out at the behest of the Statis or the unidentified funders, nor does it state whether the Statis have asked its funders or other funders to continue funding. And importantly, and this is perhaps a complete answer, there is no evidence before this court, whether from the Statis' funders or otherwise, that if the trial of the fraud allegations is to go ahead, the Statis will be unable to continue funding this litigation.

Similarly, and this is the next point, the Statis have elected not to adduce any evidence at all about their own means and the ability to fund the proceedings from their own resources, a point that we make at paragraph 24, subparagraph 2. We say that the evidence points to the opposite direction, from the breadth and number of the jurisdictions in which the Statis are seeking to enforce the award, seemingly without encountering any funding difficulties, to the extent of the costs that have been incurred by the Statis in connection with the present application, as evidenced from their schedule of costs, and we certainly don't

accept that this is a sort of a David and Goliath battle.

So we submit that in relation to that first explanation, ie they cannot afford it, there is no evidence to support it and in fact the evidence points to the contrary.

The second explanation is that because of the foreign attachments there is going to be no benefit to the Stati parties in pursuing the enforcement proceedings at this time. What they say in their evidence is that the enforcement action has been overtaken by a number of the foreign courts in five jurisdictions, and that they have frozen assets in the sum of approximately 28 billion, and they say there is no further benefit in pursuing this application. That is in their evidence at paragraphs 13.1 and 14 through to 18, which is in B, tab 6, pages 99 to 111.

Now, there are several reasons why we submit this court should reject that explanation.

The first one is the timing of the attachment/garnishment orders. Those were obtained in August through to October 2017. Your Lordship can find those dates from annex 1. It's also covered in the evidence. So one is looking at attachment/garnishment orders that have been obtained in October,

through August to October 2017, and despite this the Statis waited until 26 February before serving a Notice of Discontinuance.

If the Statis are correct that the foreign attachments make further prosecution of the English proceedings unnecessary, then the question arises as to why did they wait so long before discontinuing their claim, particularly in the circumstances where the Statis have presumably incurred substantial costs on pleadings and in disclosure, preparing for disclosure in the interim?

The second reason, which I think we make in paragraph 25.3 of our skeleton, is that the Statis have never said to us or, more importantly, the court that the proceedings would be discontinued if they managed to obtain attachments in other jurisdictions, and at no time did they tell the court or Kazakhstan that they might wish to abandon the English proceedings, depending on what happened in the foreign proceedings.

The third point is, well, what makes London so different from the other jurisdictions? They want to run away from London but prosecute in other proceedings when, on their case, they have attachments for some 28 billion for an alleged debt of 500,000 -- 500 million. I wish it was! 500 million.

Of course, the timing is quite interesting, as we point out at paragraph 25.2, is that the Statis' Notice of Discontinuance was served after they had lost the benefit of a Dutch attachment over the assets held by NBK, the national fund, as we point out earlier, and I think subject to an appeal.

The fourth reason, and this is our skeleton at paragraph 25.4, the various enforcement proceedings are being contested by the State, and no final decision has been taken in any jurisdiction where the Statis seek enforcement. It is therefore implausible to say that the English proceedings are no longer required and will not benefit the Statis in any circumstances.

So what we say in relation to those two reasons, which are the only reasons that they give, is that, and I am quoting here from paragraph 3.5 of their skeleton where they say:

"As matters presently stand, the Stati parties have two compelling reasons for discontinuing these proceedings, despite their otherwise strong desire to proceed to trial and defeat the fraud claims."

Just pausing there. If those two compelling reasons do not exist, then they, on their own case, indicate that they want to go to trial, and that is, we say, a good enough reason to go further.

But where they say that they have tackled the fraud allegations in no less than six jurisdictions, as they say in 3.6, we say that is incorrect; and that point is addressed in paragraph 26 of our skeleton, where we say that the procedural history indicates that they have endeavoured at every stage to avoid any real scrutiny of their conduct, which is consistent with their attempt to discontinue their claim days before being required to provide standard disclosure; and the conclusion that we invite the court to draw is that at paragraph 27, where we say that the court should infer that the real reason for the Statis' Notice of Discontinuance is that they recognise that their conduct by this court is likely to lead to a finding that the award was procured by fraud, and in order to avoid the serious consequences of such a judgment for overseas proceedings, the Statis are prepared to abandon their claim before the court, at least temporarily.

The next topic is case management. My Lord, you have seen from our skeleton that we say that there is a freestanding claim for relief, which is unaffected by the Notice of Discontinuance and which must, therefore, proceed to trial in accordance with the existing trial fixture.

In order to give a framework to this submission, can

I just start off by just giving your Lordship the framework of the CPR in terms of how it works.

MR JUSTICE KNOWLES: Thanks.

MR MALEK: The starting point is part 62. I am not going to take your Lordship to it now, but it is in the White Book starting at page 705. That deals with the procedure for the enforcement of awards, which your Lordship knows about, but, as in this case, the application was made without notice. There is a recognised duty of full and frank disclosure because it is an ex parte procedure, and we say that that duty is particularly important given the choice that faces the court, and that because it allows the court to determine whether it is appropriate to make an ex parte order at an -- sorry, to make an order at an ex parte stage; alternatively, whether the circumstances of the case make it appropriate to order service of the proceedings. Now, we know in this case it was done on an ex parte basis.

The next set of rules to look at concerns the question about a counterclaim. There is one provision that I don't think is mentioned by my learned friends but is important and that is: what is a counterclaim? If your Lordship can turn to the White Book at 2697, at the back, there is a definition of -- there is

a glossary, and the counterclaim is described as "a claim brought by a defendant in response to the claimant claimants' claim which is included in the same proceedings as the claimants' claim".

The rules relating to counterclaim are set out in Part 20, as your Lordship knows.

Rule 20.2 provides that the Part 20 applies to both counterclaims and to other kinds of "additional claim".

Rule 20.3 provides that an additional claim, which includes counterclaim, shall be treated as if it was a claim for the purposes of these rules.

Then rule 20.4 and PD20, part 6.1, sets out the procedure for making a counterclaim. Notably, all that is required is that the particulars of the counterclaim be served. And as confirmed by 6.1 of the practice direction, the usual practice is for the particulars of the counterclaim to be included at the end of the defence in the same document. No further formalities are proscribed.

Now, as far as the response to the skeleton is concerned, your Lordship has our submissions on this, and what I propose to do is to just pick up the points that we make by way of response.

The first point is that there appears to be a misapprehension about our position on indemnity cost,

which the Statis address at paragraphs 17 to 19 of their skeleton under the heading "Stand alone claim for indemnity costs."

Just to make it clear, we do not say that the claim for indemnity costs is entirely freestanding, in the sense that that justifies the court proceeding to a trial of fraud allegations. All we say is that the outcome of the fraud claim could be material when the court is looking at the question of costs, and that is a factor which the court can take into account.

Secondly, there is some debate in the skeletons about the status of an award debtor resisting enforcement, whether the award debtor is in substance the claimant in the proceedings. The cross-reference, for your Lordship's note, is that we deal with that in our skeleton at paragraph 29(1) and my learned friends deal with it in their skeleton at paragraphs 7 to 9 and paragraph 13.

If it were necessary for the court to decide this point, then we would say that the award debtor is in substance the claimant, for the reasons give by Lord Justice Rix in Gater Assets, which we summarise in paragraph 29(1) of our skeleton.

However, it is unnecessary, we say, to decide that point, because the effect of the Notice of

Discontinuance in this case touches not on the status of award debtors in general, but rather on the specific facts of this case, and in particular two matters: first of all, the effect of your order of 27 June, which is in tab 5 of bundle A, page 32; and the claim for declaratory relief, which is at paragraph 50 of the points of claim.

I am happy to take your Lordship to them, but I think your Lordship probably knows what I am referring to.

MR JUSTICE KNOWLES: Yes.

MR MALEK: The third point is dealing first of all with your Lordship's order. The Statis say that paragraph 2 of that order is purely a matter of procedural expediency and was proposed by Kazakhstan on that basis. The reference there, for your Lordship's note, is paragraph 10 of the Statis' skeleton. That is a point about the whether or not it is treated as if it started under part 7.

Paragraph 2 is not, we submit, about procedural expediency. It recognises, and we submit gives effect to, the reality that the State, Kazakhstan is the claimant in respect of its claim that this award was procured by fraud.

We submit also that the Statis are wrong to say that

the relevant drafting of the order indicates that they are right to support their submission, namely that it is driven by purely procedure reasons. But the rationale of paragraph 2 of your order was explained in our skeleton for the hand down, and if I can give your Lordship the reference to that, it is in C1, tab 9 at page 234. In paragraph 4, under the heading "Nature of proceedings and directions", and a reference to the trial of Kazakhstan's claim that the award was procured by fraud, and I am quoting:

"... is that we were proceeding on the basis that there would be a trial of its fraud claim and that Kazakhstan would be the claimant in respect of that trial."

As you know, Kazakhstan went on to serve its points of claim, pursuant to your Lordship's order, and the principal head of relief claimed by Kazakhstan is a series of declarations. No reference is made to the State's applications to set aside the ex parte enforcement order.

So at this stage Kazakhstan were certainly proceeding on the basis that it was the claimant in a freestanding claim for declarations, rather than merely being a passive defendant whose only claim for relief was to have the ex parte enforcement order set

aside.

The fourth point is that the Statis do not deal with the fact that Kazakhstan has claimed declaratory relief in its points of claim. They submit in a number of places, and I quote:

"The grounds pursued by the State only give rise to a refusal of recognition and no consequent judgment."

That is paragraph 9 of their submissions. Then at paragraph 16 they say:

"... nor can Kazakhstan identify any aspect of its applications and related grounds that give rise to relief outside the recognition or refusal thereof of the ECT Award as a judgment of this court."

We say that is wrong because that ignores our claim for declaratory relief, which are not dependent for its existence upon a claim for the enforcement of the award.

The last point that is made, and I am quoting here from paragraph 12.1 of my learned friend's submission where they say, in relation to the counterclaims, that only a properly constituted formal counterclaim can survive discontinuance.

We agree that counterclaims survive a Notice of Discontinuance. We also agree that a certain degree of formality is required in order for a counterclaim to be properly constituted. However, we say that that degree

of formality has been observed in this case. You can see that from the points of claim, where there is a formal claim for declaratory relief. We say this makes it, we submit, a counterclaim. And it is not necessary to use the word "counterclaim"; the reality that is we are making a claim, it is a separate claim, it is pleaded as a separate claim, it is pleaded in points of claim, and we submit that on that basis it is to be treated as a counterclaim that will survive a Notice of Discontinuance.

The only other point I need to deal with is that a number of cases have been cited which my learned friends say are of assistance but, with the greatest of respect, none of them have any relevance to the points that your Lordship has to deal with, and I am not proposing, certainly in oral submissions, to deal with them, because they are just so far removed from this case that they don't actually assist your Lordship in the slightest.

That then takes me to the fifth topic, which is the application to set aside the Notice of Discontinuance.

My Lord, I know that we are going to take a break at some stage for the shorthand writers. I don't know whether that is convenient.

MR JUSTICE KNOWLES: Yes, I hope it is. It seems a good

point to me. Five minutes.

(11.35 am)

(Short break)

(11.40 am)

MR MALEK: My Lord, topic 5 is the application to set aside the Notice of Discontinuance. Of course, as we make clear I think in our submissions, this is an alternative way of allowing the matter to go forward.

What I propose to deal with is three matters: first of all, the legal principles in play; secondly, the private interest considerations that we submit are in play here; and then, finally, the public interest considerations.

The law, the legal principles that we say are in play are set out in paragraph 36 of our submissions. I am going to come back in a moment to paragraph 36.1 and the decision of Mr Justice Henderson as he then was in the Pakistan v National Westminster Bank, but those are the legal principles that we say are in play.

In essence, using the language that we see in paragraph 36.1 of our skeleton, the overriding objective, we say that the court, applying the overriding objective should set aside the Notice of Discontinuance, first of all because the State has a legitimate and what we call private interest in the

court proceeding to judgment of the fraud claim, and secondly we rely also on the public interest in Kazakhstan's fraud claim being investigated at trial.

My learned friends say in paragraph 24.2, which suggests that the public interest only comes into play if the private interest argument is rejected, but each, we submit, is freestanding and each, we submit, is sufficient.

Now the point where we differ is the correct test, the applicable test under CPR38.4.

In short, the Statis contend for what we submit is a rigid and narrow test that focuses exclusively on the Notice of Discontinuance. According to the Statis, the Notice of Discontinuance must itself be an abuse of process or an attempt to secure a collateral advantage if it is to be set aside. They go so far as to contend that it is impermissible for the court to consider the fact that one party has a legitimate interest in a matter proceeding to trial or that there is a public interest in that happening. If I can -- that is a summary of the points that emerged from the skeleton, in the following paragraphs of their skeleton. If I just list them for you, it is paragraph 21, paragraphs 24 to 25, paragraph 26, paragraph 37, paragraph 43.5 and 43.7.

Now, we say that that approach is wrong. The first point we make is that whatever the position may have been under the old rules, abuse of process is no longer the test under CPR rule 38.4.

That was made very clear by Mr Justice Henderson in the case that we cite at paragraph 36.1 of our skeleton. Could I ask your Lordship to turn to it. It is in our authorities bundle, tab 7 at paragraph 46.

The law starts at paragraph 40, the reference to 38.4(1) and then there is a discussion of the old Rules of Court and the decision of Castanho v Brown, 43 goes through to pre—CPR decisions, and the key part is paragraph 46, where the learned judge says this:

"The CPR formed an entirely new procedural code (see rule 1.1(1)), the provisions of which should as a matter of principle be construed in their new context and not by reference to previous case law on the provisions in the superseded RSC. In some areas, of course, cases on the old rules may continue to have strong persuasive authority, but the primary obligation of the court is to construe any rule in the CPR and exercise any power given to it by the rules so as to further the overriding objective. Thus, I consider that the court should approach an application to set aside a notice of discontinuance under rule 38.4, subparagraph 1, on the

basis that the court has a discretion which it should exercise with the aim of giving effect to the overriding objective of dealing with the case justly and at proportionate costs. If the facts disclose an abuse of the court's process, that will no doubt continue to be a powerful factor in favour of granting the application but it would, in my view, be wrong to treat abuse of process as either a necessary or exclusive criterion which has to be satisfied if the application is to succeed."

Then there is a reference to Mr Justice Aikens' decision as he then was in Sheltam, which was in an arbitration context, and Mr Justice Henderson agrees with the approach that was suggested there. And you can see from paragraph 49 that this is not the only case where a notice of discontinuance has come as a bolt from the blue for his client. That's a joke!

That is the key pointers. So it's overriding objective that is the test, not abuse of process. We say it is wrong for the Statis to suggest that in applying the overriding objective it is impermissible for the court to have regard to a party's legitimate interest in a matter proceeding to trial, and to the wider public interest in the administration of justice and maintaining the integrity of the court's processes.

Those are both important facets of dealing with cases justly.

The second point to make on the dispute about the appropriate test is that even if the Statis were correct about the test, that would, we submit, not provide an answer to Kazakhstan's case on this application. Kazakhstan's point about public interest is that the Statis have committed a fraud on this court by knowingly invoking its process and obtaining an ex parte order to enforce a fraudulent award. Kazakhstan also says that the purpose of the Notice of Discontinuance is to prevent any enquiry into that fraud ever taking place. Now, if Kazakhstan is right about that, we say that it necessarily follows that the Notice of Discontinuance is itself abusive.

So the two points are that the overriding objective is not about abuse of process per se, but even if it were about abuse of process it is satisfied on the facts before the court.

As far as breaking down this private interest and public interest consideration, your Lordship has got our submissions. And as far as the private interest is concerned, we submit that unless the court proceeds to judgment Kazakhstan will be exposed to the possibilities of the Statis bringing further enforcement proceedings

on the award in this jurisdiction at a later date.

