

OPUS 2

INTERNATIONAL

National Bank of Kazakhstan v Bank of New York

Day 4

April 1, 2020

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1 Wednesday, 1 April 2020
 2 (10.30 am)
 3 MR JUSTICE TEARE: Right, good morning everybody.
 4 Presumably there is agreement as to how to divide up
 5 the day.
 6 MR MALEK: I don't think we've had any discussions, but ...
 7 MR JUSTICE TEARE: Presumably two hours for each of you.
 8 MR MALEK: Yes, that's fine.
 9 MR JUSTICE TEARE: Then time for a reply at the end.
 10 MR MALEK: That's correct.
 11 MR JUSTICE TEARE: Right, okay.
 12 MR HANDYSIDE: My Lord, I will also want about 15 minutes or
 13 so.
 14 MR JUSTICE TEARE: Right. If we keep strictly to two hours
 15 for the other two that should be possible.
 16 MR HANDYSIDE: Yes. Thank you.
 17 MR SPRANGE: I'm assuming that Mr Handyside will go after
 18 Mr Malek but before me.
 19 MR JUSTICE TEARE: That seems sensible.
 20 Yes, Mr Malek.
 21 Closing submissions by MR MALEK
 22 MR MALEK: My Lord, the court should have our written
 23 closing.
 24 MR JUSTICE TEARE: Yes.
 25 MR MALEK: Which should be read alongside our opening

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1 submissions. So far as the structure of the argument
 2 this morning, what I would like to do is to identify
 3 what the court should decide, and then what I would like
 4 to do is to follow the order of the questions which
 5 your Lordship will find at paragraph 54 of our opening
 6 which are the five questions.
 7 What I am proposing to do is I will cover the first
 8 of those three questions and then Mr Quest will deal
 9 with question 4 and question 5. Then I will come back
 10 to the question of relief and remedies, which is
 11 concerned with declarations and debt.
 12 Let's start off by looking at the issue. The
 13 fundamental issue, we say, is a simple one. We are
 14 concerned with a third party garnishment under
 15 Article 1445 of the Belgian Judicial Code. There is
 16 only subject matter as a claim by RoK against BNYM.
 17 It is -- and if there is no subject matter, there is no
 18 basis for BNYM refusing to pay NBK the cash owing under
 19 the GCA.
 20 We contend that the debt due from BNYM to NBK
 21 doesn't fall within the subject matter of the Belgian
 22 garnishment order, which relates only to obligations due
 23 from BNYM to Kazakhstan, and there are no such
 24 obligations. That was a matter referred to this court
 25 by the Belgian court, and we say the English court

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1 should decide this issue and the court should apply
 2 whatever law is in play, whether it is English, Belgian
 3 or Kazakh law.
 4 Now, the Statis' position is consistent; they don't
 5 want the English court to decide anything other than
 6 narrow contractual issues under English law.
 7 We say that that is wrong. It is wrong because
 8 it is inconsistent with the 25 May decision; there is
 9 nothing to suggest that some issues are being decided in
 10 London and some in Belgium. The Belgian court made it
 11 clear in paragraph 3.3 that the subject matter of the
 12 garnishment is for the English court.
 13 Their approach is also inconsistent with
 14 your Lordship's decision on jurisdiction. We refer in
 15 particular to paragraph 36 of that judgment, where you
 16 accepted our submission that the issue that had been
 17 determined was not limited to any liability of BNYM to
 18 RoK in contract; it includes any liability to RoK
 19 relating to the assets.
 20 It is also inconsistent with the way that the
 21 parties prepared for trial. The list of issues is very
 22 broad, the rejoinder pleaded out the Stati case on
 23 a number of the doctrines that are in play, and
 24 similarly the expert evidence has been very broad. So
 25 we contend that issues such as piercing, sham and abuse

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1 should be decided. It is only by deciding those matters
 2 that the debt claim can be determined, and that is
 3 because BNYM's only defence to the debt claim is that
 4 it is excused from repayment of the cash deposits
 5 because under 16(i) of the GCA its failure to pay as
 6 a result of the garnishment. That depends on whether
 7 the cash deposits are the subject of the garnishment.
 8 If they are not, then the garnishment has no relative
 9 causative effect.
 10 It is worth stressing that BNYM in their note of
 11 yesterday take exactly the same position as we do, which
 12 is in essence that the Statis are required to come
 13 forward with all their arguments and that there is going
 14 to be nothing left over for argument in Belgium.
 15 In our respectful submission, therefore, we say that
 16 it is absolutely critical that the court deals with all
 17 the issues that are in play and, in our submission,
 18 there is no basis for seeking to limit the case in the
 19 way that my learned friends are seeking to do in the
 20 course of their arguments.
 21 But it is also, we submit, one other point that
 22 I perhaps should mention, which is -- does your Lordship
 23 have an insert at bundle I, tab 2, page 797?
 24 MR JUSTICE TEARE: I have a bundle of trial updates.
 25 MR MALEK: Yes, it should be there.

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1 MR JUSTICE TEARE: What is its reference again?
 2 MR MALEK: It is I.2, tab 8, at 797.
 3 MR JUSTICE TEARE: Yes. I have it.
 4 MR MALEK: That is an order in the Belgian garnishment
 5 proceedings. If you can see from the second page,
 6 page 798, the Statis were the applicants. Then if you
 7 can see from the bundle at 799, this was the Statis'
 8 application to fix a procedural calendar in the
 9 executory garnishment proceedings. Then at page 800 you
 10 will see this:
 11 "Kazakhstan, NBK and BNYM also argue that there is
 12 still currently uncertainty regarding the existence or
 13 not of a subject matter of the garnishment carried out
 14 by the Statis on 13 October."
 15 And they refer to our judgment. Your Lordship can
 16 see what is written there.
 17 Then it says this:
 18 "It is not disputed by the parties that this
 19 uncertainty is currently the subject of the proceedings
 20 pending before the English courts. It is also clear
 21 from our judgment of 28 June that challenges to the
 22 garnishee declaration by BNYM raised by Kazakhstan falls
 23 within the jurisdiction of the trial judge, namely the
 24 English courts."
 25 Then:

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1 "It also appears from the submissions of Kazakhstan,
 2 NBK and BNYM that the hearing is scheduled
 3 for March 2020."
 4 In other words, there is no dispute before the
 5 Belgian court in the executory garnishment proceedings
 6 that the subject matter was before this court.
 7 Then the Belgian court said later at page 800:
 8 "In these circumstances, this court considers that
 9 the procedural timetable for the exchange of written
 10 submissions must take into account the application to
 11 set aside brought by Kazakhstan against the exequatur
 12 order for which three additional hearings have been
 13 scheduled, on 13, 14 and 15 November, and also the
 14 proceedings pending before the English High Court of
 15 Justice. This is not, however, the case with the
 16 timetable proposed by counsel for the Statis. The court
 17 therefore considers it appropriate to postpone the time
 18 limits for the filings of final submissions and also for
 19 the scheduling of the hearings of the current
 20 proceedings until after the handing down of the judgment
 21 of the English High Court."
 22 So what this shows is that the Belgian court
 23 postponed its own schedule to wait for this court first
 24 to rule on subject matter.
 25 So what has happened, the Belgian court has made

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1 a reference to this court on the subject matter issue;
 2 the Belgian court has delayed its own procedures to
 3 allow this court first to decide that issue; and we
 4 would say that it would be extraordinary, and wholly
 5 inconsistent with comity, for this court then not to
 6 rule on the central issues as the Statis' invite. And
 7 as I have said, we have prepared on the basis that all
 8 the issues are going to be determined.
 9 If I can just remind your Lordship, and for this
 10 purpose I'm going to bundle G, just to see what the list
 11 of issues is in this case. It is at G, tab 4, page 151.
 12 This is the list of issues which was approved by this
 13 court on 2 March. If we look at the issues at 161 and
 14 then over the page at 162, you can see what all the
 15 issues are in this case.
 16 So in our submission there is actually no basis to
 17 adopt the narrow approach that the Statis are seeking to
 18 do before you. We can speculate why they want to do
 19 that, but in our submission this court should go ahead,
 20 determine all the issues that arise, and if the Statis,
 21 for strategic or tactical reasons, decide not to run
 22 arguments, that shouldn't stop you from going ahead and
 23 giving the ruling, and giving us the relief that we seek
 24 by way of the debt claim.
 25 Now, just one point I wanted to deal with is the

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1 question of the award and fraud. At various points
 2 during the trial the court has heard that the Statis say
 3 something about the award, for example
 4 Professor Suleimenov was asked a series of questions
 5 about arbitral procedure, which he was not called to
 6 address and which do not go to any live issues, and the
 7 purpose in making them in this form is not clear. It is
 8 not to rely on them, but instead to be able to say,
 9 perhaps elsewhere, that they have made them, that this
 10 court did not disagree with them; and one can see that
 11 in the case of Professor Suleimenov they will trumpet,
 12 entirely divorced from its context, the points which
 13 were put to him for example on Day 3 at pages 14 to 15,
 14 where the question was:
 15 "Do you agree that for a party, in the face of the
 16 obligation in the ECT treaty and the applicable rule, to
 17 not pay a[n] ... award is acting in bad faith?"
 18 "Answer: By and large, yes."
 19 "Question: I would like to take up, please, your
 20 first opinion."
 21 In our submission, the problem with that argument is
 22 that it is predicated on a valid award. But one needs
 23 to bear in mind that so far as this court is concerned,
 24 this award -- and this is the finding of
 25 Mr Justice Robin Knowles -- this award, he found that

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1 there was a sufficient prima facie case of fraud to
 2 require a trial of that issue.
 3 You will recall what happened. The Statis brought
 4 proceedings in London; they seek to enforce under the
 5 New York Convention; Mr Justice Robin Knowles finds that
 6 there is a prima facie case of fraud, directs the trial ;
 7 and then to avoid matter going to trial the Statis then
 8 discontinue, and they have given an undertaking that
 9 they will never seek to enforce the award in this
 10 jurisdiction .
 11 So arguments about the award and its validity , as
 12 far as this court is concerned, go nowhere, because as
 13 far as this court is concerned, based on the finding of
 14 Mr Justice Robin Knowles, this award was obtained by
 15 fraud.
 16 The issue is not over in Belgium either. Further
 17 evidence of fraud on the part of the Statis resulted in
 18 KPMG, which had audited the accounts of the operating
 19 companies, which were essential to the Statis' arbitral
 20 claim, invalidating all of its audits; and that evidence
 21 resulted in the Brussels Court of Appeal, on
 22 3 December 2019, ordering the filing of further
 23 submissions on the basis that the new evidence relates
 24 to the quality of the title . In other words, it affects
 25 the validity of the award.

1 And if there was no valid award, the Statis were
 2 never entitled to conservatory attachment because they
 3 will not have no sufficient title . Somewhat like the
 4 idea to get a freezing injunction you need a cause of
 5 action. Just to remind your Lordship of that, the order
 6 is in bundle I.2 at tab 7 at page 793. If we can look
 7 briefly at it .
 8 MR JUSTICE TEARE: Bundle I, tab 2, page ...
 9 MR MALEK: Page 793. It is at the back.
 10 MR JUSTICE TEARE: So it is I.2, is it?
 11 MR MALEK: Yes, I.2.
 12 MR JUSTICE TEARE: Yes.
 13 MR MALEK: This is the order. If we can look briefly at it .
 14 At 793 to 794 you can see the parties , and at the bottom
 15 of 794 you will see this :
 16 "The present case concerns a dispute arising from an
 17 order dated 11 October issued by the attachment judge,
 18 authorising a conservatory garnishment which was levied
 19 on 13 October. The conservatory garnishment can be
 20 levied in the case of urgency on the ground of a certain
 21 fixed due and payable debt. In the present case the
 22 documents that have been inserted to be new and relevant
 23 are exhibit 2 and exhibit 3 from which, according to
 24 that party, it must be inferred that the title on which
 25 the attachment is based was obtained by fraud. The

1 Statis dispute this assertion. The court considers that
 2 these exhibits are relevant as they affect the quality
 3 of the title . The court further considers that these
 4 exhibits are new documents, as they were issued after
 5 the last day of the period allowed for the applicant to
 6 file its written submissions. In these circumstances
 7 the request for ... is granted as follows ..."
 8 What the Court of Appeal did we can see further down
 9 at page 795, where it declares the application
 10 admissible and well-founded as follows and it authorises
 11 the parties :
 12 "... to file and communicate new consolidated
 13 submissions. Also submit, together with exhibits ,
 14 including the case law and legal writings relied on, by
 15 the parties by at the latest 5.00."
 16 So the Belgian court has effectively reopened the
 17 fraud issue based on what the Court of Appeal called
 18 "new documents".
 19 Now, my Lord, you may say: what is the relevance of
 20 all of this? In one sense it has no relevance at all ,
 21 but it is important, we submit, that when statements are
 22 being made about bad faith that they are put in context .
 23 As far as this court is concerned, namely the
 24 English court is concerned, when it comes to bad faith
 25 it is clear from Mr Justice Robin Knowles' decision that

1 he found a prima facie case of fraud. And of course the
 2 fact that they abandoned the proceedings in London, in
 3 our submission is relevant , because you can't proceed on
 4 the basis or accept an argument that this award has any
 5 status whatsoever.
 6 That is all I wanted to say by way of sort of
 7 introduction .
 8 If I can then turn to what I might call the GCA, to
 9 go through the way that the case appears to be dealt
 10 with or the various way that the case is put .
 11 We submit that the GCA is clear on its face that the
 12 contracting parties are Bank of New York Mellon and NBK.
 13 There is absolutely no evidence at all that RoK is
 14 a party to this contract .
 15 If you could pick up the core bundle, please, just
 16 so we can look at the GCA to see how it operates, we can
 17 begin by looking at it on its face . In relation to
 18 cash, you can see from recital C:
 19 "This agreement sets out the terms upon which Mellon
 20 and Boston Safe will hold certain securities of the
 21 National Fund and cash on behalf of the client as
 22 custodian and bank respectively ."
 23 Of course, the client is NBK. Then if we go to 2(b)
 24 you can see:
 25 "The client [in other words NBK] hereby appoints

1 Mellon to act as banker to the client upon the terms and
 2 conditions of this agreement.”
 3 “Mellon hereby accepts such appointment.”
 4 Then if we go to 16(j) it says this :
 5 “Notwithstanding that cash is reflected in the cash
 6 account as a debt owed by Mellon to the client , neither
 7 the Boston Safe nor Mellon shall be liable for the
 8 repayment of such cash.”
 9 I don’t need to go into the rest of that. But
 10 clearly the client is NBK and, as recorded here, it is
 11 a debt owed by Bank of New York Mellon to NBK. RoK has
 12 no rights whatsoever over it.
 13 Then you have various other provision that you have
 14 seen already. You have got 18(a) about the combining of
 15 accounts. You have also got the description of the
 16 parties at the very beginning of the contract, as to who
 17 the parties are; it is a contract to which NBK but not
 18 RoK is a party. Look at the introductory text.
 19 “Agreement between NBK (the client) ...”
 20 And the TMA is referred to but not in a way to
 21 suggest that RoK is a party. Look at recital A:
 22 “Client is carrying out certain trust management
 23 services in respect of certain securities of the
 24 Republic of Kazakhstan the National Fund in accordance
 25 with the TMA.”

1 And the detailed provisions for the giving of those
 2 instructions , and they all come from NBK; see clause 4.
 3 None of this makes any sense whatsoever if in fact
 4 RoK is the party to this contract.
 5 Then you have got paragraph 5(b), and although that
 6 is dealing with securities , it’s not directly relevant
 7 but it talks about belonging to the client ; in other
 8 words, NBK.
 9 Then clause 11(e) contemplates of a debit balance on
 10 a cash account and provides -- this is, sorry, 11(e) --
 11 contemplates a debit balance on a cash account and
 12 provides that such a debit balance is a debt due from
 13 NBK. In other words, not RoK.
 14 Clause 13 sets out various warranties.
 15 MR JUSTICE TEARE: I am sorry, what does 11(e) say about
 16 a debt?
 17 MR MALEK: 11(e) says:
 18 “If a debit balance in the client’s account exists
 19 at any time through no fault of Boston Safe ... such
 20 debit shall be deemed to be an advance to the client
 21 equal to the principal allowed.”
 22 MR JUSTICE TEARE: Yes, thank you.
 23 MR MALEK: So again, there is repeated references to NBK.
 24 Then at 13 you see a whole series of warranties.
 25 I mean, none of this makes any sense if the Statis

1 are right , namely that RoK are in fact the party to this
 2 contract; you wouldn’t need these warranties.
 3 As far as termination is concerned, clauses 21 and
 4 22, the assets are to be returned. This is 22(a), “to
 5 be returned to NBK”, and not to RoK.
 6 Now, those are sort of the main provisions in the
 7 contract. We say that everything on the face of this
 8 document indicates that this is a contract between the
 9 NBK, the Central Bank, and BNYM. There is nothing to
 10 suggest that RoK has got any rights under this
 11 agreement; it all makes sense if NBK is the party to the
 12 contract.
 13 Of course, the question that is raised is that if
 14 RoK was in fact always going to be the principal to this
 15 contract, why didn’t the parties draft a contract along
 16 those lines , if that is really what their intention was?
 17 The question arises: is there any evidence to
 18 indicate that anybody thought that RoK was a party to
 19 this contract?
 20 The nearest one gets to that is in the pleadings.
 21 If you could please pick up the statements of case,
 22 please, bundle A. A/92. This is paragraph 17(f),
 23 where it states as a matter of fact , BNYM London has
 24 been directly instructed by the RoK in relation to the
 25 assets in question.

1 Now there is absolutely no evidence to support that.
 2 In fact , Ms Moldabekova is quite clear about this . If
 3 we could pick up her statement, please, in bundle C at
 4 page 11, at 39, she says in the last sentence:
 5 “I am not aware of the government ever giving any
 6 instructions that BNYM London were having any contact
 7 with it .”
 8 That is her evidence. So in our respectful
 9 submission, when you look to see what evidence there is
 10 that the parties thought that RoK was a party to this
 11 contract, there is none.
 12 Faced with this clear contractual framework, let me
 13 then turn to the question about how is it said that RoK
 14 has a claim attachable under Article 1445 of the BJC.
 15 There seem to be three arguments or three theories :
 16 agency, trust and ownership. Let me deal first of all
 17 with agency.
 18 There is no pleaded case that NBK entered into the
 19 GCA as the agent of RoK. The nearest one gets to it is ,
 20 if you can turn up the pleadings again at bundle 15B of
 21 the rejoinder at the back there, which is at A/90, where
 22 it says:
 23 “The TMA is a contract between a State entity ,
 24 namely the Ministry of Finance of the
 25 Republic of Kazakhstan on the one hand, and on the other

1 hand NBK as an agent, institution or organ of the
 2 Government of Kazakhstan.”
 3 That’s a different point. We are not taking any
 4 pleading point. I am happy to deal with agency. But
 5 it is important for the court to know that it’s not
 6 actually pleaded.
 7 It is also worth noting that neither of the Kazakh
 8 law experts specifically addresses whether NBK acted as
 9 agent for RoK in entering into the GCA. Paragraph 83 of
 10 their opening, and paragraphs, sorry, 28 to 54 of the
 11 closing, contains very confusing analysis, mostly about
 12 authority, but none of it explains why it is said that
 13 NBK acted for and on behalf of RoK in entering into the
 14 GCA.
 15 Now, the Statis’ case is that RoK was a disclosed
 16 principal of NBK. We submit that that is a hopeless
 17 allegation. We have set out the law in paragraphs 20 to
 18 21 of our closing, which we have taken from the Filatona
 19 case; that decision is in tab 8 of the claimants’
 20 supplementary authorities bundle.
 21 MR JUSTICE TEARE: Just give me a moment.
 22 MR MALEK: Of course.
 23 MR JUSTICE TEARE: Why do you say that the case put is one
 24 of a disclosed principal as opposed to an undisclosed
 25 principal?

1 MR MALEK: Let me just --
 2 MR JUSTICE TEARE: You have referred to paragraph 83 of the
 3 fifth defendant’s opening, and I am just looking quickly
 4 at 83 to see whether it says that.
 5 MR MALEK: Let me just check that.
 6 MR JUSTICE TEARE: 83.3 refers to a disclosed principal,
 7 referring to a proposition of law.
 8 I think in their closing they had said disclosed or
 9 undisclosed.
 10 MR MALEK: Okay. I don’t think it affects the position. If
 11 I misstated the case, I apologise for that.
 12 MR JUSTICE TEARE: If it were disclosed, I am not sure where
 13 it was disclosed.
 14 MR MALEK: I’m looking at 83. 83.3:
 15 “The issue of whether NBK is able to bind the RoK to
 16 the terms is governed by English law. A disclosed
 17 principal may sue on any contract ...”
 18 So that is reference to a disclosed principal.
 19 MR JUSTICE TEARE: Right.
 20 MR MALEK: That’s how we have read it anyway. But as far as
 21 the legal test is concerned, your Lordship should have
 22 the Filatona case in tab 8 of the claimants’
 23 supplemental authorities bundle.
 24 MR JUSTICE TEARE: Yes.
 25 MR MALEK: It brings back fond memories, no doubt.

1 MR JUSTICE TEARE: It certainly does.
 2 MR MALEK: If we could look at in particular at
 3 paragraphs 63 and 64 which we have quoted, but it is
 4 probably worth looking at the authority itself for that
 5 passage, where your Lordship sets out the legal test.
 6 Although the Statis referred you to this decision in
 7 their oral opening, they did not take you to these
 8 paragraphs and there are two key parts. The first is
 9 paragraph 63:
 10 “A person claiming to be a disclosed principal has
 11 the burden, legal if he is the claimant, evidential if
 12 he is the defendant, as in the present case, of showing
 13 that notwithstanding that he is not named as a party, he
 14 was in fact the principal of one of the named parties
 15 and that the other party knew that.”
 16 So the Statis must satisfy two cumulative
 17 conditions. First, that NBK was in fact and in law
 18 acting as agent of RoK when it entered into the GCA, and
 19 second, that Boston Safe and Mellon Bank, the original
 20 parties to the GCA, knew that NBK was acting in that
 21 capacity.
 22 Now if the Statis fail to satisfy either of those
 23 conditions that is an end of the disclosed principal
 24 argument.
 25 Then the second key part is paragraph 64, which is

1 that:
 2 “If a person establishes that he was the disclosed
 3 principal of a named party, and that the other party
 4 knew that he will nevertheless not be entitled to
 5 enforce a contract, if the contract expressly or
 6 impliedly confined the parties to the named parties.”
 7 So if even if the Statis satisfied both of the first
 8 two conditions, the disclosed principal case fails if
 9 the GCA expressly or impliedly confined those who can
 10 sue on it to the named parties, and that is a further
 11 condition.
 12 The understanding of the three conditions is
 13 crucial. The Statis only referred to paragraphs of the
 14 decision which deal with the third condition; they
 15 ignore the first and second conditions, and it is clear
 16 that the first and second conditions are prior points.
 17 If I could just ask your Lordship to turn to
 18 paragraph 156 of the Filatona decision, where
 19 your Lordship says halfway down:
 20 “Thus, the contractual documents consistently
 21 describe Mrs Danilina as a party and equally do not
 22 describe Mr Chernukhin as a party. There is therefore
 23 a heavy burden on Mr Chernukhin to establish that in
 24 fact, contrary to what the SHA stated, he was the
 25 beneficiary of Navigator and that Mrs Danilina only

1 signed the SHA as his nominee or agent, and that
 2 Mr Deripaska knew that. He seeks to discharge that
 3 burden by adducing evidence leading up to the signing of
 4 the SHA in 2015, beginning with the events in 2001 when
 5 all that was agreed a deal was done for a joint
 6 investment in TGM.”

