

OPUS 2

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Anatolie Stati & ors v The Republic of Kazakhstan

Day 1

March 26, 2018

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Monday, 26 March 2018

1 (10.30 am)

(Proceedings delayed)

2 (10.40 am)

3 MR JUSTICE KNOWLES: Good morning.

4 MR MALEK: Good morning.

5 MR JUSTICE KNOWLES: Can I just mention that I am joined by

6 colleague on the bench who is here for the purpose of

7 observation only and will take no part in the

8 decision—making, but of course he's most welcome.

9 MR MALEK: Most welcome from the Bar as well.

10 MR JUSTICE KNOWLES: Thanks.

11 Application by MR MALEK

12 MR MALEK: Your Lordship knows the representation in this

13 case. I appear with my learned friends Mr Harris,

14 Mr Wee and Mr Kennelly, and my learned friends

15 Mr Sprange and Mr Bhalla appear on behalf of the Statis .

16 So far as the materials are concerned, your Lordship

17 should have the bundles. There have been a couple of

18 additional statements over the weekend bringing you

19 up—to—date on the DC proceedings.

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

21 helps.

22 MR MALEK: Yes. Your Lordship should also have two

23 skeletons from us, one on Wednesday and one on Friday.

1

1 MR JUSTICE KNOWLES: Yes, thank you.

2 MR MALEK: And a skeleton from my learned friends. There is

3 also a chronology from our side. Then there was another

4 document that we handed up, or passed to your Lordship's

5 clerk this morning, annex 1 updated. Do you have that

6 one?

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

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

9 MR JUSTICE KNOWLES: In fact, I haven't got any of the

10 material over the week end in hard copy, so ...

11 MR MALEK: Okay, we will make sure that is done, but if

12 I could just hand that up now. (Handed)

13 MR JUSTICE KNOWLES: Thanks.

14 MR MALEK: I don't know if your Lordship had time to look at

15 it but what we have done is just add another column to

16 set out our position.

17 MR JUSTICE KNOWLES: Thank you.

18 MR MALEK: There are bundles of authorities from both sides

19 and a transcript is being taken, and so far as timing is

20 concerned, I have discussed this with my learned friend

21 and, subject to anything that your Lordship has going

22 say, we are going to divide up the time today.

23 MR JUSTICE KNOWLES: Okay.

24 MR MALEK: So I will be finishing about 12.30, and reserving

25 a bit of time for a reply. That is how we propose to

2

1 deal with it .

2 MR JUSTICE KNOWLES: Thank you.

3 MR MALEK: As far as the structure of my argument is

4 concerned, I am going to break it down into six parts.

5 First of all , a short overview of the issues. Secondly,

6 to look at the procedural background, looking at the

7 English proceedings and the various foreign proceedings.

8 The third topic is the Notice of Discontinuance, to look

9 at the reasons as to why that has been issued. Then the

10 fourth topic is whether or not the State of Kazakhstan

11 has a freestanding claim which is unaffected by the

12 Notice of Discontinuance. Then the fifth point is

13 whether the court should make an order setting aside the

14 Notice of Discontinuance. Then the last topic is costs,

15 although I suspect by the time I get to that

16 your Lordship might feel that that might be better left

17 for later .

18 There is also one other point that is floating

19 around, which concerns the status of the documents that

20 we have received, whether or not we are free to use

21 them, but I will deal with that point shortly if it

22 remains in dispute.

23 So far as the introduction is concerned, there is

24 really very little to say, because your Lordship knows

25 that the main issue for the court is whether there

3

1 should be a trial of the fraud issue that was the

2 subject of your previous decision. In essence, what the

3 Statis say is no, at the same time as saying they, I'm

4 quoting from their skeleton, "relish the opportunity to

5 proceed to trial with respect to the fraud allegations".

6 That is paragraph 3.6. They say they don't have the

7 financial resources for a trial , and because they have

8 attached assets of some 28 billion for a \$500 million

9 claim, they say the English proceedings are otiose and

10 futile and, therefore, they want to walk away from these

11 proceedings.

12 Just pausing there. In most cases, a party

13 receiving a Notice of Discontinuance might think that

14 that is a cause for celebration, the proceedings are

15 over, and the party gets its costs. But we say that

16 this is really an exceptional case; it was an

17 exceptional case before your Lordship on the previous

18 occasion and it remains exceptional. We will explore

19 the reasons as to why it is exceptional, but we say that

20 this is a case where the trial date should be held,

21 namely October/November this year. The court has

22 already decided that justice requires a trial of the

23 fraud issue. This is not a case of proceedings ending

24 because the claimant accepts that its allegations, the

25 subject matter of the proceedings, are not well-founded

4

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

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

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

5

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

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

9 That is why we say it is an exceptional case. It is
 10 even more exceptional when one realises that the Statis
 11 have attained attachments over assets in London,
 12 22 billion, under a global custody agreement between
 13 Bank of New York Mellon and the Central Bank of
 14 Kazakhstan.

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

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

6

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

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

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

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

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

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

7

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

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

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

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

8

1 the principal points that we say emerge from the
 2 decision below.
 3 At 7.3 we cite your Lordship’s finding that it will
 4 do nothing for the integrity of arbitration as a process
 5 or its supervision by the courts or the New York
 6 Convention or for the enforcement of arbitration awards
 7 in various countries if the fraud allegations in the
 8 present case are not examined at a trial and decided on
 9 their merits, including the question of the effect of
 10 the fraud where found. The interests of justice require
 11 that examination.
 12 What, in essence, we say is that what your Lordship
 13 said there still stands.
 14 Paragraph 8 deals with the direction that was given
 15 in terms of the way forward, and that is the order of
 16 27 June, which is at paragraph 8.
 17 Paragraph 9 deals with the refusal of permission to
 18 appeal.
 19 Then the various steps taken to take this case
 20 forward to the trial that your Lordship has directed are
 21 set out in the skeleton at paragraph 10; and, as
 22 recorded there, the trial is listed with a time estimate
 23 of eight days, commencing on 31 October this year. The
 24 variation steps are set out in paragraph 10.
 25 Then we come to the Notice of Discontinuance, which

1 is referred to at paragraph 11, and the point that we
 2 make there is that it was effectively unannounced; no
 3 explanation was given at the time. And the timing of it
 4 is of interest; it was served after the Statis issued
 5 their application seeking an extension of the disclosure
 6 deadline, three days before the Statis were due to
 7 provide disclosure.
 8 As far as the legal consequences of a Notice of
 9 Discontinuance, we refer in a footnote, footnote 3, to
 10 three consequences, which your Lordship can see are set
 11 out there.
 12 I don’t know whether your Lordship has seen the
 13 Notice of Discontinuance but it is in bundle D at
 14 page 83. The court was informed on the same day, and
 15 that is bundle D/84, and our response is at page 85. We
 16 will have to look at the motivation this Notice of
 17 Discontinuance in a moment.
 18 That is all I wanted to say by way of background to
 19 the English proceedings.
 20 So far as the foreign proceedings are concerned,
 21 these proceedings are relevant to two points that have
 22 been raised before you. First of all, the utility of
 23 the declaratory relief sought by Kazakhstan and
 24 Kazakhstan’s own interest in the determination of the
 25 fraud claim. This is described as a private interest

1 but there is also a public interest, but that
 2 consideration is of less importance in this context.
 3 Now as far as the evidence about these foreign
 4 proceedings are concerned, the one development that has
 5 not been covered is, of course, the decision in the DC
 6 enforcement proceedings. Those developments are
 7 summarised in Mr Kirtland’s statement of 25 March. He
 8 is the lead counsel for Kazakhstan in the US
 9 proceedings, and you have also got the statement of
 10 Mr Dzhazoyan of 25 March, which was also prepared over
 11 the weekend.
 12 What Mr Kirtland explains, I don’t know if we have
 13 got a copy to hand up ... (Handed)
 14 I have also put the first statement in, not because
 15 I am intending to refer to it but only because it is
 16 referred to in the body of the evidence. So that is his
 17 second statement.
 18 In summary, as Mr Kirtland explains, the DC court
 19 has denied the State’s motion for reconsideration by
 20 which the State sought to introduce the fraud
 21 allegations as a defence in the enforcement proceedings
 22 and granted the Statis’ petition for the confirmation of
 23 the award, effectively permitting them to enforce the
 24 award in Washington.
 25 Now, the two points to make in relation to that

1 decision are these:
 2 First, the DC’s court decision to refuse the State’s
 3 permission to raise the fraud allegations was, we
 4 submit, based on an incorrect basis. That is covered by
 5 Mr Kirtland in his evidence and I don’t propose to
 6 repeat what he says there.
 7 The second point is that the court’s decision is one
 8 which the State can appeal as of right; and
 9 Mr Kirtland’s evidence confirms that the State will be
 10 appealing this decision.
 11 Now the consequences, as far as the issues for this
 12 court are concerned, really come down to two points.
 13 First of all, the DC court confirms that as
 14 presently stand the DC court has not considered, and
 15 will not consider, the State’s fraud allegations. So
 16 unless and until the decision of the DC court is
 17 overturned on appeal, the DC court will not be
 18 considering Kazakhstan’s fraud allegations and that
 19 means, in summary, that there is no possibility of the
 20 DC court adjudicating upon Kazakhstan’s fraud
 21 allegations before this court in such manner as to give
 22 rise to an issue estoppel that will be binding on this
 23 court; and a judgment of this court examining the fraud
 24 allegations will not carry any weight or significance in
 25 relation to the DC enforcement proceedings.