Now, until the skeleton argument the Statis had not disclaimed that possibility by providing an undertaking that they would not in any circumstance enforce the award in England and Wales in the future. If one turns —— could I ask your Lordship just to look to see what they say about that. They say in their skeleton something which is not entirely clear to us what they are saying, but it is at paragraph 43 at page 19, where they say at the top of page 20:

"Questions of tactical collateral advantage simply do not arise in this case as regards future English proceedings given that the claimants are barred from issuing any new proceedings here pursuant to 38.7, and well, if required, provide an undertaking confirming that they will not pursue further proceedings in England."

The point is that if your Lordship turns to CPR38.7, you will see that it doesn't in fact provide a bar on further proceedings. What 38.7 says:

"A claimant who discontinues the claims needs the permission of the court to make the other claim against the same defendant."

What is said in the evidence is that the test indicates that that is quite restrictive, but you can

imagine of circumstances where the Statis may want to come back saying, "Well, the foreign attachments weren't as successful as we wished" or they may say, "We have now got a finding that there was no fraud and therefore there is an issue estoppel."

All I am saying is that if all they are prepared to do is to give an undertaking which reflects CPR38.7, the possibility of further proceedings in England still remains.

Of course, what they are not prepared to do, it would appear, is to release the foreign law attachments effectively freezing the assets in this jurisdiction.

The second private interest is the interest the State has in a speedy determination of its fraud claim in this jurisdiction, having regard to the reputational issues for Kazakhstan in refusing to pay an arbitration award. Clearly there are potential consequences if an award is unpaid. We submit that our non-payment is justified, and therefore it does raise reputational issues for the State which can be characterised as private interests but we submit are relevant considerations.

The third point in terms of private interest consideration is that the question whether the award was obtained by fraud remains a live issue between the

parties because the Statis are pursuing enforcement proceedings in multiple jurisdictions in Europe and the United States; coming back to the point that I made earlier this morning, which is that this is not a party who is discontinuing, saying, "I am dropping the allegations, I am happy to pay your costs", on the contrary, the issues remain live.

As your Lordship has already found, and this is paragraph 93 of your judgment, it is necessary in the interests of justice and for the integrity of arbitration as a process that the fraud allegations are heard and determined in a trial. And we submit that is the case.

Now, although each foreign court will have to determine its own domestic public policy for itself, we submit that the other courts will nonetheless be assisted by this court's determination of the prior factual questions as to (1) whether the Statis deliberately misled the arbitral tribunal and (2) if so, what effect that had on the arbitrator's conclusions.

What we say is that given the advanced stage of this proceedings and the evidential value of this court's judgment, we have a legitimate interest in this court proceeding to decide those questions, particularly in the context of a case which has gone so far, a trial

date has been set, the court has heard a heavy application, the matter has gone to the Court of Appeal, permission to appeal has been dismissed, we have had substantial pleadings, we have had requests for particulars, and the parties were just about to serve their disclosure statements and then the plug is pulled.

Those are, in essence, the three public interest considerations that we rely upon and which your Lordship knows from our skeleton submissions.

Now as far as the public interest considerations, in a moment I will list five of them, but before I do so could we look briefly at the decision in Cherkasov v Nogotkov which your Lordship will find in tab 10 of or authorities bundle. That was a decision of the Chancellor. I don't know whether your Lordship had time to look at this decision.

MR JUSTICE KNOWLES: Yes, I have, thank you.

MR MALEK: It is obviously a very important decision. What that case establishes, we submit, is that the court has the power to hear and adjudicate upon matters that are no longer determinative of any live issue between the parties, if it is in the public interest to do so; for example, because proceeding to judgment may expose wrongdoing.

The relevant paragraphs of the Chancellor's decision

are paragraphs 60 to 64 and 71 to 83.

The first point that we make is that there does involve a live issue, and that obviously is a point to keep in mind in considering what this case establishes.

In that case, the Chancellor held that it was in the public interest to decide whether the claimant had complied with his duty of full and frank disclosure to the court, even though a decision on that point was not required in order to resolve the matters that remained in dispute between the parties.

As your Lordship has seen, Mr Nogotkov was an Official Receiver of a company that was granted a recognition order and he sought to terminate the proceedings, and there were two issues: should the court decide the issue whether he breached his duty of full and frank disclosure when he applied for a recognition order, and if yes, did he breach that duty.

Obviously the factual point doesn't concern us, but the Chancellor dealt with this at paragraph 71, under the heading "The threshold issue: should the court decide the full and frank disclosure issue". This was directed to the issue that the original order would be unaffected; in other words, the recognition order.

Just pausing there. That applies to our case as well, because what is being sought here is a Notice of

Discontinuance that will leave unaffected the ex parte order of Mr Justice Burton that launched these proceedings on 28 February, and that order is in bundle A at tab 2.

The second consideration is at 78, where the Chancellor found that it was in the public interest to determine the full and frank disclosure issue, and he explained this by reference to discouraging him from taking further steps in the future. We would submit that applies here, where the Statis have brought multiple proceedings in various jurisdictions.

The third issue was in effect that he was unable to disentangle the issues. I don't think that applies here.

Then the fourth issue was that he found that the Hermitage parties had good reason for wanting the FFD issue determined and Mr Nogotkov had no good reason for not wanting. We say that applies here.

The attempt on the part of the Statis, if we can turn to their skeleton, where they seek to distinguish the Cherkasov case is at paragraphs 46 to 47. We invite your Lordship to say that this attempt is unpersuasive and, frankly speaking, misses the point. We do not contend that the facts of this case are identical to Cherkasov, but what we do say is that that authority

establishes two principles. The first is that the court may hear and determine points that are longer determinative of any live issue if it is in the public interest to do so, and whether the public interest is engaged necessarily is going to be a fact-sensitive analysis which the depends on the circumstances of the particular case before the court. It's therefore irrelevant that the facts of our case are not identical to those of Cherkasov.

The second proposition that we make is that the Chancellor's reason makes clear that exposing wrongdoing is an important factor in deciding whether proceeding to judgment is in the public interest. We get that from two passages from the Chancellor's judgment. The first is at paragraph 84, where he says this:

"In my judgment, where there are serious allegations of wrongdoing, as are here, and where the UK government has already made clear its views about connected aspects of this case, this court cannot stand by without deciding whether or not there has indeed been inappropriate conduct. It is in the public interest for that issue to be determined, whatever effect it has on the private interest to the litigation. I emphasise, however, that this is a wholly exceptional case."

Then at paragraph 83 what the Chancellor said is

this:

"As I have said, there are clear and compelling reasons why the FFD issue ought to be decided in the public interest. The court cannot willingly accept a situation in which one party can prevent it determining, where it is in the public interest to do so, whether its procedures have been flouted or abused."

The question, therefore, for your Lordship, is whether on the facts of our case it is in the public interest to proceed to trial. We say the answer is yes. But we do also say that this case is every bit as exceptional as Cherkasov, because the court has found in this case that there is a strong prima facie case that the award was procured by fraud, and by extension that these proceedings are a fraud on this court.

The Statis have not properly engaged with those allegations, and are now seeking to prevent any enquiry in their fraud on the arbitral tribunal and on this court, and this case has far-reaching financial and reputational consequences for a friendly foreign State. This is also is a relevant consideration under the heading of public policy.

That is all I wanted to say on the Hermitage/Cherkasov case, and what I want to do now is briefly summarise the five points which we say are in

play here in terms of public interest consideration.

The first is that there is a public interest in this claim being heard and determined at trial.

On the material before the court, there is a prima facie case that the Statis have engaged in conduct which amounts to a fraudulent abuse of this court's process. What we say, and this is echoing submissions that I have already made, is it is reasonably to be inferred that the true reason for the Statis' Notice of Discontinuance is that they realise that their fraudulent conduct will be identified by the court at trial and wish to avoid their conduct being subjected to scrutiny by this court.

We have looked at the reasons given by the Statis, namely no funds and the attachments; they are both bad. The reality is that there is no answer to the fraud case. Your Lordship notes in the judgment of June, at paragraph 68, that they don't submit any evidence on the hearing of the application to introduce the fraud case. And when they are due to give disclosure, moments before disclosure is supposed to take place they walk away.

In our respectful submission, the Statis' skeleton does not engage of the difficulties in their position or from the logic that on the basis that the award was obtained by fraud, this would necessarily have been

carried through into a deception on this court in seeking to enforce the award.

If I could ask your Lordship to turn to the Statis' skeleton at paragraph 45, where they say that the allegations made by Mr Carrington and pursued in the skeleton as to the breaches of full and frank disclosure ought not to have been made. They have never been pursued previously, are not particularised in any way, and appear to be a throwaway designed to prejudice the court's view of the Stati parties and/or to invoke the Cherkasov v Nogotkov public policy rationale.

The only reasons that the allegations are being made now is that they only became relevant now when they tried to walk away from the English proceedings. They are not throwaway remarks designed to prejudice the court; they go to the heart of the application. We say that it is, in the circumstances, the public interest to proceed and determine the allegations so as to expose wrongdoing; and that in particular the court (sic) should not be permitted to abuse this court's processes with impunity, so as to engage in abusive forum shopping, nor should the Statis be permitted to prevent investigation of their own misconduct. Again, I come back to what your Lordship said about the integrity of arbitration at paragraph 93.

That is the first reason. The second point on public interest consideration is that we submit that investigation of the Statis' misconduct is necessary to maintain confidence in the administration of justice by this court and to deter other litigants from abusing the court's processes in the future.

Going back to what was said in the Cherkasov case at paragraph 83:

"Clear and compelling reasons why the issue ought to be decided. The court cannot willingly accept a situation in which one party can prevent it determining, where it is in the public interest to do so, whether its procedures have been flouted or abused."

We submit, therefore, that the court's decision does have wider implications beyond this specific case.

I respectfully adopt what was said by Mr Smouha in that case. If we can go back to that decision at paragraph 63, subparagraph 2, where Mr Smouha, dealing with the threshold issue that starts at paragraph 60, says at paragraph 2 and I quote:

"It will undermine confidence in the business and property courts of England and Wales if the administration of justice is or appears to be a tap that a litigant can simply turn on or off. This is even more the case in the context of a foreign liquidator who has

been given access to the English court and permitted to exercise powers that are normally the preserve of a court-appointed English liquidator."

That notion of turning the tap on or off is one which we say is apt here. We also say that the misconduct, investigating the misconduct here, will send a strong message to other litigants or potential litigants that they cannot abuse the court's process with impunity. In other words, that the Statis do not have the benefit of a one-way bet which entitles them to walk away when they like from court proceedings that they started and prosecuted for so long on the common assumption that there would be a trial in October this year because they fear an adverse result.

Now, the Statis make the point that there is a point of distinction, and this is paragraph 47.1 of their skeleton, that the UK government or the Home Office have not commented on the ECT enforcement. But, with respect, that misses the point. This is all about the views of the court, not the government. This is the court controlling its own process. It is fashioning remedies designed to preserve the integrity of arbitration, where the courts of supervision, in exceptional circumstances, where those points would normally arise, do not arise for the reasons that

your Lordship identified in the June judgment.

The third point on terms of public interest considerations is the one I mentioned earlier, which is that there is a public interest engaged in relation to the order of Mr Justice Burton that was sought and obtained on an ex parte basis. That is simply ignored if the Notice of Discontinuance stands, because the question about whether that order should have been made, whether it should stand, will not arise, because the Notice of Discontinuance does not address anything to do with the earlier orders.

We say that justice requires that this order is set aside, and that is our third reason.

The fourth reason is that we say that public interest are in play because the English court is being asked to look at its interests. This is nothing to do with the court being asked to give an unsolicited advisory opinion to a foreign court; this is all about its procedures as far as this public interest consideration is played.

The other evidence point on this is that we have seen from the evidence that some weight is going to be given to an English decision by the foreign courts, and that therefore this is not a case of judicial arrogance in play, contrary to considerations of comity. There

are no comity considerations that are in play which would suggest that the English court should not proceed with this trial; the trial, of course, which the Statis have for so long said that they wanted to take place.

The fifth point is: is there a competing public interest based on court resources, which of course is a relevant consideration.

Just picking up what the Statis say about that, at 3.A, they say that we would like to waste the time and resources of this court. Of course, we fully accept that the CPR1.1(e) talks about allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases. But in relation to that consideration, what I would invite your Lordship to keep in mind are these points:

First of all the amounts at stake. We are talking about hundreds of millions, and potentially billions by virtue of these attachments. There are serious reputational issues involved in this case for a friendly foreign state. We are not involved in a trial that is going to be complicated or lengthy. In fact, it is not clear what will happen if the Notice of Discontinuance is set aside; are the Statis going to participate or will they disinstruct their lawyers and not participate?

Your Lordship can also take into account the stage

of the proceedings; in other words, the steps that we have already identified with the decision, the completion of pleadings, and where we are about to give disclosure.

So what we would say, although it is right to have regard to that aspect of the overall riding objective, namely time and court resources, we say that the public interest in investigating the misconduct outweighs all competing private and public interests that are in play. It necessarily outweighs the Statis' desire to an interest in discontinuing their claim. It also outweighs the public interest in avoiding legal costs being incurred and court resources being employed, in the circumstances where the Statis are not currently seeking to enforce in this jurisdiction. That is particularly the case where the proceedings are at a relatively advanced stage and in the light of the costs and judicial time that has already been expended on those proceedings to date.

My Lord, that is all I was going to say on public interest considerations.

I was going to go on to costs, but the Statis' position on the question of costs is that that should be left over, and that is paragraph 53. We are content with that approach because obviously the question of

costs will to some extent be dependent on what your Lordship decides.

The only other sort of costs case management matter, which I just simply identify, which is the question of whether the documents that have been disclosed by the claimants before service of the Notice of Discontinuance are subject to the usual undertaking collateral use, and that is the point that we trail in our skeleton at footnote 2, and our case is that the documents are not subject to any collateral use undertaking because they were not provided under compulsion but voluntarily, as we explain —— I will give your Lordship the reference to that —— in a letter from Herbert Smith Freehills to King & Spalding dated 13 March, which is not in the bundle, but the key point is D/37, where King & Spalding say that the documents were provided on an informal basis, free of any conditions. That is at D, 88 of the D bundle.

MR JUSTICE KNOWLES: It is helpful to know that this point is there and the essential positions, but I think I will ——

MR MALEK: Just to know it is there, yes.

MR JUSTICE KNOWLES: I will return to it after I have dealt with everything else.

MR MALEK: I'm obliged.

My Lord, unless I can assist you further, those are my submissions.

MR JUSTICE KNOWLES: What, if anything, should I make of the fact that your clients have launched proceedings in the United States which, on one analysis, overlap with the question you are saying this court should decide here?

MR MALEK: The first point is, as I understand the position the defendants haven't accepted the jurisdiction of the courts in relation to those proceedings. So this is not a claim where you can say it is going to take place. It will obviously turn on whether the proceedings have taken place, and although my learned friend has made reference to those proceedings and what is going on in them, I understand there is going to be a dispute about jurisdiction.

The other point I make is that the proceedings are much broader than the proceedings that are before the court in terms of the enforcement. It is a RICO case, it's a different cause of action. The matters that are being alleged are broader than are being alleged in these proceedings. Therefore, in my submissions, the fact that there is a RICO claim that is being brought where jurisdiction is being disputed, where the allegations are not the same, albeit they may overlap, in our submission is not a relevant factor to take into

account in deciding whether or not to set aside the Notice of Discontinuance and whether or not we should be allowed to pursue the declaratory relief that we set out in our points of claim.

MR JUSTICE KNOWLES: Thank you very much.

Mr Sprange.

(12.15 pm)

Submissions by MR SPRANGE

MR SPRANGE: I would like to start with points of context, and I say there are several that you need to take into consideration in considering the application that is before you today.