7 We say that none of these three conditions were
 8 satisfied. I will deal with only the headline points on
 9 each, since our position on these is set out in detail
 10 in section C1 of our written closing.

11 On the first condition, we have already looked at
 12 the GCA, and there is nothing in it that suggests that
 13 NBK was acting as the agent of RoK such that RoK is
 14 a party to the GCA. To the contrary, it is suggested
 15 that NBK contracted as principal. The Statis have not
 16 identified any factual matters indicating that NBK
 17 entered into the GCA as agent for RoK. That point was
 18 not put to Ms Moldabekova in cross-examination; she was
 19 not challenged on her evidence that NBK’s day-to-day
 20 management of the National Fund assets does not involve
 21 any contact between the government and NBK or between
 22 the government and Bank of New York Mellon.

23 On the second condition, there is no evidence
 24 whatsoever that Boston Safe and Mellon, the original
 25 contracting parties to the GCA, knew that NBK was

1 entering into the GCA on behalf of RoK rather than on
 2 its own behalf. That by itself is fatal to the
 3 disclosed principal case.

4 Even if the Statis satisfy you of the first and
 5 second conditions, the disclosed principal case fails on
 6 the third condition because we say that the GCA is
 7 a carefully drafted agreement designed to regulate every
 8 aspect of the relationship. There is no hint in it that
 9 the contracting parties is other than NBK, or that RoK
 10 has any rights under it as against Bank of New York
 11 Mellon. It is implicit that no one other than NBK and
 12 BNYM would have any rights under it.

13 Before leaving this issue, it is worth noting the
 14 evidential position. This case is in stark contrast to
 15 Filatona. In Filatona there was a vast amount of
 16 extrinsic evidence which led to the conclusion that
 17 Mr Chernukhin was a disclosed principal, and that was
 18 dealt with in the judgment at paragraphs 154 to 177.
 19 That included, for example, contemporaneous notes of
 20 a meeting involving Mr Deripaska, Mr Chernukhin and
 21 Mrs Danilina, where Mr Chernukhin was referred to as
 22 the “partner” and Mrs Danilina was not; that is
 23 paragraph 149 and 175. There are contemporaneous notes
 24 of telephone calls between Mr Chernukhin and
 25 Mr Deripaska; that is at 162. The absence of any

1 meetings between Mr Deripaska and Mrs Danilina until she
 2 had signed the relevant agreement; 162. Then false
 3 evidence given by Mr Deripaska in relation to
 4 Mrs Danilina’s financial contributions, in respect of
 5 which the court concluded at paragraph 160 that:

6 “The only realistic explanation for the giving of
 7 this false evidence is that they [that is Mr Deripaska
 8 and an associate] were both trying to hide
 9 Mr Chernukhin’s role as the true joint venture partner.”

10 The extrinsic evidence allowed the court to reach
 11 the clear conclusion at paragraph 283 that Mr Chernukhin
 12 was a disclosed principal.

13 The short point is that there is nothing like that
 14 in our case. The Statis can’t point to any extrinsic
 15 evidence to contradict the clear position under the GCA.
 16 Therefore, the disclosed principal case must fail.

17 MR JUSTICE TEARE: But what there is is Article 26 of the
 18 law of the National Bank.

19 MR MALEK: Yes.

20 MR JUSTICE TEARE: Paragraph 23.

21 MR MALEK: Yes.

22 MR JUSTICE TEARE: What do you say about that?

23 MR MALEK: It doesn’t -- it deals with ...

24 That doesn’t indicate that NBK is entering into
 25 a contract, a banking contract, a banker/customer

1 contract, that does not suggest that it is acting as an
 2 agent for RoK in relation to the GCA.

3 The GCA is a contract which operates on its own
 4 terms. It gives rise to rights and obligations between
 5 the parties to the contract, but it doesn’t give any
 6 suggestion that RoK is in fact a party but it also
 7 doesn’t indicate that Bank of New York Mellon itself
 8 thought that RoK was a party to the contract.

9 The contract is a very carefully drafted agreement
 10 dealing with -- well, dealing with assets going into
 11 billions, and the notion that RoK was a party to the
 12 contract, in our respectful submission it doesn’t make
 13 any sense whatsoever. If RoK was the principal to this
 14 contract, then the contract would have been entered into
 15 with RoK. But that would have been wholly inconsistent
 16 with the way that these parties operated, which is that
 17 NBK was the party with whom Bank of New York Mellon had
 18 its contract. All the provisions in the GCA are only
 19 consistent with the notion that NBK was the party to the
 20 contract, and not RoK.

21 So in our respectful submission, the fact of the
 22 provision that your Lordship just referred to doesn’t
 23 make RoK a party to this contract.

24 Now, that is all I wanted to say about agency. Let
 25 me then deal with the second way that the case is put,

1 which is a trust argument, which is in the closing at
2 paragraphs 59 to 63, and to which we say that are three
3 objections, each of which is fatal.

4 First, the entire argument is premised on the
5 relationship between NBK and RoK, under the TMA, being
6 treated as if it is, or is the equivalent to, an English
7 law trust, attracting the same rights and remedies.

8 That premise is clearly wrong given that it is
9 common ground that the trust management is
10 a relationship particular to Kazakh law and is not the
11 same as an English law trust.

12 There is no dispute between the experts on Kazakh
13 law that trust management is an institution intended to
14 be the analogue of a common law trust but on
15 a contractual basis; see the explanation in
16 section 3.2.2 of Professor Suleimenov's report, if I can
17 give you the reference there, it is at D1, tab 2,
18 page 66, which Professor Maggs accepts is accurate in
19 the joint memorandum, paragraph 6, and the reference is
20 D1, tab 4 at 181.

21 It is also common ground that the idea of a split
22 between legal and beneficial interest forms no part of
23 Kazakh law; Professor Suleimenov's first report,
24 paragraphs 23 sub-paragraph 4 and 30, which is at
25 D1/tab 2, page 64 to page 65, the joint memorandum at

1 paragraph 6.

2 So all the convoluted arguments, procedures, which
3 the Stasis rely upon as part of the English law of
4 trust, have no application at all to this case because
5 we are concerned with Kazakh law, a Kazakh law
6 contractual relationship created by the TMA. So that is
7 the first objection to the trust argument, it just
8 simply doesn't arise.

9 The second point is that the Stasis say that RoK
10 could give instructions to NBK or terminate the TMA.
11 Even if that is right, and we have looked at that issue,
12 as things stand no such instructions have been given and
13 the TMA remains on foot. That is crucial, because the
14 predicate on which the steps the Stasis suggest are open
15 to RoK, whether the Vandepitte procedure or derivative
16 action is entirely based on termination instruction
17 following by a failure of NBK to act properly. In other
18 words, this argument looks at what the position would be
19 under English law if RoK terminated the TMA or gave
20 instructions, and if NBK then wrongfully failed to
21 demand payment by NBK. But neither of those things has
22 happened, so therefore the point doesn't arise.

23 MR JUSTICE TEARE: Why do you say that the argument is

24 premised on the Republic terminating the TMA?

25 MR MALEK: Because the argument is premised on -- it's said

1 to be based on what could happen if various steps had
2 not taken place; and on our analysis none of those
3 things have happened. In our respectful submission,
4 therefore, to start bringing a legal theory based on
5 what would happen if certain events took place, in our
6 respectful submission simply does not arise on this
7 case.

8 And it leads to the third point, and this is
9 paragraph 37 of our closing, where we explain that
10 neither the Vandepitte procedure nor a derivative action
11 means that the beneficiary has a direct cause of action
12 against a third party. In other words, even if this
13 argument is accepted as correct, which of course we
14 don't accept that it comes into play, it doesn't assist
15 the Stasis because it doesn't give rise to a direct
16 claim by RoK against Bank of New York Mellon. The
17 procedure does not give rise to a claim.

18 Of course, what we are doing here is looking to see
19 whether or not there is a direct claim, and we say that
20 that is essentially a contractual issue under the GCA,
21 and under the GCA there is no claim by RoK against Bank
22 of New York Mellon.

23 In the present case, the question who owes
24 obligations and to whom they are owed and who may sue,
25 they are all contractual issues, and the only party to

1 sue Bank of New York Mellon is NBK. So in our
2 respectful submission, and this is what we have said in
3 paragraph 37(a) and 37(b) of our closing submissions,
4 these procedural shortcuts to deal with the situation
5 where a trustee acts wrongfully, in our respectful
6 submission do not arise and give rise to a direct cause
7 of action by RoK against Bank of New York Mellon.

8 That is all I wanted to say on the trust argument.

9 If I can then turn to what I call the second
10 question. For that purpose could your Lordship please
11 pick up our closing submissions. I am not sure whether
12 any of this is really challenged by the Stasis, but if
13 you turn, please, to 39, page 13:

14 "Can an asset in the hands of BNYM be garnished in
15 Belgian law if it is owned by RoK?"

16 That is the section dealing with 1445, and we have
17 set out our case over the page, at 41. In other words:

18 "... 1445 means what it says: the cash deposits are
19 only subject to the garnishment if they are owed to
20 RoK."

21 Then we have set out the key points at paragraph 42.

22 You can see at the bottom of the page
23 Professor Allemeersch's unchallenged evidence, and then
24 we have set out a number of propositions which we say
25 were unchallenged, in particular the proposition at

1 (iv), at 42(d)(iv) over the page at page 15:
 2 "With respect to cash on a bank account, the concept
 3 of ownership is irrelevant, as the banking relationship
 4 merely concerns a claim of the account holder against
 5 the bank for the amount equal to the credit balance."

6 And the right of recourse, which was relied upon by
 7 Professor Storme, Professor Allemeersch explains that
 8 that is not a standalone legal ground, and that
 9 a creditor has got to choose a specific enforcement
 10 mechanism as their means of recourse.

11 As I say, the evidence was not challenged and we
 12 therefore invite the court to accept what
 13 Professor Allemeersch has stated, and why ownership is
 14 not the relevant question and the reasons given.

15 As I say, I am happy to go through the argument
 16 again but, as I understand it, none of this has been
 17 challenged and in those circumstances I think I can deal
 18 with it pretty shortly. It simply comes down to the
 19 argument that Professor Storme's view, based on the
 20 right of recourse, is that it can't override the wording
 21 of 1445 and therefore ownership is irrelevant.

22 That was all I was going to say: ownership is
 23 irrelevant.

24 So agency, trust, ownership, none of those arguments
 25 work. The GCA, on its face, indicates that the debt is

1 owed to NBK. Therefore there is no subject matter to
 2 the garnishment, and therefore NBK is entitled to be
 3 paid.

4 The third question again doesn't appear to be
 5 challenged, which is at paragraphs 58 to 60.

6 Again, I don't think there is anything to be said in
 7 addition to what appears there.

8 My Lord, that is all I was proposing to say on the
 9 first three issues, and I was going to hand over now to
 10 Mr Quest to deal with questions 4 and 5.

11 MR JUSTICE TEARE: Thank you.
 12 (11.31 am)

13 Closing submissions by MR QUEST

14 MR QUEST: My Lord, I was going to deal with the points in
 15 section F and section G of our written submissions,
 16 beginning at page 20, starting with the question which
 17 we have called the fourth question, which is whether the
 18 Republic of Kazakhstan owns the cash deposits with which
 19 we are concerned.

20 We might first just ask ourselves why the question
 21 of ownership is relevant at all. As we understand the
 22 Statis' position from their closing, ownership is said
 23 to be relevant for two reasons.

24 First of all -- and this is paragraph 24.5 of the
 25 Statis' closing -- because it is said that the

1 Republic's ownership of the cash deposits would in
 2 itself be sufficient to give the garnishment subject
 3 matter, even if the RoK had no right of claim under the
 4 GCA. So they say ownership is sufficient for
 5 garnishment.

6 The second reason they say it comes in, is because
 7 they say in their written closing that the alleged
 8 ownership of the National Fund assets is one of the
 9 grounds which they rely on as saying that the -- as
 10 showing that NBK must have entered into the GCA as agent
 11 for the government.

12 Now as Mr Malek has just explained --

13 MR JUSTICE TEARE: I think, Mr Quest, in opening I asked
 14 Mr Sprange what was the relevance of ownership, and his
 15 answer at that time was that it was relevant to his
 16 argument on trust, that it showed who was the beneficial
 17 owner.

18 MR QUEST: Yes, well ...

19 MR JUSTICE TEARE: That is what I have kept in mind.

20 MR QUEST: I'm afraid I had rather to try and extract the
 21 point from the closings. Your Lordship may be right and
 22 maybe Mr Sprange will have to clarify that.

23 Certainly our primary position, as Mr Malek has
 24 explained, is that the question of ownership is not
 25 relevant to anything in this case, and that the only

1 question that arises in considering the subject matter
 2 of the garnishment is whether an obligation is owed by
 3 BNYM to the Republic of Kazakhstan under the GCA.

4 Just to be clear, I am addressing you on ownership
 5 in case your Lordship should not be with us on that
 6 point and should find that in some way or another the
 7 ownership of the assets is a relevant factor to
 8 ascertaining the subject matter.

9 On that basis, and looking at ownership on that
 10 basis, certainly in their submissions the Statis appear
 11 to assume that if the court has to decide the question
 12 of ownership of the cash deposits, that is a question of
 13 Kazakh law, and all of their evidence is directed to
 14 that.

15 They have not actually explained why it is Kazakh
 16 law that is relevant. Your Lordship will of course bear
 17 in mind that when we talk about the cash deposits we are
 18 talking about, and only talking about, a debt owed by
 19 BNYM under the GCA. That is a debt which is governed by
 20 English law and which is sited in England at BNYM's
 21 London Branch. So from an English perspective, the
 22 legal owner of that debt is simply the person who has
 23 the legal right to claim it, which takes us back to the
 24 obligation question.

25 So the second thing the Statis will have to do,

1 after persuading your Lordship that ownership is
2 relevant at all, is to persuade you that in some way
3 Kazakh law is the correct law for determining the
4 question.

5 If they get over those hurdles, then we look at what
6 the ownership issue is under Kazakh law and what is
7 really in dispute.

8 What seems to be common ground under Kazakh law is
9 that during the currency of the trust management
10 agreement the NBK has the right to, and I quote,
11 "possess, use and dispose of" the National Fund.
12 Your Lordship will recall that that is expressly
13 provided for in clause 2.1.1 of the TMA, which is in the
14 core bundle. If your Lordship wants to turn that up,
15 it is at first page of the core bundle.

16 So what was agreed between the bank and the
17 government in terms of the assets is that it was NBK
18 that would have the right to possess, use and dispose of
19 the National Fund, and that of course would include the
20 cash deposits.

21 Now, on that point the Statis have said in their
22 written closing that there are important limits on that
23 right, which they say are to be found within the terms
24 of the TMA itself.

25 Your Lordship may recall that I discussed with

1 Professor Maggs in cross-examination whether in truth
2 there were any relevant limits on the right of NBK to
3 dispose of the assets under the TMA, and the only
4 provision of the TMA that he was able to point to that,
5 in his view, in any way restricted the bank's right to
6 dispose of the assets was clause 2.2.5, which is the
7 provision by which the government can instruct transfers
8 out of the National Fund into the national budget.

9 But you may also recall that Ms Moldabekova gave
10 some evidence about that; she gives evidence in
11 paragraph 14 of her statement and she was also
12 cross-examined on the point. She explains that
13 withdrawals from the National Fund by the government
14 take effect by a money transfer in local Kazakh
15 currency, in Kazakh tenge, and if necessary the National
16 Bank will realise assets in order to make local currency
17 available. She also makes the point in her statement
18 that any withdrawal by the government into the budget
19 requires parliamentary approval.

20 So that is the extent of the rights that the
21 government has during the currency of the agreement, and
22 those are not rights in respect of the disposal of the
23 underlying assets; the underlying assets remain, during
24 the agreement, exclusively at the disposal of the
25 National Bank and not the government.

1 The Statis also make the point in this respect, they
2 say that the President of Kazakhstan can terminate the
3 TMA, they say, at will. They rely on clause 7.4 in that
4 respect.

5 Your Lordship will have seen our position in our
6 written closing is that it is a misreading of clause 7.4
7 of the TMA. We say clause 7.4 doesn't mean that the
8 president can terminate at any time; what it means is
9 that if there is a termination under clause 7.3 at the
10 end of the term, that termination must be supported by
11 the decision of the president.

12 That, in the end, is a question of interpretation
13 for your Lordship to decide, but it is, in our
14 submission, ultimately irrelevant anyway, because in
15 fact the TMA has not been terminated and it remains in
16 force, and for as long as it remains in force then the
17 rights of, use and disposal remain with the National
18 Bank.

19 Those rights of possession, use and disposal in
20 relation to the bank accounts that we are concerned with
21 would include, and Professor Maggs agreed with this when
22 I put it to him in cross-examination, the right to give
23 payment instructions on bank accounts and the right to
24 withdraw funds from bank accounts. So those are rights
25 which are vested in the agreement with NBK.

1 Moreover, and again I think this is common ground
2 between Professor Maggs and Professor Suleimenov, the
3 rights of possession, use and disposal that are vested
4 in NBK by this agreement are vested in NBK to the
5 exclusion of the government during the period of the
6 TMA. So it is only for as long as the TMA continues the
7 NBK has the right to dispose of these bank accounts, and
8 the government does not have the right to dispose of
9 them.

10 Just for your Lordship's note, that was
11 Professor Maggs at Day 3/98, line 15. Sorry, that is
12 a wrong reference. The reference to
13 Professor Suleimenov's evidence is paragraph 52, sub-1,
14 of his first report, and that is responded to in the
15 joint statement.

16 So there are exclusive rights of disposal during the
17 TMA vested in NBK.

18 What all that means is that whatever other
19 conclusion one might reach about legal title in Kazakh
20 law, what does not seem to be in dispute between the
21 Kazakh law experts is during the life of the TMA the
22 Republic of Kazakhstan does not have any right in Kazakh
23 law against BNYM under the GCA. That is the point that
24 Professor Maggs accepted at Day 3/98 line 15.

25 From a Kazakh law perspective, the

1 Republic of Kazakhstan's only rights in respect to these
2 bank accounts, in respect of the National Fund
3 generally, are rights against NBK under the terms of the
4 TMA.

5 If that proposition is accepted, then it makes the
6 Statis' case, in my submission, on ownership really very
7 difficult to understand. I make two points.

8 First of all, the Statis, as we know, rely on the
9 Trust Management Agreement in support of an argument
10 that the Republic of Kazakhstan is a disclosed principal
11 of NBK for the purpose of suing on the GCA.

12 But at the same time, the Kazakh law experts seem to
13 agree that RoK doesn't have any right in Kazakh law to
14 possess, use or dispose of the cash deposits, and it
15 doesn't have any rights in Kazakh law, for as long as
16 the TMA continues, against BNYM. So it is very
17 difficult to see in those circumstances how it could be
18 said that RoK was understood, from a Kazakh law
19 perspective, to be treated as principal of a contract
20 with BNYM when it has no rights against BNYM.

21 The second point I make is that the Statis rely on
22 the Republic's ownership, as they say it, of the cash
23 deposit as a grounds for garnishing them, because they
24 say it is sufficient for them to show that in Kazakh law
25 these assets are owned by the Republic of Kazakhstan,

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1 that is sufficient to justify a garnishment. But again,
2 that doesn't make any sense if in fact the position in
3 Kazakh law is that the Republic of Kazakhstan doesn't
4 have a claim in Kazakh law against Bank of New York
5 Mellon. Because if it doesn't have a claim even in
6 Kazakh law against Bank of New York Mellon, there isn't
7 anything to be garnished.

8 These difficulties, my Lord, in the Statis'
9 analysis, in my submission the Statis have not really
10 made any attempt to address these or to analyse these in
11 their written closing. Their position is: well, the
12 court simply shouldn't decide these issues, shouldn't
13 decide the question of ownership and shouldn't decide
14 the relevance of ownership to the claims that it is
15 making, all the court should do is look at the
16 contractual issues. But in my submission, and for the
17 reasons that Mr Malek has given, that is not good
18 enough. These are issues which the Statis have raised
19 in order to justify their position that the cash
20 deposits fall within the subject matter of the
21 garnishment, and if they have raised them then the court
22 is going to have to rule upon them.

23 I think your Lordship is muted.

24 MR JUSTICE TEARE: The difficulty I have with the suggestion
25 that the National Bank is the owner and the Republic is

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1 not, is that as I understand it your side accepts, see
2 paragraph 16 of your opening, that there is no dispute
3 that the National Fund assets beneficially belong to the
4 Republic.

5 MR QUEST: Yes.

6 MR JUSTICE TEARE: The picture that I have in my mind is
7 that, yes, so long as the TMA is in existence the bank
8 is able to deal with the assets, but everybody knows
9 that they remain in the ownership of the Republic.

10 MR QUEST: My Lord, I think one needs to be --

11 MR JUSTICE TEARE: And they belong beneficially to the
12 Republic.

13 MR QUEST: I think one needs to be a little careful here
14 about what we mean by using the word "ownership".

15 In the AIG case, for example, again it was common
16 ground that the beneficial -- that the government was
17 the ultimate beneficiary of these assets, in the sense
18 that economically they are held for the benefit of the
19 government, but in AIG the court declined to grant
20 a third party debt order, because the question that
21 arose in that respect was who had the legal claim to the
22 cash under the GCA, which of course is a contractual
23 question.

24 The question that arises, or the relevance of
25 ownership in this case is, in my submission: to what

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1 extent does it give RoK, as opposed to NBK, a right of
2 claim against BNYM under the GCA that is capable of
3 being garnished? To the extent that Kazakh law is
4 relevant to that question -- we say it's not, we say it
5 is an English law question -- but to the extent that
6 Kazakh law is relevant to that question, during the
7 currency of the TMA all of the rights associated with
8 ownership, ie possession, use and disposal, are vested
9 in NBK for that period.

10 MR JUSTICE TEARE: I quite accept that the question of
11 ownership or the question of beneficial ownership may be
12 irrelevant to the question of who is entitled to claim
13 the debt owed by Bank of New York Mellon. As
14 Mr Justice Aikens held in the AIG case, there was
15 a beneficial interest but that didn't assist the
16 claimants in that case. But if it is relevant, contrary
17 to that, if it is relevant, as I say, the difficulty
18 I have is that if it is accepted that the National Fund
19 assets beneficially belong to the Republic, then that is
20 because surely everybody knows the Fund is owned by the
21 Republic but pro tem the bank is managing the assets.

22 MR QUEST: My Lord, that is not the way a Kazakh lawyer
23 would see it. Of course, the case is not put in terms
24 of how a Belgian garnishment would work, is that all you
25 need to do is to identify who the beneficiary of assets

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1 are. Indeed, one of the problems of the Stasis '
 2 analysis is that although they say ownership is
 3 a relevant factor under Belgian law, and we obviously
 4 disagree with that, they haven't really explained and
 5 Professor Storme didn't really explain what they mean by
 6 "ownership" in that context. Do they mean beneficial
 7 ownership in the sense that an English trust lawyer
 8 would understand it? Do they mean -- of course, there
 9 is not in Kazakh law a division between legal and
 10 beneficial ownership, which makes the question even more
 11 difficult to answer.

12 If your Lordship is -- I really stress two points.
 13 One is that if one is asking the question, the only
 14 relevant question can really be: who has the right to
 15 dispose of these assets? Because that is what is being
 16 garnished. If one needs to go further and ask the kind
 17 of formal Kazakh law question: who, in a Kazakh court,
 18 will be treated as having legal title under Kazakh law
 19 to these assets? Then the question is not who has the
 20 ultimate benefit of them, but one gets into the rather
 21 technical debate between Professor Maggs and
 22 Professor Suleimenov about the distinction between
 23 rights of claim and other kinds of, other things in
 24 Kazakh law.