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

7 The second point, and importantly, the fact that the
 8 DC court has refused to examine the fraud allegations
 9 and granted the Statist’s petition for the confirmation of
 10 the award makes it all the more important, we submit,
 11 that the court examines these allegations at trial.

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

20 “... do nothing for the integrity of arbitration as
 21 a process or its supervision by the courts or the
 22 New York Convention.”

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

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

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

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

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

19 The first is that the Statist’s evidence concerning
 20 what has been decided in certain jurisdictions, namely
 21 Sweden and the United States, is simply wrong in the
 22 light of your judgment; and we have made the references
 23 there at the back of our skeleton submission where that
 24 point is developed.

25 The second point is that the evidence before you

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

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

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

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

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

4 MR JUSTICE KNOWLES: Yes, thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 So, in effect , your Lordship has written in

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

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

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

1 withdraw the moment that an examination of that fraud
 2 looks to be nearing.
 3 Then the last point to make here is that we come
 4 back to the point that we have touched upon already,
 5 which is that any progress made by the Statis in the
 6 foreign enforcement proceedings, such as that embodied
 7 in the recent DC court, in fact only heightens the
 8 importance of this court examining Kazakhstan's fraud
 9 allegations at a trial . If no trial occurs, this will
 10 only increase the likelihood of the Statis being
 11 entitled to profit from the enforcement of an award that
 12 this court has found to have been procured by fraud on
 13 a prima facie basis .

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

21 MR JUSTICE KNOWLES: Thank you. Thanks.
 22 MR MALEK: Topic 3 is the Notice of Discontinuance. This is
 23 an important topic and I am going to cover two points.
 24 First of all , what was the motivation behind the
 25 claimants serving a Notice of Discontinuance, and is

1 their explanations for serving the Notice of
 2 Discontinuance credible?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 through August to October 2017, and despite this the
 2 Statis waited until 26 February before serving a Notice
 3 of Discontinuance.
 4 If the Statis are correct that the foreign
 5 attachments make further prosecution of the English
 6 proceedings unnecessary, then the question arises as to
 7 why did they wait so long before discontinuing their
 8 claim, particularly in the circumstances where the
 9 Statis have presumably incurred substantial costs on
 10 pleadings and in disclosure, preparing for disclosure in
 11 the interim?
 12 The second reason, which I think we make in
 13 paragraph 25.3 of our skeleton, is that the Statis have
 14 never said to us or, more importantly, the court that
 15 the proceedings would be discontinued if they managed to
 16 obtain attachments in other jurisdictions, and at no
 17 time did they tell the court or Kazakhstan that they
 18 might wish to abandon the English proceedings, depending
 19 on what happened in the foreign proceedings.
 20 The third point is, well, what makes London so
 21 different from the other jurisdictions? They want to
 22 run away from London but prosecute in other proceedings
 23 when, on their case, they have attachments for some
 24 28 billion for an alleged debt of 500,000 --
 25 500 million. I wish it was! 500 million.

1 Of course, the timing is quite interesting, as we
 2 point out at paragraph 25.2, is that the Statis' Notice
 3 of Discontinuance was served after they had lost the
 4 benefit of a Dutch attachment over the assets held by
 5 NBK, the national fund, as we point out earlier, and I
 6 think subject to an appeal.
 7 The fourth reason, and this is our skeleton at
 8 paragraph 25.4, the various enforcement proceedings are
 9 being contested by the State, and no final decision has
 10 been taken in any jurisdiction where the Statis seek
 11 enforcement. It is therefore implausible to say that
 12 the English proceedings are no longer required and will
 13 not benefit the Statis in any circumstances.
 14 So what we say in relation to those two reasons,
 15 which are the only reasons that they give, is that, and
 16 I am quoting here from paragraph 3.5 of their skeleton
 17 where they say:
 18 "As matters presently stand, the Stati parties have
 19 two compelling reasons for discontinuing these
 20 proceedings, despite their otherwise strong desire to
 21 proceed to trial and defeat the fraud claims."
 22 Just pausing there. If those two compelling reasons
 23 do not exist, then they, on their own case, indicate
 24 that they want to go to trial, and that is, we say,
 25 a good enough reason to go further.

1 But where they say that they have tackled the fraud
 2 allegations in no less than six jurisdictions, as they
 3 say in 3.6, we say that is incorrect; and that point is
 4 addressed in paragraph 26 of our skeleton, where we say
 5 that the procedural history indicates that they have
 6 endeavoured at every stage to avoid any real scrutiny of
 7 their conduct, which is consistent with their attempt to
 8 discontinue their claim days before being required to
 9 provide standard disclosure; and the conclusion that we
 10 invite the court to draw is that at paragraph 27, where
 11 we say that the court should infer that the real reason
 12 for the Statis' Notice of Discontinuance is that they
 13 recognise that their conduct by this court is likely to
 14 lead to a finding that the award was procured by fraud,
 15 and in order to avoid the serious consequences of such
 16 a judgment for overseas proceedings, the Statis are
 17 prepared to abandon their claim before the court, at
 18 least temporarily.
 19 The next topic is case management. My Lord, you
 20 have seen from our skeleton that we say that there is
 21 a freestanding claim for relief, which is unaffected by
 22 the Notice of Discontinuance and which must, therefore,
 23 proceed to trial in accordance with the existing trial
 24 fixture.
 25 In order to give a framework to this submission, can

1 I just start off by just giving your Lordship the
 2 framework of the CPR in terms of how it works.
 3 MR JUSTICE KNOWLES: Thanks.
 4 MR MALEK: The starting point is part 62. I am not going to
 5 take your Lordship to it now, but it is in
 6 the White Book starting at page 705. That deals with
 7 the procedure for the enforcement of awards, which
 8 your Lordship knows about, but, as in this case, the
 9 application was made without notice. There is
 10 a recognised duty of full and frank disclosure because
 11 it is an ex parte procedure, and we say that that duty
 12 is particularly important given the choice that faces
 13 the court, and that because it allows the court to
 14 determine whether it is appropriate to make an ex parte
 15 order at an -- sorry, to make an order at an ex parte
 16 stage; alternatively, whether the circumstances of the
 17 case make it appropriate to order service of the
 18 proceedings. Now, we know in this case it was done on
 19 an ex parte basis.
 20 The next set of rules to look at concerns the
 21 question about a counterclaim. There is one provision
 22 that I don't think is mentioned by my learned friends
 23 but is important and that is: what is a counterclaim?
 24 If your Lordship can turn to the White Book at 2697, at
 25 the back, there is a definition of -- there is

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 MR JUSTICE KNOWLES: Yes.

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

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

25 We submit also that the Stasis are wrong to say that

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 point to me. Five minutes.
2 (11.35 am)

(Short break)

3
4 (11.40 am)

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

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

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

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

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

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

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

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

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

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

9 The law starts at paragraph 40, the reference to
 10 38.4(1) and then there is a discussion of the old Rules
 11 of Court and the decision of *Castanho v Brown*, 43 goes
 12 through to pre-CPR decisions, and the key part is
 13 paragraph 46, where the learned judge says this:

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

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

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

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

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1 Those are both important facets of dealing with cases
 2 justly.

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

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

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

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1 on the award in this jurisdiction at a later date.

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

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

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

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

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

40

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 The relevant paragraphs of the Chancellor's decision

1 are paragraphs 60 to 64 and 71 to 83.