The first is really an atmospheric point and that is this: on any view of this case, and when I say "this case" I mean this generally, the Stati parties are a victim of a longstanding oppressive, unlawful under principles of international law, campaign against them that ended up in them having their assets taken away from them. The issues before this court relate to the value of one of those particular assets and, as your Lordship has concluded, there will be, or there may not be, a trial on that issue. But it takes nothing away from the fact that the Stati parties are victims. They are wishing to enforce a New York Convention award in a number of jurisdictions, and it is not fair to

start out, as Mr Malek said, with an allegation that they are forum shopping. Because if we were here on the substantive merits of the underlying dispute that may be true, but a party who has a New York Convention award is entitled to, and indeed the whole purpose of the regime is to allow them to go to variation jurisdiction where they believe assets might be located and enforce. So it is not a case of forum shopping, it is a case of enforcing an award where you find the assets.

That is the first point of context.

The second is this, my Lord, the Stati parties only ever came to this court for one thing and that is, as you recognised in paragraph 94 of your judgment, to obtain an English judgment, to have their award recognised as an English judgment.

Kazakhstan engaged in these proceedings with one goal in mind, to stop the Stati parties getting an English judgment. Because of the Notice of Discontinuance, the Stati parties have failed with respect to the only relief that they sought, and the State has been successful with respect to the only relief it sought. That is the second point.

The third point is this, my Lord, the regime of discontinuance is premised on the basis that a claimant, without reason, without warning, can discontinue its

proceedings. The rule, which we will come to in a moment, doesn't require that reasons be given or that notice be given.

My Lord, I am going to, when I conclude, suggest to you that the approach that Kazakhstan would have you take would lead to three absurd results, and I will unpack the reasons for this as I go through my submissions, but the three results would be as follows:

First, it would elevate this court to the role of an international arbitration court or international arbitration policeman, because you would have, in the context of a New York Convention enforcement exercise, six or seven jurisdictions. A court that is not the court of the seat, that can only -- and this is clear from your judgment in the case that Kazakhstan has advanced before you -- deal with notions of English public policy, not the public policy of another jurisdiction. And that decision of an English court on public policy would be taken, on Kazakhstan's case, to the courts of other jurisdictions exercising their own public policy on the basis that, "Here, look what England says about this case and this particular award, you should adopt it, because we're very good at trials and we have disclosure and cross-examination, so you should take considerable notice of this". That is

effectively what they are asking this court to do.

The second result is this, my Lord. You would have a situation where this court would engage in two weeks of trial, together with all of the reading time and associated administration that comes with that, on an issue that has already been determined.

The only thing this court can do at the end of a trial is rule on whether the award ought to be an English judgment or not. That is a dead issue before this court, given the Notice of Discontinuance.

Now that cannot be right for other court users that this court is engaged in determining something that is a long way from trial, in circumstances where the only relief in question has been determined.

The third point would be this, it would turn the Notice of Discontinuance regime on its head. Because any defendants in a case that involved fraud allegations would be able to say, "Oh there has been wrongdoing, I want my position vindicated, it is in the public interest". What you would have is there would be no discontinuance in any case involving fraud, there would always need to be a trial. Particularly if, as Kazakhstan submits, that is a relevant factor in considering the costs of the proceedings, regardless of whether it goes to trial.

What I will be saying, my Lord, is that all of those points, those three results, would have a chilling effect on this court as an enforcement jurisdiction for New York Convention awards. Because what it would mean is that if you sought to enforce an award in a contentious arbitration, where there were serious allegations made on both sides as to fraud and bad conduct, you may well face the situation where you would have to have a trial on issues that would only need to be established by way of a prima facie showing, and that trial would take probably two to three years, and you couldn't avoid that trial if you decide that because you had found more assets elsewhere and you didn't have is to engage in such a trial, you were stuck.

So in my respectful submission, it would leave this court in the position of parties taking a very careful look at whether they should come here to enforce awards.

My Lord, with those background points in mind, what I would like to do is to take it as Mr Malek took it, and so start with the issue of whether there is a freestanding claim or not, and then turn to the set aside application.

My Lord, I might start with the counterclaim point. Until about an hour ago I didn't understand Kazakhstan's case to be that they had a counterclaim. This is a new

point. I will deal with it, but I may reserve my right to put something in writing, depending on how the day pans out.

Leaving aside the fact that it is a new argument, I say, with respect to Mr Malek, it is a very bad argument. The reason is this, my Lord. It is all very well to say "It's very like a counterclaim because we have put it in a document that said 'Points of Claim' and the rule says it only has to come after the defence", but we have those rules for a reasons and we have the requirement that you put the heading "Counterclaim" and say it's a counterclaim claim for a reason. If not, my Lord, every single defence filed in this court's registry is a counterclaim, because it simply raises points that are contrary to the position advanced by the claimant, and they are not just defences but they are counterclaims.

My Lord, when I come to it, I will show you paragraph 78 of Lord Justice Rix's judgment in Gater which kills this counterclaim argument dead. So I say that that gets them no further and there is no counterclaim.

What this issue is really about, my Lord, is who is the claimant here and who is the defendant. To succeed on this point, Kazakhstan has to establish that it is

the claimant, the formal claimant, and that the Stati parties are the defendant.

My Lord, they don't start from a position of strength, because the very authority that they rely on, albeit in the context of CPR25, proceeds on the basis, despite the obiter comments of Lord Justice Rix, on the notion that an award creditor is the claimant and an award debtor is the defendant. So that is the case that they rely on to suggest that they are actually a claimant, not the other way round.

My Lord, that leads to the bizarre conclusion that here in this case, on the basis of that authority and several others, Kazakhstan, as the defendant, could ask the Stati party, as claimant, for security for costs, because this court believes on the basis of the characterisation of who is the claimant and who is the defendant, we are and therefore we would be susceptible, on a jurisdictional basis, to an application for security of costs.

My Lord, they have to turn that around somehow, which I say would be an extraordinary thing, but let's look at the analysis.

Your Lordship will have noticed that in the Sheltam and Crescent cases, they are the two cases dealing with notices of discontinuance in the context of arbitration

proceedings, this particular argument, that is the award debtor who is attacking the award in question, neither of the parties in those cases took the position that they were in fact the claimant, they just proceeded on the basis that they were the defendant and attacked the notice of discontinuance. We say there is good reason for that.

My Lord, if I could start with our basic position, and it is encapsulated in Gater but you will have seen it, because this claim is pursued under part 62 and there is an arbitration claim form, we say there is obviously a proceeding, and we say that in that proceeding, as all of the pleadings in every document filed in this case shows, we are the claimant and Kazakhstan is the defendant.

That, we say, is a very strong, formidable, compelling position that simply isn't overturned by anything that Kazakhstan has put before you. So we say you can stop there, effectively, because we are the claimant and they are the defendant.

Let's go a step further. What do they say overturns all of that? There are several things. First of all they rely on Gater, second of all they rely upon the language of your order of 27 June and then the points of claim themselves. They say all of that converts the

order and they become the claimant.

My Lord, I am going to say that the passages from Gater, Lord Justice Rix's obiter comments, don't help them, and I am going to show you why. I am also going to say that the analogy that is drawn between domestic proceedings, either to enforce a foreign judgment or to enforce a domestic award, aren't things that can be drawn as analogies between a foreign enforcement under section 101, and 102 and 103.

As to the 27 June order, my Lord, it simply doesn't go far enough. Perhaps if we could take that up, my Lord, it is in the A bundle at tab 5.

My Lord, if I could take up page 32 of the pagination, it is under the heading "The application ". My Lord, there you will see:

"The defendants claim that the award was obtained by fraud and should proceed to trial as if commenced under CPR part 7."

What they say in their skeleton is that that makes Kazakhstan a substantive claimant, and it designates, this is their word "designates", Kazakhstan as the claimant in the formal sense. Then they go on to say that following this they filed the points of claim and that gave rise to independent relief.

Just pausing there, my Lord. If that was so, if

that is what that order was designed to do, it would have said in clear terms —— and the word "as if ", as we will see when we go through Gater, has some meaning —— it would have said "the Republic of Kazakhstan, as claimant in these proceedings, shall file points of claim and this shall proceed as a CPR part 7". It doesn't say that. That is why we say all that order did was set forth the basis upon which the parties would proceed to set out their respective positions on whether the ECT Award would become an English judgment. All that meant was Kazakhstan's arguments, their points that they wish to raise, under the Arbitration Act, as to why the fraud meant that this court ought not recognise the award, would be set forth in that manner.

My Lord, while we are in that bundle perhaps if we can take up the points of claim and just deal briefly with this contention that the points of claim gave rise to a claim for independent relief.

My Lord, we say you are absolutely right to draw attention to the RICO claim, because that is a case where some relief is sought above and beyond whether this award is enforceable, not to be recognised as a judgment. As Mr Malek accepts, it is a RICO claim alleging a series of what I will call economic torts under United States law and seeks relief accordingly,

including triple damages.

The question is —— and I'll come to the RICO claim in a minute —— do you see the kinds of things that you see in the RICO complaint, which make it an independent claim separate from just enforcement, in this document? And the simple answer is that you do not.

If you take up page 35 of tab 6, in paragraph 2.1 to 3, Kazakhstan provides a summary of its case. Having provided a summary, at paragraph 3 it says:

"Kazakhstan relies on the course of conduct referred to above as follows ..."

Then in the following three subparagraphs, at the end of each they make it very clear as to what this goes to. "The result is that the enforcement or any part thereof of the award in this jurisdiction would be contrary to English public policy ", and the same words are repeated, my Lord, in the following two paragraphs.

My Lord, we see the same if go to page 57. Page 57, you will see there, having set out in detail the points that they wish to make:

"The consequences of the claimant's deliberate misleading of the tribunal and the relief claimed by Kazakhstan, Kazakhstan is entitled to and hereby claims a declaration that ..." and we see very similar language repeated in each "... the enforcement or any part of the

award in this jurisdiction would be contrary to English public policy."

What they are really doing here, my Lord, is mirroring what you observed at paragraph 94 of your judgment, which is that the relief that the Stati parties ultimately sought here was the benefit of an English judgment.

There is nowhere in that document an independent claim for anything else other than relief to the effect that we cannot enforce the judgment here. There is nothing outside it.

MR JUSTICE KNOWLES: I don't know if anything turns on this, but at 50(3) doesn't have those words "in this jurisdiction ".

MR SPRANGE: No. I personally don't think anything turns on that because the critical bit is:

"... such that the enforcement or that part of the award would be contrary to English public policy."

I say makes sense, my Lord, because, as I am going to submit to you later, this is something that is unique to the New York Convention regime. It is each enforcing court's business to ensure, before it grants a judgment of its own in respect of an award, that its own public policy is complied with. And that makes perfect sense. And although we made lots of submissions to you as to

whether there should be a trial, we never argued with you on that point.

But the significance of that here is huge, because what it means is that having attended to that issue and having had it resolved, we say it is simply not the business of any court, including this court, to then go into those factors for the benefit of courts elsewhere. It simply doesn't make any sense.

My Lord, you have heard a lot from Kazakhstan as to why there shouldn't be a Notice of Discontinuance, but that is the real reason when you separate it all away. They want to take a judgment from this court and use it in other jurisdictions. That is it, pure and simple.

My Lord, on the basis then that there is no standalone claim from a procedural point of view on the view of the order or the pleadings, I now just need to briefly turn to the cases.

I have already made the point, my Lord, that on the basis of Gater and the other relevant authorities, for the purposes of security for costs under CPR25 we are the claimants and they are the defendants, and they can ask us for security in this case.

I also pose this probably rhetorical question: if it's the other way round, does that mean that Kazakhstan could file a Notice of Discontinuance? If they say they

are really the defendant in substance and in form, as they suggest in their skeleton, could they bring these proceedings to an end by filing a Notice of Discontinuance? The obvious answer to that is of course they couldn't. They could withdraw, but the proceedings would still exist and we would have our judgment.

So my Lord, I do need to take up Gater. I am going to use, my Lord, for the majority of cases Kazakhstan's authorities bundle. It is at tab 3.

My Lord, I respectfully submit this case is helpful but only to a limited degree, because it not a section or not a part 38 case; it is a case about security for costs. Obviously, I say the considerations are different and a lot of this analysis probably goes too far, because obviously in a case of security for costs you have got that whole question of who is really the claimants, somebody may have filed proceedings first seeking declarations.

Nevertheless, my Lord, I say, viewed in the round, it is actually supportive of the Statis' position.

If we could take up the decision, I am sure your Lordship is aware of the background. If we can turn to page 23, this is where the judge first picked up on this debate about who is the claimant and who is the defendant. In paragraph 52, on the left-hand column, he

notes that Mr Justice Field had rejected the submission from Mr Edelman, who was resisting the security for costs, and had concluded that:

"Gater was advancing a claim to be entitled to such relief and Naftogaz is therefore properly to be regarded as the defendant."

Mr Justice Field then went on to adopt the reasoning of His Honour Judge Chambers QC in Dardana v Yukos to similar effect. I show you that just to set the scene as to the debate that comes later, my Lord.

If we then turn to page 26, we then have Lord Justice Rix dealing with the question of jurisdiction. Here he has to consider whether Gater is properly the claimant and therefore susceptible to a security for costs application.

In paragraph 71, essentially he adopts the point that I have already made to you this morning, that because arbitration proceedings under CPR62 commenced by way of arbitration claim and because Gater is the claimant in the arbitration claim form, and because the CPR is engaged in other respects, such as part 58, it is clear who is the claimant and who is the defendant. Lord Justice Rix describes that argument that I rely on, and I say it is impregnable on this point, he says:

"I regard that as a strong, even formidable

argument."

My Lord, there is then discussion about whether, leaving aside part 62, that is the position in reality.

What Lord Justice Rix then did, and we see this at paragraph 75 on page 27, and this is important, my Lord, because he says:

"So since these matters were not deeply canvassed before us [and because he decides on discretion, he assumes but not decides] that there is technical jurisdiction to order security for costs against any award creditor."

That means that he is proceeding on the basis that the award creditor is the claimant and the award debtor is the respondent.

My Lord, having done that, you will then see on the same page, above paragraph 76, he deals with discretion. It is in the context of discretion that he addresses the points that Kazakhstan now raise before you as supporting their position that they have a freestanding claim. In other words, he didn't consider it, he didn't state it as a matter of jurisdiction but just discretion.

My Lord, if you turn over to page 28, it is paragraph 78, which starts on the previous page, that is relied upon by Kazakhstan in its skeleton.

What it is is Lord Justice Rix indicating that there might be situations in which the dynamic is reversed. We see that in the sentence that begins:

"In the case of an application to set aside registration of a foreign judgment under part 74.7, a court can order any issue between judgment creditor and judgment debtor to be tried."

CPR74.7. Just very briefly, that provision in terms allows the court to -- if you take up volume 1, and it is page 2209, and it reads:

"The court hearing the application may order any issue between the judgment creditor and the judgment debtor to be tried."

We accept that. What I respectfully don't accept, my Lord, is what follows. What the judge then says is:

"No doubt the same might occur in connection with an application to set aside an enforcement under order part 62."

I accept that the court has very broad case management discretion and powers, so probably could, if it thought it was the right thing to do, but you don't see in part 62 the language that you see in 74.7.

There, my Lord, you will see that the judge therefore respectfully disagrees with Judge Chambers in Dardana and the rationale that is there.

If it ended there, I would still say that this case does not help Kazakhstan because it doesn't come anywhere near dislodging either the fact that on the face of it we are the claimant and they are the defendant, or (2) the fact that under this decision we are the claimant and defendant through the lens of CPR25 and security for costs.

Be that as it may, my Lord, when we look at later cases that delve into this issue in more detail the position becomes very clear as to what the proper position is.

Just before we go, my Lord, I want to put to bed the counterclaim point. If you read in paragraph 78 there -- and this, my Lord, is picked up in our skeleton argument at 13.2.4 on page 9. You will see there in our skeleton, my Lord, it may be even if the regime could apply to the party seeking enforcement, it could not apply to the counter applicant on the basis that the arbitration claim claimant is simply not in a formal position of being a defendant to a counterclaim.

My Lord, if I could now take up Mr Justice Burton's decision in Diag, and that is at tab 13 of the claimants' authorities bundle.