25 My Lord, that is set out in the closing and it is

1 set out in Professor Suleimenov's report. Just to
 2 briefly summarise that dispute, professor Suleimenov's
 3 position is that in Kazakh law of property there is
 4 a rather fundamental distinction between things in rem,
 5 which are tangible objects, and rights of claim, which
 6 are rights in personam; and his view, and he deals with
 7 it in his first report at 27 to 33 and his second report
 8 at 35 to 54, is that from a Kazakh lawyer's perspective
 9 the whole concept of ownership and other proprietary
 10 rights can only attach to tangible things, and
 11 intangible things like debts are rights of claim, they
 12 can't be the subject of ownership in Kazakh law, and all
 13 one can therefore do is to identify the person that has
 14 the right of claim.

15 He says in Kazakh law, as in English law, in this
 16 case where one is dealing with a cash deposit at a bank,
 17 the person who has the right of claim is the person who
 18 under the banking contract would be entitled to
 19 enforce it.

20 I think if I may say, I understand the point
 21 your Lordship makes about who has the benefit of these
 22 assets, but there is a danger here in allowing the
 23 Stasis to sort of skip over a lot of the garnishment
 24 analysis to say: well, it is sufficient for them to say
 25 that these are assets of which the government is the

1 ultimate beneficiary, and that in itself is a sufficient
 2 ground for garnishment.

3 That is not the way the case is put, and if it is to
 4 be put like that they need to explain why simple benefit
 5 is sufficient under Belgian law or under English law to
 6 justify the garnishment.

7 Just to summarise on the ownership point, in my
 8 submission the whole analysis of ownership in Kazakh
 9 law, and we say it is not relevant at all, even if it
 10 turns out to be relevant, doesn't really take the case
 11 any further. Because on any view, as matters stand and
 12 for as long as the TMA is in force, the only party with
 13 the right to control or withdraw these cash deposits or
 14 dispose of them in any way, under Kazakh law or indeed
 15 any under any other law, is the National
 16 Bank of Kazakhstan. And while the TMA is in force, the
 17 Republic of Kazakhstan has no right to withdraw these
 18 funds, no right to dispose of these funds, no right to
 19 do anything with these funds, under Kazakh law or
 20 English law or any other law. That really is why I say
 21 that ownership really doesn't take matters further.

22 That is all I was going to say about question 4, my
 23 Lord, unless your Lordship has any other questions on
 24 that.

25 The fifth question is piercing, sham trust, abuse of

1 law. This is section G of our closing. Again,
 2 I preface this question by asking: why is it relevant,
 3 why are we looking at this? And again, it is relevant
 4 because the Stasis have raised arguments, here and in
 5 Belgium, that even if the RoK has no claims against BNYM
 6 on the face of the GCA or on the face of the TMA,
 7 nevertheless, they say, there might be a claim by the
 8 application of some rule of either piercing, sham,
 9 abuse, or something similar under some principle of
 10 Belgian or Kazakh law. In other words, what the Stasis
 11 say is rules on piercing, sham, abuse might give the
 12 garnishment subject matter when otherwise it would have
 13 none.

14 That issue, and I will just give your Lordship the
 15 references and we needn't turn to them, that issue is
 16 raised by the Stasis for example in paragraph 11(a),
 17 paragraph 21 and paragraph 27 of their rejoinder, and it
 18 appears as agreed issue 5(g) in the list of issues.

19 So these are all points that are raised in the
 20 pleadings by the Stasis, and your Lordship may recall
 21 also in your own judgment, at paragraph 33 on the
 22 jurisdiction hearing, you made the point that it would
 23 be open to the Stasis to make all those submissions
 24 about piercing and sham and so on at the trial as part
 25 of the subject matter issue.

1 MR JUSTICE TEARE: So long as those concepts, if it was
 2 necessary to refer to foreign law, whether foreign law
 3 was the applicable law --
 4 MR QUEST: Yes.
 5 MR JUSTICE TEARE: -- as a result of the application of the
 6 English law of conflicts .
 7 MR QUEST: Yes. Yes, I mean the reason they come in is
 8 because this court has been referred the subject matter
 9 question, so this court is dealing with the question of
 10 whether the garnishment has subject matter, where there
 11 is a claim under the GCA which is capable of forming the
 12 subject matter of this garnishment. That is what this
 13 court is seized with.
 14 The reason that the Statis have put these points in
 15 play and the reason they have pleaded them is, as I say,
 16 that the Statis say in some way that these issues about
 17 piercing and abuse might give the garnishment subject
 18 matter in circumstances where it otherwise wouldn't,
 19 because it might give them a claim against BNYM in
 20 circumstances where they wouldn't otherwise have them.
 21 Now, in terms of what the arguments are on piercing
 22 and abuse, I think possibly because the Statis' primary
 23 position is they don't want them to be decided, it is
 24 very difficult to see from the written closing precisely
 25 how these cases are put, but --

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1 MR JUSTICE TEARE: They don't seem to be put at all .
 2 MR QUEST: That's right. I mean, there is a very brief
 3 reference, if your Lordship has their closing --
 4 MR JUSTICE TEARE: Yes.
 5 MR QUEST: -- right at the end in 73.4. You see they say
 6 you shouldn't decide these points at all, but then at
 7 the end of 73.4 they say:
 8 "If to be determined, to conclude that RoK's failure
 9 to pay the award is an abuse of law, leaving the cash
 10 deposits with BNYM subject to garnishment."
 11 Then also --
 12 MR JUSTICE TEARE: 73.4.
 13 MR QUEST: Of their closing.
 14 MR JUSTICE TEARE: "If to be determined ..."
 15 MR QUEST: Yes. That seems to be more or less everything
 16 that is said about the point, except that there is also
 17 in paragraph 66 a reference to the court drawing factual
 18 conclusions as to the purpose and intent and the level
 19 of control relevant to the Stati parties' arguments of
 20 abuse of rights or *fraus omnia corrumpit* in Belgium.
 21 MR JUSTICE TEARE: I haven't received any arguments from the
 22 Stati parties as to why these concepts are relevant
 23 having applied the English law of conflicts .
 24 MR QUEST: No. My Lord, no. But your Lordship will recall
 25 that Professor Maggs spent a great deal of time in his

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1 report dealing with questions of sham and abuse under
 2 Kazakh law and Professor Storme also, in his report,
 3 refers to questions of sham and simulation under Belgian
 4 law.
 5 MR JUSTICE TEARE: I agree they do, but I'm still very
 6 puzzled as to why they're relevant. But anyway ...
 7 MR QUEST: My Lord, they are pleaded by the Statis; they are
 8 pleaded as a reason why the court should not find
 9 subject matter, and they form part of the agreed list of
 10 issues. Obviously if the Statis don't wish to argue
 11 them, then that's a matter for them. But it seemed only
 12 right, since the points have been raised, my Lord, that
 13 the court should be clear what our position is .
 14 MR JUSTICE TEARE: Yes.
 15 MR QUEST: As I say, if they are going to suggest that sham,
 16 abuse and so on is a reason why the order has subject
 17 matter and the court should so find, they need to bring
 18 those arguments forward.
 19 MR JUSTICE TEARE: Yes.
 20 MR QUEST: Very briefly, the real problem with that part of
 21 the Statis' case, and no doubt the reason why they are
 22 not pursuing this very hard, is that there is simply no
 23 factual or evidential basis for saying either that the
 24 TMA was a device for shielding State assets from
 25 enforcement or from saying that the TMA is a sham, in

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1 the sense that in some way it does not represent the
 2 reality of the arrangement between NBK and RoK.
 3 If the Statis can't make good an allegation that
 4 there was some kind of impropriety in relation to the
 5 establishment or operation of the National Fund, then
 6 however these points are put, and under whatever system
 7 of law they are advanced, they must fail, because all of
 8 these points are based in one way or the other on there
 9 being some kind of abusive conduct.
 10 Just on the evidential position, can I just remind
 11 your Lordship what Ms Moldabekova said specifically
 12 about the reasons for the formulation of the
 13 National Fund.
 14 MR JUSTICE TEARE: Yes.
 15 MR QUEST: That is in file C, page 4.
 16 MR JUSTICE TEARE: Yes.
 17 MR QUEST: Paragraph 12.
 18 MR JUSTICE TEARE: Yes.
 19 MR QUEST: I won't read it all out, but she explains in some
 20 detail that the reason the National Fund was established
 21 and the reason it was structured the way it was, was
 22 because on an existing sovereign wealth fund in Norway
 23 called the Oil Fund, and she explains there was a lot of
 24 work done with the Norwegians about it.
 25 MR JUSTICE TEARE: Yes.

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1 MR QUEST: Your Lordship will see in the final sentence she
2 refers to the fact that, like the National Fund, the
3 Norwegian National Fund is also managed by the Norwegian
4 Central Bank. I think Ms Moldabekova also said in
5 cross-examination that in fact in Kazakhstan it is only
6 the National Bank that has really the expertise or the
7 facilities to manage a portfolio of this kind.

8 In relation to the allegation that it was to shield
9 assets, again she deals with this expressly in
10 paragraph 35 on page 10 in response to the pleaded
11 allegation to this effect, and she says in the final
12 sentence:

13 "So far as I am aware, it was no part of the purpose
14 of the establishment of the National Fund to create
15 a mechanism for shielding assets from creditors nor was
16 the TMA being used for that purpose."

17 She wasn't challenged in cross-examination on either
18 the points she made in 12 or in 35.

19 The only other factual point that I think was made
20 by the Stasis, and Mr Malek alluded to it, is that in
21 paragraph 17(f) of their rejoinder they make
22 a suggestion that in reality it is the government, not
23 the National Bank, that manages the Fund; they said that
24 in fact the government gives direct instructions to
25 BNYM.

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1 Again, Ms Moldabekova deals expressly with this in
2 paragraph 39 of her witness statement on page 11. She
3 says at the end of that, well she explains the
4 government's role and she says that although NBK has
5 a reporting relationship with the government, there is
6 no direct contact with the government on a day-to-day
7 basis and she is not aware of government ever giving any
8 instructions to BNYM London or having any contact with
9 it. And again, that wasn't challenged.

10 I mean the point was made by Professor Maggs that
11 the chairman of the National Bank serves at the pleasure
12 of the president, as it were, in the sense that he can
13 be appointed and dismissed by the president. But he is
14 not the only Central Bank governor who is in that
15 position, and the court can't infer simply from that
16 that the National Bank should be regarded as some kind
17 of cipher of the government that is incapable of
18 exercising independent control or independent judgment.
19 And if the Stasis wanted the court to make a finding
20 about that, then they should have pleaded it and they
21 should, at the very least, have put it to
22 Ms Moldabekova.

23 So really there is just no factual basis at all that
24 the Stasis have put forward for applying any rule or any
25 law based on piercing, sham and abuse.

50

1 For completeness, we have set out in paragraph 97 of
2 our written closing what the Belgian position is as
3 regards sham and abuse, and Professor Allemeersch's
4 evidence, which was not challenged, was that there needs
5 to be evidence of deliberate concealment or fraud.

6 Your Lordship will recall from my cross-examination
7 of Professor Maggs that it is a similar kind of position
8 in Kazakhstan under Article 160 and under the abuse of
9 rights provisions, that there needs to be some factual
10 basis, there needs to be some evidence of interference
11 by the government, there needs to be some evidence that
12 the contract was not in fact operated in the way that it
13 was said that it would be.

14 In the case of abuse, Professor Maggs drew some
15 analogies from some cases based on inheritances, but
16 again both of those cases were situations where the
17 court accepted that there was evidence that the relevant
18 person was deliberately attempting to avoid paying his
19 creditors in an improper way.

20 Absent any evidence, and there is none in the case,
21 that the National Fund was established for the purpose
22 of defrauding creditors, or that the relationship with
23 the TMA as a contract between the government and the
24 bank was a sham, in the sense that it didn't really
25 reflect the true arrangement, all of these arguments on

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1 sham, abuse and so on, simply fall away.

2 That is what I was going to say on those two issues,
3 unless your Lordship had any question from me.

4 MR JUSTICE TEARE: No, thank you very much.

5 Would it be sensible to have a break for the
6 transcribers, Mr Malek?

7 MR MALEK: Yes, that is fine. I was literally going to be
8 two minutes.

9 MR JUSTICE TEARE: If you are just going to be two minutes
10 let us have the break after that, then.
11 (12.08 pm)

12 Further closing submissions by MR MALEK

13 MR MALEK: All I was going to say is that the position of
14 declarations and relief is set out in our closing.

15 The one point I wanted to make was to deal with
16 Mr Handyside's suggestion that we shouldn't be allowed,
17 at this stage anyway, to have our debt relief --

18 MR JUSTICE TEARE: I'm afraid I don't have in mind what debt
19 relief you are seeking. I have had in mind the dispute
20 between you and the Stati parties. I infer from what
21 you say that there is a claim by the bank against
22 New York Mellon for this debt and you are seeking
23 a judgment to that effect; is that right?

24 MR MALEK: That is correct, yes.

25 MR JUSTICE TEARE: Right, okay.

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1 MR MALEK: And we say that if you are with us in terms of
 2 the subject matter argument and there is no subject
 3 matter, then it follows that NBK is entitled to be paid
 4 the 530 million in terms of cash, and NBK therefore seek
 5 judgment in the amount outstanding in respect of the
 6 amount of the cash.

7 MR JUSTICE TEARE: Surely this court can't give judgment on
 8 that until the matter has gone back to Belgium for them
 9 to look at my judgment and say, "Well, it follows that
 10 the garnishee must be set aside" or, depending on
 11 whatever I say, "The debt must be paid to the Statis".

12 MR MALEK: No.

13 MR JUSTICE TEARE: If I were to give you judgment now,
 14 I would be usurping the role of the Belgian court,
 15 wouldn't I?

16 MR MALEK: No, my Lord. It is common ground that certainly
 17 the Bank of New York Mellon accepts that your decision
 18 will be decisive and therefore that we can get paid.
 19 I don't know why Mr Sprange is on the TV.

20 MR SPRANGE: I was going to say, it is not common ground
 21 from our perspective.

22 MR MALEK: What is common ground between us and Bank of
 23 New York Mellon is that if you decide there is no
 24 subject matter to this garnishment order that, in our
 25 submission, is the end of it, and it follows, therefore,

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1 that NBK is entitled to be paid the cash. That was the
 2 issue that was referred to this court, and if this court
 3 decides that there is no subject matter, that is the end
 4 of it.

5 So in our respectful submission -- and I think this
 6 is common ground with Bank of New York Mellon but
 7 Mr Handyside will confirm this -- your decision will be
 8 decisive. There is nothing more to be determined in
 9 Belgium, because you will have decided the question of
 10 subject matter as the competent court, and if there is
 11 no subject matter there is no basis for freezing the
 12 cash in question. Therefore, in our respectful
 13 submission, NBK is entitled to judgment.

14 There is no stage where this goes back to somebody
 15 in Belgium and they consider what you have decided.
 16 It is game over. The story, it is game over. That's
 17 because there would have been no subject matter.

18 So, my Lord, there is no question that your decision
 19 will be decisive, and if there is no subject matter
 20 there is no basis for freezing the monies.

21 My Lord, on that basis we say that you should give
 22 the debt relief which we are seeking.

23 MR JUSTICE TEARE: Thank you.

24 MR MALEK: That is all I was going to say, so we can take
 25 the break. Thank you.

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1 MR JUSTICE TEARE: Thank you.
 2 Before Mr Handyside addresses me, we will just have
 3 a break for five minutes.
 4 (12.13 pm)
 5 (Short break)
 6 (12.18 pm)

7 MR JUSTICE TEARE: Are we all ready?

8 MR HANDYSIDE: I am, my Lord.

9 MR JUSTICE TEARE: Are Mr Malek and Mr Quest there?

10 MR QUEST: I am.

11 MR JUSTICE TEARE: Yes, they are. Right.
 12 Thank you very much, Mr Handyside.
 13 Closing submissions by MR HANDYSIDE

14 MR HANDYSIDE: My Lord, there are three submissions that
 15 I wish to make.
 16 The first is that it would be very helpful if
 17 your Lordship would record in your judgment the
 18 following facts.
 19 First, that the claimants have made plain that they
 20 make no criticism of BNYM, and that on the first day of
 21 the trial they applied successfully to amend the
 22 declarations that they seek so as to put beyond any
 23 doubt that they are not making any criticism of BNYM.
 24 Secondly, that the claimants offered an undertaking,
 25 which was accepted by the court and embodied in the

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1 court's order, to the effect that they will not make any
 2 claim against BNYM in any proceedings in any
 3 jurisdiction arising out of BNYM's decision to freeze
 4 the asset under the GCA in response to the Belgian and
 5 Dutch garnishment orders.

6 My second submission is that the court should decide
 7 whether the Republic, RoK, has any claim against BNYM
 8 under any applicable system of law.

9 The only potentially applicable systems of law
 10 identified by the parties are the laws of England,
 11 Belgium and Kazakhstan. Accordingly, those are the only
 12 systems of law that the court need decide.

13 MR JUSTICE TEARE: I will only be deciding it under English
 14 law, subject to questions of foreign law which come in
 15 through conflicts of law rules, such as the relationship
 16 between the Republic and the bank.

17 MR HANDYSIDE: My Lord, we would urge slightly different,
 18 just to reorder the points, because that is all it
 19 ultimately comes to, and invite your Lordship first of
 20 all to decide whether the Statis have made out any claim
 21 under any system of law, and I have defined the only
 22 three in play, because if they haven't, that is the end
 23 of it, and the court need not decide which system of law
 24 is engaged under English conflicts of law principles.
 25 The reason I say this, my Lord, is because otherwise

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1 there is potentially a gap, because if your Lordship
 2 simply says "I am going to apply English conflicts of
 3 law principles to identify which the applicable law is,
 4 and then only decide that question", there is
 5 potentially a gap if Belgian choice of law rules are
 6 said to be different .

7 As I will come on to explain in a moment and to
 8 remind your Lordship of the history , it is absolutely
 9 clear that it is incumbent upon the Stati parties in
 10 these proceedings before you to put forward any claims
 11 which they say the Republic has under any relevant
 12 system of law. They have put forward such claims as
 13 they have put forward, and your Lordship, in our
 14 respectful submission, must now decide whether any of
 15 those claims are made out. If they are not, that will
 16 be an end to this dispute.

17 My Lord, the ultimate question which your Lordship
 18 is being asked to decide, and which your Lordship has
 19 indicated the court will decide, a point to which I will
 20 return in a moment, is the question whether the Belgian
 21 garnishment order has a subject matter. My Lord, I will
 22 come back to that in a moment, if I may.

23 Much of their argument in closing, in their written
 24 closing, is devoted to seeking to persuade this court
 25 not to decide whether the Belgian garnishment order has

1 subject matter. Their apparent aim is to preserve for
 2 themselves a yet further opportunity to advance
 3 arguments before the Belgian courts to the effect that
 4 they should be permitted to enforce their arbitral award
 5 against money that is presently frozen in the hands of
 6 BNYM.

7 We urge your Lordship to reject the Statis' plea to
 8 this court to kick the can down the road.

9 It is common ground between all of the parties
 10 before you that the Belgian court decided that at least
 11 some matters in dispute between the claimants and the
 12 Stati parties should be referred to this court.

13 Can I please take your Lordship back briefly to the
 14 Belgian court's judgment in the core volume at tab 5.
 15 I would invite you please to turn to page 14, 3.1.4 of
 16 the judgment. At the top of the page under numbered
 17 paragraph 1, the judge recorded that:

18 "Kazakhstan asserts that there exists no legal
 19 relationship between itself and the garnishee ..."

20 No legal relationship :
 21 "... and that the garnishee also does not have
 22 a restitution obligation towards it .

23 If we then skip the next three paragraphs and pick
 24 it up in the middle of the paragraph beginning "The
 25 arguments", you will see the judge said:

1 "Kazakhstan's contention is actually that the
 2 garnishment could not have any subject matter."

3 Then below that the court, in the next paragraph,
 4 said that:

5 "The absence of a debt from the garnishee towards
 6 the seized debtor only leads to the conclusion that the
 7 garnishment has no subject matter."

8 The court then recites the declaration that was made
 9 by BNYM. The key passages are four lines into the
 10 quotation:

11 "BNYM cannot fully exclude that the
 12 Republic of Kazakhstan has or will have claims on BNYM
 13 or that BNYM holds assets of or for the
 14 Republic of Kazakhstan in view of its contractual
 15 relationship with NBK and the uncertainties of a legal
 16 relationship existing between NBK and the Republic."

17 So one sees that the declaration raised the
 18 possibilities that RoK had or will have claims on BNYM,
 19 or that BNYM held assets of or for RoK.

20 Two paragraphs below that one sees that the BNYM
 21 declaration made reference to Kazakh law, and the final
 22 paragraph on the quotation from the declaration said:

23 "Given these uncertainties BNYM has frozen the
 24 assets ."

25 The court, in the next paragraph immediately

1 following on from the quotation, said that RoK is
 2 entitled to challenge the declaration from the
 3 garnishee, but that that challenge relates to the debt
 4 and must be referred to the trial court in the
 5 proceedings on the merits, namely the English court.

6 So, my Lord, it is clear, in our submission, from
 7 what I have just shown you that the Republic's challenge
 8 to BNYM's declaration that (a) RoK might have claims on
 9 BNYM or (b) that BNYM might hold assets of or for the
 10 Republic, was referred to this court.

11 What I ask my Lord to bear in mind is that as
 12 a matter of Belgian law the Belgian garnishment order
 13 would have subject matter if the Republic has a claim
 14 against BNYM under any system of law. That is common
 15 ground between the Belgian law experts; for your
 16 Lordship's note it is in the joint memorandum, volume
 17 E1, tab 4, page 120.

18 Shortly after the Belgian court made this decision
 19 the claimants commenced these proceedings. Can I,
 20 my Lord, just take you quickly to the pleadings in
 21 bundle A.

22 If you turn, please, to the particulars of claim in
 23 tab 2 and go straight to the declarations on page 21.
 24 One sees there the five declarations that were
 25 originally sought when the proceedings were issued. The

1 first three of those declarations, A, B and C, appear to
2 focus upon the GCA and the rights arising under it, and
3 the same might also be said of the fourth declaration.

4 It therefore seemed to BNYM at least that those four
5 declarations, so putting the fifth one to one side for
6 a moment, those four declarations might not go far
7 enough in order fully to resolve the competing claims to
8 the cash.

9 If your Lordship goes to BNYM's defence in the next
10 tab, tab 3, can I invite my Lord, when looking at the
11 defence at this stage, just to look at the original
12 text; ignore any amendments because I want to show you
13 what the parties originally said.

14 If we start at paragraph 6.1, BNYM pleaded its
15 understanding that as a matter of Belgian law the
16 garnishment order applied to any present claim of the
17 Republic of Kazakhstan against BNYM in relation to the
18 assets held pursuant to the GCA, arising under any
19 system of law including, for the avoidance of doubt
20 Kazakh law, whether actual or contingent, immediately
21 payable or not, and disputed or not.

22 Then at paragraph 11 we went on to plead:

23 "In the light of the matter set out in paragraph 6.1
24 above, the declaration sought by the claimants in
25 paragraphs 1(a) to 1(d) of the prayer would not

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1 necessarily fully resolve the dispute between the
2 claimants and the Stati parties or the competing claims
3 of NBK and the Stati parties to the cash held by BNYM
4 pursuant to the GCA. For this purpose it would also be
5 necessary for it to be determined whether the Republic
6 has any claims against BNYM which fall within the scope
7 of the garnishment order as a matter of Belgian law, if
8 such claims are asserted by the Stati parties to exist."