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

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

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

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

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

1 Discontinuance that will leave unaffected the ex parte
 2 order of Mr Justice Burton that launched these
 3 proceedings on 28 February, and that order is in
 4 bundle A at tab 2.
 5 The second consideration is at 78, where the
 6 Chancellor found that it was in the public interest to
 7 determine the full and frank disclosure issue, and he
 8 explained this by reference to discouraging him from
 9 taking further steps in the future. We would submit
 10 that applies here, where the Statis have brought
 11 multiple proceedings in various jurisdictions.
 12 The third issue was in effect that he was unable to
 13 disentangle the issues. I don't think that applies
 14 here.
 15 Then the fourth issue was that he found that the
 16 Hermitage parties had good reason for wanting the FFD
 17 issue determined and Mr Nogotkov had no good reason for
 18 not wanting. We say that applies here.
 19 The attempt on the part of the Statis, if we can
 20 turn to their skeleton, where they seek to distinguish
 21 the Cherkasov case is at paragraphs 46 to 47. We invite
 22 your Lordship to say that this attempt is unpersuasive
 23 and, frankly speaking, misses the point. We do not
 24 contend that the facts of this case are identical to
 25 Cherkasov, but what we do say is that that authority

1 establishes two principles. The first is that the court
 2 may hear and determine points that are longer
 3 determinative of any live issue if it is in the public
 4 interest to do so, and whether the public interest is
 5 engaged necessarily is going to be a fact-sensitive
 6 analysis which depends on the circumstances of the
 7 particular case before the court. It's therefore
 8 irrelevant that the facts of our case are not identical
 9 to those of Cherkasov.
 10 The second proposition that we make is that the
 11 Chancellor's reason makes clear that exposing wrongdoing
 12 is an important factor in deciding whether proceeding to
 13 judgment is in the public interest. We get that from
 14 two passages from the Chancellor's judgment. The first
 15 is at paragraph 84, where he says this:
 16 "In my judgment, where there are serious allegations
 17 of wrongdoing, as are here, and where the UK government
 18 has already made clear its views about connected aspects
 19 of this case, this court cannot stand by without
 20 deciding whether or not there has indeed been
 21 inappropriate conduct. It is in the public interest for
 22 that issue to be determined, whatever effect it has on
 23 the private interest to the litigation. I emphasise,
 24 however, that this is a wholly exceptional case."
 25 Then at paragraph 83 what the Chancellor said is

1 this:
 2 "As I have said, there are clear and compelling
 3 reasons why the FFD issue ought to be decided in the
 4 public interest. The court cannot willingly accept
 5 a situation in which one party can prevent it
 6 determining, where it is in the public interest to do
 7 so, whether its procedures have been flouted or abused."
 8 The question, therefore, for your Lordship, is
 9 whether on the facts of our case it is in the public
 10 interest to proceed to trial. We say the answer is yes.
 11 But we do also say that this case is every bit
 12 as exceptional as Cherkasov, because the court has found
 13 in this case that there is a strong prima facie case
 14 that the award was procured by fraud, and by extension
 15 that these proceedings are a fraud on this court.
 16 The Statis have not properly engaged with those
 17 allegations, and are now seeking to prevent any enquiry
 18 in their fraud on the arbitral tribunal and on this
 19 court, and this case has far-reaching financial and
 20 reputational consequences for a friendly foreign State.
 21 This is also a relevant consideration under the
 22 heading of public policy.
 23 That is all I wanted to say on the
 24 Hermitage/Cherkasov case, and what I want to do now is
 25 briefly summarise the five points which we say are in

1 play here in terms of public interest consideration.
 2 The first is that there is a public interest in this
 3 claim being heard and determined at trial.
 4 On the material before the court, there is
 5 a prima facie case that the Statis have engaged in
 6 conduct which amounts to a fraudulent abuse of this
 7 court's process. What we say, and this is echoing
 8 submissions that I have already made, is it is
 9 reasonably to be inferred that the true reason for the
 10 Statis' Notice of Discontinuance is that they realise
 11 that their fraudulent conduct will be identified by the
 12 court at trial and wish to avoid their conduct being
 13 subjected to scrutiny by this court.
 14 We have looked at the reasons given by the Statis,
 15 namely no funds and the attachments; they are both bad.
 16 The reality is that there is no answer to the fraud
 17 case. Your Lordship notes in the judgment of June, at
 18 paragraph 68, that they don't submit any evidence on the
 19 hearing of the application to introduce the fraud case.
 20 And when they are due to give disclosure, moments before
 21 disclosure is supposed to take place they walk away.
 22 In our respectful submission, the Statis' skeleton
 23 does not engage of the difficulties in their position or
 24 from the logic that on the basis that the award was
 25 obtained by fraud, this would necessarily have been

1 carried through into a deception on this court in
 2 seeking to enforce the award.
 3 If I could ask your Lordship to turn to the Statis’
 4 skeleton at paragraph 45, where they say that the
 5 allegations made by Mr Carrington and pursued in the
 6 skeleton as to the breaches of full and frank disclosure
 7 ought not to have been made. They have never been
 8 pursued previously, are not particularised in any way,
 9 and appear to be a throwaway designed to prejudice the
 10 court’s view of the Stati parties and/or to invoke the
 11 Cherkasov v Nogotkov public policy rationale.

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

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

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

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

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

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

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

1 been given access to the English court and permitted to
 2 exercise powers that are normally the preserve of
 3 a court—appointed English liquidator.”

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

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

1 your Lordship identified in the June judgment.

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

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

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

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

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

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

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

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

25 Your Lordship can also take into account the stage

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

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

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

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

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

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

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

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

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

25 MR MALEK: I’m obliged.

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

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

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

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

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

5 MR JUSTICE KNOWLES: Thank you very much.

6 Mr Sprange.

7 (12.15 pm)

8 Submissions by MR SPRANGE

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

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

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

10 That is the first point of context.

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

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

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

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

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

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

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1 effectively what they are asking this court to do.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 order and they become the claimant.
 2 My Lord, I am going to say that the passages from
 3 Gater, Lord Justice Rix’s obiter comments, don’t help
 4 them, and I am going to show you why. I am also going
 5 to say that the analogy that is drawn between domestic
 6 proceedings, either to enforce a foreign judgment or to
 7 enforce a domestic award, aren’t things that can be
 8 drawn as analogies between a foreign enforcement under
 9 section 101, and 102 and 103.

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

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

16 “The defendants claim that the award was obtained by
 17 fraud and should proceed to trial as if commenced under
 18 CPR part 7.”

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

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

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

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

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

1 including triple damages.
 2 The question is — and I’ll come to the RICO claim
 3 in a minute — do you see the kinds of things that you
 4 see in the RICO complaint, which make it an independent
 5 claim separate from just enforcement, in this document?
 6 And the simple answer is that you do not.

7 If you take up page 35 of tab 6, in paragraph 2.1 to
 8 3, Kazakhstan provides a summary of its case. Having
 9 provided a summary, at paragraph 3 it says:

10 “Kazakhstan relies on the course of conduct referred
 11 to above as follows ...”

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

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

21 “The consequences of the claimant’s deliberate
 22 misleading of the tribunal and the relief claimed by
 23 Kazakhstan, Kazakhstan is entitled to and hereby claims
 24 a declaration that ...” and we see very similar language
 25 repeated in each “... the enforcement or any part of the

1 award in this jurisdiction would be contrary to English
 2 public policy.”

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

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

12 MR JUSTICE KNOWLES: I don’t know if anything turns on this,
 13 but at 50(3) doesn’t have those words “in this
 14 jurisdiction”.

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

17 “... such that the enforcement or that part of the
 18 award would be contrary to English public policy.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 "I regard that as a strong, even formidable

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1 argument."

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

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

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

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

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

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

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1 What it is is Lord Justice Rix indicating that there
 2 might be situations in which the dynamic is reversed.
 3 We see that in the sentence that begins:
 4 "In the case of an application to set aside
 5 registration of a foreign judgment under part 74.7, a
 6 court can order any issue between judgment creditor and
 7 judgment debtor to be tried."
 8 CPR74.7. Just very briefly, that provision in terms
 9 allows the court to -- if you take up volume 1, and it
 10 is page 2209, and it reads:
 11 "The court hearing the application may order any
 12 issue between the judgment creditor and the judgment
 13 debtor to be tried."
 14 We accept that. What I respectfully don't accept,
 15 my Lord, is what follows. What the judge then says is:
 16 "No doubt the same might occur in connection with an
 17 application to set aside an enforcement under order part
 18 62."
 19 I accept that the court has very broad case
 20 management discretion and powers, so probably could, if
 21 it thought it was the right thing to do, but you don't
 22 see in part 62 the language that you see in 74.7.
 23 There, my Lord, you will see that the judge
 24 therefore respectfully disagrees with Judge Chambers in
 25 Dardana and the rationale that is there.