This case involved enforcement of an arbitral award and there was a debate about whether it was properly

final because there was an outstanding review. In the context of an application and claim here to enforce that award as a judgment of this court, the question arose as to this court's jurisdiction to grant security for costs, and therefore the debate about who is properly the claimants and who is properly the defendants.

My Lord, if we could pick it up at paragraph 17. I apologise, my Lord, this report is not page numbered. There, my Lord, the judge notes that:

"Since the majority decision in Gater was in fact that there was jurisdiction, he was able to proceed and therefore resolve that issue briefly."

He then, my Lord, addressed the question of discrimination and that, very briefly, was this: there was an argument, both in Gater and in this case, that you couldn't impose upon New York Convention enforcement something that was more onerous than you would impose upon domestic enforcement, and so that required a discussion and debate about what the domestic regime provided for. For present purposes, my Lord, we don't need to delve into that.

What we do need to delve into, though, my Lord, is the way that the judge resolved the question of who was really the defendant and who was really the claimant. My Lord, we can pick that up at paragraph 24, which is

two pages following. This, my Lord, was the judge considering the DAC report relating to the Arbitration Act, and the only significance is that from that it picked up this notion, which is used later in the judgment, of what are described as "passive defences to the enforcement of award", and the posited defences being those that are set are set out in sections 67 to 69. I show you that by way of background, my Lord.

Paragraph 27.

MR JUSTICE KNOWLES: Yes, thank you.

MR SPRANGE: "The third sub-issue is whether the defendant is a defendant for the purposes of security for costs. This arises out of the fact that the onus of proof is one for the defendant, and were it not for my conclusion at paragraph 8 above there would be an application to set aside."

Then he considers the Chambers decision in Yukos, and in paragraph 29 notes that Field accepted that. I forgot to show it to you, my Lord, but Lord Justice Buxton in Gater also accepted that, and the reference is paragraph 101. My Lord, do you wish me to take you back to it?

MR JUSTICE KNOWLES: No, thanks. Do if you want to, but ...

MR SPRANGE: No, I say it is a resounding endorsement of the Chambers' view, which is adopted by Field and later

here.

My Lord, the thrust of all of this we see over the next page, just above paragraph 34, and it is really, in my submission, confirming what I said at the beginning of my submissions on this point, what Lord Justice Rix noted in paragraph 71, which is confirmed here:

"In any event, there is a claim on an arbitration claim form unless there were an express order from the ex parte judge for service and there was service under 62.18(3), it would be a claim not treated as being an arbitration claim but it would still be a claim."

Over the page, my Lord, having accepted that the thrust of Court of Appeal decision is that there is jurisdiction, the following is said:

"In response to an arbitration claim form, the defendant here is putting forward what would be described in the DAC report as passive defences. I am satisfied that there is jurisdiction for the court to order security for costs in favour of such a defendant ..."

Then he talks about onus of proof:

"Both in relation to the enforcement of a domestic and consequentially a convention award, the defendant is a defendant within CPR25.12 and not an applicant rendered liable for security for costs under

section 70."

Then, my Lord, he went on to consider discretion, which doesn't matter for our purposes.

My Lord, I then went to go to an earlier iteration of the Nogotkov decision. This is a decision of Mrs Justice Rose that came before the decision that Mr Malek relies on. Unfortunately, the copy in the bundle is not a reported version. I do have a reported version of that decision.

MR JUSTICE KNOWLES: Thanks.

MR SPRANGE: My Lord, I have given you five copies. Not only does it look a lot thick are than it really is, but Mr Malek doesn't get one.

Mr Malek has shown you the decision that dealt with the set aside of the recognition order. This is the application for security for costs for that, let's call it, battle. What Mrs Justice Rose had to deal with was who, in the context of the recognition under the cross border insolvency regime, was the claimant and who was the defendant. So it was a similar debate.

My Lord, I accept the cross border insolvency regime is not the New York Convention, so there is a distinction to be drawn there, but I still say what follows is relevant and helpful, not least because the judge here thought it appropriate to rely upon

Mr Justice Burton's decision in Diag that I have just shown you.

If you could take up, my Lord, paragraph 55, which we see on the bottom of page 4278. My Lord, here the judge was grappling with the issue that often arises in terms of the security for costs: what is the status of the various claims, and if there is a counterclaim or a defence, is it any different than the mirror of the claimant's claim?

What the judge here did was draw on Lord Justice Bingham's notion of an independent vitality test. We see that in paragraph 57 over the page. Firstly, she refers to the Court of Appeal's decision in Autoworld, which uses the phrase "independent vitality", and then notes in 56 that that came from Hutchinson Telephone, Lord Justice Bingham's decision. Then she deploys that later in the judgment, my Lord.

We say it is a very important test for the purposes of this application, because it is very obvious that Kazakhstan's points of claim that you have seen certainly do not have an independent vitality over and above the question of relief of should this court issue an English judgment.

It also kills off this recently launched notion of a counterclaim, my Lord, because it is very clear that

there is no independent vitality to those points.

My Lord, if you could now turn to paragraph 64. A little like Lord Justice Rix, Lord Justice Buxton and Mr Justice Burton, she adopts the notion that the recognition application, albeit a slightly different one, is properly described as a proceeding with the meaning of CPR25.12.

Then, my Lord, if you go to paragraph 65, and this is addressing the question of whether the Hermitage parties can properly be described as the defendants to the recognition application, she says "In my judgment they can". My Lord, the thrust of her reasoning there is that they are arguing that the recognition would be contrary to the public policy of England, so they are defendants to the recognition proceeding.

On that, my Lord, you will see in paragraph 66 that she adopts Mr Justice Burton's decision in Diag.

MR JUSTICE KNOWLES: That paragraph was ...?

MR SPRANGE: Paragraph 66 she refers to Diag and adopts it, and you see the adoption at paragraph 67:

"I accept Mr Smouha's submission that I should follow the approach adopted in that case."

I think Mr Malek and I will probably have to pay Mr Smouha on the side, since we are both adopting his submissions in this case.

MR JUSTICE KNOWLES: He does quite well on his own.
MR SPRANGE: I suspect you're right, my Lord.
If we could go to paragraph 71, and this is the nub of the judgment, as we say:
"There is nothing in the point that the set aside application has an independent vitality because it would deprive Mr Nogotkov of the ability to use article 21 of the model law. There are many occasions when the relief sought by a defendant has other implication for other persons."
Not a point that we say is relevant here. But then the following part, my Lord:
"That does not deprive the defendant of his status as such. The Hermitage parties are not seeking any separate relief themselves, and the set aside application is a purely defensive stance taken against a recognition order which Mr Nogotkov accepts was sought and obtained in order to bring the section 236 application against them."
We say all of that is entirely analogous here.
My Lord, just if you could finally pick up paragraph 76, you will see:
"Even in the absence of such evidence, in my judgment the application to set aside the recognition order is part and parcel of the proceedings or claim

that was commenced. The set aside application cannot be regarded as freestanding, entirely separate from the order which it seeks to challenge. Whether or not the Hermitage parties were defendants to Mr Nogotkov's claim or proceedings at the moment it was initiated, they have certainly become defendants now that they have challenged the making of the recognition order."
My Lord, what we say in summary is this: all of the cases confirm that certainly for the purposes of CPR25 the creditor, the party seeking recognition, is the claimant, and the party seeking to set aside that recognition, on whatever grounds including public policy, is the defendant. His Honour Judge Chambers, Mr Justice Field, Mr Justice Burton and Mrs Justice Rose, Lord Justice Buxton and Lord Justice Bingham all support that view in various ways; and the obiter comments made by Lord Justice Rix, by his own admission without the benefit of full argument from the parties, and made in the context of discretion rather than jurisdiction, simply don't help Kazakhstan here.
Bear in mind, my Lord, Kazakhstan are trying to climb an Everest here, because everything else is against them on who is the claimant and who has the claim.
My Lord, if I can now turn to ...

MR JUSTICE KNOWLES: Is that a good time?
MR SPRANGE: It is a good time.
Perhaps I can just say this, my Lord: as to part 1, they do not have a freestanding claim, they simply don't, and so the only real live issue before you is the set aside, which I will address at 2 o'clock.
MR JUSTICE KNOWLES: Yes. There is the indemnity costs bit, although that is short.
MR SPRANGE: Yes, my Lord, although I will think about it and see what I need to say on it. It seems to me it is being either clarified for my benefit or abandoned, as I saw it. It no longer seems to be ——
MR JUSTICE KNOWLES: It's not put as high, if I understood Mr Malek, as "freestanding", but it's in there.
MR SPRANGE: Yes. All I say on that is whatever Kazakhstan wishes to argue and raise on indemnity costs, they are entitled to do and can do under the regime that is in place where you have a Notice of Discontinuance, and we certainly don't need a trial for that purpose.
MR JUSTICE KNOWLES: Yes. Great. Thank you very much.
MR SPRANGE: Thank you, my Lord.
MR JUSTICE KNOWLES: Two o'clock.
(1.00 pm)
(The short adjournment)
(2.00 pm)

MR SPRANGE: My Lord, unless there's any questions arising on the issue of freestanding claim, I now propose turning to the Notice of Discontinuance set aside.
MR JUSTICE KNOWLES: Thank you.
MR SPRANGE: My Lord, I might just start with the question of the legal test.
There is somewhat of a debate between the parties, in that I say that you ought to consider the following three points: is the Notice of Discontinuance itself an abuse? Is the party discontinuing receiving some form of collateral advantage? What are the surrounding circumstances, and in particular what is the claimant seeking to achieve by discontinuing?
I say you ought not consider these three things:
Is there some element of abuse generally, but not related to the Notice of Discontinuance? On that, my Lord, I accept what Mr Malek says, if there is abuse in the proceedings and therefore discontinuing them means that the Notice of Discontinuance is abusive, then sure you can take that into consideration; but you can't cherry pick something that a party to a piece of litigation has done that might be found or regarded as abusive and say that means they can never file a Notice of Discontinuance. There has to be a nexus between the abuse and the Notice of Discontinuance.

The second thing you ought not to consider is the private interests of the party receiving the Notice of Discontinuance. My Lord, I think whilst a number of defendants would be happy to receive a Notice of Discontinuance, there would be not an insignificant minority who wouldn't, and they will always have an interest in something determined; and if that was a factor, there would be a lot more Notices of Discontinuance set aside.

Finally, I say you ought not to take into consideration general notions of public policy. I will come on to the Chancellor's decision in Nogotkov later, as to where I say that ought to be put.

My Lord, just to make good why I say that's the test that you should adopt, if you could briefly take up the Pakistan case, which is tab 7 of the defendants' authorities bundle. My Lord, it is page 104.

I really just want to emphasise the part that I say is relevant. I know Mr Malek has shown you passages of this, but what the judge did in paragraph 46 is note that under the CPR there is effectively a new regime, then he says:

"But in my view it would be wrong to treat abuse of process as either a necessary or an exclusive criteria which has to be satisfied if the application is to

succeed."

Fine, but what does that mean in practice? Then he refers to Aikens J as was in Sheltam. Then, my Lord, if you pick that up about two-thirds of the way down:

"However, I agree with [and he is referring to the rule] that a court may set aside a Notice of Discontinuance if it concludes that it is an abuse of process of the court. I accept that this may not be the only circumstance ..."

Then he went on to refer to Ernst & Young v Butte, and that gets us to collateral advantage.

Then over the page, my Lord, he refers to would that permission have been granted unconditionally, and then this:

"A court must also be entitled to consider both the circumstances in which the Notice of Discontinuance was issued and what the claimant is attempting to achieve by issuing the service of the notice."

Those are all of the features that you should consider, and it doesn't include the private interest in its own right of the party being discontinued against, and there are no general public policy considerations.

MR JUSTICE KNOWLES: Is it possible that more comes in because the overriding objective comes in?

MR SPRANGE: The way I look at it is this, my Lord: if this

court thinks there is something wholly extraordinary or exceptional about a case, the overriding objective will allow it to parachute in on a particular point. So that, I say, is the test for setting aside a Notice of Discontinuance, which is obviously subject to the overriding objective; and what I say was exercised by the Chancellor in Nogotkov was an example of that. But, my Lord, for that to happen, and I am using the words the Chancellor used, it has to be "wholly exceptional"; and when we come to Nogotkov, I will explain why that case was on a different stratosphere of exceptional from anything else I would submit this court has ever seen.

MR JUSTICE KNOWLES: A particular focus is on your submission that the private interest of the party receiving the notice should not be considered. As opposed to something that comes into the balance. But if I look at the overriding objective, I would be hard pressed, wouldn't I, to exclude the interests of either party in an evaluation? Unless I'm wrong.

MR SPRANGE: I think that's fair, but I think when you are weighing up the overriding interests in this context, these are the parameters:

First of all, the right to discontinue is a right, it is an established right, exercisable without reason, without notice. It will be dislodged if the party

receiving it can show that it has been used for abusive purposes or some collateral advantage. That is effectively as far as it goes for that party's private interest, because they may be the victim of that, if it's abuse. For example, in the Pakistan case the abuse or the collateral advantage was Pakistan would quit the proceedings, reinvoke State immunity, turn up to a negotiation about a fund that had been fought about for four decades and say: you are never going to get it because we've got State immunity.

Now, in that case there probably is, on one view, a private interest of the other parties, but it is really the abuse and the collateral advantage that the other party is gaining.

If you just look at a private interest by itself, so it is not tethered to an abuse or a collateral advantage, then I say it is isn't something that you ought to take into consideration, because every defendant who doesn't like a Notice of Discontinuance will be able to point to a separate private interest in having the case pursued.

MR JUSTICE KNOWLES: Can I ask you one more thing.

I suppose that takes one back to the strength of your proposition that there is a right to discontinue. Is it possible instead to read the CPR as in fact not

conferring a right; what it is dealing with in two places is a procedure. It says that you can give a notice to discontinue, and the consequences will flow unless the other side engages with an application to set aside, in which case the court will examine the thing on the overall merits by reference to the overriding objective. So it is not that the first part of that two-step procedure gives you a right, it is that it describes a convenient sequence to come to an outcome.

MR SPRANGE: Yes, my Lord, if we were under the old rule I would agree with that characterisation. But under this rule I say no, and I say no for this reason: under the old rule, as I will show you in a moment, you would in most circumstances require permission, so there would be a process; you would file it and then you would seek permission and then there would be a debate. That is point 1.

Point 2 is when you file a Notice of Discontinuance under this regime, it is not a process, that is it, the case I say discontinued; and I would guess that in the majority of cases that is the end of the case, there is no proceeding left and it is over, subject to just resolving the question of costs.

If it was as you described it, my Lord, if it was a sort of process, that would be almost like where you

recognise an award on a preliminary basis and then come back with permission to set it aside. It would be pregnant but not confirmed. Whereas this is very stark: you file it, the case is over.

MR JUSTICE KNOWLES: Yes.

MR SPRANGE: So no, I don't.

The other thing is I should say is this, my Lord, that when you look at a private interest untethered to abuse or collateral advantage, what case where a defendant doesn't want the discontinuance, wouldn't they be able to point to a private interest that they wished to pursue? It would be the easiest thing to come up with, because every defendant would say, "I want to be vindicated" or "I want my day in court" or "I need a public decision on this" or whatever.

My Lord, I can't emphasise it enough, I do say that the context of this regime is absolutely critical. When you file a Notice of Discontinuance, the case is over; subject to any application for costs, or the type of application that we are here today for.

My last point on that, my Lord, is this: where you see Mr Justice Henderson and Mr Justice Aikens as he was expanding the test somewhat, that, to my mind, and in my submission, is taking on board the fact that the regime has changed. The court doesn't get a say at the

beginning of the process; it only gets a say at the end, but that say is more broad than it used to be.

MR JUSTICE KNOWLES: Thank you.

MR SPRANGE: Having said that it is an irrelevancy and you shouldn't take it into consideration, I also say it simply doesn't arise as matter of fact. This really goes to the heart of why we are here, because what Kazakhstan is saying is: we have an interest in the English court continuing to a lengthy trial before this court. If you are with me on accepting that that is not a correct position and there is no advantage, to me the rest falls away, including the public policy, because if there is no private interest, how can there really be a public one.