9 Pausing there, my Lord, I will come back to the
10 other texts in a while.

11 Finally in the defence, if we go to paragraph 35,
12 where we pleaded that:

13 "The Belgian court deferred to the English court to
14 resolve the question of whether the Republic had any
15 claim against BNYM falling within the state of the
16 Belgium garnishment order."

17 Then we said in 35.2:

18 "However, the dispute between NBK and the Stati
19 parties will not necessarily be fully resolved by
20 determination of the question of whether any debt or
21 obligation was owed by BNYM to the public pursuant to
22 the GCA and/or as a matter of English law."

23 So, my Lord, it was clear, in our submission, and it
24 has always been clear in our submission, that what the
25 Belgian court referred or deferred to this court to

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1 resolve was the question of whether the Republic has any
2 claim against BNYM falling within the scope of the
3 garnishment order. It is common ground between the
4 experts, as I have said, that such a claim could arise
5 under any system of law. And it was our position
6 originally that the dispute would not necessarily be
7 fully resolved by a determination of whether the
8 Republic has a claim against BNYM under the GCA as a
9 matter of English law, because the potentially relevant
10 claims go beyond that.

11 Now, my Lord, BNYM's defence was served before, and
12 without having had sight of, the Statis' defence. The
13 service of the Statis' defence was delayed by the fact
14 that they brought a jurisdiction challenge.

15 My Lord, BNYM didn't appear on that challenge but we
16 do of course have your Lordship's judgment, and could
17 I please take you back to that briefly, in bundle B,
18 tab 5.

19 The passage in your Lordship's judgment is
20 paragraphs 26 through to 33. It may be that
21 your Lordship is already familiar with this passage but
22 if not I would invite my Lord just to take a few moments
23 now to look at that.

24 MR JUSTICE TEARE: 26 to 33.

25 MR HANDYSIDE: 26 to 33, please. (Pause)

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1 MR JUSTICE TEARE: I have the conclusion in 33 well in mind.

2 MR HANDYSIDE: Yes. I won't take you through it paragraph
3 by paragraph, but there was obviously a vigorous debate
4 before the court on that occasion as to the scope of the
5 issues in dispute and the scope of the referral by the
6 Belgian court.

7 It is clear from these paragraphs that what the
8 Statis sought to argue before your Lordship was that the
9 Belgian court had only referred a narrow contractual
10 point under English law, and that the particulars of
11 claim, they said, did not raise any broader question as
12 to whether a debt was owed to the Republic by BNYM on
13 any legal basis outside of the GCA. I am picking up
14 those words from paragraph 32.

15 But those arguments were rejected by the court.
16 Paragraph 33, your Lordship accepted Mr Malek's
17 submission that the declarations sought by the
18 claimants, which of course included declaration (e) as
19 then formulated, were not limited to any liability in
20 contract, but included any liability to the Republic
21 relating to the assets. The last line on the page going
22 over to page 82 of the bundle, one sees that.

23 Could I invite you, my Lord, also just to remind
24 yourself of paragraphs 36 and 60.

25 MR JUSTICE TEARE: That was Mr Malek's submission, but my

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1 conclusion was immediately before that. Those are all
 2 matters that can be determined by this court applying
 3 what it determines to be the applicable law.

4 I have to say the idea that I, an English judge,
 5 should be determining hypothetical questions as to
 6 whether there is a claim in Kazakh law or a claim in
 7 Belgian law is, frankly, ridiculous. But of course if,
 8 as a matter of English law, the suggested claim can only
 9 be resolved by applying Belgian law or Kazakh law
 10 pursuant to the English law conflicts, then of course
 11 the court will do it.

12 MR HANDYSIDE: My Lord, in my respectful submission the
 13 starting point is: what has the Belgian court referred
 14 to this court to decide?

15 MR JUSTICE TEARE: I can't believe the Belgian court has
 16 referred to this court matters of Kazakh law. It chose
 17 this court because English law is the governing law of
 18 the contract.

19 MR HANDYSIDE: Indeed. I accept that, my Lord. But the
 20 issue that has been referred is whether the Belgian
 21 garnishment order has subject matter.

22 Now the difference, with respect, between the
 23 position which your Lordship has just put to me and what
 24 I am putting to your Lordship is not a big difference in
 25 practice. The Statis have put forward claims or

1 arguments relying on questions of Kazakh law, or
 2 principles of Kazakh law, and such points of Belgian
 3 law as they put to the claimant's expert, in support
 4 of a case that the Republic has claims on Bank of
 5 New York Mellon.

6 Your Lordship will either find those claims are made
 7 out or they are not.

8 If your Lordship finds that they are not, then that
 9 is the end of the dispute because it will follow from
 10 that that the Belgian garnishment order has no subject
 11 matter.

12 Nobody has advanced an argument before your Lordship
 13 that you should ignore any of the claims that have been
 14 sought to be put forward on the basis that under English
 15 conflict of laws rules those claims under those systems
 16 of law are irrelevant. That is not an argument anybody
 17 has made. So I am not asking your Lordship --

18 MR JUSTICE TEARE: I have been waiting to hear from
 19 Mr Sprange, but I know I'm not going to, that there are
 20 various foreign laws which are relevant under English
 21 conflicts of law rules, apart, of course, from the
 22 question of the relationship between the RoK and the
 23 bank, which is a matter of Kazakh law. But he hasn't
 24 advanced them and I am not, therefore, going to consider
 25 them.

1 Now, whether he can raise them in another court on
 2 another day will be a matter for that court. No doubt
 3 if he does, you and Mr Malek will say: this is quite
 4 wrong, he had every opportunity to raise these claims
 5 and chose not to do so.

6 MR HANDYSIDE: Well, my Lord, it goes beyond that. Because
 7 it is clear from the time that you handed down the
 8 jurisdiction judgment that the question whether the
 9 Belgian garnishment order has subject matter arises from
 10 the decision in these proceedings and was going to be
 11 decided in these proceedings.

12 Your Lordship said to me a moment ago in relation to
 13 paragraph 33 that it was just Mr Malek's submission at
 14 the end of 33; it was Mr Malek's submission, but it was
 15 a submission that your Lordship accepted.

16 MR JUSTICE TEARE: Yes, I agree. But I just took exception
 17 to the fact that you ignored the most important part of
 18 my decision.

19 MR HANDYSIDE: I'm sorry, my Lord, that wasn't
 20 a deliberate --

21 MR JUSTICE TEARE: No, I'm sure it wasn't deliberate.

22 MR HANDYSIDE: No. The point is that since your Lordship's
 23 judgment in the jurisdiction challenge it has been
 24 incumbent upon the Statis to plead and prove any claims
 25 or rights which they assert the Republic either has or

1 will have that gives subject matter to the Belgian
 2 garnishment order. They have served expert evidence of
 3 Belgian law and Kazakh law and have had an opportunity
 4 to cross-examine the claimants' experts in those
 5 disciplines.

6 It is now, in our submission, for your Lordship to
 7 decide, in the light of the evidence that you have
 8 heard, whether the Belgian garnishment order has subject
 9 matter.

10 If your Lordship, having heard the submission that
 11 have been made on Kazakh law and Belgian law, cannot
 12 identify or is not satisfied that there is any claim
 13 that the Republic has against BNYM, then your Lordship
 14 should decide that and say so. And if your Lordship
 15 decides that and says so, you will be doing everybody an
 16 enormous service, because it will then become clear that
 17 the Belgian garnishment order did not have any subject
 18 matter and the monies will be capable of being released
 19 and this dispute will be concluded.

20 My Lord, that is, with respect, the course that we
 21 urge upon you. I fully understand your Lordship's
 22 puzzlement as to the conflicts of law analysis. Any of
 23 the other aspects of the Statis' position that may be
 24 puzzling is a matter for your Lordship. But at the end
 25 of the day, the claims should have been put forward,

1 they have been put forward to the extent the Statis have
2 been advised to do so and have chosen to do so. If
3 those claims fail, then all we are respectfully asking
4 your Lordship to do is to say that they have failed to
5 make claims under any of those systems of law. And as
6 I say, if your Lordship is willing to take that step,
7 that ought to be an end to this whole matter.

8 My Lord, there are two related points that I want to
9 make.

10 The first is just for you to note that in
11 paragraph 18 of their written closing the Stati parties
12 refer to BNYM's pleaded position. That description
13 of --

14 MR JUSTICE TEARE: Paragraph what of what?

15 MR HANDYSIDE: It is the Statis' written closing at
16 paragraph 18.

17 MR JUSTICE TEARE: Yes.

18 MR HANDYSIDE: They quote from our pleadings, but you need
19 to approach paragraph 18 with very considerable care
20 because if you go back, sorry, for the last time to the
21 pleadings bundle, our defence ...

22 MR JUSTICE TEARE: Yes.

23 MR HANDYSIDE: Go back to paragraph 11, please. This time
24 read the whole paragraph together with the amended text
25 that was added in following the jurisdiction judgment.

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1 (Pause)

2 MR JUSTICE TEARE: Yes.

3 MR HANDYSIDE: You will see that it absolutely is our
4 pleaded position that this court is in a position to and
5 should decide the ultimate question as to whether the
6 garnishment order has subject matter, whether there are
7 any claims.

8 I just wanted to point that out because if you
9 simply read paragraph 18 of the Statis' closing you will
10 think our position is rather different.

11 The second point, my Lord, is simply this, that it
12 follows from what I have said that the court should not
13 entertain making the declarations in the amended form
14 set out at the end of the Statis' closing in
15 paragraph 76.

16 If your Lordship wants to take the Statis' closing,
17 you will remember that they say at 76 ...

18 MR JUSTICE TEARE: I don't think actually I got as far as
19 paragraph 76.

20 MR HANDYSIDE: It did arrive rather later than we were all
21 hoping, my Lord.

22 MR JUSTICE TEARE: 76, yes.

23 MR HANDYSIDE: What they say there is that if the court is
24 against them on the merits, then the court should only
25 grant the declarations in the amended form set out in

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1 76; in other words, simply restricted to English law.

2 We respectfully say that you shouldn't do that, and
3 the court should make declaration 1(e) either in the
4 form that the claimants invite you to make it in or with
5 the adjustments that we have suggested in paragraph 5 of
6 our note, where we have put forward some minor tweaks.

7 Subject to that, we say your Lordship should grant
8 the declarations in the form that the claimants seek, if
9 you are with the claimants on the merits.

10 My Lord, I hope I have explained why, although
11 I understand your Lordship's concern about being asked
12 to make findings under these various foreign laws,
13 I hope I have explained why it is important for
14 your Lordship to do so, and why it ought not to be as
15 bad a task or as big a task as it might at first sight
16 appear.

17 MR JUSTICE TEARE: I don't mind it being bad or big.

18 MR HANDYSIDE: No, my Lord --

19 MR JUSTICE TEARE: It's just odd.

20 MR HANDYSIDE: It is of course unusual for a foreign
21 attachment court to refer an issue to this court.

22 MR JUSTICE TEARE: It's unprecedented, isn't it?

23 MR HANDYSIDE: In my experience it is, and by the sound of
24 your Lordship's it is as well, but there we are, that is
25 the hand that has been dealt, as it were, and I hope

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1 I have explained why it is important that your Lordship
2 takes the approach that I'm urging upon you.

3 MR JUSTICE TEARE: Thank you very much, Mr Handyside.

4 MR HANDYSIDE: There is one final submission, which is on
5 a different topic, which relates to the debt claim.

6 You will have seen at the end of our note that we
7 have urged the court not to enter judgment against Bank
8 of New York Mellon --

9 MR JUSTICE TEARE: Yes.

10 MR HANDYSIDE: -- should you otherwise be with the
11 claimants. Essentially, the point is that it's not
12 appropriate, in our submission, for this court to enter
13 a judgment for half a billion dollars or more against
14 a reputable financial institution whose only role in all
15 of this has only ever been to try to do the right thing,
16 an institution which has never suggested that it won't
17 pay the money to the person entitled to it, once that
18 person has been identified for it by the court.

19 We therefore submit that the appropriate course
20 would be, if your Lordship is otherwise with the
21 claimants, to grant the declarations but not to award
22 a judgment in debt, but rather to stand over that claim
23 for relief for a period of time to allow my clients to
24 make payment voluntarily, on the basis that if they
25 don't then it is open for the claimants to come back to

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1 the court and apply, possibly on paper, but if not at
 2 a very short hearing.
 3 MR JUSTICE TEARE: How long?
 4 MR HANDYSIDE: In our note we say 28 days, in paragraph 9.
 5 I would like to amend that to 35 days, please, because
 6 I have had a quick look at the rules this morning and
 7 reminded myself that we may not actually find out
 8 whether the Statis are seeking to appeal in a judgment
 9 against then until day 28. So if we could extend that
 10 to 35, that would work.
 11 My very final point on this is simply this, my Lord,
 12 that Mr Malek didn't address you on any of this in the
 13 last two minutes of his submissions. He hasn't
 14 suggested that this course would cause his clients any
 15 prejudice or wouldn't properly protect their position
 16 and so that is the position that I would invite
 17 your Lordship to adopt.
 18 MR JUSTICE TEARE: Thank you.
 19 Mr Sprange.
 20 MR SPRANGE: I am in your hands, my Lord. I can make
 21 a start now or we can come back a little earlier than
 22 usual.
 23 MR JUSTICE TEARE: Why don't you make a start now.
 24 (12.52 pm)
 25

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1 Closing submissions by MR SPRANGE
 2 MR SPRANGE: Thank you, my Lord.
 3 What I am going to start with is I hoped the "F"
 4 word wouldn't have been raised in these proceedings
 5 because in our view it is utterly irrelevant, but
 6 Mr Malek couldn't resist but raise the fraud point and
 7 I want to put that straight, my Lord.
 8 He made the statement at page 9, line 13 of the
 9 transcript, to you that based on the findings of Robin
 10 Knowles J the award was obtained by fraud. That is
 11 a thoroughly misleading statement that should not have
 12 been made, my Lord. And don't take it from me, my Lord.
 13 If I could ask you, please, in the joint authorities
 14 bundle to go to the decision of --
 15 MR JUSTICE TEARE: What statement should not have been made?
 16 MR SPRANGE: The statement that based on the findings of
 17 Mr Justice Robin Knowles the award was obtained by
 18 fraud.
 19 MR JUSTICE TEARE: I agree that he didn't hold that; he
 20 merely held that there was an arguable case.
 21 MR SPRANGE: Right. So there are no findings of fraud by
 22 this court with respect to the award.
 23 My Lord, if I could just ask you to take up, it is
 24 in the authorities bundle, it is the joint authorities
 25 bundle, tab 56. My apologies, 55. Sorry, my Lord,

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1 it is now saying it should be 57, but it should be in
 2 the same bundle.
 3 MR JUSTICE TEARE: 57 is the judgment of Mr Justice Baker.
 4 MR SPRANGE: Yes. My Lord, if I could ask you to turn to
 5 page 17 of that. That was a decision he made with
 6 respect to the cost of the discontinued enforcement
 7 proceedings.
 8 MR JUSTICE TEARE: Yes.
 9 MR SPRANGE: There he summarised the arguments that Mr Malek
 10 made as to why indemnity costs ought to be made, and the
 11 expansion of those in paragraph 18.
 12 MR JUSTICE TEARE: Yes.
 13 MR SPRANGE: If I could just ask you to read paragraph 19
 14 and paragraph 21. (Pause)
 15 MR JUSTICE TEARE: Yes. Sorry, your microphone is off.
 16 MR SPRANGE: We say that is as far as it goes, my Lord, in
 17 terms of this court. But this court, with respect to
 18 this court, is not the relevant enquiry. The relevant
 19 enquiry for your Lordship in terms of any arguments
 20 about abuse and so on is the Belgian court.
 21 Your Lordship may recall that in paragraph 6 of your
 22 judgment on jurisdiction you observe the fact that the
 23 supervisory court, that is the courts in Stockholm, had
 24 at first instance and on appeal to the Supreme Court
 25 rejected all of Kazakhstan's challenges. So as far as

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1 this award goes it is final, conclusive and cannot be
 2 challenged again.
 3 What Mr Malek then said to you is the issue, the
 4 fraud issue, still arises in Belgium, and took you to
 5 tab 7, my Lord, of the I bundle, volume 1.
 6 Now, that my Lord was a decision --
 7 MR JUSTICE TEARE: Sorry, the I bundle?
 8 MR SPRANGE: Yes, I. Capital I bundle. It is the Belgium
 9 proceedings bundle.
 10 MR JUSTICE TEARE: Is it point 1 or point 2.
 11 MR SPRANGE: Point 1. Could you also get I.2 available as
 12 well because I need to compare the two of them.
 13 MR JUSTICE TEARE: Right.
 14 MR SPRANGE: At I1 you will see at tab 5, my Lord,
 15 a decision of 20 December 2019 from the French-speaking
 16 court of the first instance in Brussels. This, my Lord,
 17 is a judgment upholding the enforcement of the arbitral
 18 award. What it does, my Lord, is rejects all of
 19 Kazakhstan's arguments on fraud. During the course of
 20 your deliberations, my Lord, you may want to consider it
 21 in detail, but the short answer is every allegation of
 22 fraud made by Kazakhstan was rejected in this decision,
 23 which then led to the enforcement of the award in
 24 Belgium.
 25 That was on 20 December 2019. Of course, my Lord,

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1 that is the court in Brussels that has the proper
2 jurisdiction to consider the enforcement recognition and
3 then enforcement of the award. It is a substantive
4 merits court. It is not the conservatory garnishee
5 court which considers obviously questions of garnishee.

6 What Mr Malek showed you in tab 7 of I.2 --

7 MR JUSTICE TEARE: Yes.

8 MR SPRANGE: -- is a decision of the Court of Appeal with
9 respect to the conservatory garnishee order. So this
10 court has no jurisdiction to make decisions about
11 whether the award should be recognised in Belgium or
12 not. It was made on --

13 MR JUSTICE TEARE: The first judgment you showed me, this is
14 the Belgian court, but it is the Belgian enforcement
15 court, did you say?

16 MR SPRANGE: I would call it recognition and enforcement
17 court. So it is the court seized of jurisdiction to
18 decide issues relating to the award and whether it
19 should be recognised in Belgium pursuant to the New York
20 Convention provisions.

21 MR JUSTICE TEARE: Right.

22 MR SPRANGE: Whereas the decision he showed you was simply
23 a decision of 3 December, so several weeks before the
24 decision I just showed you, relating to procedural
25 issues on the conservatory garnishee proceedings and the

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1 appeal in particular.

2 So it is simply, I say, wrong to make reference to
3 that to try and persuade you that questions of fraud
4 remain an issue in Belgium on the enforcement of the
5 award, because they don't.

6 MR JUSTICE TEARE: They obviously remain in issue so far as
7 some Belgian court is concerned.

8 MR SPRANGE: Yes in the sense that we have a final decision
9 at first instance on the award. Kazakhstan can appeal
10 that. They have not yet, so far as I am aware. So
11 it is possible that they can. But right now is it fair
12 to say, as Professor Suleimenov conceded, that it is
13 abusive and in bad faith not to pay an award that has
14 been upheld at the seat.

15 MR JUSTICE TEARE: In the judgment to which Mr Malek
16 referred me, what point is being made in that?

17 MR SPRANGE: It essentially is procedural, how things were
18 to be addressed in these proceedings going forward.

19 MR JUSTICE TEARE: The reason I asked the question is
20 looking at it I can't see what the application was, and
21 I wondered whether you could refer me to it.

22 MR SPRANGE: I do plan to do that. What I do plan to do
23 after the break is to give you a very short overview of
24 the status of all of the proceedings in Belgium and the
25 timetables, and that will show you what that application

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1 was about.

2 MR JUSTICE TEARE: I see that at the bottom of page 794,
3 three paragraphs up, it was an application to submit new
4 submissions on the ground of a new and relevant document
5 or fact, and the judge gives permission for those new
6 submissions.

7 To what would those new submissions relate: an
8 appeal or what?

9 MR SPRANGE: To garnishee issues and whether those documents
10 go to whether the fact -- whether there should or should
11 not be a garnishee order.

12 MR JUSTICE TEARE: Is that order overtaken by the judgment
13 to which you have referred?

14 MR SPRANGE: I will not trespass on questions of Belgian law
15 but our short position is yes, because the award is
16 being recognised in Belgium pursuant to the New York
17 Convention provisions, and all of the fraud arguments
18 were disposed of, and all that matters is do the Statis
19 have a recognised and enforceable award in Belgium, and
20 the answer to that is yes. So anything that Kazakhstan
21 wants to raise about KPMG and attacking the award goes
22 nowhere.

23 MR JUSTICE TEARE: In the later judgment to which you
24 referred, do you know were the facts referred to?

25 MR SPRANGE: That I will need to check, my Lord. I put it

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1 this way, having read that fairly recently, all of the
2 headline fraud allegations were addressed. I can't say
3 that the particular documents in question were but
4 I will check that over the break.

5 My Lord, before you go what I just want to leave you
6 with so it is clear over the lunch break: what am
7 I asking you to decide and what are we not asking you to
8 decide. In very simple terms we have accepted your
9 jurisdiction decision; we have abided by it. We want
10 you to decide all of the questions referred under
11 English law as per the referral. Where in considering
12 questions of English law you need to look at another law
13 we agree and indeed we have made submissions on that.

14 We say there are a host of issues that are either
15 pure Belgian law or pure Kazakh law that don't arise for
16 you to determine and that in Belgium, as I am going to
17 show you, there is going to be at least two more
18 hearings and a series of pleadings that will take
19 your Lordship's judgment and treat it appropriately
20 according to Belgian law based on the findings that you
21 make and the declarations you do or don't make.

