

OPUS 2

INTERNATIONAL

National Bank of Kazakhstan v Bank of New York

Day 1

March 26, 2020

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1 Thursday, 26 March 2020
2 (10.30 am)
3 (Proceedings delayed)
4 (10.45 am)
5 (Hearing conducted through Zoom technology)
6 MR JUSTICE TEARE: Thank you very much.
7 MR MALEK: Can you see me?
8 MR JUSTICE TEARE: I can.
9 Housekeeping
10 MR MALEK: Good.
11 My Lord, I think the position is that we are all
12 here. I think there may be some issue about the
13 publicity point, which I have just asked Mr Quest to
14 address you on so that we cover everything.
15 MR JUSTICE TEARE: Thank you.
16 MR QUEST: Good morning. Your Lordship should have received
17 an email from us very recently about the position of
18 press access.
19 MR JUSTICE TEARE: I haven't, I'm afraid.
20 MR QUEST: I will just explain the position. The full
21 public live stream, which will be unlimited access to
22 the public, is for technical reasons not going to be
23 available until tomorrow. What we do have is a private
24 live stream which the parties are using, which has
25 a maximum number of links of 150, most of which are

1

1 being used by the parties, but there are probably about
2 10 or 15 that we could make available to particular
3 members of the press or the public if they identify
4 themselves.
5 What we were proposing to do is to invite anyone,
6 any journalist or member of the public who wishes to
7 watch the proceedings, to get in touch with Aleks Valkov
8 at Stewarts and he can provide them with a link to the
9 private line feed; but that would have to be strictly
10 will the basis that it is for sole use only, because
11 there are only a certain number of slots for today. So
12 if we provide access details it will be just for that
13 individual person.
14 MR JUSTICE TEARE: Yes.
15 MR QUEST: That is what we propose to do, if that is
16 acceptable.
17 The other point which your Lordship needs to address
18 is the formal one. The Coronavirus Act received Royal
19 Assent last night, so it is now legal to broadcast
20 proceedings by video, provided the court so directs.
21 MR JUSTICE TEARE: Right.
22 MR QUEST: We set out in a note, I think we sent a couple of
23 days ago, the relevant provisions of the Coronavirus
24 Act. I should also, I hope, be able to just put it on
25 the screen, if you bear with me for a moment.

2

1 MR JUSTICE TEARE: Thank you.
2 MR QUEST: Do you see -- it should have come up on the
3 screen -- a copy of the Act?
4 MR JUSTICE TEARE: Yes.
5 MR QUEST: Just to explain how the Act works. This is
6 schedule 25 to the Act and what it does in section (1)
7 of schedule 25 is to amend the Courts Act 2003 to
8 introduce a new section 85(a) enabling the public to see
9 and hear the proceedings; and it provides that if the
10 court directs the proceedings are to be conducted wholly
11 as video proceedings, the court may direct that the
12 proceedings are to be broadcast in the manner specified
13 in the direction for the purpose of enabling members of
14 the public to see and hear, and may direct that
15 a recording of the proceedings is to be made.
16 So what we would ask your Lordship to do is to make
17 a direction under that section, firstly that we can
18 broadcast the proceedings initially via the private live
19 stream to a limited number of people, and from tomorrow
20 by a public live stream, and also to direct under 85A(b)
21 that we can make a recording of the proceedings.
22 MR JUSTICE TEARE: Yes, thank you.
23 Does anybody object to my doing so?
24 MR SPRANGE: Not from the second to fifth defendants'
25 perspective, no.

3

1 MR JUSTICE TEARE: Thank you very much.
2 MR QUEST: Just to explain how the procedure will work,
3 there will also be, as I think we discussed yesterday,
4 a daily transcript available at a website that Stewarts
5 will host. What we were going to propose, just so
6 members of the public know how to access it, at the
7 moment the case is listed in the daily cause list as
8 taking place via Zoom and it seemed to us that the
9 sensible way of doing it is for, as from tomorrow, the
10 case to be listed with a link to the website, which will
11 allow members of the public both to see the daily
12 transcript and it will have a link to the live feed as
13 well.
14 MR JUSTICE TEARE: Yes, thank you.
15 Well, in circumstances where the Coronavirus Act is
16 now in force it does seem to me to be entirely
17 appropriate. I have already directed that the
18 proceedings -- Mr Quest, could we have your text back on
19 the screen, please.
20 MR QUEST: You can, just a moment:
21 MR JUSTICE TEARE: I have already directed that the
22 proceedings are to be conducted wholly as video
23 proceedings, and in those circumstances I direct that
24 the proceedings are to be broadcast for the purpose of
25 enabling members of the public to see and hear the

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1 proceedings.
 2 The method by which the proceedings are to be
 3 broadcast is that as for the purposes of today members
 4 of the public can contact Messrs Stewarts in order to
 5 dial into a private live stream of these proceedings;
 6 but as of tomorrow there will be a more general or
 7 public live streaming of the proceedings which members
 8 of the public will be able to access. I accept
 9 Mr Quest’s submission that in those circumstances it
 10 seems appropriate that when the matter is listed in the
 11 cause list for tomorrow, reference should be made there
 12 to the link which the members of the public may use to
 13 follow the proceedings.
 14 It is also necessary for the court to direct that
 15 a recording of the proceedings is to be made. As
 16 I understand it, in this case that recording will be
 17 made by or under the auspices of Zoom, whose software is
 18 enabling this video hearing to take place. It may also
 19 be that to the extent that these proceedings are being
 20 screened in Court 26, the ordinary court transcription
 21 service will also be recording the proceedings.
 22 Is that everything, Mr Quest?
 23 MR QUEST: That is. Thank you very much.
 24 MR JUSTICE TEARE: Thank you.
 25 MR MALEK: My Lord, as far as this hearing is concerned,

1 I think we have agreed a protocol in terms of how we
 2 operate it, and in particular there is no question of
 3 overspeaking, and if you are not speaking, please could
 4 everybody switch off their microphones. Hopefully, on
 5 that basis we should be able to work.
 6 I don’t know whether your Lordship proposes to have
 7 a five minute break for the transcribers; I can see
 8 their picture there. It may be that there should be
 9 a five minute break at some stage.
 10 MR JUSTICE TEARE: Yes, I agree with that entirely.
 11 Application for permission to amend by MR MALEK
 12 MR MALEK: That then leaves the question of the amendment
 13 which your Lordship has seen, and your Lordship should
 14 have a clip of correspondence sent by email to
 15 your Lordship’s clerk yesterday, Wednesday the 25th.
 16 You may recall that last Thursday Mr Handyside, for
 17 BNYM, made clear that if three things could be done Bank
 18 of New York Mellon could play a far more limited part in
 19 the trial, and in the present unusual circumstances
 20 that, in our submission, would be obviously desirable.
 21 It would have the effect that it would be unnecessary
 22 for him to call two fact witnesses, or for that matter
 23 its expert on Belgian law, Mr Ryelandt, although there
 24 is a point made in relation to him by the Statis which
 25 no doubt we will have to return to.