To address the private interest point, I really need to unpack for you what precisely it is that Kazakhstan say on this. Mr Malek's skeleton very neatly summarises this, and I would ask you just to take it up for reference at paragraph 40, so we can keep it in front of us.

MR JUSTICE KNOWLES: Yes.

MR SPRANGE: I am going to deal with it in the order that he provides in paragraphs 40 to 45, my Lord.

MR JUSTICE KNOWLES: Yes.

MR SPRANGE: The first point that he raises is this

possibility of bringing future proceedings to enforce the award in this jurisdiction at a later date.

My Lord, I say that is a very bad point, for this reason: under this regime we can't, without the permission of the court. My Lord, just to get a grip on what that means, if we could take up the White Book volume 1, at page 119. My Lord, 38.7 says:

"A claimant who discontinues a claim needs the permission of the court to make another claim against the same defendant."

Then sets out the circumstances, and in the explanatory note below it says:

"The court is likely to give permission, for example, where the claimant was misled or tricked by the defendant or important new evidence has come to light or where there has been a retrospective change in the law."

Those are high burdens indeed. So we say that whilst we are happy to give an undertaking, and I think Mr Malek probably gives us too much credit in suggesting that our language was artful, and to be very clear to the court now, our undertaking is we will not, the Stati parties will not bring enforcement proceedings of the ECT Award in England and Wales.

MR JUSTICE KNOWLES: For all time in any circumstance?

MR SPRANGE: For all time in any circumstances. My Lord,

the reason we feel comfortable giving that undertaking is because if the court required such an undertaking, we don't think it really is much different from this rule, in the sense that let's say it later turned out that Kazakhstan had entirely misled you at the January hearing and the award, your June judgment was procured by fraud. We would have is to get over those types of hurdles, whether it was an undertaking or the permission.

So we are happy to give it, but we really don't see that it gives any more protection, and in the circumstances that we give that undertaking we would be required, a bit like they were, to effectively satisfy the two limbs in Westacre to come back. They can't really say that this is a genuine point.

My Lord, if it was, it would be a genuine point in every single Notice of Discontinuance, because you could always say there was a risk that somebody would come back. Although I am coming on to it in a bit more detail in a moment, my Lord, when you look at the Stati party reasons for not doing it, they are an award creditor, they have attached in various jurisdictions other than in England 40 times the award, including large sums in Sweden where the award is now, we say, impregnable, it makes sense for them to give that kind

of undertaking because this is not a place that they need to pursue any more.

So it is not as though it can be said that the undertaking is given just to satisfy the court and get out; it's an undertaking which makes logical sense when you look at the surrounding circumstances.

So, my Lord, on that we say that's not a valid private interest.

The next point they raise, my Lord, is that there are reputational issues in Kazakhstan refusing to pay, and a determination of the fraud claim will remedy that. My Lord, that just doesn't make logical sense, because let's assume, and we say this is a very big assumption, let's say there was a trial and the Stati parties lost and they could not enforce the judgment here. Kazakhstan would still suffer the reputational harm it suffers today by not complying with the enforcement of this award in Sweden. Because the English judgment will have no effect in Sweden and, in my submission, it won't have any effect in any other jurisdictions, because they will all look at it through their own public policy.

So no matter what happens here in England, if Kazakhstan continues not to comply with an award that has been upheld at the seat, it may in the press say it has got reasons not to, but as a matter of law it won't.

So having a trial here simply won't help reputational issues.

My Lord, I'm going to show you in a moment some important evidence from independent, I would say, Belgian and Dutch lawyers, and in that it is also made very clear that Kazakhstan could in a moment put up security in any of these other six jurisdictions, could leave money in a court in any jurisdiction pending the enforcement proceedings there, and stop everything everywhere. So if reputation was the real concern, there is plenty of simple measures Kazakhstan can take other than trying to force this court into pursuing a fraud trial that can only ever involve the determination of issues under English public policy.

My Lord, the next point is that fraud is a live issue that should be determined. My Lord, first of all, I think this is a slightly unfair point in the sense that it takes a passage from your judgment and deploys it in a broader sense than it was intended. I'm sure your Lordship, being the author of the judgment, can tell me if I have got that wrong almost immediately, but paragraph 93 of your judgment —— do you have it, my Lord? I have got the reported version, but it is in the bundle.

MR JUSTICE KNOWLES: Yes.

MR SPRANGE: It is in A, tab 4 in substance, my Lord, I would like to take up paragraph 89.

What your Lordship may recall is that you made the point at the end of paragraph 89:

"The powers of the English court and the requirements of English public policy are not so limited."

So in rejecting our argument that you ought to tuck in behind the Swedish decision, English public policy is more nuanced and looks at other issues, and so that is why there was no, amongst other reasons, estoppel from the Swedish decision.

Then you go on to your conclusion and note, this is in paragraph 92, that the Swedish and US decisions didn't create estoppel, and in 93 is the paragraph that is relied on so heavily.

My Lord, we of course don't say anything about that, other than it is obvious and correct. But we say it needed to be looked at in the context of your decision as a whole, which means you are looking at the question of what should happen in this jurisdiction where an award creditor wants an English judgment. Simply because they have got through the gate in other jurisdictions doesn't mean that they get through the gate here; and to allow that, as you say there, would

not be good for the integrity of the New York Convention arbitration users, et cetera, et cetera.

That doesn't mean, which is exactly what Kazakhstan says it means, that you were saying to all jurisdictions in all of the world "Until this court has considered all of this, under transnational public policy and your own public policy there ought not to be enforcement".

That, my Lord, means that when we say the fraud is a live issue, we need to be very careful; because what is a live issue is whether under English public policy this court should recognise this award, and your Lordship has carefully picked out two issues, that is the indirect impact and whether the KMG indicative offer was induced by the misrepresentations, and you passed those as two issues that weren't addressed by the Swedish court.

So when you say the fraud issue is a live issue, there is two important caveats, it's those narrow aspects of the fraud and from the context of English public policy. In my respectful submission, the fraud as a live issue generally isn't a fair or accurate summary.

So if there were a jurisdiction out there, my Lord, that had in its Arbitration Act, "We will adopt any English decision on public policy and the enforcement of

an award", and we were seeking to enforce in that jurisdiction, I could see paragraph 93 having some force. But we're not in that position at all; as a matter of fact, we are in the opposite position, in the sense that other than England, English public policy isn't relevant in any other jurisdiction.

It's rather ironic, my Lord, that the aggressive thrust of Kazakhstan's case before you in January of last year was "because of the differences in public policy between Sweden and England there ought to be a trial here", and having taken that position so forcefully, it now bites them back, because if that is so, it works the other way. This court can't be giving any help to any other New York Convention jurisdiction on enforcement of this award, because those courts will look through the lens of their own public policy.

But there is an even more fundamental point than this, my Lord. If this were a genuine complaint of Kazakhstan and their issue was, "Well, we just think as a matter of transnational public policy or good New York Convention sense this needs to be looked at", that is what they are doing very precisely in the RICO proceedings in the United States.

If we could just take up the RICO complaints, because there are some important passages that I want to

show you. It is in volume C2. The point of showing you this, my Lord, is if this is a genuine point, Kazakhstan has taken care of it by filing this case.

If you were at all enamoured by this as an argument, you could tick that box by saying the DC court has recognised the ECT Award. We saw that decision from Friday.

Kazakhstan has filed a fraud case under the RICO statute in the United States, they are making a series of allegations relating to the award and, in relation to the indirect issue, the KMG indicative offer being induced by fraud. That will be, indeed as you will see from the front page of that, or might even be a jury trial, but there will certainly be all of the procedural advantages that litigation in the United States attracts, including discovery, depositions, oral hearing at trial, cross-examination. My Lord, it will go directly to the issues that you flagged up in your June judgment.

If I could take you first to the index, we see it on page 2, and it is under the heading "1. The underlying fraud", (g) and (h):

"False representations of construction costs of the LPG plant in audited financial statements."

Then (h):

"Falsified financial statements were used to obtain bids for the purchase of the LPG plant."

If you could then turn to page 35, my Lord, and skipping over (g) simply, my Lord, you will be very familiar with those allegations relating to the audited financial statements from the earlier hearings, but you will see the bottom of page 35(h), you will see there the allegation:

"The Statis continued their fraudulent scheme when they attempted to sell certain of their assets, including the LPG plant, through a bidding process Project Zenith."

Then if you could take up paragraph 1.18 they referred to the "teaser", which was the Renaissance Capital document, and you will see the third line from the bottom:

"The teaser mentioned an amount of 230 million on capital expenditure."

Then, my Lord, in paragraph 119 there is reference to the information memorandum, and it notes in paragraph 121 that the information memorandum is based on financial information which was derived from ... and it is all of the financials that Kazakhstan say in this court they wish to explore at trial, whether they were inaccurate and inconsistent with IFRS, which we see at

paragraph 122, and in particular the allegation that there was no mention of Perkwood, and we see that on page 123.

My Lord, if you go to paragraph 124 there is a direct allegation that they were falsified on false information by Mr Stati or the Statis and the Stati companies, and at the bottom of that paragraph:

"It was false or misleading because of the failure of all of the Stati parties to disclose Perkwood as a related party."

If you could take up paragraph 130, which we see at page 40 of the pagination, it then discusses the KMG indicative offer, and contends in paragraph 131 that that was based on the information memorandum and the expenditure on the LPG plant.

The detail of where that leads in terms of the allegation is at 133, on the next page, which reads:

"The KMG indicative offer was thus procured by fraud because defendants knew that the bid was expressly submitted in reliance on information that the defendants knew to be false."

Then there you have it.

My Lord, if you could just turn now to the end of this document. I don't propose to show you all of the relief, but if you could take up page 94 you will see

there that there is various counts of fraud, fraud and civil conspiracy, and they adopt all of the paragraphs that I have shown you.

My Lord, that's a substantive action brought by Kazakhstan against the Stati parties in the United States, where they wish to have, in the full glare/gaze of the US court system under the federal rules of civil procedure, a trial on those issues.

My Lord, those issues are the very issues that they say are live. If we go back to your judgment, if I could just briefly remind you, it is tab 4 of the A bundle, if you take up paragraph 21 of the judgment on page 15, you will see there, my Lord, in paragraphs 21 and 22 you refer to Perkwood, and that is just the allegation there that Perkwood was one of the entities that had siphoned off money. That was one of Kazakhstan's allegations in the ECT arbitration.

Then, my Lord, if we could turn to paragraph 47, which is on page 20, and you refer there to:

"If the KMG indicative bid was in fact the result of the defendants' dishonest representation, at this stage is the necessary strength a prima facie case?"

On that basis, my Lord, if you could go over to 52 and 53, in those paragraphs, my Lord, you noted that that issue hadn't been dealt with by the US court at

that stage in the preliminary recognition decision that we relied on before you as and estoppel, and in particular you said:

"The decision of the US court does not conclude the question of the consequences of the tribunal's reliance on the KMG indicative bid. This includes the question of whether the tribunal was misled because the KMG indicative bid was based on the alleged fraudulent material and the claimant knew that when they presented not the fraudulent material but the KMG indicative bid."

My Lord, just to close the loop on that, you then in, paragraphs 64 to 66, reached similar findings in relation to Sweden, in the sense that the Swedish court likewise hadn't addressed these issues because of the effect of Swedish public policy.

My Lord, those are the issues that really are live based on your judgment, and it is absolutely plain that following the discontinuance of these proceedings they remain very much live in the RICO claim on a standalone basis, untethered by public policy. So the US court will be able to look at those two points that I have referred to in your judgment and that are pleaded in the RICO action, and look at them simply on the basis: are they a fraud? It won't have to say, on the basis of whatever it finds, that it is pursuant to its own public

policy or the public policy of any other jurisdiction.

So, my Lord, the question arises as follows: which court is in a better place to consider this live issue? And the answer is plainly the United States court, because that is where it is going to be considered in fraud terms, without being straitjacketed by a particular public policy.

My Lord, Mr Malek raises jurisdiction. I obviously can't make any concessions today about jurisdiction, but let's just look at this. How is it that a party who approaches the US courts to enforce a New York Convention award is going to turn around and say that that court doesn't have jurisdiction over it for a related action? My Lord, I would submit that is a very bad point, and the reality is that the Stati parties are going to have to face up and deal with this RICO case.

My Lord, I will deal with this point in more detail when I cover the assistance to foreign courts, but let's just pause for a moment. What is going to be more useful for Kazakhstan, a judgment from a federal court following trial on those very issues that I have shown you that are pleaded, not tethered to any public policy, or a judgment of this court, which is tethered to public policy, and is just that narrow question of whether

there should be a judgment here?

My Lord, if getting judgments for use in other jurisdictions was a permissible act, which I say it is not, for reasons I will come to, it is very clear that the US judgment and the US proceedings are the right place, not here.

My Lord, the next point that is taken is in paragraph 43 of their skeleton. It goes something like this: they say that a judgment of this court following a trial —— and this is as high as they put it —— may result in other courts being assisted; "assisted" is the highest they put it, and they describe it as having some evidential value.

I say two things, my Lord.

First of all, on the basis of the evidence that simply isn't the case. But even more so, that assistance and evidential value is simply not a reason to set aside a discontinuance and go to trial.

My Lord, again I need just to set the scene with your judgment. Your judgment, hopefully I can remember it, what your judgment said is: this is Swedish public policy, this is what Swedish public policy did with the fraud, it looked at the direct impact, it didn't look at the indirect impact and in particular whether the KMG indicative offer was one that was itself induced by

fraud. Under English policy, this court needs to look at those two issues and decide them, because the Swedish court didn't and the US court didn't. And that is what we are going to have, that is what is going to be the focus of that trial.

If that is true, then what Kazakhstan has as a very basic burden is to prove to you, by evidence today, that an English court finding on those two extra points is relevant under the public policy of the other jurisdictions and will be taken into consideration by them, because their public policy similarly differs from Sweden and is more akin to English public policy and therefore it will help.

If they cannot prove that, my Lord, they cannot say to you that those courts will be assisted by anything that this court finds. Because what if the position in civil law jurisdictions like the Netherlands, like Belgium, like Luxembourg, the approach is like Sweden? The fact that an English court, applying its own public policy, looks left, looks right, not just straight ahead, may be an utter irrelevancy. But as you sit here today, my Lord, you simply don't have any help on that from Kazakhstan; and absent that help, you can't accept their submission that it will be of assistance to those courts.

My Lord, I don't just say that as a matter of submission, I also say it because there is some compelling evidence to support that conclusion, and it comes in several forms.

The first is if we look at the Bank of New York evidence that was submitted in the part 8 proceedings before Mr Justice Popplewell. We see the views of Dutch and Belgian lawyers on behalf of the bank, so you would expect them not to have the same skin in the game that the Stati parties or Kazakhstan have.

Although dealing with slightly different issues, in particular State immunity, both lawyers made it very clear that English law, in that case State immunity, was simply irrelevant to the Belgian and Dutch courts. If I can take up those statements, my Lord, they are in the C2 bundle. If I could start at tab 17, it is page 150.

Just briefly, my Lord, the deponent of this witness statement, whose lengthy name I won't attempt, is a partner at Linklaters, they were acting for the Bank of New York in the part 8 proceedings, and she is giving evidence about the effect of the garnishee —— the attachment orders in the Netherlands. On page 150 she is dealing with the question of the relevance in the Netherlands of an English judgment rendered in the part 8 proceedings.

You will recall, my Lord, Kazakhstan wanted this court to make determinations relating to issues of English law that they could then take to these jurisdictions and rely upon. So not a dissimilar exercise to what they are applying for now, only I say they probably had some compelling reasons then but don't now.

This what is she had to say, and you will see it in paragraph 67:

"English law of sovereign immunity is not relevant to any Dutch court's ruling."

Then amplified in paragraph 71:

"The Dutch court should re—examine the question of immunity from execution under the applicable Dutch law provisions, notwithstanding the existence of an English court judgment with respect to the question of sovereign immunity under English law."