22 So the notion that I am trying to gain the system
23 and asking you not to decide things that have been
24 referred to you is wrong and is unfair. I am going to
25 show you the detail of that in 55 minutes, unless you

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1 would like us to come back a little earlier?
 2 MR JUSTICE TEARE: Might we need a little more time?
 3 MR SPRANGE: When it comes to lawyers and time estimates
 4 I always think it is better to err on the side of
 5 caution. So I think it would make sense to come back
 6 a little earlier.
 7 MR JUSTICE TEARE: Would anybody object to starting at 10 to
 8 2? I don't hear any objection, so let us say 10 to 2.
 9 MR SPRANGE: Thank you, my Lord.
 10 (1.06 pm)^^^ spelled to here
 11 (The short adjournment)
 12 (1.50 pm)
 13 MR JUSTICE TEARE: I think it is 10 to 2 so, Mr Sprange, you
 14 can continue.
 15 MR SPRANGE: Thank you, my Lord.
 16 I would like to go back to where we all started,
 17 which is the 28 May decision, which we find in the core
 18 bundle. I know this is a well traversed document, my
 19 Lord but it important in current context to remind
 20 ourselves of two passages.
 21 My Lord, the first is on page 8. You may recall
 22 that one of the questions or issues that was raised by
 23 the Republic on this application was because of an
 24 English law conflict, and we see that on page 7 where it
 25 starts:

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1 "Subsequently, Kazakhstan put forward that the
 2 Belgian attachment judge could not authorise the
 3 requested attachment by reason of its conflict with
 4 English law."
 5 On page 8, my Lord, if I could just ask you to
 6 kindly read the last three paragraphs in the top half of
 7 the page, above the heading "Non-fulfilment". (Pause)
 8 MR JUSTICE TEARE: Yes.
 9 MR SPRANGE: My Lord, in that context the judge then made
 10 the referral which we see on pages 14 and 15, and the
 11 passage that I am particularly interested in drawing
 12 your Lordship's attention to is on page 15, starting
 13 after the quote of the Bank of New York declaration,
 14 "The seized debtor ..."
 15 MR JUSTICE TEARE: Yes, I am very familiar with this.
 16 MR SPRANGE: Yes, and the bit that is most important is the
 17 competent judge on the merits is you, my Lord, who must
 18 supply its own national substantive law.
 19 So if you take in literal terms what has been
 20 suggested by Mr Malek and Mr Handyside earlier today,
 21 they effectively are saying to you that the Belgian
 22 court has subcontracted all of its garnishee duties to
 23 the English court and has asked the English court to
 24 give it an all-encompassing answer under all laws,
 25 including Belgian law, as to whether this garnishee

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1 should remain in place or not.
 2 I say that is absurd. It just has to be said to be
 3 absurd. But if you want the technical reason why it is
 4 absurd, it is very clear that on a very important issue,
 5 that's the GCA interpretation, and the status of a debt
 6 claim or not under that GCA, that question has been sent
 7 to you; but all other questions of Belgian attachment
 8 law will be applied by Belgian judges in due course.
 9 My Lord, on that, if I could please take you back to
 10 the I bundle, and it is I bundle 1, and it is tab 2.
 11 MR JUSTICE TEARE: Yes.
 12 MR SPRANGE: Tab 2 is a filing made by NBK in the appeal.
 13 It is the most helpful document that you have with
 14 respect to what is going on in Belgium. If I could ask
 15 you to take up I/49.
 16 Just to set the scene, here they have pleaded out
 17 your jurisdiction decision in paragraphs 89 and 90, and
 18 they are now addressing proceedings before other Belgian
 19 judges. They start in paragraph 95 with respect to the
 20 conservatory garnishee proceedings in which the
 21 reference was made to you, and they note in
 22 paragraph 96, as you will see, my Lord, that that
 23 decision of the 28 May has been appealed, and
 24 effectively by everybody. Kazakhstan says it shouldn't
 25 have reached the conclusions it reached, and we say the

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1 referral should not have been made.
 2 My Lord, if you then go to page 51 and you will see
 3 there the status, about halfway down above the heading
 4 "The executory garnishment", and there in the appeal of
 5 the 28 May decision there was going to be three hearings
 6 in September and October.
 7 MR JUSTICE TEARE: Sorry, which paragraph are you referring
 8 to?
 9 MR SPRANGE: It is paragraph 97, but you don't see the
 10 number "97" on 50 or 51. If you look at the heading
 11 halfway down page 51, just above it you will see the
 12 last paragraph.
 13 MR JUSTICE TEARE: Oh yes. Thank you. Yes.
 14 MR SPRANGE: What is clear, my Lord, when I show you some
 15 other passages, is that at those hearings your judgment
 16 will obviously loom large and be important, but there
 17 will also be a range of other issues, including the
 18 debate that the Belgian law experts have had in these
 19 proceedings about things like rights of recourse and
 20 whether ownership is sufficient, and they will do that
 21 under pure Belgian law principles.
 22 So, my Lord, the next set of proceedings that they
 23 refer to is the executory garnishment proceedings, and
 24 there the chronology is --
 25 MR JUSTICE TEARE: You tell me that they would consider

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1 whether ownership is sufficient . Does this document
2 tell me that they will consider whether ownership is
3 sufficient ?

4 MR SPRANGE: I am going to take you to the Stati parties '
5 submission in these proceedings, my Lord.

6 MR JUSTICE TEARE: Okay, right.

7 MR SPRANGE: If we then go, my Lord, to look at these
8 executory garnishment proceedings, page 52, you will see
9 there there was a debate about whether cash had been
10 moved to Belgium, and one of the reasons that it
11 wasn't -- and this is the second last bullet -- is that
12 the Bank of New York assured not to release the frozen
13 assets .

14 So in my submission, my Lord, these assets in
15 question won't go anywhere until these proceedings that
16 are described here have been resolved, because the bank
17 has assured the court that they won't release them.

18 MR JUSTICE TEARE: Right.

19 MR SPRANGE: Then you will see, my Lord, in paragraph 102,
20 the timetable has been set out for these proceedings and
21 you will see there is an extensive exchange of
22 submissions and then a hearing set for December this
23 year. You will see that all parties, NBK, the Bank of
24 New York and the Stati parties , will be filing
25 submissions from late August all the way up

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1 until October, which suggests that any decision of this
2 court will be briefed and addressed.

3 Now, my Lord, you asked the question about property
4 issues and so on. If you go back to page 23 you will
5 see the index.

6 MR JUSTICE TEARE: Yes.

7 MR SPRANGE: If you look at, say, section (vi) on page 23 --

8 MR JUSTICE TEARE: Yes.

9 MR SPRANGE: -- about halfway down the page, as to the law
10 on the merits of the appeal --

11 MR JUSTICE TEARE: Yes.

12 MR SPRANGE: -- you will see there there are a number of
13 issues raised. For example, if you look at 2.2.7:

14 "The allegations of the Stati regarding simulation,
15 piercing legal personality, abuse of law and fictitious
16 transactions are without merits."

17 So certainly from a pleadings point of view the
18 claimants are pleading to those issues and saying they
19 are without merit. Now, of course the Stati parties say
20 the opposite.

21 So in this appeal on the question of whether the
22 28 May decision was correct or incorrect, those types of
23 issues will be addressed. And you will see again,
24 my Lord, if you look at 2.2.1, obligations under the
25 GCA. Obviously --

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1 MR JUSTICE TEARE: They might be addressed, but they will be
2 addressed in the light of my judgment, presumably.

3 MR SPRANGE: Absolutely. Absolutely, my Lord.

4 You will see if you look at obligations under the
5 GCA, that are addressed from paragraph 56, we absolutely
6 accept that your judgment will be likely dispositive of
7 that. The conclusions you reach about how the GCA
8 should be interpreted under English law, the agency
9 argument and the trust argument, is likely to give the
10 Belgian judge very little work to do. But that doesn't
11 mean your decision will be exhaustive of everything that
12 will happen in Belgium.

13 If I could then ask you to take up, my Lord, tab 3.
14 It's the Statis' submissions. If you could please look
15 at page 208.

16 MR JUSTICE TEARE: Yes.

17 MR SPRANGE: You will see there that it is submitted on
18 behalf of the Stati parties that the attachment judge
19 has exclusive material jurisdiction to rule on the
20 rights of the creditors when this issue is extrinsically
21 linked to the enforcement, et cetera .

22 What I say there, my Lord, is that for the Stati
23 parties in these proceedings, in addition to your
24 determinations on the GCA, it will also raise arguments
25 under Belgian attachment law that will bring into play

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1 Kazakh law.

2 They won't need to bother with English law, because
3 you will have decided those.

4 My Lord, just on page 211, paragraph 122.

5 MR JUSTICE TEARE: Sorry, 122?

6 MR SPRANGE: That is the paragraph, and the page number is
7 I/211. It is page 211 of the bundle, and on that page
8 you should find paragraph 122.

9 MR JUSTICE TEARE: Right.

10 MR SPRANGE: You will see there, my Lord, that is one of the
11 debates that the Belgian judge will need to resolve as
12 to whether those particular arguments should be
13 determined by Belgian law or English law.

14 I say, my Lord, this is where things have got
15 a little -- reality is kind of being turned on its head.
16 It has been said several times this morning it is
17 incumbent upon the Stati parties to run veil piercing
18 arguments and sham arguments here. We say what is
19 incumbent upon us is to defend the claims for
20 declarations being pursued.

21 MR JUSTICE TEARE: Why did you plead matters of sham trust,
22 abuse of rights and so forth in your rejoinder --

23 MR SPRANGE: My Lord, I am going to go to that, because you
24 raised --

25 MR JUSTICE TEARE: -- if this court wasn't going to consider

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1 them?
 2 MR SPRANGE: My Lord, you raise a good and a fair question,
 3 and I think it will become very apparent when I show you
 4 the rejoinder what is meant there. We certainly pleaded
 5 them, but it was by way of background as to the Belgian
 6 proceedings. It was certainly not pleading it in the
 7 sense that we said that under English conflicts of law
 8 you needed to --
 9 MR JUSTICE TEARE: Why, then, were they put in the list of
 10 issues?
 11 MR SPRANGE: They were put in the list of issues because
 12 I think the list of issues was based very much on your
 13 jurisdictional judgment, my Lord.
 14 MR JUSTICE TEARE: What you are telling me is they are
 15 a list of non-issues.
 16 MR SPRANGE: Yes, I agree. For us they are a list of
 17 non-issues.
 18 MR JUSTICE TEARE: Why did you agree to them as a list of
 19 issues?
 20 MR SPRANGE: Because when you are agreeing a list of issues,
 21 my Lord, you can't say that something is not an issue,
 22 you can merely make submissions on whether it is a good
 23 issue or a bad issue. It is difficult to exclude from
 24 a list of issues a point that either party wants to
 25 raise.

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1 MR JUSTICE TEARE: You could have said to Mr Malek, "No,
 2 Mr Malek, I am afraid you have misunderstood what we are
 3 doing. We are not seeking to get the English court to
 4 make a finding of sham trust or abuse of rights, that's
 5 all for Belgium, it has nothing to do with England."
 6 You could have said that.
 7 MR SPRANGE: Yes, and I think we did, my Lord, in our
 8 rejoinder. When I come to it I will show you.
 9 MR JUSTICE TEARE: Okay.
 10 MR SPRANGE: I say this, my Lord, cautiously, because
 11 obviously, my Lord, you and I have crossed swords on the
 12 scope of the reference, but what we were very clear
 13 about in the jurisdictional hearing was that obviously
 14 the GCA interpretation needed to be considered; we
 15 accepted your decision that that included
 16 a consideration of the nature of the relationship
 17 between NBK and Kazakhstan and the National Fund, but we
 18 always said the Belgian court would need to deal
 19 a series of other issues.
 20 Just while we are in that bundle, two other quick
 21 references I ought to show you. Could you please look
 22 at page 285 of the bundle.
 23 MR JUSTICE TEARE: Yes.
 24 MR SPRANGE: My Lord, there in paragraph 258 is the
 25 introduction, and of course it doesn't do justice to the

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1 many pages that follow, but that is the substance of
 2 what we say the Belgian court in these proceedings and
 3 indeed the executionary garnishment proceedings will
 4 address under Belgian law.
 5 MR JUSTICE TEARE: Yes.
 6 MR SPRANGE: My Lord, it is certainly the position that --
 7 perhaps if I could ask your Lordship to take up the
 8 pleading bundle, please. That is bundle A. The purpose
 9 to go through this is just to show you how these Belgian
 10 law issues came into existence in the pleadings.
 11 Now, you may recall that in our defence we had said
 12 that it was only a narrow issue that should come to
 13 England and everything also should go to Belgium. We
 14 obviously revised that position following your judgment.
 15 If you look at tab 6 you will see the reply to our
 16 defence.
 17 MR JUSTICE TEARE: Where do you say that in your defence?
 18 MR SPRANGE: My Lord, if you could look at the defence,
 19 it is tab 4 and it is paragraph 20.
 20 MR JUSTICE TEARE: Right.
 21 MR SPRANGE: Then if you see the reply, my Lord, which is at
 22 tab 6 --
 23 MR JUSTICE TEARE: Yes.
 24 MR SPRANGE: -- paragraph 13 on page A/76.
 25 MR JUSTICE TEARE: Yes.

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1 MR SPRANGE: So the claimants introduced a notion of Belgian
 2 law that a garnishment could only be levied in respect
 3 of a debt if the debt is owed towards the judgment
 4 debtor. They did this under the heading "English law",
 5 where they were pleading the points that really, we say,
 6 arise for you, which we see in paragraph 12,
 7 subparagraphs 1, 2, 3 and 4.
 8 MR JUSTICE TEARE: Yes.
 9 MR SPRANGE: Then Kazakh law is addressed. Then if you go
 10 to paragraph 23, which is on page A/80, this is still in
 11 the section on Kazakh law, and you will see a reference
 12 in paragraph 23 to the Civil Code of Kazakhstan,
 13 Article 160.
 14 Then, my Lord, please take up A/83, which is the
 15 last page of the defence.
 16 MR JUSTICE TEARE: Yes.
 17 MR SPRANGE: It's said that the defence contains no proper
 18 plea as to Belgian law and we are not entitled to make
 19 arguments about the scope of the garnishee order under
 20 Belgian law. Then they make their point again, that by
 21 Belgian law there must be an obligation owed to the
 22 judgment debtor.
 23 So it was in response to that that we filed our
 24 rejoinder. If you could please take up page A/88, this
 25 is paragraph 11, we denied paragraph 13 and said it was

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1 an incomplete statement.
 2 MR JUSTICE TEARE: Yes.
 3 MR SPRANGE: Then we said in subparagraph (a):
 4 "In cases of simulation or pretence a Belgian court
 5 would be entitled to look behind the simulation or
 6 pretence to examine the facts."
 7 MR JUSTICE TEARE: Paragraph 8, did you say?
 8 MR SPRANGE: Subparagraph (a). It is paragraph 11 still and
 9 it is paragraphs (a), (b) and (c) over the following
 10 page.
 11 MR JUSTICE TEARE: Right.
 12 MR SPRANGE: So we picked up what we say is an incomplete
 13 general statement of the meaning and effect of
 14 Article 1445. We have said what else a Belgian court
 15 will look at, but that is it. So it is by way of
 16 background, pleading to what we say is an inaccurate
 17 statement. We are not there pleading all of these
 18 issues under English law, whether directly or by
 19 a conflicts analysis, for you to decide.
 20 My Lord, if you could then go, please -- we then
 21 respond to all of the Kazakh law points. If you have
 22 a look, my Lord, at page A/94, we plead to Kazakh law on
 23 abuse of rights and separate personality under Kazakh
 24 law.
 25 MR JUSTICE TEARE: Which paragraph are you in now?

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1 MR SPRANGE: The heading is at the top of page of A/94,
 2 "Abuse of rights under Kazakh law" and then "Separate
 3 personality and independence under Kazakh law". A/94.
 4 MR JUSTICE TEARE: Right.
 5 MR SPRANGE: Then finally page A/96, when we deal with
 6 alleged sham, again we plead to Kazakh law issues other
 7 than a reference:
 8 "... and/or under Belgian law and/or alternatively
 9 under English law."
 10 This is in paragraph 27.
 11 MR JUSTICE TEARE: That does look to me as if you are
 12 intending to argue, under Kazakh or Belgian or English
 13 law, the TMA was a sham or mock agreement.
 14 MR SPRANGE: Yes. And that, my Lord, is the high point of
 15 any of our pleading on any relief that you should grant
 16 under Belgian law.
 17 Now, what we then go on to say in that context,
 18 however, you see at the conclusion of our defence. So
 19 on page A/97 -- and you will recall, my Lord, that
 20 paragraph 32 of their defence expressly pleaded that
 21 there was no proper plea as to Belgian law and we
 22 couldn't make arguments about it, and what we say here
 23 it's not admitted in particular:
 24 "The ultimate question of whether the National Fund
 25 assets held under the GCA are caught by the Belgian

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1 attachment on the basis they form the subject matter of
 2 the attachment or the rights is to be finally determined
 3 by the Belgian courts."
 4 MR JUSTICE TEARE: Yes.
 5 MR SPRANGE: So from our perspective, and you will remember
 6 the summary of issues at paragraph 54 of the claimants'
 7 opening, it is first of those, what is the position in
 8 terms of parties and obligations under the GCA under
 9 English law, that you must determine.
 10 MR JUSTICE TEARE: Yes.
 11 MR SPRANGE: The question of whether rights of creditors,
 12 rights of recovery of creditors, simulation,
 13 whether pure ownership is enough under Belgian law, we
 14 have never said, and don't say, should be determined in
 15 this court.
 16 As for veil piercing, sham and abuse, we say that if
 17 we wanted to persuade you on that first question of how
 18 you interpret the GCA by way of English law principles
 19 of sham transaction, veil piercing and so on, we would
 20 have to do that, and we plainly haven't and we have no
 21 case to that effect.
 22 So when you look at it all in the round, my Lord,
 23 it is simply not right for Mr Malek to say, as he did at
 24 [draft] page 54 of the transcript today, there is no
 25 stage where this goes back to a Belgian judge. Well, it

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1 plainly does. It will go back to at least two Belgian
 2 judges, who will apply Belgian law and will determine
 3 all of those issues with your considerable help, which
 4 may resolve a number of the issues. But for Mr Malek to
 5 be right, it is almost as though it is this
 6 Alice in Wonderland world where those proceedings in
 7 Belgium that I have just referred you to, with their
 8 timetables and which require the assets to remain where
 9 they are, don't exist, when plainly they do.
 10 And you, as I interpret your comments earlier today,
 11 I think this is not a controversial point that I am
 12 going to make, but it beggars belief that you would
 13 issue a decision that says to a Belgian court, "I have
 14 decided the GCA debt issue. Here is what you as
 15 a Belgian court should define as the subject matter
 16 under Belgian attachment law, and here are my findings
 17 on abuse, sham and veil piercing under Belgian law, and
 18 you can all pack up and go home now because I have
 19 decided things."
 20 That is the practical effect of what the claimants
 21 suggest to you, and indeed now the bank.
 22 My Lord, on that, and I will just leave you with
 23 some references, that is a position that is not
 24 consistent with what they have said, both of them, in
 25 the Belgian proceedings. The reference is, I will put

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1 it on for the transcript, bundle I1, tab 4, page 452,
2 paragraph 106 and then paragraph 109 in the same
3 document, and then bundle I2, tab 6, page 723.

4 My Lord, I can now turn to what I say are the
5 central issues that you do need to consider.

6 My Lord, actually, sorry, before I do that, I do
7 want to say a word about the amendments. For that,
8 could I just ask you to take up the joint memorandum on
9 Belgian law. That is in tab 4 of the E bundle. This,
10 you will recall, is what Mr Malek relied upon to justify
11 his extraordinarily late amendment, and he said to you
12 the reference to any other system of law was necessary
13 and it was something the parties have addressed, and
14 therefore shouldn't be a problem at all for us to
15 address.

16 If you go to page E/120, internal page 10, at the
17 very top of the page is that question, and this is one
18 of the questions that the Belgian law --

19 MR JUSTICE TEARE: Yes.

20 MR SPRANGE: What it says there is:

21 "When responding to the Belgian garnishment order
22 what is the relevance, if any, of any claims that
23 Kazakhstan has against BNYM in relation to the cash or
24 securities held pursuant to the GCA which arise under
25 any foreign, ie not Belgian, system of law."

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1 Now, I said to you at the commencement of this trial
2 that I couldn't meet a case that was "any system of law"
3 per se. And I still can't. Because if that question
4 encompasses everything under Belgian law, rather than
5 having the Belgian law experts deal with the five
6 questions that they had, we would have effectively had
7 a Belgian attachment law trial which would have been
8 much more broad.

9 That is the first point. The second point is that's
10 not the question. Clearly, on a reference from
11 a Belgian court to you, they are not referring Belgian
12 law questions. Why would they? It is farcical to
13 suggest that they would. So I say there that the only
14 foreign law that is relevant is English law, other than
15 where you need, under a conflicts analysis, to look at
16 a foreign law, and then the only conceivable candidate
17 is Kazakh law, which both parties have addressed.

18 That is why I say whatever declarations you grant,
19 whether they are in favour of the Stati parties or the
20 claimants, it is an English law analysis. It's not
21 Belgian law. And if it is any system of law, including
22 Belgian law, I can't meet that case, and that would be
23 highly prejudicial for us to have to face that case
24 given how late the amendment was.

25 Can I, my Lord, do this, could I turn to agency.

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1 For that, to start with you if you could please take up
2 our closing submissions at paragraph 16.

3 My Lord, I should apologise for the fact that this
4 didn't get to you at the time when we had hoped. That,
5 of course, is down to me, being a slow typer.

6 MR JUSTICE TEARE: Thank you.

7 MR SPRANGE: A couple of points, my Lord.

8 Much reliance was placed on Ms Moldabekova's
9 evidence with respect to agency. I say her evidence
10 can't really help you on this topic because, by her own
11 fair concession, she wasn't involved directly in any of
12 the setting up of the structures that govern the
13 question of whether there is an agency or not. She can
14 help you with what happened on a day-to-day basis, but
15 that is not a relevant enquiry. Indeed, the fact that
16 she was not aware of any communications directly between
17 the government and Bank of New York Mellon is consistent
18 with a principal agency arrangement. That is the whole
19 reason principals engage agents, so that agents such as
20 NBK can deal directly with the bank.

21 The second point is this: it is not right for
22 Mr Malek to say that there is no extrinsic evidence with
23 respect to the agency relationship. You recall that he
24 referred to terms of the GCA and said there is just
25 nothing here that indicates the government is a party,

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1 and you have no extrinsic evidence. I say there is
2 actually a huge amount, and there is more than you had
3 in Filatona and the reason for that is this: you have
4 the statutes, the National Bank statutes, you have the
5 Civil Code, you have Presidential Decrees, you have NBK
6 regulations, and then you have the TMA itself, and then
7 you have some contemporaneous communications between the
8 parties, including the government, when the GCA was set
9 up. And by way of reminder, you have recital A to the
10 GCA, which is in the core bundle, my Lord, and couldn't
11 be clearer as to what this arrangement was about. It
12 says in terms:

13 "Client [so in other words, National Bank] is
14 carrying out certain trust management services with
15 respect to certain securities of the
16 Republic of Kazakhstan (the National Fund) in accordance
17 with the Trust Management Agreement by and between the
18 Government of the Republic of Kazakhstan and the
19 National Bank, approved by resolution of the
20 government."

21 There are more, but let's start with that. So it is
22 very, very clear from the outset that there was another
23 agreement, that what was being done was a trust
24 management service by NBK on behalf of the government in
25 respect of the National Fund. And I ask this, my Lord,

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1 rhetorically : who on earth did ABN Amro at the time, and
 2 Bank of New York its successor, think the assets
 3 belonged to when they entered into the GCA? They
 4 plainly knew that they had a large sovereign as
 5 a client , that there was a trust management agreement in
 6 respect of the National Fund.

7 My Lord, before I delve into the --
 8 MR JUSTICE TEARE: Is that one of disclosed or undisclosed
 9 principal?

10 MR SPRANGE: Both.

11 MR JUSTICE TEARE: What is your primary case?

12 MR SPRANGE: Disclosed, my Lord. Disclosed.

13 MR JUSTICE TEARE: Why do you say it is disclosed? Where
 14 was it disclosed that the Republic was the principal?

15 MR SPRANGE: Starting with recital A of the GCA. Then,
 16 my Lord, I am going to show you, and I have the
 17 references in the closing notes which I'll take you to,
 18 there were contemporaneous documents relating to the
 19 beneficial owner of the assets, National Fund assets, as
 20 the government. So I say those two things were
 21 a disclosure of who the principal was.

22 MR JUSTICE TEARE: So you rely upon the recital and some
 23 other documents.

24 MR SPRANGE: Yes.

25 MR JUSTICE TEARE: I see.

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1 MR SPRANGE: I will take you to those as I go through the
 2 four key points. But, my Lord, while we are at it and
 3 while we are on your question as to disclosed or
 4 undisclosed, you have obviously seen the first instance
 5 decision in Filatona; if I could just take you to the
 6 Court of Appeal decision briefly. That, my Lord, is in
 7 the authorities bundle at 59B.

8 MR JUSTICE TEARE: I don't have a 59B.

9 MR SPRANGE: What I will do, my Lord, is I will have it
 10 emailed to your clerk immediately, and what I will do is
 11 we will bring it up on Zoom.