1 If I can just remind your Lordship what those three
 2 points were. First of all, a revised form of
 3 declaration, what one might call paragraph 1(e), to make
 4 plain that criticism of Bank of New York Mellon is not
 5 intended; secondly, an undertaking not to pursue
 6 a damages claim; and thirdly, an agreement not to pursue
 7 the first formulation of the debt claim.
 8 As your Lordship has seen, accommodation has been
 9 reached with BNYM on the terms of a draft order in the
 10 clip attached to Stewarts’ letter dated 23 March.
 11 I don’t think the clip is paginated but it should be at
 12 page 29. If I can just deal with those three points in
 13 reverse order.
 14 First of all, the debt claim point has been
 15 addressed in correspondence. It causes no difficulty.
 16 NBK simply will not pursue the formulation of the debt
 17 claim in its re-amended points of the particulars of
 18 claim paragraph 28 but only that in paragraph 29.
 19 Secondly, there is an undertaking that I can give, as
 20 set out in the schedule to the draft order. Then there
 21 is the revised declaration as set out in the draft
 22 order.
 23 Now, if I can deal first of all with the revised
 24 declaration.
 25 Could I ask your Lordship to pick up the pleading,

1 which is in bundle A, and it is bundle A, tab 2 at
 2 page 14, paragraphs 17.2 and 17.4.
 3 17.2 is that:
 4 “Kazakhstan has never been a party to, have rights
 5 or obligations arising or otherwise had the capacity
 6 directly to enforce the GCA [Global Custody Agreement].”
 7 Then 17.4:
 8 “In the premises BNYM in London had no obligation
 9 under the GCA to pay any debt due to Kazakhstan or to
 10 transfer any security or interest therein to Kazakhstan,
 11 and that Bank of New York Mellon had no grounds to
 12 assert or affirm the Belgian BNYM declaration that any
 13 of the assets held in the GCA performed in the subject
 14 matter of the Belgian garnishment order.”
 15 If we could then go to the prayer, which is the
 16 numbering of paragraph 21, at the bottom there. Just
 17 looking at the declaratory relief, 1(d) has gone,
 18 because there is no securities in play. Declarations
 19 (a) to (c), namely: the contracting parties of the GCA
 20 are Bank of New York Mellon London and NBK, and not
 21 Kazakhstan; (b) the obligation owed by BNYM London under
 22 the GCA are owed solely to NBK and not Kazakhstan; and
 23 (c) BNYM London has no obligation to pay any debt due
 24 under the GCA to Kazakhstan.
 25 The intention behind declaration (e) is simply to

1 spell out the consequences, ie that the Belgian
 2 garnishment has no subject matter, which of course is
 3 the issue that arises here and it is a binary question;
 4 there is either subject matter or there is not subject
 5 matter. There can be no doubt that this question "Does
 6 the Belgian garnishment have subject matter or not" is
 7 clearly an issue. We can see that if you turn now to
 8 bundle G, which sets out the issues. There is a list of
 9 issues. It is at tab 4, the revised common ground and
 10 list of issues.

11 If we could turn, please, to page 161, you can see
 12 the issues there. First:

13 "Does Kazakhstan have capacity to enforce the GCA
 14 and the right to demand payment of cash?"

15 2 is:

16 "As of 31 October did Kazakhstan have any claims
 17 against BNYM and/or did BNYM owe any obligations to
 18 Kazakhstan in relation [and for present purposes lets
 19 just look at cash] ... which fell within the scope of
 20 the Belgian garnishment order.

21 3:

22 "Does Kazakhstan have any claims against Bank of New
 23 York Mellon and does BNYM have any obligations to
 24 Kazakhstan in relation to cash, which fell within the
 25 scope of the Belgian garnishment order?"

1 4:

2 "Was the declaration materially inaccurate as to its
 3 description?"

4 I think we can go on to and you can read that to
 5 yourself.

6 Then 5(g), going over the page:

7 "Insofar as is relevant to these questions ..."

8 Then your Lordship can see the various questions
 9 that have been raised, including at 5(g):

10 "Claims or rights against BNYM arising analogous to
 11 piercing the legal personality, sham trust and abuse of
 12 law, under whichever law governs that question."

13 Any question relevant to whether the court should
 14 grant the revised form of declaration 1(e) that
 15 your Lordship has seen is caught by those issues. In
 16 particular, issues 2, 3 and 5(g) read together plainly
 17 encompass any point relevant to the declaration 1(e).
 18 But far from the revision increasing the scope of the
 19 trial, it is decreasing it. It recasts the declaration
 20 as to remove any implicit criticism of BNYM, it also
 21 removes any reference to securities, while retaining the
 22 fundamental point that the cash is not the subject
 23 matter of the garnishment.

24 Your Lordship has seen the correspondence in the
 25 clip given yesterday and I am not proposing to go

1 through it in any detail because it is self-explanatory,
 2 but the objections appear to come down to three points.
 3 First of all, that the proposed amendment is late; that
 4 it increases the scope of the trial; and that pleadings
 5 should formulate the declaratory relief sought.

6 If I can just deal with those three points.

7 As to lateness, yes it is late, but that is not
 8 a reason to refuse the application to amend. It is
 9 clearly desirable that the declaration as formulated
 10 reflects the issue that needs to be decided. And as
 11 I have said earlier, this simply reflects the case that
 12 has already been made; it is covered in the pleadings,
 13 it has been covered in the expert's report, and in our
 14 respectful submission there is no reason to refuse it.
 15 As I said, it doesn't increase the scope of the trial,
 16 it narrows it.

17 As to the second assertion, with respect it's
 18 hopeless, as is clear from the list of issues --

19 MR JUSTICE TEARE: The second being?

20 MR MALEK: The second assertion being that the objection
 21 increases the scope of the trial.

22 The first one is late. The second one is increases
 23 the scope of the trial. The third one is about the need
 24 for a pleading to formulate the declaratory relief
 25 sought.

1 The point that we make is that this issue, the issue
 2 in 1(e) as amended, is clearly within the list of
 3 issues. It is in the pleading, it is a point that
 4 everybody has dealt with, and it has been clear that
 5 this is what this case is about.

6 If I can just remind your Lordship of the
 7 jurisdiction judgment. If we could pick that up, it is
 8 at bundle B. This is your Lordship's 4 December --
 9 it is in B at tab 5. It is really 20 to 26, bundle B,
 10 page 80, where your Lordship starts an analysis of the
 11 declarations that are sought. Of course, at that point
 12 of time declaration 1(e) was already formulated. The
 13 case to bring a claim in damages had not been brought at
 14 that stage.

15 If you can just briefly look at 26 and then perhaps
 16 32, where your Lordship deals with the argument that the
 17 court is concerned with a narrow contractual point. If
 18 I could just ask your Lordship to read to yourself
 19 paragraph 32. (Pause)

20 Then at paragraph 36, over the page, where
 21 your Lordship says:

22 "I am unable to accept that the Belgian court has
 23 not in substance referred the question of the content of
 24 the attachment order to this court."

25 Paragraph 48 is worth looking at, and paragraph 51.

1 I think that is probably -- no, that's not right.
 2 Anyway, the point is that the list of issues is
 3 clear as to what this case is about. All that the
 4 amended declaration 1(e) is doing is to make clear
 5 precisely what the issue is and the relief that we are
 6 seeking.