1 If it ended there, I would still say that this case
 2 does not help Kazakhstan because it doesn't come
 3 anywhere near dislodging either the fact that on the
 4 face of it we are the claimant and they are the
 5 defendant, or (2) the fact that under this decision we
 6 are the claimant and defendant through the lens of CPR25
 7 and security for costs.
 8 Be that as it may, my Lord, when we look at later
 9 cases that delve into this issue in more detail the
 10 position becomes very clear as to what the proper
 11 position is.
 12 Just before we go, my Lord, I want to put to bed the
 13 counterclaim point. If you read in paragraph 78
 14 there -- and this, my Lord, is picked up in our skeleton
 15 argument at 13.2.4 on page 9. You will see there in our
 16 skeleton, my Lord, it may be even if the regime could
 17 apply to the party seeking enforcement, it could not
 18 apply to the counter applicant on the basis that the
 19 arbitration claim claimant is simply not in a formal
 20 position of being a defendant to a counterclaim.
 21 My Lord, if I could now take up Mr Justice Burton's
 22 decision in Diag, and that is at tab 13 of the
 23 claimants' authorities bundle.
 24 This case involved enforcement of an arbitral award
 25 and there was a debate about whether it was properly

1 final because there was an outstanding review. In the
 2 context of an application and claim here to enforce that
 3 award as a judgment of this court, the question arose as
 4 to this court's jurisdiction to grant security for
 5 costs, and therefore the debate about who is properly
 6 the claimants and who is properly the defendants.
 7 My Lord, if we could pick it up at paragraph 17.
 8 I apologise, my Lord, this report is not page numbered.
 9 There, my Lord, the judge notes that:
 10 "Since the majority decision in Gater was in fact
 11 that there was jurisdiction, he was able to proceed and
 12 therefore resolve that issue briefly."
 13 He then, my Lord, addressed the question of
 14 discrimination and that, very briefly, was this: there
 15 was an argument, both in Gater and in this case, that
 16 you couldn't impose upon New York Convention enforcement
 17 something that was more onerous than you would impose
 18 upon domestic enforcement, and so that required
 19 a discussion and debate about what the domestic regime
 20 provided for. For present purposes, my Lord, we don't
 21 need to delve into that.
 22 What we do need to delve into, though, my Lord, is
 23 the way that the judge resolved the question of who was
 24 really the defendant and who was really the claimant.
 25 My Lord, we can pick that up at paragraph 24, which is

1 two pages following. This, my Lord, was the judge
 2 considering the DAC report relating to the
 3 Arbitration Act, and the only significance is that from
 4 that it picked up this notion, which is used later in
 5 the judgment, of what are described as "passive defences
 6 to the enforcement of award", and the posited defences
 7 being those that are set are set out in sections 67 to
 8 69. I show you that by way of background, my Lord.
 9 Paragraph 27.
 10 MR JUSTICE KNOWLES: Yes, thank you.
 11 MR SPRANGE: "The third sub-issue is whether the defendant
 12 is a defendant for the purposes of security for costs.
 13 This arises out of the fact that the onus of proof is
 14 one for the defendant, and were it not for my conclusion
 15 at paragraph 8 above there would be an application to
 16 set aside."
 17 Then he considers the Chambers decision in Yukos,
 18 and in paragraph 29 notes that Field accepted that.
 19 I forgot to show it to you, my Lord, but
 20 Lord Justice Buxton in Gater also accepted that, and the
 21 reference is paragraph 101. My Lord, do you wish me to
 22 take you back to it?
 23 MR JUSTICE KNOWLES: No, thanks. Do if you want to, but ...
 24 MR SPRANGE: No, I say it is a resounding endorsement of the
 25 Chambers' view, which is adopted by Field and later

1 here.
 2 My Lord, the thrust of all of this we see over the
 3 next page, just above paragraph 34, and it is really, in
 4 my submission, confirming what I said at the beginning
 5 of my submissions on this point, what Lord Justice Rix
 6 noted in paragraph 71, which is confirmed here:
 7 "In any event, there is a claim on an arbitration
 8 claim form unless there were an express order from the
 9 ex parte judge for service and there was service under
 10 62.18(3), it would be a claim not treated as being an
 11 arbitration claim but it would still be a claim."
 12 Over the page, my Lord, having accepted that the
 13 thrust of Court of Appeal decision is that there is
 14 jurisdiction, the following is said:
 15 "In response to an arbitration claim form, the
 16 defendant here is putting forward what would be
 17 described in the DAC report as passive defences. I am
 18 satisfied that there is jurisdiction for the court to
 19 order security for costs in favour of such
 20 a defendant ..."
 21 Then he talks about onus of proof:
 22 "Both in relation to the enforcement of a domestic
 23 and consequentially a convention award, the defendant is
 24 a defendant within CPR25.12 and not an applicant
 25 rendered liable for security for costs under

1 section 70."
 2 Then, my Lord, he went on to consider discretion,
 3 which doesn't matter for our purposes.
 4 My Lord, I then went to go to an earlier iteration
 5 of the Nogotkov decision. This is a decision of
 6 Mrs Justice Rose that came before the decision that
 7 Mr Malek relies on. Unfortunately, the copy in the
 8 bundle is not a reported version. I do have a reported
 9 version of that decision.
 10 MR JUSTICE KNOWLES: Thanks.
 11 MR SPRANGE: My Lord, I have given you five copies. Not
 12 only does it look a lot thicker than it really is, but
 13 Mr Malek doesn't get one.
 14 Mr Malek has shown you the decision that dealt with
 15 the set aside of the recognition order. This is the
 16 application for security for costs for that, let's call
 17 it, battle. What Mrs Justice Rose had to deal with was
 18 who, in the context of the recognition under the cross
 19 border insolvency regime, was the claimant and who was
 20 the defendant. So it was a similar debate.
 21 My Lord, I accept the cross border insolvency regime
 22 is not the New York Convention, so there is
 23 a distinction to be drawn there, but I still say what
 24 follows is relevant and helpful, not least because the
 25 judge here thought it appropriate to rely upon

1 Mr Justice Burton's decision in Diag that I have just
 2 shown you.
 3 If you could take up, my Lord, paragraph 55, which
 4 we see on the bottom of page 4278. My Lord, here the
 5 judge was grappling with the issue that often arises in
 6 terms of the security for costs: what is the status of
 7 the various claims, and if there is a counterclaim or
 8 a defence, is it any different than the mirror of the
 9 claimant's claim?
 10 What the judge here did was draw on
 11 Lord Justice Bingham's notion of an independent vitality
 12 test. We see that in paragraph 57 over the page.
 13 Firstly, she refers to the Court of Appeal's decision in
 14 Autoworld, which uses the phrase "independent vitality",
 15 and then notes in 56 that that came from
 16 Hutchinson Telephone, Lord Justice Bingham's decision.
 17 Then she deploys that later in the judgment, my Lord.
 18 We say it is a very important test for the purposes
 19 of this application, because it is very obvious that
 20 Kazakhstan's points of claim that you have seen
 21 certainly do not have an independent vitality over and
 22 above the question of relief of should this court issue
 23 an English judgment.
 24 It also kills off this recently launched notion of
 25 a counterclaim, my Lord, because it is very clear that

1 there is no independent vitality to those points.
 2 My Lord, if you could now turn to paragraph 64.
 3 A little like Lord Justice Rix, Lord Justice Buxton and
 4 Mr Justice Burton, she adopts the notion that the
 5 recognition application, albeit a slightly different
 6 one, is properly described as a proceeding with the
 7 meaning of CPR25.12.
 8 Then, my Lord, if you go to paragraph 65, and this
 9 is addressing the question of whether the Hermitage
 10 parties can properly be described as the defendants to
 11 the recognition application, she says "In my judgment
 12 they can". My Lord, the thrust of her reasoning there
 13 is that they are arguing that the recognition would be
 14 contrary to the public policy of England, so they are
 15 defendants to the recognition proceeding.
 16 On that, my Lord, you will see in paragraph 66 that
 17 she adopts Mr Justice Burton's decision in Diag.
 18 MR JUSTICE KNOWLES: That paragraph was ...?
 19 MR SPRANGE: Paragraph 66 she refers to Diag and adopts it,
 20 and you see the adoption at paragraph 67:
 21 "I accept Mr Smouha's submission that I should
 22 follow the approach adopted in that case."
 23 I think Mr Malek and I will probably have to pay Mr
 24 Smouha on the side, since we are both adopting his
 25 submissions in this case.