12 MR JUSTICE TEARE: It may have been emailed before.

13 MR SPRANGE: It is certainly one of the updates. My Lord,
 14 Ms Wong will send it right now to your clerk by email so
 15 that you have a soft copy version.

16 Could we take up paragraph 36 of the decision,
 17 please. Can you see that on the videolink?

18 MR JUSTICE TEARE: Yes.

19 MR SPRANGE: The simple point is made there, and that is
 20 just the legal principle overhanging the facts I just
 21 gave you:

22 "... whether identified or unidentified, whose
 23 interest in the transaction is known to the counterparty
 24 at the relevant time."

25 That is the basis of the recital on its own but also

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1 the tax documents that I am going to show you that that
 2 was clearly the place.

3 My Lord, paragraph 40 of the same page.

4 MR JUSTICE TEARE: Yes.

5 MR SPRANGE: Then, my Lord, probably paragraph 41 as well.

6 I am instructed this has gone to you, my Lord, and
 7 we are just going to send it again, this authority, but
 8 paragraph 41 is the further Bowstead commentary.

9 (Pause)

10 MR JUSTICE TEARE: Yes.

11 MR SPRANGE: Then finally, my Lord, paragraph 48. (Pause)

12 This is where the court discusses the approach to
 13 deciding whether an undisclosed principal is excluded
 14 from suing and being sued. It is the Court of Appeal
 15 decision in Teheran-Europe, and Diplock LJ, if I could
 16 just kindly ask you to read that, "Where an agent ..."

17 MR JUSTICE TEARE: I am familiar with that.

18 MR SPRANGE: Thank you, my Lord.

19 What I say then is there are four important indicia
 20 of agency that we need to satisfy you of for you to find
 21 that NBK entered into this agreement as agent for its
 22 principal, the government. That analysis, we say,
 23 starts under Kazakh law, because Kazakh law governs the
 24 relationship between the government and NBK, but English
 25 law is to be applied on the significance of those

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1 arrangements under Kazakh law.

2 The authorities for those propositions, my Lord, are
 3 at paragraph 30 of our closing note.

4 MR JUSTICE TEARE: Yes.

5 MR SPRANGE: Really, my Lord, this is about what, in
 6 substance, have the parties agreed, what is it that has
 7 really been reached as a modus operandi with respect to
 8 the National Fund? We say there is four things you need
 9 to look at: conferral of authority; control by the
 10 principal; remuneration. And obligations owed by the
 11 agent to the principal.

12 My Lord, if you could please take up page 18 of our
 13 closing note, we have put a number of documents here by
 14 way of reference on the question of conferral of
 15 authority. I am happy to take your Lordship to any of
 16 them by way of further reminder, but given time and
 17 given that you have the references there, I won't unless
 18 you particularly require it.

19 MR JUSTICE TEARE: Can I just point out a difficulty I have,
 20 or a weakness you may have in your case, which is that
 21 you say that the law applicable to whether NBK had
 22 actual authority to enter into the agreement(?) is
 23 Kazakh law. You then refer to these various articles,
 24 and so forth, but Professor Maggs, your expert on Kazakh
 25 law, said not a word about this. He had every

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1 opportunity, when asked the question "Under what
2 circumstances might, in Kazakh law, the Republic have
3 a claim on the GCA?" He went on for page after page
4 about abuse of law, sham trusts and all this sort of
5 business, when there was a simple explanation, which he
6 could have made in a few sentences: the Republic is the
7 principal.
8 My difficulty is that you are advancing a case and
9 have not a single word from Professor Maggs to rely
10 upon. I find that surprising.
11 MR SPRANGE: My Lord, the obvious explanation is that it is
12 not a matter of contention given Professor Suleimenov's
13 position in *AIG v Kazakhstan*, and the various --
14 MR JUSTICE TEARE: With respect, it is a matter of
15 contention, because Professor Suleimenov says that the
16 Republic is not the principal. I quite accept that you
17 say he said something different in *AIG*, but in his
18 report in this case he, unlike Professor Maggs, dealt
19 with the question of agency and gave reasons for it, and
20 those reasons were not challenged.
21 MR SPRANGE: Well, my Lord, they were challenged, and
22 successfully so, because during his oral evidence he
23 rowed back from that position considerably.
24 MR JUSTICE TEARE: I have read that passage in your closing
25 submissions and obviously you will come to it, but I do

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1 not read that passage in the way you do, obviously.
2 Of course the bank had permission or authority from
3 the government, but it is quite a different thing,
4 really, that in doing what it did it was acting as
5 agent, whereas ... (audio interference) ... You didn't
6 take that point up with him, you thought you'd done
7 enough. But I, unfortunately, have to decide whether
8 you have done enough.
9 MR SPRANGE: Understood, my Lord. I will address both those
10 points as I go, bearing in mind that you have very
11 fairly raised them as either problems that you have or
12 weaknesses I have.
13 If I can address it this way, my Lord, if we are
14 looking at the question of conferral of authority --
15 I don't know, did you receive a hard copy of the
16 transcript or have you only got soft copies?
17 MR JUSTICE TEARE: No, I have the hard copy, thank you.
18 MR SPRANGE: Great. My Lord, could you please go to Day 3.
19 MR JUSTICE TEARE: Yes.
20 MR SPRANGE: It is pages 22 and 23. I am using the
21 manuscript version.
22 MR JUSTICE TEARE: Yes.
23 MR SPRANGE: My Lord, some questions were asked about the
24 formation of the TMA and the source of that authority,
25 and if I could ask you to read page 23 and 24 down to

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1 line 11. Mr Malek may want you to read the whole of
2 page 24, so perhaps do that.
3 MR JUSTICE TEARE: Where do you want me to begin on 23?
4 MR SPRANGE: The bottom of page 22:
5 "Professor, in relation to the last topic, is it not
6 right that the law that you speak of with respect to the
7 formation of the TMA ..."
8 From there. (Pause)
9 MR JUSTICE TEARE: Yes, I have read to the bottom of 24.
10 MR SPRANGE: The point there, my Lord, is twofold. It is
11 clear from that passage, and other passages that we have
12 referred to in our closing which you have already read,
13 that there is no other source for the entering into of
14 the GCA other than the TMA and the statutes that
15 underlie it. That means that the only authority that
16 NBK had to enter into the GCA was that conferred upon it
17 by the government, from the statutes all the way down to
18 the decree that led to the TMA.
19 MR JUSTICE TEARE: Without all of that activity by the
20 government, the bank would have had no authority to do
21 anything with regard to the National Fund. But the
22 question is whether it had authority to bind the
23 government when it entered the GCA. I don't see
24 anything in that history which gives an affirmative
25 answer to that question.

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1 MR SPRANGE: Yes, my Lord, that's -- but in terms of -- it
2 doesn't not arise implicitly, my Lord, because of this.
3 If you give a national bank the authority to manage and
4 dispose of national fund assets and you list a series of
5 instruments in the agreed regulations by a joint
6 council, and it is obvious from that that you will enter
7 into -- you will need to enter into arrangements with
8 third party banks, then is it not the case, and I say
9 it is the case, that you, the government, have conferred
10 authority upon the national bank to pursue investment
11 activities with respect to the national fund assets,
12 including with third parties, who will plainly require
13 you to enter into agreements. And in that very
14 agreement you, the government, and your asset, the
15 national fund, are referred to.
16 MR JUSTICE TEARE: Presumably this is an argument which
17 escaped the attention of everybody in the *AIG* case.
18 MR SPRANGE: I'm sure that is the case, my Lord.
19 My Lord, the other thing is the *AIG* case is
20 interesting historically but we must remember that it
21 poses a very different question. It is a very narrow
22 question of a third party debt order and --
23 MR JUSTICE TEARE: What is the difference between that and
24 the question I have to resolve? I thought a third party
25 debt order was the modern equivalent of a garnishee

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1 order.

2 MR SPRANGE: I think our continental friends would be very

3 offended by that suggestion, my Lord, because I think

4 they would say this, and indeed it is apparent from the

5 issues that have been referred to in this case: it is

6 not just -- the garnishee -- a third party debt order is

7 at the end of the case when you are actually trying to

8 get the money into your hands. The garnishee order is

9 seeing whether --

10 MR JUSTICE TEARE: Presumably it starts with some sort of

11 interim order, doesn't it?

12 MR SPRANGE: Yes, that is exactly how it starts.

13 MR JUSTICE TEARE: That is why I am saying it is similar.

14 Is it not the modern equivalent of what we used to have,

15 leaving aside continental friends, a garnishee order?

16 MR SPRANGE: Yes, my Lord, you are absolutely right. What

17 you get is an interim third party debt order. There is

18 then a period of 21 days, by which time the debtor

19 either hands the money over or the debtor and the owner

20 of the asset dispute it and then it becomes a final

21 third party debt order. So in that respect the analogy

22 is right.

23 But here we have this concept of subject matter,

24 because it is to begin with a conservatory attachment

25 order, and the question is whether it has subject matter

1 and, by definition under Belgian garnishee law, having

2 a claim can be an actual claim, a contingent claim, a

3 future claim, and that, my Lord, I say is broader than

4 a debt owed.

5 So the third party debt order enquiry is more narrow

6 than the conservative attachment enquiry.

7 My Lord, we were talking about conferral of

8 authority and your question as to whether there was

9 something express about the GCA. If I could ask you,

10 please, to look at paragraph 34.

11 MR JUSTICE TEARE: Of what, sorry?

12 MR SPRANGE: Of our closing note. And if you would prefer

13 the TMA itself --

14 MR JUSTICE TEARE: I have got it here.

15 MR SPRANGE: You will see there in paragraph 34, my Lord, we

16 have set out the provisions of the TMA.

17 MR JUSTICE TEARE: Would you accept that the TMA contains no

18 words which in terms state that when the NBK enters into

19 commercial contracts with the bank, it does so on behalf

20 of the government, with the result that the government

21 will be bound by those contracts as principal? Do you

22 accept that there is nothing in the TMA which says that?

23 MR SPRANGE: I accept, my Lord, that there is no language

24 that says "When we, NBK, enter into commercial contracts

25 we do so as agent". I accept that.

1 MR JUSTICE TEARE: Or are there other words which would

2 enable that to be implied?

3 MR SPRANGE: Yes, there are. Also, I say that specific

4 words aren't required because we are not looking at

5 a specific instruction, because after all we are dealing

6 with a legal concept under English law that by its

7 nature is amorphous because it isn't in the contract.

8 MR JUSTICE TEARE: So your case is implied authority in the

9 TMA, is it?

10 MR SPRANGE: Not implied. I don't want to use the word

11 "authority" pejoratively. All I would say is this: if

12 you look at 34.1, for example, it says that:

13 "The NBK has the right to possess, use and dispose

14 of the funds under the conditions specified in the TMA

15 and to carry out investments of the Fund, including the

16 transfer of the part of the Fund under management by

17 external managers."

18 That couldn't be done, but they clearly had

19 authority to do what they do with Bank of New York,

20 because they were able to transfer it. The fact that it

21 doesn't say "and you will do so as our agents" or "You

22 can enter into things like a GCA", I say doesn't matter,

23 because the enquiry is: what is the conferral of

24 authority? And there that is a very specific conferral

25 of authority, "including the transfer of the part of the

1 Fund under management by external managers."

2 MR JUSTICE TEARE: It is certainly giving them permission to

3 do those things, but is it saying: when you do those

4 things you will bind us, the government?

5 MR SPRANGE: On that, my Lord, they must. Because if they

6 take the property -- if you take the property being the

7 government's, and the government has said, "You may

8 transfer this to be managed by an external manager", how

9 could the government then turn around and say "Oh well,

10 you didn't have permission to do that". The NBK would

11 turn around very quickly, as would the bank, and say

12 "Have a look at clause 2.1.2 of the TMA. That is

13 exactly what you told us we could do, transfer a part of

14 the funds under management by external managers."

15 My Lord, when you accept the background that we have

16 on the factual evidence, that the idea of this was to

17 set up a fund not unlike the Norwegian model, and that

18 a good portion would be managed by NBK itself but

19 another significant portion would be sent to external

20 managers and third parties, and that was part of the

21 process in setting it up and part of the rules and

22 regulations, and you look for example, my Lord, at 34.2,

23 where there is a reference to clause 2.2.2, and "inform

24 the government of choosing each external manager of the

25 Fund and the custodian to hold the fund."

1 So again it would not be open, in my submission, for
2 anybody, particularly the government but also the
3 parties who sit behind the arrangements, to say, "Oh
4 well, we didn't consent to this, we didn't give you
5 authority".

6 MR JUSTICE TEARE: I quite agree. I don't suppose anybody
7 would suggest that the government had not consented to
8 the NBK doing all these things. But you are having to
9 say that not only did they consent to the NBK doing
10 these things, but it also said "and when you do so, you
11 will behind us as a matter of contract to these
12 contracts".

13 My difficulty -- I have said this more than once and
14 this, I promise, is the last time I say it -- my
15 difficulty is that I cannot see any words in the TMA
16 which have that effect. I agree, lots of it is
17 consistent with there being that sort of relationship.
18 If there was, it is consistent. But you haven't
19 referred to the clause which says all of this is for the
20 benefit of the government.

21 MR SPRANGE: Yes.

22 MR JUSTICE TEARE: I quite agree that that is not sufficient
23 by itself to create an agency, but it is consistent with
24 an agency; but there is nothing in the TMA which creates
25 that agency. Of course it creates permission(?), but

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1 not an agency.

2 MR SPRANGE: My Lord, this is where I slightly disagree on
3 the ingredients required. I say what you need is all of
4 the indicia of a conferral of authority, that is the
5 first thing. Once you have that conferral of authority,
6 and that authority includes the task or the activity or
7 the entering into the arrangement in question, you don't
8 need a specific reference to "and you will bind us",
9 because that naturally follows, and is consistent with
10 everything else that has gone before it.

11 The only enquiry that you then need to undertake is
12 this: is there anything in the GCA itself which suggests
13 that any of the parties, including the Bank of New York,
14 didn't agree with the notion that the government would
15 be the principal?

16 So I say it rather gets flipped round the other way
17 and we have to ask ourselves: is there anything that
18 says "No, NBK couldn't bind the government"? On that,
19 my Lord, the four factors that the claimants come up
20 with, I say, are not good enough because, as you found
21 in Filatona, it requires very clear language. And that
22 very clear language is the only very clear language
23 requirement when we look at agents of this nature, and
24 there is no such very clear words requirement with
25 respect to the ability to bind.

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1 MR JUSTICE TEARE: I think with respect, Mr Sprange, you are
2 confusing a different question there.

3 The very clear words to which I referred were words
4 in the agreement itself, in this case the GCA, which
5 would exclude the suggested principal being the
6 principal. That question only arises if you establish
7 the first question, or the first proposition, that NBK
8 is the agent of the government as principal.

9 MR SPRANGE: No, I agree with you, my Lord, and I may not
10 have articulated my point very well but we are on the
11 same page, I understand that distinction.

12 What I am saying is if that is the end enquiry that
13 requires very clear words, I say there is nothing before
14 that that requires very clear words. In fact, to the
15 contrary. What you are doing is you are looking at four
16 topics, conferral of authority, control, remuneration
17 and obligations; and when it comes to conferral of
18 authority, the conferral of authority doesn't have to go
19 so broadly to include specific very clear words that
20 says "and you will bind".

21 My Lord, if I could ask you to take up our opening
22 statement I just want to revisit one aspect in there --

23 MR JUSTICE TEARE: Yes.

24 MR SPRANGE: If you could look at 83.1.

25 MR JUSTICE TEARE: Yes.

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1 MR SPRANGE: Obviously there you say the question is express
2 conferring of authority by a principal on the agent to
3 enter into a particular transaction or class of
4 transactions.

5 I say I have got that, just on the basis of the TMA
6 language that we set out in paragraph 34 in the
7 subparagraphs there. It is a class of --

8 MR JUSTICE TEARE: 83.1?

9 MR SPRANGE: Sorry, 83.3.1 on page 40.

10 MR JUSTICE TEARE: Sorry, 83.3.1. "Express actual authority
11 means ..."

12 MR SPRANGE: Yes.

13 MR JUSTICE TEARE: Yes.

14 MR SPRANGE: "Express conferring of authority by the
15 principal on the agent to enter into a particular
16 transaction or class of transactions."

17 I say we do have that from the TMA based on those
18 provision that I have shown you. Transfer of funds for
19 management by external managers, and then the language
20 that follows "carry out the trust management with the
21 rules", which includes with third parties, and then to
22 inform the government of choosing each external manager
23 of the Fund and the custodian to hold the Fund.

24 So I say we do have something that is express. But
25 even if we don't, it is clearly implied, given

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1 everything else. Do you see there at paragraph 83.3.2,
 2 that is the Law Debenture Trust v Ukraine.
 3 MR JUSTICE TEARE: Yes.
 4 MR SPRANGE: My Lord, to test how compelling that is and to
 5 pick up on a thread that you laid down a moment ago, if
 6 we step back from this and asked, based on the
 7 legislation and the regulations, the Presidential Decree
 8 and the TMA, whether there had been a conferral of
 9 authority by the Government of Kazakhstan to NBK to
 10 enter into an agreement like the GCA, the answer would
 11 have plainly been yes.
 12 Then if you ask the follow-on question: could the
 13 government turn around and say, "Well I didn't authorise
 14 that and I am not bound by it", the answer would be
 15 plainly, "Well, bad luck, look at how this was set up.
 16 You required the TMA, look at the terms of the TMA."
 17 My Lord, in addition to those provisions in the TMA
 18 we have set out in paragraph 34, there is also
 19 Article 889, that is at paragraph 35. My Lord, you will
 20 recall that Article 889 is in chapter 44 of the Civil
 21 Code that deals directly with entrusted management, of
 22 which this is a species.
 23 MR JUSTICE TEARE: Yes.
 24 MR SPRANGE: My Lord, I would say that is further evidence
 25 of either express or implied authority to bind. If you

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1 will, it augments what is already said.
 2 MR JUSTICE TEARE: Yes.
 3 MR SPRANGE: Authorised to do so by an act on the
 4 establishment of the entrusted management.
 5 MR JUSTICE TEARE: Yes.
 6 MR SPRANGE: In terms of the evidence, my Lord, on agency,
 7 there is -- leave aside -- and frankly, my Lord, I say
 8 that based on what you have, the experts themselves
 9 might be helpful but really it is the documents that lie
 10 beneath, and the authority that is conferred by them,
 11 that is most important, including things like Articles
 12 23 and 26, which clearly say "as agent".
 13 MR JUSTICE TEARE: Perhaps you can't answer this, but I had
 14 better just mention it because it is something which
 15 occurred to me. You quote what Professor Suleimenov
 16 said in the AIG case.
 17 MR SPRANGE: Yes.
 18 MR JUSTICE TEARE: Paragraph 36.
 19 MR SPRANGE: Yes.
 20 MR JUSTICE TEARE: That was evidence which was before
 21 Mr Justice Aikens, and it was evidence which was before
 22 the claimants or creditors in that case.
 23 MR SPRANGE: Yes. Yes.
 24 MR JUSTICE TEARE: Yet nobody suggested that the government
 25 was bound by the GCA as principal.

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1 MR SPRANGE: From what I have read of that decision, no,
 2 my Lord.
 3 MR JUSTICE TEARE: Which suggests to me that
 4 Professor Suleimenov can't have been saying precisely
 5 that which you want him to have said. I agree he said
 6 those words, but if they had had the meaning, in the
 7 context of that case, which you say they have in the
 8 context of our case, surely someone would have
 9 mentioned it?
 10 MR SPRANGE: I don't know about that, my Lord. I don't
 11 think you should be guided by what parties to litigation
 12 15 years ago did or didn't argue.
 13 MR JUSTICE TEARE: I'm only raising the point because you
 14 have raised what Professor Suleimenov said 15 years ago.
 15 MR SPRANGE: Fair enough, my Lord. That is why I was clear
 16 to put it to him and see whether he meant that in the
 17 context that we say it arises in, and my Lord you
 18 obviously have there the passage.
 19 My Lord, that is why I have showed you the earlier
 20 passage, because what he says now is being fairly put to
 21 him. Because it's not like I just asked him, "Are they
 22 an agent generally?" On that page 23/24, I asked him,
 23 "Does the conferral power for the TMA and the GCA come
 24 from those statutes?"
 25 My Lord, if you are looking at page 20 of our

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1 submission, you will see there in the question:
 2 "The TMA was entered into because of the authority
 3 granted to NBK by the government under the statutes we
 4 referred to earlier."
 5 Read pages --
 6 MR JUSTICE TEARE: What I was looking at is paragraphs 84 to
 7 87 of Professor Suleimenov's opinion, in which he said
 8 in terms that NBK entered into the contract on its own
 9 behalf and not on behalf of the Republic, and he gave
 10 his reasons. And as I said to you when we first started
 11 discussing this, that opinion and those reasons were not
 12 challenged by you; he was not tested on them.
 13 What is worrying me is you asked me to read the
 14 passages which you have quoted at 37 --
 15 MR SPRANGE: Yes.
 16 MR JUSTICE TEARE: -- and ... (audio interference) ... that
 17 what he says in his main report you can put to one side.
 18 If you had taken him to paragraphs 84 to 87 and said
 19 "Therefore, Professor Suleimenov, would you accept that
 20 what you have there said is wrong?" If you got an
 21 answer, "You're quite right", then I would accept it.
 22 But for good reasons, as an advocate, you didn't dare to
 23 go that far.
 24 MR SPRANGE: Well, my Lord --
 25 MR JUSTICE TEARE: And I am left, as judges often are being

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1 left , having to make do with a very carefully phrased
 2 cross-examination which you then ask me to rely upon as
 3 going the whole hog, when you weren't brave enough to go
 4 the whole hog.
 5 MR SPRANGE: I think I was brave enough to go the whole hog
 6 in this sense, my Lord: that is not to be read in
 7 a vacuum, in the sense that I fairly asked him to
 8 pages 22, 23 and 24 what was the genesis of the
 9 authority.
 10 MR JUSTICE TEARE: Yes.
 11 MR SPRANGE: Then you see, my Lord, the last question on
 12 page 20 of our closing , where he said the TMA was
 13 entered into , and we say:
 14 "... under the statutes we referred to earlier ;
 15 correct?"
 16 That, my Lord, is a reference to pages 23 and 24.
 17 So when he says, "in exercising that authority NBK
 18 entered into the GCA that was the subject matter of this
 19 litigation ", no, your Lordship is right, he wasn't taken
 20 to the precise paragraph of his statement, but it is
 21 unsurprising that in the cold light of day before
 22 your Lordship he made that concession given everything
 23 that I have shown you.
 24 My Lord, there is an independent view on this and it
 25 has several advantages: (1) it 's not from the claimants

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1 and it 's not from us, (2) it was prepared
 2 contemporaneously, so it wasn't prepared for the purpose
 3 of these proceedings; and that is the Linklaters memo.
 4 I don't know whether your Lordship has had an
 5 opportunity to read that. It is in the F bundle. It is
 6 in the F bundle at page 1003, which is in F3.
 7 MR JUSTICE TEARE: Page?
 8 MR SPRANGE: 1003.
 9 MR JUSTICE TEARE: What makes you think I would have read
 10 this?
 11 MR SPRANGE: Only, my Lord, it was one of the most
 12 interesting documents I found in the F bundle.
 13 MR JUSTICE TEARE: Where do you want me to read?
 14 MR SPRANGE: My Lord, if you could go to paragraph 15.
 15 MR JUSTICE TEARE: Yes. (Pause)
 16 MR SPRANGE: What I might do, my Lord, is start with the --
 17 MR JUSTICE TEARE: This is the opinion of Linklaters , is it?
 18 MR SPRANGE: That is right.
 19 MR JUSTICE TEARE: Is this by someone who is qualified to
 20 speak as to Russian law?
 21 MR SPRANGE: Yes, I am going to take you to that. If you
 22 like , my Lord, we can start with that. If you could go
 23 to 845 of the same bundle, F/845.
 24 MR JUSTICE TEARE: Yes.
 25 MR SPRANGE: This is the underlying Kazakh opinion.