7 As to the point that there can be an objection
 8 about -- this is the last point. We don't really follow
 9 what the point is. We have actually formulated the
 10 relief that we are seeking, it does reflect what the
 11 case is about and, as your Lordship knows, in essence
 12 this dispute is whether or not this garnishment order
 13 had subject matter, and that is the issue that has been
 14 referred to the court by the Belgian court; and all that
 15 paragraph 1(e) is doing is effectively to narrow the
 16 issues before the court. On that basis, we invite the
 17 court to give us permission to amend, for the reasons
 18 that I have just given.

19 My Lord, that is all I was proposing to say at this
 20 stage unless I can assist you further. The
 21 correspondence from Stewarts in particular elaborates
 22 the points that we want to make, but I am not going to
 23 repeat them, your Lordship has read them.

24 MR JUSTICE TEARE: Thank you.

25 Mr Sprange?

1 Submissions by MR SPRANGE

2 MR SPRANGE: Thank you, my Lord.

3 Before I make submissions to you on this, can I just
 4 check that you have available the correspondence that
 5 passed between the parties? I am particularly focused
 6 on the Stewarts' letter of 21 March, and then our letter
 7 of 23 March.

8 MR JUSTICE TEARE: I have got the clip. I will just try and
 9 turn up -- did you say the Stewarts' letter of 21 March?

10 MR SPRANGE: Yes, setting out the proposed amendments, and
 11 then our response of 23 March.

12 MR JUSTICE TEARE: Right.

13 MR SPRANGE: I am just going to refer to those briefly.

14 Before I respond in detail to what Mr Malek has said
 15 to you, just to make our position very clear: we accept,
 16 and it makes sense, that by abandoning the current 1(e)
 17 allows the Bank of New York to, for all intent and
 18 purposes, step out of these proceedings, which will
 19 streamline the trial and make it easier. We don't want
 20 to stand in the way of that, so we are content for that
 21 to happen.

22 The way we say this should work is that 1(e) is
 23 abandoned. We may have something to say about you
 24 making a declaration regarding the Bank of New York
 25 declaration in any event.

1 In terms of the amendment, I will come on to the
 2 reasons why we say it shouldn't be allowed, but we
 3 suggest that you not decide that question now, but
 4 rather decide it with the benefit of hearing the
 5 evidence and the parties' submissions and closing
 6 statements, and then decide, either then or in your
 7 judgment, on the merits whether the amendment should be
 8 allowed.

9 The reason I suggest that, my Lord, is for two
 10 reasons.

11 The first is we think that is the most pragmatic
 12 solution in ensuring that we get on with the trial and
 13 we don't lose a great deal of time arguing about this.

14 Second of all, and this is probably the most
 15 important bit, if you look at the King & Spalding
 16 letter, my Lord, and if you look at the paragraph 7(c),
 17 that is really the nub of the debate between -- H/113 is
 18 the page number.

19 MR JUSTICE TEARE: Did you say paragraph 7(c)?

20 MR SPRANGE: Yes, that's correct.

21 MR JUSTICE TEARE: Beginning:

22 "Third, it is inaccurate ..."

23 MR SPRANGE: Yes, yes. (Pause)

24 MR JUSTICE TEARE: Thank you.

25 MR SPRANGE: So, my Lord, I accept what Mr Malek says in the

1 sense that the issues that he has drawn your attention
 2 to in the list of issues would be relevant and would
 3 arise with respect to his proposed amendment, they are
 4 certainly factors that would be taken into
 5 consideration.

6 What we don't know -- and when I say "we", the
 7 second to fifth defendants -- is what other issues may
 8 arise, because of the very -- and I do say it broadens
 9 a question in this case, and that is whether RoK has any
 10 claims under any system of law against the bank in
 11 relation to cash deposits.

12 Now, we have asked both our Belgian law and Kazakh
 13 law experts to look at that revised question and to see
 14 in their views whether there are other things, other
 15 issues that would arise, and preliminary indications are
 16 that there are likely to be.

17 Now, for me and Mr Malek to argue with you now about
 18 who is right or wrong on that, I say would not be
 19 a particularly fruitful exercise in circumstances where
 20 we are going to get into the majority of the very issues
 21 that arise in the list of issues over the following
 22 days. And I am confident that over that period of time
 23 either I will be persuaded that we can meet the new
 24 declaration on the evidence adduced and there is nothing
 25 else we wish to bring to bear, or that we can't. Then

1 you, particularly after we have finished with the expert
 2 evidence, will be in a much better position to decide
 3 whether there is force in what we say in paragraph 7(c)
 4 or not.
 5 That, we say, is a good way of resolving it. I say
 6 that, my Lord, in a position of real strength, and I say
 7 that because of this: if you look again at our letter,
 8 at paragraph 5 we set out the test for amendments, which
 9 I am sure your Lordship is very familiar with having
 10 faced countless applications like this, but (b) is
 11 particularly important:
 12 "A heavy onus lies on the party seeking to make
 13 a very late amendment to justify it."
 14 I hear what Mr Malek says about the practical
 15 utility of this, but what he doesn't address, and what
 16 is not satisfactory, I say, in a case of this magnitude
 17 and importance, is the chronology that you see in
 18 paragraph 2 of our letter; that the particulars were
 19 filed in May 2018 and amended on 1 June; the letter, the
 20 damages claim --
 21 MR JUSTICE TEARE: Sorry, I have just got to find your
 22 letter again.
 23 MR SPRANGE: Sorry, it is at H/111 is the page number.
 24 MR JUSTICE TEARE: It is in the hard copy bundle, is it?
 25 MR SPRANGE: I don't think it will have made it to your hard

1 copy bundle just yet. It is in the electronic --
 2 MR JUSTICE TEARE: I'm looking at an email I received.
 3 So it is your letter of 23 March.
 4 MR SPRANGE: That's correct. It is 2. There are just some
 5 dates there, and there is really three: there is the
 6 original particulars in May '18, the amended
 7 particulars -- Sorry. Claim form in May 2018; 1 June
 8 was the particulars; and then there was the
 9 discontinuance of the damages claim and a request by the
 10 bank, this is in December 2019, to remove the pejorative
 11 language and criticisms towards the bank.
 12 Now, the proposal that I have made, I say is fair
 13 and pragmatic, but it is made in circumstances where
 14 really I shouldn't be the party here having to deal with
 15 something that is made incredibly late, and really you
 16 have heard nothing from the claimants as to why they
 17 couldn't have done what they have done in the last
 18 several days, months ago and certainly in December of
 19 last year.
 20 So in circumstances where I say they haven't filed
 21 an application, they haven't given you a good reason for
 22 doing all of this late, and we have come up with
 23 a pragmatic solution, we say that is the way that you
 24 should proceed.
 25 MR JUSTICE TEARE: Thank you.