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

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

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1 MR JUSTICE KNOWLES: Is that a good time?
 2 MR SPRANGE: It is a good time.
 3 Perhaps I can just say this, my Lord: as to part 1,
 4 they do not have a freestanding claim, they simply
 5 don't, and so the only real live issue before you is the
 6 set aside, which I will address at 2 o'clock.
 7 MR JUSTICE KNOWLES: Yes. There is the indemnity costs bit,
 8 although that is short.
 9 MR SPRANGE: Yes, my Lord, although I will think about it
 10 and see what I need to say on it. It seems to me it is
 11 being either clarified for my benefit or abandoned, as
 12 I saw it. It no longer seems to be --
 13 MR JUSTICE KNOWLES: It's not put as high, if I understood
 14 Mr Malek, as "freestanding", but it's in there.
 15 MR SPRANGE: Yes. All I say on that is whatever Kazakhstan
 16 wishes to argue and raise on indemnity costs, they are
 17 entitled to do and can do under the regime that is in
 18 place where you have a Notice of Discontinuance, and we
 19 certainly don't need a trial for that purpose.
 20 MR JUSTICE KNOWLES: Yes. Great. Thank you very much.
 21 MR SPRANGE: Thank you, my Lord.
 22 MR JUSTICE KNOWLES: Two o'clock.
 23 (1.00 pm)
 24 (The short adjournment)
 25 (2.00 pm)

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

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

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

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

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

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

1 succeed."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

22 MR JUSTICE KNOWLES: Can I ask you one more thing.
 23 I suppose that takes one back to the strength of your
 24 proposition that there is a right to discontinue. Is it
 25 possible instead to read the CPR as in fact not

1 conferring a right; what it is dealing with in two
 2 places is a procedure. It says that you can give
 3 a notice to discontinue, and the consequences will flow
 4 unless the other side engages with an application to set
 5 aside, in which case the court will examine the thing on
 6 the overall merits by reference to the overriding
 7 objective. So it is not that the first part of that
 8 two-step procedure gives you a right, it is that it
 9 describes a convenient sequence to come to an outcome.
 10 MR SPRANGE: Yes, my Lord, if we were under the old rule
 11 I would agree with that characterisation. But under
 12 this rule I say no, and I say no for this reason: under
 13 the old rule, as I will show you in a moment, you would
 14 in most circumstances require permission, so there would
 15 be a process; you would file it and then you would seek
 16 permission and then there would be a debate. That is
 17 point 1.
 18 Point 2 is when you file a Notice of Discontinuance
 19 under this regime, it is not a process, that is it, the
 20 case I say discontinued; and I would guess that in the
 21 majority of cases that is the end of the case, there is
 22 no proceeding left and it is over, subject to just
 23 resolving the question of costs.
 24 If it was as you described it, my Lord, if it was
 25 a sort of process, that would be almost like where you

1 recognise an award on a preliminary basis and then come
 2 back with permission to set it aside. It would be
 3 pregnant but not confirmed. Whereas this is very stark:
 4 you file it, the case is over.
 5 MR JUSTICE KNOWLES: Yes.
 6 MR SPRANGE: So no, I don't.
 7 The other thing is I should say is this, my Lord,
 8 that when you look at a private interest untethered to
 9 abuse or collateral advantage, what case where
 10 a defendant doesn't want the discontinuance, wouldn't
 11 they be able to point to a private interest that they
 12 wished to pursue? It would be the easiest thing to come
 13 up with, because every defendant would say, "I want to
 14 be vindicated" or "I want my day in court" or "I need
 15 a public decision on this" or whatever.
 16 My Lord, I can't emphasise it enough, I do say that
 17 the context of this regime is absolutely critical. When
 18 you file a Notice of Discontinuance, the case is over;
 19 subject to any application for costs, or the type of
 20 application that we are here today for.
 21 My last point on that, my Lord, is this: where you
 22 see Mr Justice Henderson and Mr Justice Aikens as he was
 23 expanding the test somewhat, that, to my mind, and in my
 24 submission, is taking on board the fact that the regime
 25 has changed. The court doesn't get a say at the

1 beginning of the process; it only gets a say at the end,
 2 but that say is more broad than it used to be.
 3 MR JUSTICE KNOWLES: Thank you.
 4 MR SPRANGE: Having said that it is an irrelevancy and you
 5 shouldn't take it into consideration, I also say it
 6 simply doesn't arise as matter of fact. This really
 7 goes to the heart of why we are here, because what
 8 Kazakhstan is saying is: we have an interest in the
 9 English court continuing to a lengthy trial before this
 10 court. If you are with me on accepting that that is not
 11 a correct position and there is no advantage, to me the
 12 rest falls away, including the public policy, because if
 13 there is no private interest, how can there really be
 14 a public one.
 15 To address the private interest point, I really need
 16 to unpack for you what precisely it is that Kazakhstan
 17 say on this. Mr Malek's skeleton very neatly summarises
 18 this, and I would ask you just to take it up for
 19 reference at paragraph 40, so we can keep it in front of
 20 us.
 21 MR JUSTICE KNOWLES: Yes.
 22 MR SPRANGE: I am going to deal with it in the order that he
 23 provides in paragraphs 40 to 45, my Lord.
 24 MR JUSTICE KNOWLES: Yes.
 25 MR SPRANGE: The first point that he raises is this

1 possibility of bringing future proceedings to enforce
 2 the award in this jurisdiction at a later date.
 3 My Lord, I say that is a very bad point, for this
 4 reason: under this regime we can't, without the
 5 permission of the court. My Lord, just to get a grip on
 6 what that means, if we could take up the White Book
 7 volume 1, at page 119. My Lord, 38.7 says:
 8 "A claimant who discontinues a claim needs the
 9 permission of the court to make another claim against
 10 the same defendant."
 11 Then sets out the circumstances, and in the
 12 explanatory note below it says:
 13 "The court is likely to give permission, for
 14 example, where the claimant was misled or tricked by the
 15 defendant or important new evidence has come to light or
 16 where there has been a retrospective change in the law."
 17 Those are high burdens indeed. So we say that
 18 whilst we are happy to give an undertaking, and I think
 19 Mr Malek probably gives us too much credit in suggesting
 20 that our language was artful, and to be very clear to
 21 the court now, our undertaking is we will not, the Stati
 22 parties will not bring enforcement proceedings of the
 23 ECT Award in England and Wales.
 24 MR JUSTICE KNOWLES: For all time in any circumstance?
 25 MR SPRANGE: For all time in any circumstances. My Lord,

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

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

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

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

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

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

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

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

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

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

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

25 MR JUSTICE KNOWLES: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Then (h):

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

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

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

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

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

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

1 paragraph 122, and in particular the allegation that
 2 there was no mention of Perkwood, and we see that on
 3 page 123.
 4 My Lord, if you go to paragraph 124 there is
 5 a direct allegation that they were falsified on false
 6 information by Mr Stati or the Statis and the Stati
 7 companies, and at the bottom of that paragraph:
 8 "It was false or misleading because of the failure
 9 of all of the Stati parties to disclose Perkwood as
 10 a related party."
 11 If you could take up paragraph 130, which we see at
 12 page 40 of the pagination, it then discusses the KMG
 13 indicative offer, and contends in paragraph 131 that
 14 that was based on the information memorandum and the
 15 expenditure on the LPG plant.
 16 The detail of where that leads in terms of the
 17 allegation is at 133, on the next page, which reads:
 18 "The KMG indicative offer was thus procured by fraud
 19 because defendants knew that the bid was expressly
 20 submitted in reliance on information that the defendants
 21 knew to be false."
 22 Then there you have it.
 23 My Lord, if you could just turn now to the end of
 24 this document. I don't propose to show you all of the
 25 relief, but if you could take up page 94 you will see

1 there that there is various counts of fraud, fraud and
 2 civil conspiracy, and they adopt all of the paragraphs
 3 that I have shown you.
 4 My Lord, that's a substantive action brought by
 5 Kazakhstan against the Stati parties in the
 6 United States, where they wish to have, in the full
 7 glare/gaze of the US court system under the federal
 8 rules of civil procedure, a trial on those issues.
 9 My Lord, those issues are the very issues that they
 10 say are live. If we go back to your judgment, if
 11 I could just briefly remind you, it is tab 4 of the A
 12 bundle, if you take up paragraph 21 of the judgment on
 13 page 15, you will see there, my Lord, in paragraphs 21
 14 and 22 you refer to Perkwood, and that is just the
 15 allegation there that Perkwood was one of the entities
 16 that had siphoned off money. That was one of
 17 Kazakhstan's allegations in the ECT arbitration.
 18 Then, my Lord, if we could turn to paragraph 47,
 19 which is on page 20, and you refer there to:
 20 "If the KMG indicative bid was in fact the result of
 21 the defendants' dishonest representation, at this stage
 22 is the necessary strength a prima facie case?"
 23 On that basis, my Lord, if you could go over to 52
 24 and 53, in those paragraphs, my Lord, you noted that
 25 that issue hadn't been dealt with by the US court at