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1 MR JUSTICE TEARE: Yes.
 2 MR SPRANGE: My Lord, if you take up F/849 ...
 3 MR JUSTICE TEARE: Yes.
 4 MR SPRANGE: There you will see reference to the fact that
 5 NBK does not make it capable of owning any assets which
 6 are not assets of the Republic.
 7 MR JUSTICE TEARE: Page 849, whereabouts?
 8 MR SPRANGE: Yes, it starts with "However, such status ..."
 9 MR JUSTICE TEARE: Right. Look at the opinion of Mr Burton,
 10 is it? Mr Barton?
 11 MR SPRANGE: No, my Lord. If you go to F/851, you get the
 12 two signatories , they are two Kazakh lawyers.
 13 MR JUSTICE TEARE: Right. What is the relevant bit of their
 14 opinion?
 15 MR SPRANGE: Go to F/850. After they have concluded that
 16 the assets can't be held by the National Bank in its own
 17 name and the Republic is the owner, they say there on
 18 page F/850, halfway down starting:
 19 "Interaction of the status of the National Bank as
 20 agent of the State ..."
 21 MR JUSTICE TEARE: Yes? That relates to agency. It doesn't
 22 seem to be our sort of agency at all , does it?
 23 MR SPRANGE: My Lord, the question here is whether there can
 24 be a relationship of agency between Kazakhstan and NBK,
 25 and that is the starting point. But if you go to the

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1 updated opinion, which is at F -- it starts in the same
 2 bundle at F/1115.
 3 MR JUSTICE TEARE: Yes.
 4 MR SPRANGE: Do you see, my Lord, if you turn to page
 5 F/1118, subparagraph 17(b) "Specific features of the
 6 National Bank as a legal entity".
 7 MR JUSTICE TEARE: Page 1118. Which paragraph?
 8 MR SPRANGE: 17(b), which starts on the previous page,
 9 "Specific features ..."
 10 MR JUSTICE TEARE: Yes. (Pause)
 11 Yes.
 12 MR SPRANGE: Then page F/1122, paragraph 55.
 13 MR JUSTICE TEARE: Page 1122, yes. Paragraph 55. Yes.
 14 MR SPRANGE: My Lord, if you take those statutes , so I start
 15 with the National Bank statute , 23/26, the statute
 16 giving rise to the TMA, the regulations in the TMA
 17 itself , you clearly have a conferral of authority that
 18 is specific enough to allow NBK to authorise anybody to
 19 enter into exactly the class of transactions that NBK
 20 entered into with the Bank of New York in the form of
 21 the GCA.
 22 Once you had that conferral of authority, which
 23 after all is the relevant and pertinent enquiry, two
 24 questions really arise : was that conferral of authority
 25 specific enough; and did it permit the agent to enter

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1 into the agreement in question? And here I say that is
2 fundamentally clear.

3 The only other question that arises -- and I will
4 come on to the answer for that in a moment but just to
5 flag it -- is the one that you alluded to earlier in
6 Filatona, which is: is there very clear words in the
7 actual GCA that would undercut that conferral of
8 authority?

9 My Lord, I say again a tick for that enquiry, the
10 conferral.

11 There is then a slightly more simple question and
12 that is control by the government over NBK.

13 This, my Lord, doesn't have to be direct day-to-day
14 control but rather control as to the agency arrangement
15 that is in place. My Lord, on this I would say the
16 evidence is pretty clear from what --

17 MR JUSTICE TEARE: Everybody agrees that the RoK can
18 exercise considerable control over the NBK.

19 MR SPRANGE: Yes, yes.

20 MR JUSTICE TEARE: What inference do I draw from that?

21 MR SPRANGE: It is not so much an inference that you draw,
22 it's are you satisfied that one of the key indicia of an
23 agency arrangement is in place? And I say that is an
24 easy conclusion for you to reach, because while on
25 a day-to-day basis the agent may do things like make

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1 trades and conduct day-to-day activities, if that
2 arrangement, if that structure can either be brought to
3 an end or the contents of it dictated to by the
4 principal, then there you have another important indicia
5 of agency.

6 My Lord, I don't know if it got enough air time, but
7 I would respectfully draw your attention to paragraph 40
8 of our closing, and in particular the bundle references
9 at footnote 55. The reason for that, my Lord, is there
10 you see, on a pretty regular basis given the importance
11 of both the rules but also the TMA, the government
12 effectively dictating TMA amendments by the mechanism we
13 have described, including presidential decrees. That,
14 together with the termination rights that we refer to in
15 paragraph 41, is, I say, the most important aspects of
16 control that you ought to consider.

17 Finally on the control point, my Lord, it's not only
18 what happens to the money when it gets put in by the
19 government, it is also on the way out. In the sense
20 that the National Bank, once required by the government,
21 either by a specific request, known as a targeted
22 request, or in the general budget, can ask for the money
23 to come out, and that is the other key point of control.

24 My Lord, I am going to now just move -- the only
25 other two, and these are very small points, we address

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1 in paragraph 46 and 47 the other two indicia: that is
2 payments, that's common ground, that there was
3 a commission arrangement consistent with agency; and the
4 other point is obligations, holding this money, these
5 assets for the benefit of the government, that is also
6 common ground.

7 Those are the final two indicia.

8 My Lord, I was then going to turn to ownership of
9 the National Fund assets, which we say arises in several
10 contexts.

11 I see the time is 20 past 3. If we could take the
12 short break now ...

13 MR JUSTICE TEARE: Just for my purposes, section G,

14 "Ownership of the National Fund assets", do you rely
15 upon this in the context of agency?

16 MR SPRANGE: I rely upon it in the context of agency only to
17 this degree: I don't say it is a necessary requirement
18 of agency, but I say it is an important background to
19 the agency argument. Because the things that I have
20 submitted to you on why there was a conferral of
21 authority and why it works the way I say, and why it is
22 implicit that NBK was able to bind, is strengthened if
23 it is indeed the case that the assets are ultimately
24 owned by the government.

25 But, my Lord, it is far more important in terms of

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1 legal principles for the trust arguments.

2 MR JUSTICE TEARE: So, as I understand it, you say that the
3 TMA confers authority either expressly or impliedly. If
4 you are wrong about that, do you have another argument,
5 which is that when one looks at the authority or
6 permission which the TMA plainly gives, coupled with the
7 ability to give instructions and coupled with the
8 payment of NBK for its performance of the TMA and the
9 obligation owed by the NBK to RoK, looking at all of
10 those matters collectively, the court should infer that
11 authority was conferred by the government on the bank?

12 MR SPRANGE: Yes, my Lord. I would go back to my reference
13 to paragraph 83.3(2) of our opening --

14 MR JUSTICE TEARE: Yes.

15 MR SPRANGE: -- and 83.5. Ostensible or apparent.

16 MR JUSTICE TEARE: Well, ostensible or apparent authority.
17 Where is the representation?

18 MR SPRANGE: Recital A of the GCA, my Lord. In all
19 seriousness, if I have not persuaded you on the three
20 formulations that we have just discussed, I accept that
21 83.5 becomes difficult.

22 MR JUSTICE TEARE: Could I just say that on the second way
23 of putting the case there is an authority of
24 Mr Justice Leggatt, as he then was, I think, Magellan
25 Spirit it's called, which says that where there is no

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1 express authority but one is relying upon authority
 2 conferred by conduct, which seems to be analogous to
 3 your sort of argument, one has to find conduct which is
 4 only explicable by there being an agency relationship.
 5 If it is consistent with there not being an agency
 6 relationship then that is not enough.
 7 I just thought I should mention that authority to
 8 you.
 9 MR SPRANGE: Thank you very much, my Lord. Over the five
 10 minute break I will give that some quick thought.
 11 But, my Lord, that is exactly why I say the
 12 ownership of the National Fund by the government is
 13 a factor that is relevant to agency. It is not
 14 a necessary ingredient but it is an important factor.
 15 Because if you then look at the question posed, is it
 16 all consistent with agency, then how else could NBK be
 17 out in the market putting National Fund assets into
 18 third party bank accounts? It could only be because
 19 it is an agent of the principal, the government, with
 20 its property, putting it there. It can't be doing this
 21 in its own right. It simply can't, if we are right on
 22 the property question.
 23 MR JUSTICE TEARE: When you say that ownership is part of
 24 the background and so is a relevant factor, you contrast
 25 that with I think what you have described as the

1 necessary indicia of an agency relationship. I think in
 2 paragraph 28 and paragraph 29 you refer to the legal
 3 principles and you have given me references in Bowstead
 4 on Agency but I don't think they are within the bundle
 5 I have got. The extract from Bowstead on Agency in the
 6 bundle is just the very first page. So if there is
 7 anything more in Bowstead which you rely upon in this
 8 context, I would very much like it.
 9 MR SPRANGE: Yes, my Lord, I will check that immediately.
 10 MR JUSTICE TEARE: Then we will break for five minutes.
 11 MR SPRANGE: Thank you, my Lord.
 12 (3.23 pm)
 13 (Short break)
 14 (3.28 pm)
 15 MR JUSTICE TEARE: If you are ready, Mr Sprange, and if the
 16 others have come back -- are the others ready to
 17 continue?
 18 MR HANDYSIDE: Yes.
 19 MR MALEK: Yes.
 20 MR JUSTICE TEARE: It looks as if they are, so why don't you
 21 continue.
 22 MR SPRANGE: Thank you, my Lord.
 23 Just two quick tidy up points on agency. It is
 24 paragraph 29 of the Magellan that I think your Lordship
 25 was referring to, and it is:

1 "... is necessary to identify conduct which was only
 2 consistent with such an agreement or mutual intention
 3 and inconsistent with any other intended relationship.
 4 Put another way, it must be fatal to the implication of
 5 an agency relationship if the parties would have or
 6 might have acted as they did in the absence of such
 7 a relationship."
 8 My Lord, in terms of Bowstead, we will ensure that
 9 the full chapter is with your Lordship. I understand
 10 that a hard copy may have been delivered at 11.30 am
 11 today, which was obviously a little late.
 12 MR JUSTICE TEARE: Something did arrive today but I haven't
 13 opened it.
 14 MR SPRANGE: My Lord, it may be just what you are looking
 15 for is in there, but we will send it by way of soft copy
 16 anyway.
 17 I did also forget to address the point -- we have
 18 done it in our written document at paragraph 57,
 19 page 30 -- and this is Kazakhstan's case, or the
 20 claimants' case, pardon me, that there are very clear
 21 words in the GCA excluding an agency relationship. You
 22 will see we summarise what those are as follows:
 23 It is the contract itself says that the contract and
 24 parties are NBK and Bank of New York. On that one,
 25 my Lord, if that was a reason, we wouldn't have this

1 disclosed/undisclosed principal theory, it would never
 2 exist. They only ever exist when the contracts say
 3 that.
 4 The second point, clause 24 excludes the right of
 5 any third party. Of course, if we are a principal and
 6 they are our agents, we are not a third party.
 7 My Lord, clause 16(j), which says the cash reflected
 8 in the cash account as a debt owed by Mellon to the
 9 client, doesn't say anything about -- it is certainly
 10 not very clear words that only the named party was to be
 11 the party with the right to perform the contract.
 12 Fourth, I don't think you can rely on the existence
 13 of very clear words if you say there are provisions
 14 consistent with the bank owing an obligation only to
 15 NBK; it has to be very clear words rejecting the notion
 16 of the agency relationship.
 17 MR JUSTICE TEARE: Right.
 18 MR SPRANGE: My Lord, I am going to turn now to ownership of
 19 the funds. As lawyers often do, it has become a very
 20 interesting academic debate between both the experts and
 21 counsel before you. I want to draw this to your
 22 attention though, my Lord, it only arises for you at one
 23 particular level, and that is: is there to be
 24 a distinction drawn between property under Kazakh law
 25 that is placed into entrusted management?

1 The battle lines for that are very simple.
 2 Professor Maggs says that under Kazakh law
 3 Article 115(2) of the Civil Code, there are various
 4 forms of property, including property with respect to --
 5 property in the form of money, non-cash money. That is
 6 described as a property right.

7 Professor Maggs says when you place that in
 8 entrusted management, like other property, it doesn't
 9 transfer title, does not transfer to the entrusted
 10 manager.

11 Professor Suleimenov says it does, and I will come
 12 to why we say he is wrong in a moment.

13 If we are right on that, then the technically
 14 appealing argument that Mr Quest has presented to you
 15 simply doesn't arise, and it doesn't arise because NBK
 16 would never have received the property right in the
 17 first place.

18 So the quick answer to all of this is to deal with
 19 that question of who is right or wrong between
 20 Professor Maggs and Professor Suleimenov on that point.

21 My Lord, I think it is an easy debate to resolve for
 22 several reasons. The first, my Lord, is this, that what
 23 Professor Suleimenov says in these proceedings, both in
 24 his report and before you, is a complete outlier. It is
 25 not only an outlier in terms of himself, because he has

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1 expressed a view that is inconsistent with it in the
 2 past, it is inconsistent with, and we have set out all
 3 of the references in paragraphs 49 to 50, other leading
 4 commentators, including Professor Didenko, it is
 5 inconsistent with what I would say the neutral opinion
 6 of the Linklaters' experts provided contemporaneously at
 7 the time, and of course Professor Maggs.

8 That is alarm bell number 1. Alarm bell number 2 is
 9 Professor Suleimenov's change in view. Now a change in
 10 view by itself is not necessarily fatal, but when one
 11 changes a view, particularly an expert giving evidence
 12 in important cases, the real question is: what is the
 13 rationale for the change in view and is it a good one,
 14 does it make sense? And here I say that
 15 Professor Suleimenov's explanation is poor indeed. It
 16 really came down to this: well that AIG case was a quick
 17 look and we didn't look at it in as much detail as we
 18 have this time, and then there was an amendment to the
 19 Civil Code sometime later and that drew a distinction
 20 between these types of property.

21 You have heard and read what we say about those --
 22 MR JUSTICE TEARE: Well, Mr Sprange, if you are dealing with
 23 this question of inconsistency, between AIG and what he
 24 said in this case, you will just have to take me quickly
 25 to what he said in the AIG case, because I think there

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1 is agreement that he didn't hold by what he said in the
 2 AIG case but he didn't actually tell me what it was he
 3 said in the AIG case.

4 MR SPRANGE: Understood. If you can take up the D bundle
 5 again, my Lord, and if you could -- I will start from
 6 the back. If you go to D1, so the first bundle, tab 11.

7 MR JUSTICE TEARE: Right.

8 MR SPRANGE: There, my Lord, is his comments on
 9 Professor Didenko.

10 MR JUSTICE TEARE: Which is the relevant comment?

11 MR SPRANGE: Paragraph 6.

12 MR JUSTICE TEARE: Paragraph 6, right.

13 MR SPRANGE: Over the next page:

14 "I disagree."

15 (Pause)

16 MR JUSTICE TEARE: Right.

17 MR SPRANGE: Then, my Lord, also in that same bundle, if you
 18 could go to tab 9, page D/262.

19 MR JUSTICE TEARE: Yes.

20 MR SPRANGE: It is the end of paragraph 15 and paragraph 16.

21 MR JUSTICE TEARE: Right. So what is the statement he is
 22 there making which is now inconsistent with what he says
 23 in this case?

24 MR SPRANGE: What he is saying in those two passages is that
 25 that the government remains the owner of the assets in

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1 the National Fund and it is not NBK, the entrusted
 2 manager.

3 What he now says in these proceedings is summarised
 4 page 26, paragraph 51 of our closing. He splits out the
 5 difference, or splits out different assets, and
 6 basically says that tangibles remain the property of the
 7 government but intangibles, like non-cash assets, do
 8 transfer.

9 My Lord, the best place to get his explanation other
 10 than his oral evidence on what is going on here is if
 11 you go back to the D1 bundle. D/228 at tab 6, this is
 12 his supplemental report.

13 MR JUSTICE TEARE: Yes.

14 MR SPRANGE: Paragraph 44.

15 MR JUSTICE TEARE: Yes.

16 MR SPRANGE: He is addressing the criticism that was made of
 17 him for not referring to his commentary. He basically
 18 says that was a general commentary, it was not
 19 discussing a proper analysis of where a right of claim
 20 is transferred into trust management.

21 Well, that is fair enough, but then you would expect
 22 him to take you to something that describes how
 23 property, under Kazakh law, is treated when it is
 24 entrusted into trust management.

25 Then he referred to another publication he wrote

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1 about Article 115.2, but all that tells us is what we
2 already know, that under Kazakh law there are
3 effectively two types of property; as he says there,
4 there is "things", that can give rise to ownership
5 rights, and then he says "or property rights (non-cash
6 money, uncertified securities)" in which case they give
7 rise to rights of obligations.

8 We accept that. There is common ground between he
9 and Professor Maggs on that point. But that doesn't
10 answer the question. The question is: when either of
11 those forms of ownership, property rights or ownership
12 rights, go into entrusted management what happens to
13 them? This, my Lord, is where we say analytically --
14 leave aside all of the other points -- analytically
15 Professor Suleimenov is totally off beam, and the reason
16 is, my Lord, when you look there at the word "property
17 rights", which is very clearly used in Article 115 --

18 MR JUSTICE TEARE: We haven't got 115 there. This is just
19 his report.

20 MR SPRANGE: I thought you might say that, my Lord, so if
21 you could go to Professor Maggs' report, which is in the
22 same bundle, D4, and if you could go to paragraph 43,
23 which is on page 11. D/117.

24 MR JUSTICE TEARE: Yes.

25 MR SPRANGE: You will see there Professor Maggs has set out

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1 in paragraph 43 the full language of Article 115, and he
2 says in the summary:

3 "... defines 'property rights' as including 'rights
4 of claim for payment of money.'"

5 It is the third paragraph down.

6 MR JUSTICE TEARE: That is what has been described as
7 paragraph 2.1, isn't it?

8 MR SPRANGE: Yes, exactly. Unfortunately in this
9 translation there is a missing 2.1 in the sentence "With
10 respects". But the critical phrase there, my Lord, is
11 within:

12 "... the regime of things or of property rights
13 (claims) ..."

14 If we accept that both experts are right that there
15 is these two types of label you may put on property, the
16 critical question is: when they get put in entrusted
17 management do they get treated differently?

18 Now Professor Suleimenov had every opportunity after
19 he was criticised, and he said in paragraph 44 it
20 doesn't discuss the analysis where you put a right of
21 claim or a property right into trust management, and the
22 reason that is so important, my Lord, because if you
23 take up D/138 when we get to --

24 MR JUSTICE TEARE: On that translation of Article 115.2.1,
25 I think Mr Quest referred us to another translation,

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1 because I can't make head nor tail of this translation.
2 I just don't know what it is saying. I don't know how
3 you understand it. It is not English, of course it is
4 plainly not English:

5 "With respects to money and rights ... under a
6 monetary obligation ... are applied respectively the
7 regime of things or of property rights ..."

8 Does it mean that with respect to monetary rights
9 there can't be effectively the regime of things and of
10 property rights? I just don't understand it.

11 MR SPRANGE: My Lord, if it is helpful I can give you the
12 other translation, which is at D2/27, and it is
13 page 449.

14 My only concern is that was an update, so hopefully
15 it has reached your Lordship.

16 MR JUSTICE TEARE: D2/449.

17 MR SPRANGE: Which is in tab 27:

18 MR JUSTICE TEARE: Yes. This is what we had before. So
19 this says:

20 "Legal regime of objects or property rights shall be
21 applied respectively to the money and the rights
22 (claims) for money liability (rights of claim for
23 payment of money)."

24 MR SPRANGE: The critical question on that, my Lord, is
25 this: if you accept that that is the division of

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1 property ownership under Kazakh law. What happens when
2 it is put into entrusted management and is it treated
3 differently?

4 The answer, we say, to that is very simple. If you
5 could go D/138 of tab 4 of D1, and this is where
6 Professor Maggs provided translations of chapter 44.

7 MR JUSTICE TEARE: I'm sorry, D1 ...

8 MR SPRANGE: Tab 4.

9 MR JUSTICE TEARE: Yes.

10 MR SPRANGE: It is page D/138, it is Professor Maggs'
11 opinion. It is just the appendix:

12 MR JUSTICE TEARE: Yes.

13 MR SPRANGE: Here, my Lord, you have the provisions that
14 apply to the transfer into entrusted management. 884
15 talks about subjects and 885 talks about objects. In
16 both cases property rights are referred to.

17 MR JUSTICE TEARE: Right.

18 MR SPRANGE: Paragraph 1 of 884 and paragraph 1 of 885.

19 If Professor Suleimenov was right, you would expect
20 to see language in here that distinguished the treatment
21 of property on the one hand, tangibles, and property
22 rights, intangibles on the other; but there is no such
23 distinction. That is why Professor Maggs and all of the
24 other commentators make it very clear that
25 Professor Suleimenov is wrong, because there is no

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1 textual basis for what he concludes.
 2 MR JUSTICE TEARE: No.
 3 MR SPRANGE: Really, if it did exist, if there is any
 4 semblance of authority to back this up, he would have
 5 told us what it was in paragraph 44 of his supplemental
 6 opinion.
 7 MR JUSTICE TEARE: Right.
 8 MR SPRANGE: So my Lord, if you get down into the weeds of
 9 that debate when we talk about the right of claim
 10 against Bank of New York, who owns it, we say in all the
 11 circumstances it is Kazakhstan, and you should find for
 12 us on that if required.
 13 However, there is a simple answer to this. Given
 14 all of the powers, that really can't be seriously
 15 disputed, that the president and the government have
 16 over NBK, the TMA and over the National Fund, it is
 17 a somewhat academic debate, because at the end of the
 18 day it would take two or three pieces of paper that
 19 could clearly be imposed by Presidential Decree and the
 20 mechanism would follow, like in those examples I gave
 21 you, for all of the National Fund or a part of the
 22 National Fund to come straight back to the government.
 23 So it is a debate, we say it should be decided in
 24 our favour; but in terms of it making a material
 25 difference either to the trust claims or the agency

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1 claims, we say it does not.
 2 MR JUSTICE TEARE: To what issue does this incredibly
 3 obscure point go?
 4 MR SPRANGE: My Lord, I say it would only arise if the only
 5 question, the only question, was when you look at the
 6 relationship between NBK and the Bank of New York, and
 7 you ask yourself who has the right to either write
 8 a letter or send an instrument to the Bank of New York
 9 to say, "Give me the money", Mr Quest says, under his
 10 analysis, only NBK can do that.
 11 MR JUSTICE TEARE: As a matter of contract he says that.
 12 MR SPRANGE: As a matter of contract. And he says it is not
 13 changed, as I understand his case, by the ownership
 14 position, because he says, per Professor Suleimenov, the
 15 right of claim goes to NBK.
 16 MR JUSTICE TEARE: But even if you are right and the
 17 ownership, whatever that means, remains with the
 18 Republic, does it follow that the Republic can demand
 19 the money from BNYM?
 20 MR SPRANGE: We say yes, but they can do an indirect --
 21 MR JUSTICE TEARE: Why? Why?
 22 MR SPRANGE: For the trust reasons I am going to come to as
 23 my last topic, my Lord.
 24 MR JUSTICE TEARE: If it is the trust reason, let's get on
 25 to that. Because, as I said this morning, it is common

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1 ground that the beneficial ownership remains with RoK.
 2 MR SPRANGE: Yes, yes.
 3 MR JUSTICE TEARE: Is that not a sufficient foundation for
 4 your argument?
 5 MR SPRANGE: Yes, my Lord, it absolutely is. I say I don't
 6 need this obscure point to be decided in my favour to
 7 launch the trust argument.
 8 MR JUSTICE TEARE: Let's get on to the trust argument then.
 9 MR SPRANGE: We deal with it in our closing, my Lord. It is
 10 at section H, page 29.
 11 Sorry, my Lord, I misspeak. It is section I on
 12 page 31.
 13 My Lord, I just want to put the proper context here.
 14 I submit that you do not have to decide as a matter of
 15 finality these claims, whether these claims could be
 16 pursued. The question that you have been asked by the
 17 Belgian court on referral is: does Kazakhstan have
 18 a claim against Bank of New York under English law?
 19 Because this is the question of a garnishee order.
 20 So if you are satisfied that the principles that we
 21 have described in paragraph 61 onwards are, I say,
 22 arguable under English law, then we have a claim and
 23 that is sufficient --
 24 MR JUSTICE TEARE: How do you overcome the first problem
 25 which Mr Malek has identified, namely that legal and

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1 beneficial ownership in Kazakh law is unknown? Why
 2 should I simply assume that you can apply the English
 3 law of trusts to this relationship?
 4 MR SPRANGE: My Lord, the question I say here is that if you
 5 accept that under Kazakh law we are the owner of the
 6 assets, which we say you must given the evidence, the
 7 question then becomes: do we have standing to pursue,
 8 under English law -- so it's a standing question: do we,
 9 under English law, have standing to pursue the bank
 10 and/or NBK at the same time to enforce rights under the
 11 GCA?
 12 That is why I say this is a simple enquiry, because
 13 forget about the debate between --
 14 MR JUSTICE TEARE: Let's assume you do have that right. It
 15 is a right in the name of NBK, is it not?
 16 MR SPRANGE: No, because, as we say in paragraph 61.1 which
 17 is where we set out the authorities, it is a right that
 18 we would have standing to enforce ourselves. We would
 19 have to join NBK --
 20 MR JUSTICE TEARE: But the right that you are exercising is
 21 the right of NBK, which you say they should be
 22 exercising but they for some reason are refusing to do
 23 so, and you can then force them to do so.
 24 MR SPRANGE: Yes, my Lord, and we would do that by making
 25 a claim, and that is the question that the Belgian court

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1 is interested in. Under English law, is there a method
 2 or a basis or a standing or a cause of action whereby
 3 you can bring a claim against the bank to enforce that
 4 right? It doesn't say "solely by yourself" or "without
 5 involving NBK" or it is a forcing of NBK to do
 6 something, it is just a claim.