1 MR HANDYSIDE: May I say something, my Lord?
 2 MR JUSTICE TEARE: Yes. Who is speaking?
 3 MR HANDYSIDE: It is Mr Handyside.
 4 MR JUSTICE TEARE: Mr Handyside, yes.
 5 Submissions by MR HANDYSIDE
 6 MR HANDYSIDE: My Lord, our position is that you should
 7 grant permission for the amendment. We consent to it.
 8 Your Lordship is familiar with the clarity that my
 9 clients would want to have in terms of what is in play.
 10 If we can get clarity on the declaration that are in
 11 play, potentially then we won't need to call any
 12 witnesses or play any role in the trial other than to
 13 observe and to make some submissions, potentially, in
 14 closing in relation to relief.
 15 It seems to me, having heard what Mr Sprange just
 16 said, that one route your Lordship could adopt would be
 17 to grant permission but grant permission without
 18 prejudice to the arguments that Mr Sprange wants to make
 19 as identified in paragraph 7(c) of his letter.
 20 Obviously if he satisfies you in closing that it is
 21 inappropriate to grant the declaration because written
 22 submissions and expert evidence going beyond that which
 23 the parties have deployed would be required, then no
 24 doubt your Lordship will decline to grant the
 25 declaration as a matter of discretion. So the point can

1 be dealt with at that stage. But it is important for my
 2 clients to know where they are and to have a clear
 3 understanding of what declarations are potentially in
 4 play in the proceedings.
 5 For those reasons, we would invite you to grant
 6 permission and to accept the undertaking which has been
 7 proffered by Mr Malek, which can be embodied in an
 8 order.
 9 MR JUSTICE TEARE: Thank you.
 10 Mr Malek.
 11 Reply submissions by MR MALEK
 12 MR MALEK: My Lord, I would invite your Lordship to permit
 13 us to make the amendment sought. It is, of course, no
 14 prejudice whatsoever to any of the parties. It reflects
 15 the issues that are in play, it reflects the issues that
 16 have been covered in the expert evidence, it doesn't
 17 cause any surprise, and in my submission Mr Handyside is
 18 right that it is important to declare at the outset the
 19 precise declaration that we are seeking, although we
 20 fully accept that the form of declaration is a matter
 21 entirely for your Lordship and that can only be decided
 22 once your Lordship has made his decision on the issues
 23 in dispute.
 24 One can see from the issues as they have been
 25 formulated, on the pleadings and in the list of issues

1 and in the expert reports, that the parties have been
 2 proceeding on the basis that this is what this hearing
 3 is about, namely whether or not there is subject matter,
 4 and as to the point about claims arising under different
 5 systems of law, that in fact is an issue that has
 6 already been considered.

7 If I could invite your Lordship to pick up the
 8 expert evidence bundle E1 and turn, please, to E1/120.
 9 This is an extract -- this is the joint memorandum of
 10 the three experts, and you can see what question 2 was
 11 about:

12 "When responding to the Belgian garnishment order
 13 what is the relevance, if any, of any claims that
 14 Kazakhstan has against BNYM in relation to cash which
 15 arise under any foreign, not Belgian, system of law."

16 You can see that the experts were slightly perplexed
 17 as to what the question was getting at, but you can see
 18 that they are agreed, last sentence:

19 "The experts are of the opinion that the question of
 20 whether the claim arises under Belgian law or under
 21 foreign law is irrelevant. If BNYM owes cash and
 22 securities in Kazakhstan, these ... fall within the
 23 scope of the garnishment order irrespective of the law
 24 under which that claim arises."

25 Which I think explains the amendment to 1(e) when it

21

1 talks about other systems of law. I haven't got it in
 2 front of me, but that was intended to deal with that.
 3 MR JUSTICE TEARE: I have it in front of me. The difficulty
 4 I have with the phrase "under any system of law" is that
 5 it appears to be inviting me to consider whether there
 6 is a claim not only under English law but under any
 7 other system of law, and I hadn't understood that I was
 8 being asked to decide whether Kazakhstan has a claim
 9 under systems of law other than English.

10 I quite accept that in order to decide the question
 11 whether in English law Kazakhstan has a claim it may be
 12 necessary, under English conflict of law rules, to have
 13 regard to a system of foreign law. But I had not
 14 understood that I was actually being asked to consider
 15 whether there is a claim against the bank under any
 16 system of law.

17 I just wondered whether the revised form of
 18 declaration is appropriately clear in that context.

19 MR MALEK: Yes, I mean, the issue before you is whether or
 20 not under Article 1445 of the Belgian Judicial Code,
 21 Kazakhstan has got a claim against BNYM. That is
 22 obviously the issue. We say no. And when I come to my
 23 opening submissions in a moment I am going to analyse
 24 the way that the claims have been formulated by the
 25 parties in relation to that.

22

1 I think the reference to "under any system of law"
 2 is simply there to make it clear that for the purpose of
 3 1445 there has to be a claim, and that claim can arise
 4 under any system of law. I think what BNYM is seeking
 5 in particular is, as I say, finality, so that they know
 6 precisely what the issue is. If they are happy with it,
 7 we are happy with it.

8 But your Lordship is right. We will look in
 9 a moment at the way that the claim, the issues have been
 10 formulated, but from our perspective we say that in
 11 essence you are looking at the position under the GCA,
 12 and in particular whether or not Kazakhstan has got
 13 a claim against Bank of New York Mellon in debt under
 14 the GCA, which of course is governed by English law.
 15 And it is going to be one of my submissions that a lot
 16 of the disputes that have been identified by the experts
 17 do not actually arise and have added a degree of
 18 complication that is unnecessary.

19 But I think the reason for the language "under any
 20 system of law" is just to highlight that a claim that is
 21 attachable can arise under any system of law. But we
 22 would agree with your Lordship that on the facts of this
 23 case that is going to be a question of English law; and
 24 the debt, and the only debt, is under English law and
 25 not under any other legal -- does not have any other

23

1 legal basis.

2 I think that that is the rationale in 1(e) of using
 3 the words "under any system of law", just to make it
 4 clear that it could arise that the -- that the claim
 5 could arise under any legal system, although
 6 your Lordship is right, your Lordship is going to be
 7 really concerned with English law.

8 MR JUSTICE TEARE: Thank you.

9 MR MALEK: That was all I was going to say.

10 MR JUSTICE TEARE: Yes, thank you.

11 Did somebody else want to say something? Yes,
 12 Mr Sprange.

13 Further submissions by MR SPRANGE

14 MR SPRANGE: Thank you, my Lord.

15 Just two things. On Mr Handyside's suggestion,
 16 I think in practical terms he is protected by my
 17 proposal as much as by his, in the sense that either the
 18 claimants get this amendment past you and persuade that
 19 you the declaration should be made and it is made, and
 20 then he is obviously very happy; or the amendment is not
 21 allowed and the declaration is not made, and 1(e), the
 22 current 1(e), falls away, in which case he is very
 23 happy.

24 I don't see a situation in which you not allowing
 25 the amendment now and considering it can prejudice him.

24

1 If there is some sliver of opportunity, I am happy to be
2 persuaded that the without prejudice way is the way to
3 do it .

4 On Mr Malek's point about no prejudice, that is
5 simply not correct. I use his example. He showed you
6 the joint experts' declaration on Belgian law at E1/20,
7 and it is very clear that they were asked a question and
8 the experts said that the question of whether the claim
9 arises under Belgian law or under foreign law is
10 irrelevant . So they didn't even address it . You will
11 see that in its answer to question 2 on page E1/20. If
12 this declaration was in, we would certainly be saying to
13 both our Belgian and Kazakh law experts: what
14 conceivable claims could there be? And what this
15 amendment, we say, does is to detach it somewhat from
16 the GCA because it is "any claims".