1 that stage in the preliminary recognition decision that
 2 we relied on before you as and estoppel, and in
 3 particular you said:
 4 "The decision of the US court does not conclude the
 5 question of the consequences of the tribunal's reliance
 6 on the KMG indicative bid. This includes the question
 7 of whether the tribunal was misled because the KMG
 8 indicative bid was based on the alleged fraudulent
 9 material and the claimant knew that when they presented
 10 not the fraudulent material but the KMG indicative bid."
 11 My Lord, just to close the loop on that, you then
 12 in, paragraphs 64 to 66, reached similar findings in
 13 relation to Sweden, in the sense that the Swedish court
 14 likewise hadn't addressed these issues because of the
 15 effect of Swedish public policy.
 16 My Lord, those are the issues that really are live
 17 based on your judgment, and it is absolutely plain that
 18 following the discontinuance of these proceedings they
 19 remain very much live in the RICO claim on a standalone
 20 basis, untethered by public policy. So the US court
 21 will be able to look at those two points that I have
 22 referred to in your judgment and that are pleaded in the
 23 RICO action, and look at them simply on the basis: are
 24 they a fraud? It won't have to say, on the basis of
 25 whatever it finds, that it is pursuant to its own public

1 policy or the public policy of any other jurisdiction.
 2 So, my Lord, the question arises as follows: which
 3 court is in a better place to consider this live issue?
 4 And the answer is plainly the United States court,
 5 because that is where it is going to be considered in
 6 fraud terms, without being straitjacketed by
 7 a particular public policy.
 8 My Lord, Mr Malek raises jurisdiction. I obviously
 9 can't make any concessions today about jurisdiction, but
 10 let's just look at this. How is it that a party who
 11 approaches the US courts to enforce a New York
 12 Convention award is going to turn around and say that
 13 that court doesn't have jurisdiction over it for
 14 a related action? My Lord, I would submit that is
 15 a very bad point, and the reality is that the Stati
 16 parties are going to have to face up and deal with this
 17 RICO case.
 18 My Lord, I will deal with this point in more detail
 19 when I cover the assistance to foreign courts, but let's
 20 just pause for a moment. What is going to be more
 21 useful for Kazakhstan, a judgment from a federal court
 22 following trial on those very issues that I have shown
 23 you that are pleaded, not tethered to any public policy,
 24 or a judgment of this court, which is tethered to public
 25 policy, and is just that narrow question of whether

1 there should be a judgment here?
 2 My Lord, if getting judgments for use in other
 3 jurisdictions was a permissible act, which I say it is
 4 not, for reasons I will come to, it is very clear that
 5 the US judgment and the US proceedings are the right
 6 place, not here.
 7 My Lord, the next point that is taken is in
 8 paragraph 43 of their skeleton. It goes something like
 9 this: they say that a judgment of this court following
 10 a trial -- and this is as high as they put it -- may
 11 result in other courts being assisted; "assisted" is the
 12 highest they put it, and they describe it as having some
 13 evidential value.
 14 I say two things, my Lord.
 15 First of all, on the basis of the evidence that
 16 simply isn't the case. But even more so, that
 17 assistance and evidential value is simply not a reason
 18 to set aside a discontinuance and go to trial.
 19 My Lord, again I need just to set the scene with
 20 your judgment. Your judgment, hopefully I can remember
 21 it, what your judgment said is: this is Swedish public
 22 policy, this is what Swedish public policy did with the
 23 fraud, it looked at the direct impact, it didn't look at
 24 the indirect impact and in particular whether the KMG
 25 indicative offer was one that was itself induced by

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1 fraud. Under English policy, this court needs to look
 2 at those two issues and decide them, because the Swedish
 3 court didn't and the US court didn't. And that is what
 4 we are going to have, that is what is going to be the
 5 focus of that trial.
 6 If that is true, then what Kazakhstan has as a very
 7 basic burden is to prove to you, by evidence today, that
 8 an English court finding on those two extra points is
 9 relevant under the public policy of the other
 10 jurisdictions and will be taken into consideration by
 11 them, because their public policy similarly differs from
 12 Sweden and is more akin to English public policy and
 13 therefore it will help.
 14 If they cannot prove that, my Lord, they cannot say
 15 to you that those courts will be assisted by anything
 16 that this court finds. Because what if the position in
 17 civil law jurisdictions like the Netherlands, like
 18 Belgium, like Luxembourg, the approach is like Sweden?
 19 The fact that an English court, applying its own public
 20 policy, looks left, looks right, not just straight
 21 ahead, may be an utter irrelevancy. But as you sit here
 22 today, my Lord, you simply don't have any help on that
 23 from Kazakhstan; and absent that help, you can't accept
 24 their submission that it will be of assistance to those
 25 courts.

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1 My Lord, I don't just say that as a matter of
 2 submission, I also say it because there is some
 3 compelling evidence to support that conclusion, and it
 4 comes in several forms.
 5 The first is if we look at the Bank of New York
 6 evidence that was submitted in the part 8 proceedings
 7 before Mr Justice Popplewell. We see the views of Dutch
 8 and Belgian lawyers on behalf of the bank, so you would
 9 expect them not to have the same skin in the game that
 10 the Stati parties or Kazakhstan have.
 11 Although dealing with slightly different issues, in
 12 particular State immunity, both lawyers made it very
 13 clear that English law, in that case State immunity, was
 14 simply irrelevant to the Belgian and Dutch courts. If
 15 I can take up those statements, my Lord, they are in the
 16 C2 bundle. If I could start at tab 17, it is page 150.
 17 Just briefly, my Lord, the deponent of this witness
 18 statement, whose lengthy name I won't attempt, is
 19 a partner at Linklaters, they were acting for the Bank
 20 of New York in the part 8 proceedings, and she is giving
 21 evidence about the effect of the garnishee -- the
 22 attachment orders in the Netherlands. On page 150 she
 23 is dealing with the question of the relevance in the
 24 Netherlands of an English judgment rendered in the
 25 part 8 proceedings.

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1 You will recall, my Lord, Kazakhstan wanted this
 2 court to make determinations relating to issues of
 3 English law that they could then take to these
 4 jurisdictions and rely upon. So not a dissimilar
 5 exercise to what they are applying for now, only I say
 6 they probably had some compelling reasons then but don't
 7 now.
 8 This what is she had to say, and you will see it in
 9 paragraph 67:
 10 "English law of sovereign immunity is not relevant
 11 to any Dutch court's ruling."
 12 Then amplified in paragraph 71:
 13 "The Dutch court should re-examine the question of
 14 immunity from execution under the applicable Dutch law
 15 provisions, notwithstanding the existence of an English
 16 court judgment with respect to the question of sovereign
 17 immunity under English law."
 18 My Lord, in the next tab we have a statement from
 19 a Linklaters partner in Brussels addressing the same
 20 points. If you could take up page 173, paragraph 71,
 21 you will see there too, my Lord:
 22 "The issue of State immunity under English law would
 23 be irrelevant with regard to the scope or ability of the
 24 garnishee order in Belgium, since the Belgian court must
 25 apply the Belgian rules, [et cetera]."

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

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

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

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

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

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

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

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

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

7 Lastly in this bundle, if you could briefly take up
 8 19, my Lord. This is the Belgian court on the
 9 enforcement side of the house. We see that at page 176.
 10 It is the exequatur proceedings, and the significance
 11 here is at the bottom of page 177 we have the court in
 12 various, what we English lawyers would probably regard
 13 as recitals, saying "Whereas", "Whereas", and in the
 14 final two paragraphs on 177 you have got the Stati
 15 parties' position saying everything is being decided at
 16 the seat in Sweden, so it's fine.

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

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

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

1 Belgian international public policy is established at
 2 this stage."

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

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

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

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

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

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

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

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

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

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

18 That application failed for a number of reasons, but
 19 the ones that are particularly relevant to this,
 20 my Lord, is, if you could take up page 74 -- it is at
 21 C2, tab 21. Please ignore that page number, because

22 I was looking at my own copy, not the bundle copy --

23 MR JUSTICE KNOWLES: Sure.

24 MR SPRANGE: It is 211, my Lord.

25 MR JUSTICE KNOWLES: Thank you. (Pause)

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

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

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

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

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

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1 legal right."