My Lord, in the next tab we have a statement from a Linklaters partner in Brussels addressing the same points. If you could take up page 173, paragraph 71, you will see there too, my Lord:

"The issue of State immunity under English law would be irrelevant with regard to the scope or ability of the garnishee order in Belgium, since the Belgian court must apply the Belgian rules, [et cetera]."

Then:

"The question of whether assets will be considered to be located as a matter of English law or where the obligations under the global custody agreement are performed as a matter of English law are likewise irrelevant, for the reasons set out above."

I appreciate, my Lord, this doesn't relate to public policy, but the principle remains the same. These courts are going to look at their own laws. And in circumstances where they are plainly not interested in what this court thinks of English law issues that are pertinent to them, such as the location of assets or State immunity, bearing in mind that the global agreement in question is governed by English law, why would they be interested in any way, shape or form in what this court has to say about those additional limbs that you have alluded to in your judgment?

Now, Kazakhstan hasn't presented any evidence to that effect, and the evidence that is available, from two independent lawyers, I would say, suggests exactly the opposite.

My Lord, there is just two more things that I need to show you in this particular bundle. The first is if you could look at tab 13, and this goes to the same issue.

There, my Lord, is the translation of a letter in November of last year where Kazakhstan was writing to the Dutch court to ask for a stay of the Dutch proceedings. It was written post your judgment, and your judgment got much air time. If you take up page 101, you will see there in the third paragraph reference to paragraph 93 of your judgment.

What they are effectively saying in this application is the English court is going to look at all of these issues. Here is what was said at paragraph 93, here is the procedural posture, "There is going to be a trial in October/November", we see that in the next paragraph, "please stay".

Now, my Lord, there is a debate and a dispute about the significance of what happened next, but this much is clear: there was no stay by the Dutch court, and there will be a hearing on I think it's 22 June, I will show you a reference to Mr Dzhazoyan's statement in a moment, with respect to that issue. So the Dutch court, fully appraised of your judgment and the issues there, didn't stay the proceedings, it was happy to proceed to a hearing that takes place in June.

In my submission, if what Kazakhstan now says is fair and accurate then the Dutch court wouldn't have proceeded to the hearing in June, it would stayed, a bit

like Mr Justice Popplewell did in September 2015 before the Swedish proceedings. You may recall that that was the first listing of the question of whether the judgment should become an award, and it was adjourned on the basis at the court's own behest because of the Stockholm proceedings.

Lastly in this bundle, if you could briefly take up 19, my Lord. This is the Belgian court on the enforcement side of the house. We see that at page 176. It is the exequatur proceedings, and the significance here is at the bottom of page 177 we have the court in various, what we English lawyers would probably regard as recitals, saying "Whereas", "Whereas", and in the final two paragraphs on 177 you have got the Stati parties' position saying everything is being decided at the seat in Sweden, so it's fine.

Then you have got Kazakhstan's reliance on the decision of this court of 6 June. Then the Statis' response to that. So the court sees very clearly the procedural posture between the parties and the fact that there is the decision of this court.

Then over the page, having noted the parties' respective positions, they say:

"There exists no reason not to grant enforcement in Belgium of the arbitral awards ... that no violation of

Belgian international public policy is established at this stage."

So the Belgian court, aware that the English court felt there was a prima facie case of fraud from an English public policy perspective and ordered a trial, didn't stop the Belgian court, albeit on a preliminary basis, going ahead.

So, my Lord, where that gets us is, let's assume —— my submission, based on all of that, is that you cannot be satisfied on the evidence that the assistance as is described is genuine or real from a legal point of view, and whilst Kazakhstan might like the atmospheric benefits of a judgment of this court, it is going to be of precious little value to courts of other jurisdictions, for no other reason than they need to apply their own public policy, much like this court did.

But there is a further point, my Lord, and I say this is even more compelling ——

MR JUSTICE KNOWLES: There is obviously references in the evidence from Kazakhstan suggesting that they have spoken to counsel in Holland and elsewhere, who thinks that there would be some regard had to an English decision. Are you going to go to those? Or is it that the passages that you have taken me to, you suggest have more weight?

MR SPRANGE: Yes, each of those passages, and your Lordship has no doubt read them carefully, as I have and Mr Malek, and the language is "It is on information and belief from Mr Carrington" and it says "shall be of assistance", "shall be of assistance", "shall be of assistance".

I accept, my Lord, any court in the world will always take "assistance", in inverted commas, from the decision of another jurisdiction which deals with some common matter. Whether you sit as a judge or an arbitrator or as a lawyer, if you see a decision from another jurisdiction you read it and it might give you some assistance, but I say that ——

MR JUSTICE KNOWLES: Can I just stop you there. Just in case it has a bearing. I think the formulation is "would be likely to have regard to". Does the phrasing matter, for your purposes?

MR SPRANGE: No, it doesn't, my Lord. Because what I say is that if you want this court to go to trial in the face of a Notice of Discontinuance, in circumstances where this court can only deal with English public policy on the two narrow—ish points that you have referred to, you need a lot more than "will have regard to" or "assistance". What you have to be told is that public policy in Belgium is like English public policy, it

would look at the additional points like the English court has. If the English court were to address those two, it would be relevant under Belgian law for the following reasons. It may have a res judicata effect. It may this and may that. Saying that "it will have regard to" and "assistance", that's a polite way of saying it won't be ignored, but that's not really the enquiry you have to embark on.

Where we get that from, my Lord, is remember this, and I am going to show you Mr Justice Popplewell's decision in the part 8 proceeding, remember in that case the declarations were relating to English law with respect to an English law agreement that was going to be considered by courts in Belgium and the Netherlands as to whether they ought to attach assets. So English law was fairly and squarely something that those courts were going to have to look at.

That application failed for a number of reasons, but the ones that are particularly relevant to this, my Lord, is, if you could take up page 74 —— it is at C2, tab 21. Please ignore that page number, because I was looking at my own copy, not the bundle copy ——

MR JUSTICE KNOWLES: Sure.

MR SPRANGE: It is 211, my Lord.

MR JUSTICE KNOWLES: Thank you. (Pause)

MR SPRANGE: Before I just show you the principles, my Lord, just look at it at a macro level. Mr Justice Popplewell declined to interpret a key provision of the GCA under English law, despite the fact that that GCA would be an integral part of the considerations in two foreign courts as to whether assets ought to be attached or not, and what their situs might be.

So when you look at that in the round, you can say to yourself, just as a matter of common sense, that might be something of more than just assistance to those courts.

Kazakhstan doesn't have that luxury here, for the reason that I have articulated. The Belgian and Dutch courts won't be applying English public policy when they look at the enforcement of this award; they will be applying their own public policy. So it is not something that they will look to to decide on at all.

As to principles, my Lord, at paragraph 97 the judge set out the relevant principles with respect to declaratory relief. This is just whether the declarations should be allowed. These are principles extracted from Rolls Royce. My Lord, 2 is of particular significance:

"The real and present issue between the parties before the court as to the existence or extent of the

legal right."

We say that is not satisfied here, because there is no legal right. Because of the discontinuance, the Burton order doesn't exist because the proceedings don't exist. So there is no legal right to be decided. We can't get a judgment here. And all that Kazakhstan seeks, based on a number of grounds, is that we don't get a judgment here, so there is no legal right.

My Lord, the balance of the grounds are well—known and I don't need to go ——

MR JUSTICE KNOWLES: You're still saying I've got a legal right to enforce. You're not prepared to say to Kazakhstan I don't have that right. So ...

MR SPRANGE: We are, my Lord, in two ways. One, we have brought to an end a proceeding where that was the only relief we sought, and we can't come back without the permission of the court, and that would be on very, very limited grounds. We are also prepared to give an undertaking to say that we will not come back to this court to enforce the English award. I don't see how more definitive you could be in saying that we will —— the Stati parties' ability to enforce in this jurisdiction is, on any view, dead and buried.

MR JUSTICE KNOWLES: Does that not go to —— you're putting out of your reach your ability to exercise this right,

but you're not accepting, on the merits, that you have no right.

MR SPRANGE: We are not accepting -- well, yes, I think we are, my Lord. We are not accepting that we can't enforce this award in Luxembourg or Belgium or the Netherlands, because we can, and there is nothing to stop us doing that; and we are the beneficiary of a New York Convention award, so should be.

If this case went to trial in England and we lost, we could still do that. There wouldn't be any impediment to us seeking to enforce in other jurisdictions.

So it is right that we are giving up forever any enforcement in this court, my Lord, and by that any assets located in this jurisdiction, but it doesn't mean, and nor should it mean, that we can't try and enforce elsewhere.

That, we say, is a very important distinction.

MR JUSTICE KNOWLES: Yes.

MR SPRANGE: Obviously, my Lord, I will explore that in the context of the Bank of New York attachments in a moment.

MR JUSTICE KNOWLES: Thanks.

MR SPRANGE: My Lord, if you go 98, which is after the setting forth of those principles, it is noted there:

"It serves no useful purpose as between the parties

to these proceedings and if it is intended to serve some other purpose then it offends the principles I have identified."

So we say, my Lord, here, in circumstances where the relief, do we get an English judgment or not, has been determined against us by the Notice of Discontinuance, Kazakhstan's use of these proceedings can only be for another purpose and that is not permissible.

My Lord, lastly on page 76, paragraph 103 and 104 ... (Pause)

Here the judge concluded that the declarations that were sought as to English law, it's not clear that they would be of any assistance, and it's noted that the English court would be prepared to grant declarations for the purposes of informing a foreign court of the position under English law where it will assist the foreign court in resolving issues before that court.

It wasn't the case in this particular case, even though the GCA is governed by English law; and in my submission it could never be the case with respect to the issues that Kazakhstan would like to take to trial, because English law simply won't arise in those other jurisdictions because it is not English public policy that is before them, but rather local public policy.

The second point, my Lord, we see in paragraph 104.

This is exactly, we say, the situation here:

"It is a rare case in which the court will do so simply for the purposes of assisting the foreign court, without it serving any purpose in relation to an issue between the parties before the English court."

There is a reference to Howden v Ace:

"The court must exercise very considerable caution before doing so on these grounds. Where the assistance has not been requested by the foreign court [which is our case] it must be clear that the foreign court cannot itself receive evidence and resolve the English law issues on its own without difficulty ..."

That is simply not the case here. In fact, the opposite is true:

"... and that the English's court view will be of real and substantial assistance."

Well, Kazakhstan's evidence on the assistance doesn't go anywhere near real and substantial:

"Otherwise, the idea that the English court should give unsolicited advice to a foreign court may be regarded as presumptuous and condescending."

That is why, my Lord, when I started out, I said that if you adopt Kazakhstan's approach and take it to its natural conclusion, it is elevating this court to almost an international arbitration advisory court.

"This is what our public policy says, so here you go, when you look at this case this is what you should do."

My Lord, where all that leads us to is I say there is no private interest.

The fresh proceedings point is dealt with by the fact that the case is over, and we would only get permission on the narrowest of grounds, and that we are also prepared to give a very clear undertaking that enforcement in this jurisdiction for the Stati parties of the ECT Award is forever over.

The reputational issue we say doesn't arise, because a judgment of this court will make no difference, and there is plenty of other ways that can be solved.

The fraud is a live issue. You have heard what I have said about that and the RICO claim.

The foreign court assistance point, my Lord, I say is not borne out by the evidence, and in any event would be an impermissible use and not a reason for this court to proceed to a trial.

That, my Lord, brings me to the public policy question. If I can start, my Lord, just by saying if you accept that the reasons that the Stati parties have given for discontinuing are genuine, there cannot be a public policy issue.

I say they plainly are genuine, for this reason,

my Lord.

First of all, the actual facts that we contend aren't seriously in dispute. Kazakhstan accepts that there is a very large amount of money attached in a number of jurisdictions. When you consider, my Lord, that this whole notion of enforcing a New York Convention award is about one thing, it is about getting paid under the award that you have obtained, the idea that a commercial party would say, "I have filed in six or seven jurisdictions, I'm not sure what I would find, I have found more than enough in three or four jurisdictions so I'm not going to pursue proceedings elsewhere", there is nothing abusive or unusual or illogical about that. It makes perfect sense. That is based on undisputed facts.

The second point, my Lord, about impecuniosity, there is an attack made on that, but the evidence is compelling. If I could just take you to bundle B, tab 6, my Lord, page 112. This is Mr Dzhazoyan's second witness statement.

MR JUSTICE KNOWLES: Sorry, the page is?

MR SPRANGE: Page 112.

MR JUSTICE KNOWLES: Thanks.

MR SPRANGE: In paragraphs 49 to 52 he explains the funding position. It is said in a "nudge nudge, wink wink" kind

of way that Mr Dzhazoyan is making all this up, but the evidence is very, very clear. He says there that there has been three funding arrangements, one in August 2016, one in May 2017 and there is a third that is to be put in place. Bear in mind, my Lord, these are funding arrangements which have been put in place over the objection of the Vitol parties, who was the party to the JOA arbitration, so they are certainly receiving the scrutiny of an adversary. They are also receiving the scrutiny of this court, because they have to be done with the permission of this court, because of the existence of the freezing order. So the funding arrangements in August 2016 and May 2017 were ultimately approved by the English court.

Then the third, you will see in paragraph 51 he says, "which is yet to be approved by the English court". I am instructed, my Lord, that Mr Justice Popplewell has now approved that variation since this witness statement was filed.

So, my Lord, Kazakhstan cannot stand here and attack this evidence, given that it is from an officer of the court and it is an officer of the court who is acting understands are the scrutiny of an adversary and the court itself.

There is a further point, my Lord. Mr Malek made

the point about what has the funder said. Well, what funder on the planet wouldn't say, "You have got 44 times—odd the award attached in four or five jurisdictions, you are going to have to go to a long and expensive trial in this jurisdiction, we don't know what the asset position is, we're not funding that". That makes perfect logical sense. There is no reason to think that is not a genuine explanation.

My last point on this, my Lord, is this: bearing in mind you have to look to see whether there is some kind of collateral advantage, there is no collateral advantage here for the Stati parties; it is a huge collateral disadvantage, because they are going to have to, in all of the jurisdictions in which they seek to enforce, deal with all of these allegations that appear in this court's June judgment, and they are going to have to face Kazakhstan saying ferociously and aggressively, "They ducked out of going to a trial". I fail to see how that is an advantage to them.

The more advantageous thing would be, if they could, to fund it, fight it and clear their name. That would be the best thing to do. That would be the advantage for them.

So leaving aside any order this court makes in relation to costs, there is also the fact that they are

leaving themselves open on a regular basis to continuing attacks.

My Lord, if you accept that those explanations are reasonable, then I say there cannot be a public policy objection to the Notice of Discontinuance.

My Lord, I just want to finish the public policy on two topics. One, just I do need to show you the Chancellor's decision, because it is an extraordinary case, and because of its extraordinary nature we say it's simply not a case that is of any assistance to you here.

My Lord, if we could take that up, it is at tab 10 of the defendants' authorities bundle.

My Lord, Kazakhstan invokes this really on two bases. First of all, they say this is authority for the notion that the court can proceed to determine something if it will expose wrongdoing; and it is also authority for the proposition that litigants can't turn the tap on and off, let's just call that the Smouha point.

My Lord, they are principles that make sense but they need to be very carefully deployed, because, my Lord, they could be applied to almost every case otherwise. If you think of a case that is discontinued, one party will always be able to say "They shouldn't be able to just turn the tap off, they ought to go to trial

and face the music", or "There is some wrongdoing here that we would like to expose".

So, my Lord, in my submission you can't take those two points, pluck them out of a very careful, reasoned judgment in extraordinary circumstances and apply them generally.

I also say that this case is distinguishable at a high level on three grounds.

First of all, this was not an application under CPR38.4, so it had nothing to do with the discontinuance of a claim. That doesn't mean I say that the Chancellor didn't have the power to do what he did; I simply say it needs to be looked at in the context of what it was, which was not a discontinuance.