17 So there could be a situation that the Republic of
18 Kazakhstan could sue the bank for negligence somewhere,
19 say Kazakhstan, and seek an attachment against the Bank
20 of New York in Belgium.

21 If there was cash as part of the dispute, part of
22 the subject matter, who knows where and how that may
23 raise questions in terms of other law?

24 So there is prejudice to us, not because what we
25 know, but because what we don't know as at now, based on

1 what that broader language brings in .

2 For me, that highlights the necessity not to allow
3 the amendment now, but to hear the evidence and hold my
4 feet and Mr Malek's feet to the fire when we get to
5 closings , about what may be missing and whether there
6 that is a declaration that ought properly to be made.

7 Frankly, if we really are talking about prejudice,
8 what prejudice is there to Mr Malek by approaching it
9 this way? If I can't come up with something by the end
10 of the trial , the amendment is in. If I can, then he
11 will have to consider it then. But to allow in a half
12 a billion dollar case an amendment like this, on the eve
13 of the trial , that has not been explained in any way, is
14 in my respectful submission prejudicial just on the face
15 of it .

16 MR JUSTICE TEARE: Thank you.

17 Could I just ask, Mr Handyside, you have indicated
18 that you need clarity . If I were to adopt Mr Sprange's
19 pragmatic solution, as he describes it , would you be in
20 difficulty in knowing whether you should be calling
21 evidence or not?

22 MR HANDYSIDE: I would, my Lord. Because unless the
23 amendment is made, the existing 1(e) will still be
24 sitting there, unless Mr Malek is prepared to delete
25 that now, even though it is not being immediately

1 replaced by something else. That is the problem.

2 MR JUSTICE TEARE: Thank you.

3 MR SPRANGE: So it is clear , my Lord, we certainly consent
4 to the deletion of the current 1(e).

5 MR JUSTICE TEARE: Thank you. (Pause)
6 (11.35 am)

7 Ruling (sent for approval)
8 (11.45 am)

9 Housekeeping

10 MR MALEK: Thank you, my Lord.

11 It may be important at this stage to take stock what
12 that then means in terms of Mr Handyside's clients .
13 Obviously they remain parties and they are fully
14 entitled to make whatever submissions they wish, but as
15 I understand it, what it means is that the two factual
16 witnesses will not be called , nor the expert on Belgian
17 law, Mr Ryelandt.

18 Perhaps Mr Handyside can confirm the position rather
19 than me.

20 MR HANDYSIDE: That is correct.

21 MR JUSTICE TEARE: Thank you. So we should proceed to
22 Mr Malek's opening.

23 MR MALEK: Yes.

24 MR JUSTICE TEARE: I notice the time. Shall we have a five
25 minute break?

1 MR MALEK: Yes, fine. Thank you very much.

2 MR JUSTICE TEARE: Perhaps I should just ask, do I switch
3 anything off for this break or do we just keep
4 everything running? I suppose we keep everything
5 running.

6 MR MALEK: Yes, I think so.

7 SPARQ TECHNICIAN: If you all mute your microphones, that
8 will be the best way.

9 MR JUSTICE TEARE: Right. Thank you.

10 SPARQ TECHNICIAN: Thank you.
11 (11.47 am)

12 (Short break)

13 (11.52 am)

14 MR JUSTICE TEARE: I think we are all back. Mr Sprange, are
15 you with us again? Good.

16 Mr Malek.

17 Opening submissions by MR MALEK

18 MR MALEK: Yes.

19 Your Lordship has read the skeleton submission, so
20 if I may I am going to do quite a short opening. Can
21 I start off by dealing with two procedural points.

22 First , the position in relation to the debt and the
23 damages claim. If your Lordship can pick up bundle G
24 and turn to the chronology, which is at page 167, just
25 behind tab 6.

1 MR JUSTICE TEARE: Yes.
 2 MR MALEK: Just to remind your Lordship of the background,
 3 on 25 May 2018 the Belgian court made its referral
 4 decision. On 28 May the claim was issued, and all that
 5 was claimed at that stage was declaratory relief. Then
 6 on 31 May 2018 BNYM released to NBK all bar 530 million
 7 in cash.
 8 Then on 25 September NBK made demand on BNYM in
 9 respect of the cash. The demand, just for
 10 your Lordship's note, is at F3/1135. That was so as to
 11 vest in NBK a complete cause of action. BNYM refused to
 12 pay over the cash, and its purported contractual
 13 justification for doing so was on the basis of
 14 clause 16(j) for the GCA, which provides that BNYM shall
 15 not be liable for any failure to perform an obligation
 16 which, and I quote, "in whole or in part arises out of
 17 or is caused by any order by any judicial authority".
 18 As your Lordship knows, in the previous Part 8
 19 proceedings it was held that BNYM could in principle
 20 rely on that clause even where the relevant order was
 21 a foreign order, that would not be recognised or
 22 enforced in England. However, there had to be
 23 a causative link between the order and the failure to
 24 perform.
 25 Going on in the chronology, the CMC was on

1 15 February 2019 and your Lordship gave permission to
 2 amend, to add a claim by NBK in debt, and that is the
 3 530 million in cash, and in damages on the basis that
 4 BNYM had wrongly frozen the GCA accounts, both cash and
 5 securities, and that substantial loss had been suffered,
 6 particularly in respect of the inability to deal with
 7 the securities over the period of the freezing of the
 8 accounts on 30 October, that is on the agreed chronology
 9 at page 168, and the release of all bar the 530 million
 10 on 31 May, a period of seven months.
 11 The damages claim meant that the court would have to
 12 have investigated the position as to both cash and
 13 securities, and as to the freeze following both the
 14 Belgian and Dutch garnishment order.
 15 Then, following disclosure, the damages claim was
 16 discontinued on 9 December 2019. That is in the agreed
 17 chronology, and again for your note, the Notice of
 18 Discontinuance is at A/99, and that renders
 19 consideration of the position as to securities entirely
 20 moot, because there are no longer securities held by
 21 BNYM, all that remains in cash.
 22 The Stasis appear to have asked the court to
 23 investigate the position as to securities on the basis
 24 of -- and perhaps your Lordship can pick up the opening
 25 submissions of the Stasis at paragraph 93 if you can

1 find it. Where it says at the bottom:
 2 "The declaration may be of significance given the
 3 chronology of events and the temporal nature of the
 4 enquiry as to whether the garnishee order had subject
 5 matter."
 6 By that what appears to be meant is the question
 7 whether there was subject matter is to be answered at
 8 the date of the garnishment. We submit that no purpose
 9 can be served in asking whether the securities were
 10 caught by the garnishment when it was served, because
 11 they have since been released with the Stasis'
 12 agreement. All that matters is whether the garnishment
 13 caught and now captures the cash; because if it did not
 14 and does not, it must be paid to NBK. That is the point
 15 about the securities.
 16 The second procedural point concerns disclosure.
 17 Again, if I could invite the court to turn to the
 18 Stasis' skeleton at paragraph 37, where what they say is
 19 it refers to the limited disclosure served by the
 20 claimants and BNYM, and then go on to say, this is
 21 paragraph 38:
 22 "... a lack of disclosure from the only parties that
 23 have access to relevant documents: the claimants, and to
 24 a lesser extent, BNYM."
 25 This appears to amount to an assertion that there