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

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

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

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

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

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

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

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

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

18 That, we say, is a very important distinction.

19 MR JUSTICE KNOWLES: Yes.

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

22 MR JUSTICE KNOWLES: Thanks.

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

25 "It serves no useful purpose as between the parties

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

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

9 My Lord, lastly on page 76, paragraph 103 and
10 104 ... (Pause)

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

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

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

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1 This is exactly, we say, the situation here:

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

6 There is a reference to *Howden v Ace*:

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

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

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

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

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

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

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

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

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

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

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

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

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

25 I say they plainly are genuine, for this reason,

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1 my Lord.
 2 First of all, the actual facts that we contend
 3 aren't seriously in dispute. Kazakhstan accepts that
 4 there is a very large amount of money attached in
 5 a number of jurisdictions. When you consider, my Lord,
 6 that this whole notion of enforcing a New York
 7 Convention award is about one thing, it is about getting
 8 paid under the award that you have obtained, the idea
 9 that a commercial party would say, "I have filed in six
 10 or seven jurisdictions, I'm not sure what I would find,
 11 I have found more than enough in three or four
 12 jurisdictions so I'm not going to pursue proceedings
 13 elsewhere", there is nothing abusive or unusual or
 14 illogical about that. It makes perfect sense. That is
 15 based on undisputed facts.
 16 The second point, my Lord, about impecuniosity,
 17 there is an attack made on that, but the evidence is
 18 compelling. If I could just take you to bundle B,
 19 tab 6, my Lord, page 112. This is Mr Dzhazoyan's second
 20 witness statement.
 21 MR JUSTICE KNOWLES: Sorry, the page is?
 22 MR SPRANGE: Page 112.
 23 MR JUSTICE KNOWLES: Thanks.
 24 MR SPRANGE: In paragraphs 49 to 52 he explains the funding
 25 position. It is said in a "nudge nudge, wink wink" kind

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1 of way that Mr Dzhazoyan is making all this up, but the
 2 evidence is very, very clear. He says there that there
 3 has been three funding arrangements, one in August 2016,
 4 one in May 2017 and there is a third that is to be put
 5 in place. Bear in mind, my Lord, these are funding
 6 arrangements which have been put in place over the
 7 objection of the Vitol parties, who was the party to the
 8 JOA arbitration, so they are certainly receiving the
 9 scrutiny of an adversary. They are also receiving the
 10 scrutiny of this court, because they have to be done
 11 with the permission of this court, because of the
 12 existence of the freezing order. So the funding
 13 arrangements in August 2016 and May 2017 were ultimately
 14 approved by the English court.
 15 Then the third, you will see in paragraph 51 he
 16 says, "which is yet to be approved by the English
 17 court". I am instructed, my Lord, that
 18 Mr Justice Popplewell has now approved that variation
 19 since this witness statement was filed.
 20 So, my Lord, Kazakhstan cannot stand here and attack
 21 this evidence, given that it is from an officer of the
 22 court and it is an officer of the court who is acting
 23 understands are the scrutiny of an adversary and the
 24 court itself.
 25 There is a further point, my Lord. Mr Malek made

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1 the point about what has the funder said. Well, what
 2 funder on the planet wouldn't say, "You have got 44
 3 times—odd the award attached in four or five
 4 jurisdictions, you are going to have to go to a long and
 5 expensive trial in this jurisdiction, we don't know what
 6 the asset position is, we're not funding that". That
 7 makes perfect logical sense. There is no reason to
 8 think that is not a genuine explanation.
 9 My last point on this, my Lord, is this: bearing in
 10 mind you have to look to see whether there is some kind
 11 of collateral advantage, there is no collateral
 12 advantage here for the Stati parties; it is a huge
 13 collateral disadvantage, because they are going to have
 14 to, in all of the jurisdictions in which they seek to
 15 enforce, deal with all of these allegations that appear
 16 in this court's June judgment, and they are going to
 17 have to face Kazakhstan saying ferociously and
 18 aggressively, "They ducked out of going to a trial".
 19 I fail to see how that is an advantage to them.
 20 The more advantageous thing would be, if they could,
 21 to fund it, fight it and clear their name. That would
 22 be the best thing to do. That would be the advantage
 23 for them.
 24 So leaving aside any order this court makes in
 25 relation to costs, there is also the fact that they are

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1 leaving themselves open on a regular basis to continuing
 2 attacks.
 3 My Lord, if you accept that those explanations are
 4 reasonable, then I say there cannot be a public policy
 5 objection to the Notice of Discontinuance.
 6 My Lord, I just want to finish the public policy on
 7 two topics. One, just I do need to show you the
 8 Chancellor's decision, because it is an extraordinary
 9 case, and because of its extraordinary nature we say
 10 it's simply not a case that is of any assistance to you
 11 here.
 12 My Lord, if we could take that up, it is at tab 10
 13 of the defendants' authorities bundle.
 14 My Lord, Kazakhstan invokes this really on two
 15 bases. First of all, they say this is authority for the
 16 notion that the court can proceed to determine something
 17 if it will expose wrongdoing; and it is also authority
 18 for the proposition that litigants can't turn the tap on
 19 and off, let's just call that the Smouha point.
 20 My Lord, they are principles that make sense but
 21 they need to be very carefully deployed, because,
 22 my Lord, they could be applied to almost every case
 23 otherwise. If you think of a case that is discontinued,
 24 one party will always be able to say "They shouldn't be
 25 able to just turn the tap off, they ought to go to trial

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

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

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

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

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

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

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

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

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

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

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

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

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1 of relief for the court to consider.

2 My Lord, the second point is just how extraordinary
3 the facts were of this case. As your Lordship will have
4 seen from the summary at the beginning of the case and
5 also from passages which I am about to show you, the
6 Russian government has been after Hermitage for
7 15 years. A lawyer died in prison in Russia without
8 trial. Principles of Hermitage have been pursued
9 mercilessly by the Russian State by all means possible.
10 As we will see, this has been something that has
11 resulted in around a dozen requests to this government
12 for judicial assistance by the Russian authorities,
13 which have been declined on the basis of English public
14 policy.

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

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

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

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

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

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

16 (3.17 pm)

(Short break)

18 (3.23 pm)

19 MR SPRANGE: Thank you, my Lord.

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

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

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1 parties alleged and the UK government’s response to
 2 numerous international requests for assistance that the
 3 Russian State has made.”
 4 Then further down:
 5 “It needed to be made clear in a public judgment
 6 that this later step had been wrongful and improper so
 7 as to discourage further steps being taken in the
 8 future, as he argued was likely if not inevitable. It
 9 does ... seem that the Russian State ... ”.
 10 MR JUSTICE KNOWLES: It does not seem.
 11 MR SPRANGE: Sorry:
 12 “It does not seem that the Russian State has been
 13 prepared to accept no for an answer regarding requests
 14 for assistance from the UK authorities.”
 15 That is unpacked over the page, which I will show
 16 you, my Lord, but his third reason is here, that he
 17 couldn’t decide that without looking at the full and
 18 frank disclosure issues. In the circumstances where he
 19 couldn’t untangle it all, he felt that he had to decide
 20 it. Of course, that is not an issue here.
 21 Then, my Lord, he really gets into the details, in
 22 paragraph 79, of the background and you will see at the
 23 bottom:
 24 “There appears to have been unprecedented number of
 25 steps taken against the Hermitage parties and

1 Mr Magnitsky in the last 15 years.”
 2 Then words the bottom of that same paragraph:
 3 “There is no reason to suppose that those
 4 responsible for these steps are likely to give up or
 5 even stop trying to involve or gain assistance from the
 6 UK government or the courts of England and Wales in this
 7 process. The numerous requests of assistance in
 8 criminal proceedings, all of which have been met with
 9 the same response, are clear evidence of this.”
 10 Then, my Lord, this is an important bit:
 11 “The UK’s government repeated response to these
 12 requests is crucial, in my judgment, to an
 13 identification of where the public interest lies.”
 14 You will see there, my Lord, that the
 15 Secretary of State had responded in relation to the
 16 Russian assistance requests, in relation to the criminal
 17 proceedings there, that to do so would be contrary to,
 18 among other things, English public policy. As the judge
 19 says:
 20 “In matters of this kind it is incumbent upon the
 21 court to take the views of the UK government very
 22 seriously indeed.”
 23 Then in paragraph 81, my Lord:
 24 “Where there are very serious allegations of
 25 wrongdoing and where the UK government has already made