The second point is this, that I don't accept, as Kazakhstan has said several times, that these proceedings are advanced. We haven't had disclosure yet, we haven't had witness statements and we are not on the doors of court for the trial. I say it is not advanced, really we just have pleadings.

In this case the opposite was true; the parties were poised to deal with the recognition point and the full and frank disclosure.

The third point, my Lord, and this goes back to the nature of what is sought here, here the court was

deciding or was called upon to decide a procedural question of whether there had been a breach of the duty of full and frank disclosure, in circumstances where the parties had addressed their evidence to that. That is very different to the situation before you now, where you have a defendant saying it wants to go to trial to get declarations. Here you are being asked to allow a trial on the substantive merits, not simply consider a procedural point.

My Lord, in terms of the facts, I do think it is important that we look carefully at why this was an exceptional case. If you could take up, please, page 186, paragraph 77. Here, my Lord, the judge is considering whether he ought to consider the full and frank disclosure issue, and the first reason he doesn't, and we see this at the end of paragraph 77, is:

"There are material, if not critical, differences between an order setting aside a recognition ab initio and terminating such an order at the office holder's request some 17 months after it took effect."

So there was actually something of substance that flowed from the court's decision.

We don't have that here. There was a preliminary recognition order, the case is over, there is nothing. It's done. There is nothing material or critical by way

of relief for the court to consider.

My Lord, the second point is just how extraordinary the facts were of this case. As your Lordship will have seen from the summary at the beginning of the case and also from passages which I am about to show you, the Russian government has been after Hermitage for 15 years. A lawyer died in prison in Russia without trial. Principles of Hermitage have been pursued mercilessly by the Russian State by all means possible. As we will see, this has been something that has resulted in around a dozen requests to this government for judicial assistance by the Russian authorities, which have been declined on the basis of English public policy.

That is a very serious matter, and you can see why the Chancellor would wish to have these issues determined, if Russian officials are coming here, being given the powers of an officer of the English court by way of recognition, in circumstances where they are not disclosing the existence of this alleged political vendetta against the Hermitage group. And that doesn't look like stopping, and it is going to continue, despite what the government keeps saying to the Russian government. You can see why the Chancellor thought it was appropriate to give a judgment of this court for

assistance to judges of this court and the government in the future as to what they might do if approached in the same way. That starts to makes sense. But boy is it extraordinary facts. They are the kinds of facts that almost read like they're out of a novel rather than reality.

My Lord, if I could just perhaps show you some of those.

MR JUSTICE KNOWLES: I am just thinking when to take the shorthand break.

MR SPRANGE: My Lord, I will probably take two or three minutes on this and then it's really tidy up, so I am happy to take it now or ...

MR JUSTICE KNOWLES: Shall we take it now? It will put you under less pressure.

(3.17 pm)

(Short break)

(3.23 pm)

MR SPRANGE: Thank you, my Lord.

In paragraph 78, I wanted to refer you to the exceptional circumstances of this particular case. You will see halfway down:

"The core of his response [this is Mr Smouha's response, as to why Mr Smouha needed this judgment] was taking me into detail of the campaign the Hermitage

parties alleged and the UK government's response to numerous international requests for assistance that the Russian State has made."

Then further down:

"It needed to be made clear in a public judgment that this later step had been wrongful and improper so as to discourage further steps being taken in the future, as he argued was likely if not inevitable. It does ... seem that the Russian State ... ".

MR JUSTICE KNOWLES: It does not seem.

MR SPRANGE: Sorry:

"It does not seem that the Russian State has been prepared to accept no for an answer regarding requests for assistance from the UK authorities."

That is unpacked over the page, which I will show you, my Lord, but his third reason is here, that he couldn't decide that without looking at the full and frank disclosure issues. In the circumstances where he couldn't untangle it all, he felt that he had to decide it. Of course, that is not an issue here.

Then, my Lord, he really gets into the details, in paragraph 79, of the background and you will see at the bottom:

"There appears to have been unprecedented number of steps taken against the Hermitage parties and

Mr Magnitsky in the last 15 years."

Then words the bottom of that same paragraph:

"There is no reason to suppose that those responsible for these steps are likely to give up or even stop trying to involve or gain assistance from the UK government or the courts of England and Wales in this process. The numerous requests of assistance in criminal proceedings, all of which have been met with the same response, are clear evidence of this."

Then, my Lord, this is an important bit:

"The UK's government repeated response to these requests is crucial, in my judgment, to an identification of where the public interest lies."

You will see there, my Lord, that the Secretary of State had responded in relation to the Russian assistance requests, in relation to the criminal proceedings there, that to do so would be contrary to, among other things, English public policy. As the judge says:

"In matters of this kind it is incumbent upon the court to take the views of the UK government very seriously indeed."

Then in paragraph 81, my Lord:

"Where there are very serious allegations of wrongdoing and where the UK government has already made

clear its views about connected aspects of the case, this court cannot stand by without deciding whether or not there has indeed been inappropriate conduct. It is of public interest for that issue to be determined, whatever effect it has on the private parties to the litigation. I [cannot] emphasise, however, that this is a wholly exceptional case".

MR JUSTICE KNOWLES: I think you put a "cannot" in there. "I emphasise".

MR SPRANGE: "I emphasise". I'm sorry, my Lord.

Then in paragraph 82 the point is made again:

"As I have said, the campaign against the Hermitage parties is unlikely to stop, and judgment on the FFD issue will at least ensure that the public policy context is put before the court in any future without notice application made at the behest ..." that's the Russian authority.

My Lord, that clearly is a very, very exceptional case.

Bear in mind that US congress passed a statute laying sanctions against 44 people who had been involved in the proceedings and the death of Mr Magnitsky. This is quite clearly a geopolitical issue that raised important issues of public policy that needed to be resolved for future purposes in this jurisdiction. That

is where we get a very important distinction between that case and our case. Here the Chancellor was not seeking to assist a private party in litigation in a foreign jurisdiction, which is what Kazakhstan is seeking to do. What Kazakhstan wants is a judgment from this court that it can take to other jurisdictions to use. What the Chancellor was doing here was deciding something under English public policy principles for the benefit of the UK government and the courts. You can imagine if somebody else comes to this court to seek recognition of an insolvency order from Russia in this context, that decision will be very helpful. But it is a decision on English public policy relating to potential things happening here in this jurisdiction. It's not for the benefit of a foreign court.

What is more, my Lord, it is dealing with English public policy where English public policy is the relevant enquiry. Any judgment from this court following a trial can only be on English public policy, and that won't be relevant anywhere else because it will be local public policy:

My Lord, having set the scene as to why that is an exceptional case, it doesn't help and sets the bar, I would say, extremely high in terms of public policy considerations generally, and not necessarily with

respect to a Notice of Discontinuance because, as I say, it is my primary submission they don't arise, the quick question is: the points that Kazakhstan raise as public policy, do they come anywhere close to what we see there?

I have covered them in the context of the private interests, so I will give just your Lordship, other than one exception a quick laundry list.

The first is that there is a public policy point because the Stati parties are trying to prevent the investigation of their fraud. As I say, my Lord, as I have said previously, that is a bad point because the Stati parties have had to fight fraud generally in six jurisdictions and they are going to have to fight all of the fraud in the United States and in Belgium and in the Netherlands and in Luxembourg. So there is no question of the fraud allegations not being investigated; they are going to be investigated in fact in five or six places.

The next point that is raised is that the proceedings before you are at an advanced stage, and you have heard what I have said about that. They are not.

The financial and reputational consequences is raised. As I have already said, my Lord, if Kazakhstan really has a problem with that, then they can put

security in one jurisdiction outside England and all of this comes to an end. And a decision of this court is not going to help the reputational issue, because it won't affect proceedings elsewhere.

My Lord, it is then said that it would act as a deterrent to other parties, but how is a finding by this court on specific facts that a particular award was allegedly procured by fraud, how is that going to act as a deterrent to parties? If anything is a deterrent, my Lord, it is this court's judgment of 6 June. There is nothing further that a trial will give. And it is not a public policy point, my Lord. The law in this jurisdiction is well-established after Westacre as to the position, and this will just be another example of the application of those principles.

Finally, my Lord, it is said on public policy grounds that Kazakhstan has a strong prima facie case that this court has been subject to a fraudulent abuse by the Stati parties. My Lord, if I could just take up for that purpose, ask you to look at their skeleton argument at paragraph 50, subparagraph 3, page 21.

My Lord, I say that the heading there is not a fair characterisation of the position, and I say that for two reasons. If you look at paragraph 2, you will see the word "strong" is used in the heading and then "strong"

is used in paragraph 2. If you look carefully at the paragraphs of your judgment that are relied upon, nowhere does it say "strong". In some instances it says "sufficient" and some instances it says "of the necessary strength of prima facie", but it doesn't say "strong".

The only paragraph in which "strong" is used is in paragraph 11, subparagraph 10, but that is a quartation from Westacre, that is not a finding by you. So we say "strong" is not a fair word to use.

The second point is this, my Lord, and this is the more important one. It's paragraph 3, it says:

"If [if] the State's fraud allegations are proven at trial ..." et cetera. Where we are today, my Lord, is simply this: they have satisfied the two limbs of Westacre, so there is going to be a trial. It cannot be said that there is evidence of fraudulent abuse of this court's process. That is very much open season. There will need to be a substantive trial at which all of these issues will be addressed in detail for that to be explored properly. In that, my Lord, if we could stay in your judgment, if you have it handy, one of the issues that will be alive in those proceedings is, if you take up paragraph 26 of your judgment on page 16, there, my Lord, you relied, and on the basis that every

care was taken in the written evidence of Ms Nacimiento, you relied on her evidence as to two important points. First, in paragraph 26, that the State had since the award discovered that there was a separate arbitration; and further, in paragraph 27, that the Perkwood contract was not available to Kazakhstan in the arbitration. That is at the bottom of paragraph 29.

My Lord, you will have seen the third witness statement from Mr Dzhazoyan. I don't need to go into all of this for the purposes of today, because that issue is not squarely before you, but it is before you in this sense: Kazakhstan cannot stand here today and say that there is a strong prima facie case of fraudulent abuse of this court, because there is going to be a ding dong battle about that, and two of the fundamental planks that Kazakhstan relied upon before you, they didn't know about the related arbitrations until 2015 and they didn't have the Perkwood contract are both wrong. Flat wrong. It seems from Ms Nacimiento's evidence that they knew in 2013 about the existence of the other arbitration, and that somebody from the general prosecutor's office, it being heavily involved in the underlying arbitration, had a copy of the Perkwood contract. That is a document that they described as critical to the discovery of the

fraud.

So the correction point goes to this, my Lord. This is a tough, hard fought, nasty battle between a sovereign state and an investor. There are allegations flying left, right and centre by both parties. For them to be resolved there needs to be a trial. The bitter nature of that battle and the allegations back and forth each way simply don't give rise to a public policy ground. It cannot be said, on the basis of that, it is something that has to be determined by this court. Certainly, those things cannot be invoked in the way that Kazakhstan seeks to, by reference to the Chancellor's decision of discovering a wrong, because they are simply incomparable to the Russian State's campaign, relentless, decade and a half, never stopping campaign against the Hermitage group.

My Lord, if I could leave public policy and just deal with some tidy up issues.

First of all, my Lord, just this notion of enforcement against assets in England. I say that is not a submission or a point that survives Mr Justice Popplewell's decision in the part 8 proceedings. If we could just pick those up again, my Lord, it is C2 at tab 21. There just two paragraphs, my Lord.

First of all, this is a finding as to the nature of those assets, and this is based on evidence that you have before you. Given time, I will not take you to it but there was a witness statement in the bundle from the banker at Bank of New York, and it is James Robert Ronald at tab 16, the essential element of his evidence on this was that the assets in question, the $22 billion worth of assets, are effectively without a situs; in other words, they don't have a physical location. The way they are treated for location purposes is based upon designations within the bank, which is based upon a range of things.

You will see, my Lord, on page 190 how Mr Justice Popplewell dealt with this. My Lord, there is two points. There is a relatively small cash component, which is treated internally by the Bank of New York as being located in London; and the majority of the assets are in the form of securities and not such as to have a physical existence so far as Mr Ronald described. Then it is noted that they have various locations depending on a variety of laws and including, among other places, England, the Netherlands and Belgium.

My Lord, if you could then move to paragraph 28, this is how the funds came to be frozen. It is wrong,

we say, for Kazakhstan to say that the Stati parties attached these assets. What the Stati parties did, as they are entitled to do, is on the back of enforcement in the Netherlands and Belgium they got attachment orders, and the attachment orders get served on the bank, and then the bank makes a decision about what it does, and the Bank of New York took a conservative approach and attached a series of assets. Whether that survives or not, and what the position is with respect to that will be decided in due course. But it is not -- it is presented as though the Stati parties have gone out and surreptitiously tried to grab English-based assets through an attachment proceedings, but that, in my submission, is not fair or accurate, and the real answer we see in paragraph 28 and paragraph 29.

My Lord, as I said, that is all based on the evidence of Mr Ronald, which is before the court.

My Lord, the other point on this is as follows: this issue resolves itself. There is going to be a proceeding in Belgium with respect to these assets, and the Netherlands, and there it will be resolved. If the assets are located here, Kazakhstan will have plenty of cause for celebration because of the Notice of Discontinuance. They will not be assets that are available to the Stati parties.

So the fear that they have, we say, is not a real fear, because given the Notice of Discontinuance and given the fact that the Belgium and the Netherlands proceedings will resolve themselves, there is no prospect of the Stati parties getting assets here, given the Notice of Discontinuance.

My Lord, two final points. You have seen the reference to the Pakistan case and the Media CAT case in terms of setting aside a Notice of Discontinuance. We say neither of those are analogous because the facts are very different.

In the Pakistan case, Pakistan was avoiding the effect -- by discontinuing themselves, they took themselves back into the State immunity protections, because the waiver by filing proceedings would be gone, and that would help them in the negotiation. Nothing like that arises here, and we have no such collateral advantage.

In the Media CAT case, the claimants to those proceedings were trying to pursue IP claims by a letter writing campaign away from the gaze of the court, because they were making good money out of it and the law firm involved was getting a cut. Nothing like that arises here. There is no collateral advantage to us.

My Lord, in National Iranian v Crescent and Sheltam,

both arbitration decisions dealing with a Notice of Discontinuance the facts were twisted, importantly, the other way. First of all, London was the seat, and that is very important because it was the supervisory court. In both cases, immediately before hearings about whether the award ought to be properly challenged the parties in question stepped away, and they stepped away on the basis that they were going to pursue proceedings in other jurisdictions for enforcement, and were likely to make contentions about the sanctity of the award. The English court said: we are the seat, that is a collateral advantage, we are going to make it very clear that the law, the court of supervisory jurisdiction, has addressed the challenge points. Again, it is very different to our case.

My Lord, lastly that just brings me to the Canadian cases that we sent. I can hand those up in hard copy, my Lord.

MR JUSTICE KNOWLES: Would you? Thanks. (Handed)

MR SPRANGE: My Lord, I am not suggesting that the Supreme Court of Alberta is binding on this court, but these decisions, we say, are very helpful in the sense that the court is dealing with the closest analogy we could find to the issue before this court. There is two decisions. There is the first instance decision from

the Queen's Bench of Alberta, and then there is the appeal decision flowing from it. My Lord, there were some important similarities in the sense that there was enforcement proceedings in a number of jurisdictions, including in the United States. There had been no set aside of the award at the seat. Enforcement proceedings in Alberta had been pursued, gone quiet, and then discontinued. In Indonesia the award debtor wanted those proceedings to continue so they could undertake an attack on the award and take it elsewhere.

My Lord, if you could take up paragraph 19 on page 5 of the first instance decision. Bear in mind, my Lord, the test here we say is more loose than before this court, because it is just one of fairness, and we see that in 18.

The significant point, my Lord, is this, the Alberta court concluded there that Pertamina, which is the Indonesian company, could point to no right or litigation right or cause of action created by the litigation which would be lost by ending the proceedings:

"Pertamina argued that it loses the ability to establish fraud in the defence of the claim to enforce the arbitral award. It argues that if successful in establishing fraud it might be able to use that decision

to convince the US district court to revoke its prohibitionary injunction. That is true, but it does not constitute a right of cause of action."