1 has been a failure on the part of the claimants and BNYM
 2 in their disclosure duties. That is wrong, for the
 3 simple reason that extended disclosure was ordered on
 4 a limited basis.
 5 If we can just look at the documents on that.
 6 The CMC was on 15 February last year. If we can
 7 turn to bundle B at page 95 you can see paragraph 13 to
 8 17 deals with disclosure. And if we turn to page 98 we
 9 can see that disclosure was ordered in respect of two
 10 issues set out in the table, and this is very limited.
 11 So those are the two issues, and paragraph 17 said:
 12 "There would be liberty to apply for such further
 13 orders in relation to extended disclosure as may be
 14 necessary following the service of the rejoinder."
 15 But the point to make here is that the Stasis never
 16 applied under that provision. They have never sought to
 17 say that their rejoinder meant that further issues
 18 requiring further disclosure were in play, and at the
 19 time of the CMC. Thus, the reason the disclosure is
 20 limited is not because anyone has failed to do what the
 21 court has directed; on the contrary, they have done
 22 exactly what the court has ordered. And we would
 23 suggest that the criticism here, concerning a lack or
 24 failure in respect of disclosure, is misplaced.
 25 The next point I want to deal with briefly is to

1 look at the way that the case is formulated, and what
 2 the issues are in the case.
 3 It's interesting to compare the way that the case is
 4 now put compared to the way that it has been pleaded on
 5 the part of the Statis .
 6 If we can look at the way that the case is put, if
 7 you turn to the opening submissions of the Statis , and
 8 turn to paragraph 75.1. It is at G/134.
 9 75.1 has two limbs. The first is to allege that NBK
 10 entered into the GCA as the agent of RoK. Then the
 11 second is to say that NBK held the debt on trust.
 12 Then at paragraph 91 of this submission they allege
 13 that the consequence is that RoK could take various
 14 steps under the English law of trust , which are set out
 15 there.
 16 Then paragraph 75.2 and 75.3, it asserts that RoK
 17 retains ownership at all times of the National Fund
 18 assets, and that ownership suffices for a Belgian
 19 garnishment.
 20 If we can look now at the pleading in terms of how
 21 this case has been put, and for that purpose if we can
 22 pick up the pleading bundle, which I think is A.
 23 The defence, which is at page 51, that contains no
 24 reference to agency.
 25 The rejoinder, if one turns to page 95, alleges that

1 RoK and NBK were to be equated, and that is at
 2 paragraphs 24 and 25, where there is a reference there,
 3 but they did not plead that NBK entered into the GCA as
 4 RoK's agent. There was a point about agency in relation
 5 to the TMA, it is pleaded in paragraph 15(a), which is
 6 at page 90, but that is a different point.
 7 So far as the trust argument, the Statis ' defence
 8 and the rejoinder contains no reference to a trust case
 9 of the sort now alleged. The closest they get to the
 10 arguments now advanced is a plea at paragraph 17(b) on
 11 page 91, that the president of RoK has a unilateral
 12 right to terminate the TMA. But that is an entirely
 13 different point from that now advanced, because it was
 14 all under the heading that the TMA is a sham.
 15 As far as the ownership case is put, in the defence
 16 at page 51 of bundle A, the Statis ' case is put on the
 17 basis of agency, and that is paragraph 2 and
 18 paragraph 12; and the rejoinder --
 19 MR JUSTICE TEARE: I am sorry, you are dealing with the
 20 ownership case and --
 21 MR MALEK: Yes, and that is put in paragraphs 2 and 12 of
 22 the defence. I think it is at page 51.
 23 MR JUSTICE TEARE: The reason I'm interrupting you is that
 24 I thought you said that in relation to page 51 reference
 25 was made to agency.

1 MR MALEK: If I did that was a mistake, because there was no
 2 reference to agency.
 3 MR JUSTICE TEARE: Right.
 4 MR MALEK: I am just going through the three: agency, trust,
 5 and now ownership. Ownership is referred to in the
 6 rejoinder at page 85.
 7 MR JUSTICE TEARE: In the defence where is ownership
 8 referred to?
 9 MR MALEK: Paragraph 2 and paragraph 12.
 10 MR JUSTICE TEARE: Thank you. Then the rejoinder.
 11 MR MALEK: Yes, at paragraph 13(a).
 12 The short point here is that the Statis did not have
 13 a pleaded case about agency or trust; it was merely
 14 about ownership. It is only now that the Statis have
 15 sought to advance a claim based on agency and trust in
 16 the way they now do.
 17 I will summarise in a moment the matters that the
 18 court is going to have to decide, but I want to
 19 underscore a point that is not in dispute, and that is
 20 that the cash is simply a debt owed by BNYM to
 21 someone -- so we can put to one side for the moment the
 22 question to whom it is owed -- and the Statis do not
 23 identify any cause of action against the debt except
 24 against BNYM. There is much philosophising in the
 25 Belgian experts' reports about what obligations may in

1 principle be garnished, but in the present case that is
 2 irrelevant . BNYM's engagement under the GCA was
 3 a contractual engagement. There would be no cause of
 4 action against BNYM other than in debt; and all we are
 5 concerned with is whether that debt falls within the
 6 scope of Article 1445 of the Belgian Judicial Code.
 7 The context in which this arises , you can see it
 8 from the Statis ' application to the Belgian court, which
 9 is at F2 at 543. That was 29 September.
 10 If you turn to paragraph 19 of their application at
 11 552, you can see that it is alleged that BNYM Mellon,
 12 garnishee according to the present request, acts
 13 as global custodian to NFRK, based on which Kazakhstan
 14 must have a claim against BNYM Mellon relating to NFRK,
 15 and that BNYM holds for NFRK as full part of Kazakhstan.
 16 That is obviously a reference to the National Fund.
 17 The Belgian court's decision, 25 May, is important. For
 18 that purpose could you please pick up the core. It is
 19 at the back, I think, of that bundle.
 20 Just to remind yourself of that decision, the first
 21 page sets out the various parties . On the next page it
 22 deals with the proceedings. Section 1 is the object of
 23 the claims and the defence. 1.2 refers to BNYM as the
 24 third party garnishee. Then the judgment, section 3.,
 25 and then deals with a number of points, the first one

1 being lack of jurisdiction .
 2 I think we can move to the section "The lack of the
 3 legal relationship of the garnishee", which is the
 4 fourth argument. Your Lordship can see the declaration
 5 stated there. In fact , just going halfway down:
 6 "The fact that the garnishee is not the debtor (the
 7 seized debtor) is not a ground for the withdrawal of the
 8 authorisation, nor for the lifting of a garnishment that
 9 has been authorised. The absence of a debt for the
 10 garnishee towards the seized debtor only leads to the
 11 conclusion that the garnishment has no subject matter."
 12 Then there is a reference to the declaration. Then
 13 it says this :
 14 "The seized debtor is entitled to challenge the
 15 declaration from the garnishee before the attachment
 16 judge. However, this challenge relates to the debt of a
 17 third party and must be referred to the trial court in
 18 the proceedings on the merits. The competent judge on
 19 the merits is , as stated by Kazakhstan itself , the
 20 English court, who must apply its own national
 21 substantive law. The fourth ground from Kazakhstan
 22 therefore fails entirely in both fact and law."
 23 I think that is probably all I need to refer to.
 24 In other words, the Belgian court thought that what
 25 was being referred to was a straightforward question as