7 MR JUSTICE TEARE: This is another argument which escaped
 8 the attention of all those learned people in AIG.

9 MR SPRANGE: I don't know if it escaped all of them,
 10 my Lord, in the sense that I don't necessarily see that
 11 because of the unusual nature of this enquiry, in other
 12 words, you are being asked by a Belgian judge to
 13 consider something which brings with it a broader scope
 14 of questions, I don't necessarily think this would have
 15 been relevant in AIG v Kazakhstan.

16 MR JUSTICE TEARE: Well, it is 4.00 pm, so how much longer?

17 MR SPRANGE: My Lord, I don't think I can advance orally
 18 with any more succinctness or persuasion what we have
 19 said on the trust point.

20 MR JUSTICE TEARE: Yes.

21 MR SPRANGE: The only point I would like to emphasise is
 22 it is not who owns the right, it is: do we have a claim?
 23 And here I say it is unanswerable.

24 MR JUSTICE TEARE: Right.

25 MR SPRANGE: My Lord, if I could finish up then just with

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1 declarations and the relief that you ought to give.
 2 What we have attempted to do, my Lord, is in
 3 paragraph 69 we have just put what we say the key
 4 principles are on declaratory relief.

5 MR JUSTICE TEARE: Yes, thank you.

6 MR SPRANGE: The point of emphasis here is, this court,
 7 despite its obvious gravitas and skill, and respect
 8 throughout the world as a leading Commercial Court,
 9 should only be answering questions of English law and,
 10 where that English law analysis requires consideration
 11 of foreign law, addressing those. This court should
 12 never, and I would say it would be unprecedented for it
 13 to also decide questions of Belgian law as part of
 14 addressing the points here. That would, in my
 15 respectful submission, clearly breach principles of
 16 comity if this court were to turn round to the Belgian
 17 judge and say, "I decide that your subject matter should
 18 be determined as follows ... and that these arguments
 19 are no longer available to you".

20 What is obviously required here, and although we
 21 fought against it in the beginning we have accepted it
 22 very clearly ever since, is for you to decide, under the
 23 GCA, the interpretation issues and also whether the
 24 relationship between NBK and RoK changes that in any
 25 way, including by reference to agency and trust.

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1 In terms of the declarations themselves, if you are
 2 with me, the declarations themselves as articulated by
 3 the claimants would fall away, and all you would be left
 4 with is what we suggest in paragraph 74.

5 Now, my Lord, you wouldn't necessarily need to
 6 make -- that is 74 of our closing.

7 MR JUSTICE TEARE: Yes.

8 MR SPRANGE: You wouldn't necessarily need to make these
 9 declarations, because they would be apparent from your
 10 conclusions, but for the sake of clarity, which we agree
 11 is required, those could be made.

12 MR JUSTICE TEARE: Yes.

13 MR SPRANGE: They would naturally follow, my Lord, from our
 14 findings on either agency or trust.

15 My Lord, if you happen to be against us on agency or
 16 trust, and therefore were to make the declarations, I do
 17 say with some vigour that what we have suggested in
 18 paragraph 76 would be the extent of it.

19 MR JUSTICE TEARE: Yes, right.

20 MR SPRANGE: I am particularly concerned, my Lord, with
 21 paragraph 76.4. Not only can I not meet the case, it
 22 would be unbelievable for an English judge on a referral
 23 to say to a Belgian court, "Under any system of law,
 24 including your own, there is no debt claims".

25 MR JUSTICE TEARE: Yes.

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1 MR SPRANGE: That is why we also suggested the words
 2 "constitute subject matter following within the scope of
 3 the Belgian garnishment order". That is for the Belgian
 4 court to decide once they have your decision. They may
 5 agree and say, "Yes, you are right, given the GCA
 6 dynamic there is no subject matter", but that is for
 7 them, based on your decision.

8 MR JUSTICE TEARE: Yes.

9 MR SPRANGE: Unless there is anything else, my Lord, thank
 10 you for the indulgence.

11 MR JUSTICE TEARE: Mr Sprange, thank you very much indeed.
 12 Right, who would like to reply?
 13 (4.06 pm)

14 Reply submissions by MR MALEK

15 MR MALEK: My Lord, I will start off. I think Mr Quest may
 16 cover some points on Kazakh law.

17 If I can deal with this first question about what
 18 are you being asked to decide, the subject matter issue.
 19 The fact of the matter is that the parties have adduced
 20 a substantial body of material on Belgian and Kazakh
 21 law, and that was so that the court could decide all the
 22 issues in dispute, the breadth of the issues before you
 23 is reflected in the list of issues, it is reflected in
 24 the pleadings and the level of detail in the rejoinder,
 25 and it is also reflected in the detailed expert

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1 evidence, in particular the joint memoranda.
 2 Now, the point here is that if your Lordship could
 3 turn to the 25 May.
 4 MR JUSTICE TEARE: Yet again?
 5 MR MALEK: To look perhaps at a section that we haven't
 6 looked at.
 7 MR JUSTICE TEARE: Right, okay.
 8 MR MALEK: A bit of variety. It's at page 8.
 9 MR JUSTICE TEARE: Yes.
 10 MR MALEK: The very top, where it says this:
 11 "At once the attachment judge remarks that he
 12 granted the Stati parties at their request an
 13 authorisation for attachment against Kazakhstan, they
 14 did not ask for attachment against the NBK. Such ultra
 15 petita authorisation was not granted."
 16 So if your Lordship finds that the debt for the
 17 amount of 530 million is due solely to NBK, it follows
 18 from the existing judgment, Belgian judgment, that there
 19 is nothing further to be decided in Belgium.
 20 In other words, if the English court confirms that
 21 the debt is owed to NBK, then it means that the
 22 garnishment order, although valid, is an empty shell
 23 because it has hit no target. The garnishment will have
 24 no subject matter by a judgment of the competent trial
 25 court, to use the expression of the Belgian court.

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1 There will be nothing further to be decided in Belgium,
 2 as all that will remain is a relationship between BNYM
 3 and NBK, governed by the GCA under English law, under
 4 which BNYM is obliged to pay back the money to NBK.
 5 That is why we have brought the debt claim.
 6 The fundamental problem with Mr Sprange's arguments
 7 is that he assumes that simulation, piercing, ownership,
 8 sham trusts, are all arguments of Belgium enforcement
 9 law, yet these are substantive law arguments that are
 10 governed by the relevant conflicts rule. This is the
 11 reason why the attachment judge did not rule on these
 12 arguments in her judgment of 25 May.
 13 It should be remembered that all of these arguments
 14 were before the attachment judge before her judgment of
 15 25 May and yet she did not rule these arguments because
 16 they are part of the issue referred to England.
 17 MR JUSTICE TEARE: Mr Malek, can you show me where they were
 18 before her? I know I was referred to that in the
 19 jurisdiction hearing, but I don't think I have been
 20 referred to at this hearing. Can you show me where
 21 those points were taken before the attachment judge?
 22 MR MALEK: Yes, I will get somebody to look for the
 23 cross-reference.
 24 MR JUSTICE TEARE: Thank you.
 25 MR MALEK: But your Lordship is right on the judgment,

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1 because at paragraph 33 your Lordship made a reference
 2 to that. Because what your Lordship said at 33, you
 3 say:
 4 "At the trial the Stati parties ought to be able to
 5 make submissions based on a relationship between RoK and
 6 NBK which go beyond the narrow question of who is the
 7 counterparty to the GCA, and which shall enable issues
 8 analogous to the issues of piercing personality, sham
 9 trust and abuse of law, which the Stati parties have
 10 raised in their written submissions in Belgium to be
 11 addressed."
 12 MR JUSTICE TEARE: Quite, but I don't know where those
 13 written submissions are.
 14 MR MALEK: I will see if we can get a reference to them and
 15 give it to your Lordship.
 16 That is why we submit that your Lordship should deal
 17 with all these issues. The reality is that it is not
 18 going to be very difficult or arduous, because although
 19 a lot of work has been done by the experts, the reality
 20 is that the Statis have actually not made out a case
 21 based on the facts.
 22 MR JUSTICE TEARE: Quite. They haven't made a single
 23 submission on the facts as to sham trusts.
 24 MR MALEK: Exactly, which it is going to be quite simple do
 25 so. But to say that is going to be dealt with in

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1 Belgium on another occasion, in our respectful
 2 submission that is simply contrary to the referral,
 3 which has basically said that the English court is the
 4 competent court to determine the question of whether or
 5 not there is subject matter or not.
 6 Of course, the question of subject matter is whether
 7 or not RoK has a claim against BNYM, and the answer is
 8 that it either does or it does not, and in our
 9 submission it does not. If the Stati parties want to
 10 argue that there are doctrines which give rise to claim,
 11 then they have to do so, they have to then advance the
 12 arguments before you and you can then decide it.
 13 MR JUSTICE TEARE: Right.
 14 MR MALEK: That is the question of the scope point.
 15 So your Lordship is right when he says that the
 16 court needs to decide foreign law issues to the extent
 17 to the extent that English conflict of law rules point
 18 to the foreign law, and that is clearly right. But with
 19 respect, when your Lordship says you need not decide
 20 certain points because they are not pursued any more by
 21 the Statis, and therefore it may be open to the Statis
 22 to raise them in other fora such as the Belgian
 23 proceedings, we say that that is not right, because the
 24 Statis have raised various theories in support of their
 25 contention that the debt to BNYM is due to RoK, and in

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1 our respectful submission it must be for the English
2 court to resolve those questions now. As I say, they
3 have been raised, but the fact of the matter is that by
4 dropping them now, because they have not got the
5 evidence or the case that they want to support it, in
6 our respectful submission that is not the right way
7 forward, and in our submission all the issues that have
8 been identified as issues remain as issues, and we
9 invite your Lordship to decide them.

10 MR JUSTICE TEARE: Thank you.

11 MR MALEK: As far as the fraud is concerned, the judgment of
12 20 December 2019 is from the first instance court of
13 Brussels, in other words, a lower court. It rejects the
14 application of RoK to set aside the exequatur, in other
15 words, the enforcement of the award, but it does not
16 address the new evidence, for the simple reason that the
17 Stasis had objected to the introduction of this evidence
18 and only lifted their objection at the end of the
19 hearing. So there is not a word about the new KPMG
20 evidence in the judgment of 20 December.

21 The order of 3 December is from a higher court, the
22 Court of Appeal of Brussels, and it is that court that
23 finds that the KPMG correspondence is new and is
24 relevant, and the court orders new submissions.

25 It is entirely incorrect for Mr Sprange to say that

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1 the judgment of 20 December takes precedence over the
2 order of 3 December; this order that is from a higher
3 court, the court has specifically directed that the
4 parties should file submissions about the new fraud
5 evidence, and the hearing is fixed for late September,
6 the beginning of October 2020.

7 RoK has appealed the judgment of 20 December;
8 a notice of appeal was filed on 17 February and the case
9 has been listed before the same judge, sitting in the
10 same chamber of the Court of Appeal who made the order
11 of 3 December 2019. The notice of appeal is based on
12 the very same new KPMG fraud evidence that the judge in
13 the Court of Appeal has found is new and relevant and
14 because it relates to the quality of the title.

15 The other points I want to deal with in terms of
16 agency, Professor Maggs did not give evidence that
17 supported the Stasis' position. The TMA does not state
18 that in all contracts NBK acts as an agent for RoK. And
19 it is right that in AIG the point was not run, and in
20 the present case it was not even pleaded.

21 So in our respectful submission, the correct
22 analysis is that the contracting parties were BNYM and
23 NBK; RoK was not a party; and Mr Quest will deal with
24 the Kazakh law point dealing with Articles 23 and 26 in
25 a moment.

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1 As to the other evidence, Professor Suleimenov's
2 evidence was unchallenged, where he said that NBK
3 entered into the GCA on its own behalf, and we
4 respectfully submit that there is no reason for going
5 behind what Professor Suleimenov found.

6 As far as the Magellan case is concerned, the
7 decision of Mr Justice Leggatt at first instance, we do
8 say it is relevant. If I can just find it, I don't know
9 if we can get it on the screen but it is reported, it is
10 in 2016, the Magellan Spirit v Vitol, and there the
11 issues were similar, in the sense that there was an
12 issue about whether or not there was a party who was an
13 undisclosed principal could sue.

14 MR JUSTICE TEARE: I am familiar with the case because
15 I mentioned it, but ...

16 MR MALEK: Absolutely, but it is paragraph 28. I will just
17 read it, your Lordship is familiar with it, but where
18 Mr Justice Leggatt said this:

19 "Where a contract is made by or on behalf of a legal
20 person and there is nothing in the terms of the contract
21 or surrounding circumstances to indicate to the other
22 contracting party that the named person is making the
23 contract as an agent, then the presumption must be that
24 the named person is contracting as a principal. That
25 presumption is capable of being displaced, but in order

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1 to displace it convincing proof is needed that the named
2 party was, contrary to appearances, contracting on
3 behalf of an undisclosed principal."

4 I don't think we need it on the screen any more,
5 thank you.

6 MR JUSTICE TEARE: Thank you.

7 MR MALEK: As far as the trust argument, I have nothing
8 further to say on that. There is nothing to indicate
9 how an English law of trust doctrine can apply here and
10 in our submission whether one wants to look at this in
11 terms of agency, trust or ownership, there is no basis
12 to say that RoK has any claim against Bank of New York
13 Mellon.

14 The reality is that the contracting parties are Bank
15 of New York Mellon and NBK, the money is owed to NBK,
16 and there is absolutely no reason why NBK should be kept
17 out of its money. And it is for that reason that we ask
18 the court to grant the declarations that we seek as well
19 to grant the debt claim which will bring everything to
20 a head.

21 So if I can pass over to Mr Quest to deal with the
22 one point on Article 26.

23 MR JUSTICE TEARE: Thank you, yes.

24 Further reply submissions by MR QUEST

25 MR QUEST: If I can sweep up just 0a small number of Kazakh

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1 law points. The first is about agency and Article 26 on
2 the law of the National Bank mentioned a couple of
3 times.

4 Can I ask your Lordship to look at the law, which is
5 in D2-tab 28. Do you have that. That is a complete
6 copy of the law on National Bank.

7 MR JUSTICE TEARE: I am not sure I have 28.

8 MR QUEST: It is a late addition.

9 MR JUSTICE TEARE: It was sent to me electronically .

10 MR QUEST: Let me see if I can find it . If you bear with me
11 for a moment. It should be on the screen if you ...

12 MR JUSTICE TEARE: Yes.

13 MR QUEST: So there are several relevant provisions, or
14 a few relevant provisions that one needs to look at
15 before one gets to Article 26.

16 The first is that if your Lordship sees one has to
17 start with Article 23, which says:

18 "National Bank of Kazakhstan, a bank, a financial
19 adviser and agent ..."

20 Article 23 says:

21 "The National Bank of Kazakhstan may act as a bank,
22 financial adviser and agent of the State bodies in
23 agreement with them."

24 So what the Act is doing is setting out the roles
25 that the National Bank of Kazakhstan may play.

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1 Then it deals in 24 with its role as a bank and in
2 25 as an adviser and ultimately where says "an agent of
3 the government."

4 What it actually says is:

5 "The National Bank of Kazakhstan acts as an agent of
6 the government on the terms that have been agreed
7 between the National Bank of Kazakhstan and the
8 government of the Republic."

9 So the law is not saying that NBK must act or can
10 only act as agent for the government; only that it can
11 act in that capacity if that is what has been agreed.

12 There is one other relevant Article which is
13 relevant to the question of agency in connection with
14 contracts with third parties. I can just go back. Does
15 your Lordship see Article 22 on the screen.

16 MR JUSTICE TEARE: No, not yet. Yes.

17 MR QUEST: Article 22. There is a provision that the
18 government shall not be liable for the obligations of
19 the National Bank of Kazakhstan as well as the National
20 Bank of Kazakhstan shall not be liable for the
21 obligations of government, except when it takes on that
22 responsibility .

23 So it can't be the case that under this law,
24 whenever the National Bank of Kazakhstan enters into
25 a commercial contract with a third party, it is deemed

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1 to do so with the government as principal, because the
2 law itself provides that in general the government is
3 not liable for obligations that the National Bank of
4 Kazakhstan has undertaken.

5 So what we say follows from the law is no more than
6 that NBK can act as an agent if that has been agreed
7 between NBK and the government, and therefore in this
8 case where your Lordship is considering the particular
9 question of in what capacity NBK entered into the GCA,
10 that is a question which has to be considered by
11 reference to the specific terms of the TMA, and indeed
12 the specific terms of the GCA.

13 Your Lordship already has our submissions that there
14 is neither in either of those contracts which suggests
15 that NBK is acting as agent for the government as
16 disclosed or undisclosed principal .

17 That is the first point that I wanted to make. The
18 second point is a very short point just about
19 Professor Suleimenov's evidence. Your Lordship was
20 shown in file D1, at page 267, the reports or, sorry,
21 the comments of Professor Suleimenov in the AIG case.

22 MR JUSTICE TEARE: Yes.

23 MR QUEST: It was those comments, particularly number 4,
24 which were relied on by the Statis as a concession by
25 him about the agency point. The only point I make on

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1 this is that your Lordship will see that these are
2 comments on an expert report by Professor Didenko.

3 MR JUSTICE TEARE: Yes.

4 MR QUEST: As far as I'm aware the report on which he is
5 commenting is not in the bundle. I am not sure what
6 it is. There is a report of Professor Didenko in the
7 bundle at tab -- I have lost it now. But as far as I am
8 aware this report on which Professor Suleimenov is
9 commenting we haven't seen and it wasn't put to
10 Professor Suleimenov. So it is not entirely clear
11 exactly what it is that he is commenting on when he
12 makes that point.

13 The third and final point on Kazakh law is just
14 about ownership. Mr Sprange made the point that, as he
15 put it, or the point he relies upon, is that the
16 Republic of Kazakhstan never, he said, transferred
17 ownership of the National Fund assets to NBK, so title
18 or ownership of those assets remained with RoK at all
19 times.

20 But of course in so far as the cash deposits are
21 concerned, those were never transferred at all from the
22 Republic of Kazakhstan. The cash deposits we are
23 concerned with are dollar deposits which only ever came
24 into existence in the first place as a credit on an
25 account in the name of NBK with BNYM. And your Lordship

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1 will recall that Ms Moldabekova explained that the
 2 government actually wasn't in a position to hold dollar
 3 deposits itself. So these cash deposits were not an
 4 asset that were transferred to the National Bank from
 5 the Republic. They are an asset that came into
 6 existence pursuant to a contract and custody arrangement
 7 between NBK and BNYM, to which the Republic was not
 8 a party.

9 My Lord, those are the points that I wanted to
 10 raise.

11 MR JUSTICE TEARE: Thank you very much, Mr Quest.

12 MR MALEK: My Lord, just the reference that your Lordship
 13 wants. I don't think the document referred to in
 14 paragraph 33 is in the bundle so what we will do is we
 15 will get a copy and get it sent to you, so that you can
 16 see what we were referring to.

17 MR JUSTICE TEARE: Thank you.

18 MR MALEK: That completes our submissions.

19 MR JUSTICE TEARE: Thank you very much.

20 MR HANDYSIDE: My Lord, there is one point that Mr Sprange
 21 mentioned that was new. May I just have one minute
 22 literally to deal with it?

23 MR JUSTICE TEARE: Yes.

24 Further reply submissions by MR HANDYSIDE

25 MR HANDYSIDE: He submitted that BNYM's position in Belgium,

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1 to freeze the money until the executory proceedings
 2 there are concluded, and the reference he gave was I1
 3 tab 4, page 452, paragraphs 106 and 109, those
 4 paragraphs have been taken out of context. The document
 5 was filed at a time when BNYM was concerned that the
 6 executory proceedings might be determined before these
 7 English proceedings.

8 Your Lordship has BNYM's most recent submissions in
 9 Belgium. They are dated 27 March 2020. They are at
 10 I2-tab 9. The relevant passages for your Lordship's
 11 note are paragraphs 35 to 37, 81 to 84, and the prayer.
 12 In short, BNYM's position there is that the question
 13 before this court is whether the Republic has a claim
 14 against BNYM under any system of law. In other words,
 15 BNYM's position there is entirely consistent with this
 16 position before your Lordship. This court's judgment
 17 provides certainty, one way or the other; then the funds
 18 will be capable of being released.

19 I am grateful, my Lord.

20 MR JUSTICE TEARE: Thank you. Thank you all very much
 21 indeed.

22 May I pass on my thanks to the instructing
 23 solicitors and the technicians who have enabled this
 24 hearing to take place. It really has been most
 25 remarkable and I am very grateful for the co-operation

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1 which you have all displayed in enabling it to take
 2 place.

3 I shall of course reserve my judgment. I can't tell
 4 you when it will emerge but I will obviously do it as
 5 soon as I can.

6 I think that is it. Presumably people will liaise
 7 with my clerk about, perhaps not removing the bundles
 8 yet, but they may want to remove the computer and the
 9 screen and so forth, but no doubt that can be arranged.

10 Thank you all very much indeed.

11 (4.30 pm)

(The hearing concluded)

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