My Lord, if you could pick up paragraphs 24 and 25, and perhaps we can go to 25:

"It seems reasonable to think that Pertamina's real complaint can be addressed by showing the US district court that it has a meritorious case which justifies setting aside the injunction, allowing it to pursue its remedies. It also may attempt to avail itself of the apparent right to pursue the review on the basis of fraud in the Swiss Supreme Court. Either forum appears to be a much better alternative to this jurisdiction."

My Lord, that decision was upheld on appeal, and I just need to show you one paragraph from the appeal judgment. That is paragraph 11:

"Alberta is very plainly not the appropriate forum for any attempt to upset the arbitral award for fraud. It got involved originally just to chase assets here which probably never existed. Getting a judgment in an inappropriate forum in hope of influencing a court elsewhere is, and always will be, a novel idea, tending to destroy all conflict of law rules on jurisdiction recognition. This appeal and its underlying motion are an attempt to have the tail wag an elderly elephant."

What we say here is that although there are some nuanced differences, at the bottom the principles are exactly the same.

What Kazakhstan is asking you to do is to give an advisory opinion on English public policy with respect to the fraud, that it can go use to try to help it in other jurisdictions that will be applying their own local public policy; and that is not a private interest that can be permissibly pursued and it is certainly not something that they are entitled to do under public policy, and it is certainly not one of the grounds upon which you could set aside the Notice of Discontinuance.

My Lord, unless there is any other issues you would me to help you with, those are Mr Stati and the Stati party's submissions.

MR JUSTICE KNOWLES: I just ask you one thing. What happened, on your submission, to the 2014 ex parte order that you got from Mr Justice Burton by reason of the Notice of Discontinuance?

MR SPRANGE: My Lord, I say, as a technical matter, it is void. It doesn't exist any more, because the proceedings don't exist. So an order was made but those proceedings were brought to an end, so it has no legal life, no legal substance.

I also say this, my Lord, if that was the only issue

left, if that was the only point of concern, it would be very easy for there to be an order made that dismissed or set aside that order.

My Lord, if your Lordship concludes that there ought to be an undertaking to buttress the requirement for the permission, that can be made clear in it. Although I say that both would only be giving what is already there. In other words, there is no further legal effect of having it made clear in a recital or in an order that the Burton order doesn't exist, because how can we -- put it this way, could we turn up to the registry with a judgment and say we would like a judgment on the back of that order; and the answer would be no, because the proceedings are over, no longer alive.

MR JUSTICE KNOWLES: Thanks very much.

MR SPRANGE: Thank you, my Lord.

(3.49 pm)

Reply submissions by MR MALEK

MR MALEK: My Lord, can I just briefly cover some of the points. I will endeavour not to repeat what I said earlier, for obvious reasons.

MR JUSTICE KNOWLES: Thanks.

MR MALEK: As far as the question about the freestanding claim, your Lordship has got my point, which is essentially that your Lordship does not need to get into

the debate raised by the decision of Lord Justice Rix in Gater Assets. As my learned friend I think stated in his skeleton, correctly, if your Lordship wants to take through that debate to the very end, I think one has to look at the judgment of Lord Mance in the Dallah case, where he says he's not going to express a view one way or another. But our point is it doesn't arise, because our case is based on what has actually happened in this case by virtue of the order and your Lordship's decision and the way that parties have behaved.

If you are against me that this is not a freestanding point, it still comes into the question as to whether or not it is appropriate that we have a private interest that should be recognised when your Lordship comes to consider the Notice of Discontinuance.

The only point perhaps of a technical matter is that there was a suggestion that it is not possible to set aside the claim or the counterclaim, to discontinue the claim or counterclaim, but that is not correct. The reference there is CPR20.3 subparagraph 1, which is at page 657, which deals with the effect of carrying across provisions in relation to counterclaims.

As far as the Notice of Discontinuance is concerned, the big dispute between us has been identified by my

learned friend in his submission about what a correct test is and the relevance of abuse and collateral advantages. But we say that the answer to that is the overriding objective. It is a concept that is fundamental to civil procedure in this country. It brings forward a whole series of considerations, both private and public; and private interests do have relevance, and that is the interests of both parties to the dispute.

In our submission, in answer to the question raised by your Lordship, which is do you have a right to discontinue, the answer is that there isn't a right. The process is that you can attempt to discontinue by serving a Notice of Discontinuance, but ultimately it is up to the court to consider whether or not that Notice of Discontinuance stands, and we submit that what the court does in those circumstances is apply the overriding objective.

Now, as far as the private/public interests are concerned, the question is: what is the position now in terms of the ability on the part of the Statis to come back to the court? On our side, it is not entirely clear. It looks as if they are prepared to give an undertaking in the terms of CPR38.7 but, as I have said earlier, that is going to give rise to lots of

opportunities to argue that things have happened, which means that they can come back to the court, and we say that the position is not clear.

As to the reputational issues that are in play here, we have identified what those reputational issues are. They are serious ones. The notion that we should, in effect, just simply provide security in the foreign jurisdictions in relation to awards that we say have been obtained, an award that has been obtained by fraud, in our submission is fanciful.

As far as the question of have we made an unfair interpretation of your Lordship's judgment, and if we just pick up the relevant paragraph it is in -- I think it is 93 is the one that we need to look at. In our respectful submission, your Lordship was saying that there should be a trial of this dispute in London. The steps and the reasoning, obviously your Lordship is familiar. The fact of the matter is that the supervisory court did not deal with the point. And this, as your Lordship has identified at paragraph 89, is an exceptional case. In our respectful submission, the point that your Lordship makes at paragraph 93 about the integrity of arbitration as a process and the need to examine the matters at trial, and the interests of justice requiring that examination, all of those points

are valid, and they remain particularly valid if we are right when your Lordship comes to analyse the reasons given for the Notice of Discontinuance, and your Lordship concludes that we are right in saying that there is no substance to either of the points, whether it is in terms of funding or whether it is in terms of impecuniosity. What we submit is behind your Lordship's reasoning, what was driving it, was the notion that the supervisory court had not dealt with the fraud issue and that it is vital for that to be examined, and that involved a trial in London for which your Lordship has given directions.

None of the explanations for not going ahead with the trial make any sense, and it still remains the case that the Notice of Discontinuance came out of the blue, and the timing suggests that it had nothing to do with attachments but a purely tactical, abusive forum shopping tactic which we say has no place in international arbitration.

If it means that parties are going to be more careful about coming to London and enforcing awards, that, we say, is something that is to be encouraged rather than something, as my learned friend says, that has bad consequences for London.

In our respectful submission, this is precisely the

type of exceptional case where the court, having set a process leading to a trial, where the parties have worked very hard and spent considerable sums of money going to a trial, where the court has given a reasoned judgment at to why the trial should take place, it's not open to a party to simply get out. To some extent that party may be locked in, but that is a consequence of coming to London to enforce an arbitration award, particularly in circumstances where they are attacking assets which are of fundamental importance to my client, being immune, and recognised by this court in the AIG as being immune and subject to the protection of the English court.

The next point that was made was "Oh, you don't need all of this, you can use the RICO proceedings". But in my respectful submission, my learned friend's argument goes absolutely nowhere. Those proceedings have not got to the stage where a dismissal application is made, although we understand that one is going to be made. My learned friend cannot stand up before your Lordship and say to your Lordship that there is not going to be a challenge as to jurisdiction, because there will be. There will be a challenge in terms of subject matter, there will be a challenge in relation to in personam jurisdiction, there will be a challenge in relation to

the merits. The contrast with this action is that the court has looked at the merits and decided that a trial is appropriate.

There is no equivalence between the RICO proceedings and these proceedings. The issues are different, they may overlap in partly, but the existence of the RICO proceedings cannot be an answer to what should happen in relation to the trial in London. The issues in London are ripe for consideration, disclosure is about to take place and a date has been given. As I have said, there is no equivalence at all.

The next point is the complaint that all we are trying to do here is to give advisory assistance, opinions for foreign courts, where that is an inappropriate exercise. But as we have seen from the evidence, summarised in annex 1, there is utility in the English proceedings going forward. Weight will be given to them. There may be a dispute about that weight, but your Lordship sees, or will see when he goes through the schedule, that there is in fact reference to English authority, and the AIG case has been cited and applied by the foreign court.

In Carrington 2, as Mr Harris reminds me, and the reference there is at page 123, tab 7, bundle B, it is pointed out that the district court in Amsterdam lifted

the garnishments on the basis of the analysis of the English law GCA given in the AIG Capital. This indicates the willingness of the Dutch courts to have regard to decisions of this court in an appropriate case. So we actually have a practical example of where an English case has been considered; and it is hardly surprising, in circumstances where the underlying issue about whether or not the issue was obtained by fraud is going to be the same.

Yes, of course, ultimately the question of public policy has to be applied by the courts applying its own principles. But the prior question, as to whether or not the award was obtained by fraud, is one that will have to be investigated. And as my learned friend said on a number of occasions, and when your Lordship comes to the transcript look at 10 past 3, he says that the June allegations, referring to your Lordship's decision, will have to be dealt with in all jurisdictions. So it can hardly be said that these issues are not going to be considered.

As to the decision of Mr Justice Popplewell in Bank of New York Mellon, yes, we do not dispute the principle that an English court does not go about in the business of giving advisory opinions where they have no purpose and where they may give rise to an arrogance

that is unjustified. But in this case, the point about the underlying fraud is not a point of just giving an advisory opinion, it is a matter directly raised in these proceedings and it is a matter which the court has already opined on.

To say that the issue is "strong", a strong prima facie case, what we had in mind there was the fact that your Lordship was applying the test in Westacre, which, as your Lordship records at 11, subparagraphs 9 and 10, referring to a prima facie case of fraud which is sufficient to overcome the extreme caution, and then goes on to say whether perjury is the fraud alleged, where the very issue before the arbitrators is whether a witness or witnesses were lying, the evidence must be so strong that it would reasonably be expected to be decisive of the hearing, and if answered have that result.

That is what we had in mind, when we referred to prima facie cases of fraud we say "strong", and that is the passage that we have in mind.

Now, as far as the public policy considerations are concerned, your Lordship has our submissions that yes, of course we accept that the Hermitage case was an exceptional set of facts, but we also say that this case is an exceptional set of facts.

How often is it that the English court is having to make a finding of fraud, even on a prima facie basis, where the supervisory court has declined to do that because the nature of the analysis is different? This is an exceptional case on any view.

In terms of the reasons that have been given as to why the Notice of Discontinuance, I would submit that those are matters that the court is going to need to look at very carefully; because if the court concludes that they are not compelling reasons, then we are left with the argument that this Notice of Discontinuance, in our submission, must be set aside because there is no justification for it.

The two justifications that have been given, namely the fact that there have been these attachments, made months ago and in unexplained circumstances now said to be decisive, attachments where the underlying merits do not have to be looked at at all are points that, in our respectful submission, simply do not answer the case.

Why is it that they need attachments of 28 billion for a claim of 500 million? So this case has nothing to do with attachments. The Statis will continue and seek attachments. They will continue to seek disclosure orders in the United States. So this case has nothing to do with attachments.

As to impecuniosity, yes of course we accept that an officer of the court has referred to impecuniosity, but with the greatest of respect he hasn't actually answered the question as to why the money can't be raised and funded in other ways. So it is simply merely an assertion, it is not particularised, it is not back up with any material, and in those circumstances the reasons that have been given do not bear up to analysis.

Now as far as the Hermitage case is concerned and the public policy points are concerned, your Lordship has those points and I'm not going to go through it again.

As to the Canadian case, your Lordship will look at that and see whether or not it gives you any assistance. My learned friend says it's very helpful, that it's a close analogy, although accepting that the position is perhaps more nuanced. But in our submission the Canadian case highlights why this case is different and why it should proceed to trial.

If I can just highlight three points about the Canadian case that your Lordship should look at. In the Canadian case, the award creditor had a good reason for discontinuing. It had actually been paid out in full on the award. That is not the case here. The reasons given, as I have submitted, are bogus, and Stati does

not even allege that it has been paid out even on part of it yet. In fact, we are at an early stage in all jurisdictions other than in Sweden.

The second point is that in Canada, the Canadian case, the fraud case had been fully heard and ruled on by two different foreign courts. Again, not in the case before your Lordship. And your Lordship has already made the prima facie case of fraud, which we have referred to. And no court has heard or determined the fraud case.

The third point, perhaps most critically, in the Canadian case the Canadian court had already heard and dismissed the defences to enforcement, presumably including the fraud case. Here, the exact opposite is the case. The English court has heard an attempt by Stati to shut down the fraud case and dismissed it, making the clear finding that there is a strong prima facie case of fraud which must be investigated at a trial in England. There is equally a prima facie finding on a fraud on this court, we submit, which follows from the fraud case. That just highlights how important your Lordship's determination last year is in terms in the analysis.

My Lord, I think that has probably covered all the points. Just Mr Harris may have one other point for me.

Mr Harris has asked me to point out that my learned friend was wrong to say that the Dutch court had refused a stay, showing that he didn't listen to the argument based on the English authority. The reference there is bundle B, tab 7, Mr Carrington's second witness statement, paragraph 6. That is at page 123.

MR JUSTICE KNOWLES: Thanks very much.

(4.07 pm)

Further submissions by MR SPRANGE

MR SPRANGE: My Lord, if I'm permitted, just two things.

I forgot to give you two references. If I could give you those.

MR JUSTICE KNOWLES: Yes, please do.

MR SPRANGE: And I do have one piece of housekeeping.

You asked me about the effect of the discontinuance and what that meant.

MR JUSTICE KNOWLES: On the 2014 order, is that?

MR SPRANGE: Yes, yes. I said to you the proceedings were brought to an end by the filing of the Notice of Discontinuance.

Page 1194 of the White Book, and it is 38.5(2) which simply says the proceedings are brought to an end as against the party on the date when they are served with the Notice of Discontinuance.

MR JUSTICE KNOWLES: Could you give me the reference again?

MR SPRANGE: Sorry, it is page 1194 of volume 1 of the White Book, and it is 38.5(2).

MR JUSTICE KNOWLES: Thanks.

MR SPRANGE: The other reference I forgot to give you with precision was your Lordship referred -- I referred your Lordship, sorry, to Mr Justice Popplewell's decision at paragraph 28. I said that was based on the evidence of Mr James Robert Ronald. The reference to his evidence in question is tab 16 of C2, and it is paragraphs 30 to 35 and 49 to 55.

MR JUSTICE KNOWLES: C2.

MR SPRANGE: Tab 16.

MR JUSTICE KNOWLES: Thanks.

MR SPRANGE: Page 128, paragraph 30 for five paragraphs, and page 131, paragraph 49 for five paragraphs.

MR JUSTICE KNOWLES: Yes.

(4.09 pm)

Housekeeping

MR SPRANGE: The housekeeping, my Lord, is just this. We put the schedule of foreign jurisdiction status with our skeleton. Mr Malek helpfully, almost like a Redfern schedule in an arbitration, put his comments to that, which we got late yesterday. No problem with that. We would just like to reflect. I am imagining that your Lordship is going to reserve, and if that is the

case we would just like to consider it overnight and if we have anything to add we will put it in a different colour in another column, but we won't go beyond what Mr Malek said.

MR JUSTICE KNOWLES: Yes.

Are you okay with that?

MR MALEK: Yes.

MR JUSTICE KNOWLES: Great. By some time in the course of tomorrow?

MR SPRANGE: Absolutely, my Lord, yes.

MR JUSTICE KNOWLES: That would be excellent.

Great. I am very grateful for the assistance all round. I will reserve. I am acutely aware of time pressure overall for everyone to know where they stand. No indication either way of my decision, but for the time being this case is being held in the diary for that trial date, just so that all options are open.

Information through the usual channels when it is ready. Thanks very much.

(4.10 pm)

(The hearing was concluded)

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