1 to whom the debt was owed. There is no question or
 2 suggestion that the question of ownership was relevant.
 3 In fact , as we will see, it was common ground, certainly
 4 before the judge, that the ownership of the National
 5 Fund was with Kazakhstan. Therefore, if it was all only
 6 about ownership rather than debt, there wouldn't have
 7 been any need for a referral at all . In other words, if
 8 the question was ownership, as suggested by the Statis ,
 9 this reference would never have taken place.
 10 The only other point I wanted to make before I move
 11 on is that there is nothing in the Belgian court that
 12 suggests that the subject matter issue needs to be
 13 further considered in Belgium once the English court has
 14 ruled on it . In other words, the decision on subject
 15 matter is going to be decisive . There is no question of
 16 going back, as if the English proceedings were simply
 17 a dummy run and didn't matter, and the whole matter can
 18 be reinvestigated in Belgium. On the contrary, the
 19 English court's decision on subject matter is going to
 20 be decisive .
 21 As we know, the Statis ' jurisdictional challenge was
 22 dismissed by this court on 4 December, we have seen
 23 that. It is clear from the judgment -- perhaps we can
 24 just look at it briefly , it is at bundle B/73. If we
 25 can look at page 73. Yes, that 's where it starts .

1 If we can look at paragraphs 30 to 33, the arguments
 2 then thought to be in play were piercing legal
 3 personality, sham trust and abuse of law, and so they
 4 are in play.
 5 Then in paragraph 36, which I think we have already
 6 looked at today, your Lordship finds and says this :
 7 "I am unable to accept that the Belgian court has
 8 not in substance referred the question of the content of
 9 the attachment order to this court. Whether or not the
 10 attachment judge made a formal referral is a matter of
 11 Belgian procedural law, because in my judgment it is
 12 clear from the terms of the judgment set out above that
 13 the attachment judge considered that the correctness of
 14 the BNYM declaration and the existence of a chose in
 15 action held by BNYM for RoK to be questions for the
 16 court as the competent trial judge."
 17 It is noteworthy that BNYM shares this
 18 understanding, as pleaded in its defence at
 19 paragraph 25.1.
 20 It is clear from the CMC on 15 February, the court
 21 made clear when considering the drafting of the list of
 22 issues that the question of subject matter or not had
 23 been referred to this court.
 24 I will just give a reference to the transcript on
 25 that. It is at page 107, and it is at B/108. I don't

1 think I need to take you there, but your Lordship
 2 will --
 3 MR JUSTICE TEARE: It is page 107 of ...?
 4 MR MALEK: Bundle B. Where your Lordship made it clear that
 5 the question of subject matter had been referred to this
 6 court.
 7 I have already mentioned the release of all but the
 8 530 million in cash and the discontinuance of NBK's
 9 damages claim against BNYM, and there is no dispute that
 10 the cash is simply a debt the bank owes to its customer.
 11 The cross-reference there is the Statis ' opening at
 12 paragraph 35.1. So all we are talking about is that
 13 debt, that cause of action against BNYM, and it is
 14 important not to lose sight of that in the numerous
 15 points of Belgian and Kazakh law mentioned in the
 16 reports.
 17 As to what the court is to decide, put generally the
 18 court is to decide if the debt owed by BNYM falls within
 19 the scope of the Belgian garnishment. There is a binary
 20 answer to that question; it does or it doesn't. Like
 21 all questions of that sort investigated by the court,
 22 the court answers it one way or the other. The court
 23 doesn't answer it by saying that it is a difficult
 24 question, without deciding what the right answer is.
 25 And it is unnecessary and irrelevant, now that the

1 damages claim has gone, to investigate whether anyone
2 thinks or thought that the position is or was uncertain
3 or whether they were right to do so.

4 Now in the Stasis' opening, and if we can turn to
5 that, this is at paragraph 2.1, and another reference at
6 paragraph 32, they suggest that what the court is to
7 investigate is whether the BNYM garnishment declaration
8 was reasonable, by which they appear to mean was within
9 a range of reasonable responses. But that is simply not
10 the question. It will help no one for the court to
11 decide whether it was reasonable for BNYM to express the
12 opinion it did in the garnishment declaration. It does
13 not matter if it was reasonable to say there were
14 uncertainties.

15 We have looked at its list of issues already to see
16 what the issues are, but they are not concerned with
17 whether the form of declaration was reasonable. One is
18 only concerned with the question of subject matter.

19 The next question I want to look at is: why is the
20 foreign expert evidence necessary? How is it going to
21 assist?

22 On our case, the only relevant question is whether
23 BNYM owes the cash deposits to RoK. That is a question
24 of English law.

25 As to the law of the GCA, except in one or perhaps

1 two respects, the exceptions are that first the Kazakh
2 law governs the question whether RoK and NBK are
3 separate legal entities, but it is common ground that
4 they are separate.

5 Second, in support of their new disclosed agency
6 argument, the Stasis argue that NBK acted as agent of
7 RoK under Kazakh law, when entering into the GCA.

8 However, the Stasis advance a case that under
9 Belgian law it is possible to obtain a garnishment order
10 against a bank if the seized debtor owns the deposits,
11 even if they are not owed to the debtor. That gives
12 rise on the Stasis' case to a complex mixed question of
13 Belgian law and Kazakh law, with Belgian procedural law
14 determining the scope of the assets that can be
15 garnished, and Kazakh law of property determining who
16 owns the cash deposits.

17 In addition, the Stasis rely in a very unclear way
18 on various concepts of simulation, piercing and abuse of
19 rights in both Belgian and Kazakh law.

20 We observe that the Belgian court would clearly not
21 have referred the matter to England if she thought that
22 the question turned on true points of Belgian and Kazakh
23 law. Thus it is the Stasis' case, not our case, that
24 gives rise to the need for the court to hear from four
25 experts on foreign law.

1 As to the expert evidence on Belgian law, the
2 Belgian law is going to be covered by
3 Professor Allemeersch for RoK and NBK, and
4 Professor Storme for the Stasis. Mr Ryelandt will not
5 be giving evidence, although I understand that the
6 Stasis may be applying for a witness summons; but with
7 the greatest of respect we don't see how that could
8 possibly be done, and we are working on the assumption
9 that Mr Ryelandt will not be giving evidence.

10 Your Lordship has seen the two reports. There is
11 also a joint memorandum. Why is there expert evidence,
12 what is it about? Really it is to do with Article 1445
13 of the Belgian Judicial Code. And the core dispute, as
14 far as England is concerned, is whether or not the
15 garnishment order has subject matter, because there were
16 no assets to attach. That is our case, and we contend
17 that that has been referred to this court by the Belgian
18 court.

19 The Stasis know that this is our case and they have
20 referred to it. We say that if there is no subject
21 matter then the attachment will be lifted.

22 It is unclear to us what the Stasis are saying in
23 this respect. If you turn to the Stasis' skeleton at
24 paragraph 4.4, they say there:

25 "However, the Stati parties submit that, if the

1 court is prepared to extend this enquiry beyond the
2 English law analysis of the terms of the GCA, the court
3 must engage with some of the Belgian law analysis."