1 clear its views about connected aspects of the case,
 2 this court cannot stand by without deciding whether or
 3 not there has indeed been inappropriate conduct. It is
 4 of public interest for that issue to be determined,
 5 whatever effect it has on the private parties to the
 6 litigation. I [cannot] emphasise, however, that this is
 7 a wholly exceptional case.”
 8 MR JUSTICE KNOWLES: I think you put a “cannot” in there.
 9 “I emphasise”.
 10 MR SPRANGE: “I emphasise”. I’m sorry, my Lord.
 11 Then in paragraph 82 the point is made again:
 12 “As I have said, the campaign against the Hermitage
 13 parties is unlikely to stop, and judgment on the FFD
 14 issue will at least ensure that the public policy
 15 context is put before the court in any future without
 16 notice application made at the behest ...” that’s the
 17 Russian authority.
 18 My Lord, that clearly is a very, very exceptional
 19 case.
 20 Bear in mind that US congress passed a statute
 21 laying sanctions against 44 people who had been involved
 22 in the proceedings and the death of Mr Magnitsky. This
 23 is quite clearly a geopolitical issue that raised
 24 important issues of public policy that needed to be
 25 resolved for future purposes in this jurisdiction. That

1 is where we get a very important distinction between
 2 that case and our case. Here the Chancellor was not
 3 seeking to assist a private party in litigation in
 4 a foreign jurisdiction, which is what Kazakhstan is
 5 seeking to do. What Kazakhstan wants is a judgment from
 6 this court that it can take to other jurisdictions to
 7 use. What the Chancellor was doing here was deciding
 8 something under English public policy principles for the
 9 benefit of the UK government and the courts. You can
 10 imagine if somebody else comes to this court to seek
 11 recognition of an insolvency order from Russia in this
 12 context, that decision will be very helpful. But it is
 13 a decision on English public policy relating to
 14 potential things happening here in this jurisdiction.
 15 It’s not for the benefit of a foreign court.
 16 What is more, my Lord, it is dealing with English
 17 public policy where English public policy is the
 18 relevant enquiry. Any judgment from this court
 19 following a trial can only be on English public policy,
 20 and that won’t be relevant anywhere else because it will
 21 be local public policy:
 22 My Lord, having set the scene as to why that is an
 23 exceptional case, it doesn’t help and sets the bar,
 24 I would say, extremely high in terms of public policy
 25 considerations generally, and not necessarily with

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 fraud.
 2 So the correction point goes to this, my Lord. This
 3 is a tough, hard fought, nasty battle between
 4 a sovereign state and an investor. There are
 5 allegations flying left, right and centre by both
 6 parties. For them to be resolved there needs to be
 7 a trial. The bitter nature of that battle and the
 8 allegations back and forth each way simply don't give
 9 rise to a public policy ground. It cannot be said, on
 10 the basis of that, it is something that has to be
 11 determined by this court. Certainly, those things
 12 cannot be invoked in the way that Kazakhstan seeks to,
 13 by reference to the Chancellor's decision of discovering
 14 a wrong, because they are simply incomparable to the
 15 Russian State's campaign, relentless, decade and a half,
 16 never stopping campaign against the Hermitage group.
 17 My Lord, if I could leave public policy and just
 18 deal with some tidy up issues.
 19 First of all, my Lord, just this notion of
 20 enforcement against assets in England. I say that is
 21 not a submission or a point that survives
 22 Mr Justice Poplewell's decision in the part 8
 23 proceedings. If we could just pick those up again,
 24 my Lord, it is C2 at tab 21. There just two paragraphs,
 25 my Lord.

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1 First of all, this is a finding as to the nature of
 2 those assets, and this is based on evidence that you
 3 have before you. Given time, I will not take you to it
 4 but there was a witness statement in the bundle from the
 5 banker at Bank of New York, and it is James Robert
 6 Ronald at tab 16, the essential element of his evidence
 7 on this was that the assets in question, the \$22 billion
 8 worth of assets, are effectively without a situs; in
 9 other words, they don't have a physical location. The
 10 way they are treated for location purposes is based upon
 11 designations within the bank, which is based upon
 12 a range of things.
 13 You will see, my Lord, on page 190 how
 14 Mr Justice Poplewell dealt with this. My Lord, there
 15 is two points. There is a relatively small cash
 16 component, which is treated internally by the Bank of
 17 New York as being located in London; and the majority of
 18 the assets are in the form of securities and not such as
 19 to have a physical existence so far as Mr Ronald
 20 described. Then it is noted that they have various
 21 locations depending on a variety of laws and including,
 22 among other places, England, the Netherlands and
 23 Belgium.
 24 My Lord, if you could then move to paragraph 28,
 25 this is how the funds came to be frozen. It is wrong,

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1 we say, for Kazakhstan to say that the Stati parties
 2 attached these assets. What the Stati parties did, as
 3 they are entitled to do, is on the back of enforcement
 4 in the Netherlands and Belgium they got attachment
 5 orders, and the attachment orders get served on the
 6 bank, and then the bank makes a decision about what it
 7 does, and the Bank of New York took a conservative
 8 approach and attached a series of assets. Whether that
 9 survives or not, and what the position is with respect
 10 to that will be decided in due course. But it is not --
 11 it is presented as though the Stati parties have gone
 12 out and surreptitiously tried to grab English-based
 13 assets through an attachment proceedings, but that, in
 14 my submission, is not fair or accurate, and the real
 15 answer we see in paragraph 28 and paragraph 29.
 16 My Lord, as I said, that is all based on the
 17 evidence of Mr Ronald, which is before the court.
 18 My Lord, the other point on this is as follows: this
 19 issue resolves itself. There is going to be
 20 a proceeding in Belgium with respect to these assets,
 21 and the Netherlands, and there it will be resolved. If
 22 the assets are located here, Kazakhstan will have plenty
 23 of cause for celebration because of the Notice of
 24 Discontinuance. They will not be assets that are
 25 available to the Stati parties.

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1 So the fear that they have, we say, is not a real
 2 fear, because given the Notice of Discontinuance and
 3 given the fact that the Belgium and the Netherlands
 4 proceedings will resolve themselves, there is no
 5 prospect of the Stati parties getting assets here, given
 6 the Notice of Discontinuance.
 7 My Lord, two final points. You have seen the
 8 reference to the Pakistan case and the Media CAT case in
 9 terms of setting aside a Notice of Discontinuance. We
 10 say neither of those are analogous because the facts are
 11 very different.
 12 In the Pakistan case, Pakistan was avoiding the
 13 effect -- by discontinuing themselves, they took
 14 themselves back into the State immunity protections,
 15 because the waiver by filing proceedings would be gone,
 16 and that would help them in the negotiation. Nothing
 17 like that arises here, and we have no such collateral
 18 advantage.
 19 In the Media CAT case, the claimants to those
 20 proceedings were trying to pursue IP claims by a letter
 21 writing campaign away from the gaze of the court,
 22 because they were making good money out of it and the
 23 law firm involved was getting a cut. Nothing like that
 24 arises here. There is no collateral advantage to us.
 25 My Lord, in National Iranian v Crescent and Sheltam,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15 MR JUSTICE KNOWLES: Thanks very much.

16 MR SPRANGE: Thank you, my Lord.
 17 (3.49 pm)

18 Reply submissions by MR MALEK

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

22 MR JUSTICE KNOWLES: Thanks.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 In our respectful submission, this is precisely the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7 MR JUSTICE KNOWLES: Thanks very much.
 8 (4.07 pm)

9 Further submissions by MR SPRANGE
 10 MR SPRANGE: My Lord, if I'm permitted, just two things.
 11 I forgot to give you two references. If I could
 12 give you those.

13 MR JUSTICE KNOWLES: Yes, please do.

14 MR SPRANGE: And I do have one piece of housekeeping.
 15 You asked me about the effect of the discontinuance
 16 and what that meant.

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

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

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

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

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

3 MR JUSTICE KNOWLES: Thanks.

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

11 MR JUSTICE KNOWLES: C2.

12 MR SPRANGE: Tab 16.

13 MR JUSTICE KNOWLES: Thanks.

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

16 MR JUSTICE KNOWLES: Yes.
 17 (4.09 pm)

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

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

5 MR JUSTICE KNOWLES: Yes.

6 Are you okay with that?

7 MR MALEK: Yes.

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

10 MR SPRANGE: Absolutely, my Lord, yes.

11 MR JUSTICE KNOWLES: That would be excellent.

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

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

20 (4.10 pm)

21 (The hearing was concluded)

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