4 Clearly there is more than simply an analysis of the
5 GCA, because the court must determine the question that
6 has been referred to the English court, which is whether
7 or not there is subject matter.

8 We also submit that paragraph 79.1 of the Stasis'
9 skeleton, if we can look at that, where it is said at
10 79.1:

11 "First, it is not in dispute that the Belgian court
12 in enforcement proceedings will (separate from the
13 garnishee proceedings) determine whether enforcement
14 should take place. This will require the Belgian court
15 to determine issues of Belgian law ... which do not
16 arise in these proceedings. The English court should
17 consider the utility of granting declaratory relief in
18 view of the issues that the Belgian court will
19 determine."

20 Well, with respect, that ignores the fact that the
21 question of subject matter has been referred to this
22 court. There is no serious submission to be made to
23 suggest that the question of subject matter is going to
24 be investigated again by the Belgian court.

25 Now the next point I was going to make is the role

1 of experts, but we have covered that in terms of the
 2 position of giving evidence and not dealing with the
 3 fact, but that is all well-established principles.
 4 The last point to deal with here is that the
 5 experts' reports cover matters which you will not need
 6 to deal with.
 7 First of all, we are only concerned with whether the
 8 garnishment order has subject matter in the sense of
 9 a debt between RoK and BNYM. We are not concerned with
 10 anything other than cash. As you know, we were
 11 originally considering cash and securities; we are only
 12 considering cash now. Therefore, paragraphs 93 to 94 of
 13 the Statis' skeleton, dealing with securities, in our
 14 submission is irrelevant.
 15 We are not concerned with the issue of whether there
 16 is any claim against BNYM arising out of its
 17 declaration. Nor are we concerned with the
 18 reasonableness of the BNYM declaration, as suggested in
 19 paragraph 54.1 and 2.1 of the Statis' submissions.
 20 Similarly, paragraph 50 -- 96, where they say that
 21 the subject matter of declaration is principally
 22 directed against BNYM. No, it affects everyone.
 23 I have already dealt with paragraph 97.3, where
 24 it is said that:
 25 "To secure the declaratory relief sought, the

1 claimants have to show that there is no conceivable
 2 basis on which BNYM, based on the materials available to
 3 it ... could have reached the views that it articulated
 4 in the BNYM declaration."
 5 That, in our respectful submission, is a complete
 6 misunderstanding about what this case is about.
 7 A number of the issues that have been dealt with by
 8 the experts will fall away. If we can just look at the
 9 joint memorandum to see what they are. It is in bundle
 10 E, and if you could turn, please, to 114.
 11 The first question clearly remains in play. You can
 12 see what the structure of this is; basically it's to set
 13 out the three experts -- just looking for example at 114
 14 under the section "Matthias Storme", and he starts off
 15 by making a number of remarks which, with the greatest
 16 of respect, simply can't form part of these proceedings.
 17 I mean, if you look at the second point there:
 18 "The Belgian enforcement judge has decided that the
 19 garnishment order extends to the National Fund of
 20 Kazakhstan. Hence, insofar as cash and securities are
 21 part of the National Fund they fall squarely within the
 22 scope of the garnishment order."
 23 So his argument appears to be that we should not be
 24 dealing with any of this because it has already been
 25 decided by the judge who made the original garnishment

1 order, which in our respectful submission cannot be
 2 right.
 3 He then goes on to say that the enforcement judge
 4 was entitled to make this decision, even if arguendo the
 5 cash and securities were not contractually due to
 6 Kazakhstan.
 7 Then he deals with the question of right of
 8 recourse, but we will come back to that later in
 9 cross-examination tomorrow.
 10 That is the first question.
 11 The second question is at 120 of this bundle, E1,
 12 which we looked at earlier today.
 13 Then the remaining questions, questions 3, 4, 5, 6
 14 and 7 are moot. So they simply don't arise, and can be
 15 ignored.
 16 I think I have covered those points already.
 17 If we just go back to the skeleton submissions of
 18 the Stati parties. First of all 54.1, the suggestion
 19 remains, there is a reference to the Belgian
 20 proceedings, the experts rather. In fact, I think I can
 21 skip that bit.
 22 Then if we can go to 75.4 where it says:
 23 "If the English court is persuaded that the
 24 declaration was sustainable as a matter of English
 25 law ..."

1 MR JUSTICE TEARE: Did you say 75.4?
 2 MR MALEK: Sorry, 79.5 I should have said.
 3 MR JUSTICE TEARE: 79.5. Thank you.
 4 MR MALEK: Yes, my mistake.
 5 MR JUSTICE TEARE: Yes.
 6 MR MALEK: These are points -- I think I have covered this
 7 point already.
 8 MR JUSTICE TEARE: Yes.
 9 MR MALEK: Anyway, the point here is that there is
 10 a suggestion throughout the Stati parties' evidence that
 11 there is going to be issues that the Belgian court is
 12 going to have to decide after this decision. We don't
 13 accept that. We accept that the subject matter issue
 14 has been referred to this court and that there is
 15 nothing remaining to go back to the Belgian courts.
 16 I think that is probably all. Let me check.
 17 I have various other points I could cover, but I am
 18 very keen that we do actually start at 2.00 pm. Unless
 19 there is anything that I can assist your Lordship with
 20 at this stage, that is all I wanted to say by way of
 21 opening remarks.
 22 MR JUSTICE TEARE: Thank you very much, Mr Malek.
 23 Who goes next?
 24 (12.36 pm)
 25

1 Opening submissions by MR HANDYSIDE
 2 MR HANDYSIDE: If I could make one very short submission
 3 just to clarify where we have got to.
 4 You have given permission for the amendment to be
 5 made. What we would invite your Lordship to do is to
 6 make the order in the terms that were submitted by the
 7 claimants. It is in the clip that was attached to the
 8 supplementary note that you received a day or so ago, on
 9 page 29 of the clip.
 10 The reason I am drawing attention to this is because
 11 the order incorporates the undertaking which the
 12 claimants have agreed to give. So we ask that the
 13 matter be formally recorded in that way.
 14 MR JUSTICE TEARE: I'm sure that Mr Malek would agree with
 15 that.
 16 MR MALEK: I do agree.
 17 MR JUSTICE TEARE: Thank you.
 18 MR HANDYSIDE: Other than that, my Lord, I have nothing more
 19 to say. We respectfully reserve the right to make some
 20 submissions in closing in relation to relief. Further
 21 than that, we don't propose to cross-examine any
 22 witnesses or call any witnesses of our own.
 23 MR JUSTICE TEARE: Thank you.
 24 Mr Sprange.
 25 (12.38 pm)

1 Opening submissions by MR SPRANGE
 2 MR SPRANGE: Thank you, my Lord.
 3 I would like to start just with the law on
 4 declarations, which after all is where we are all hoping
 5 to end up in this case. For that we will certainly take
 6 you to the authorities themselves during the course of
 7 closing, but perhaps for this purpose I can just rely on
 8 the passages that we have referred to in our skeleton.
 9 If you could kindly take up page 28, where we cover
 10 the legal framework for declaratory relief. I would
 11 like to just start with 7. Your Lordship will be very
 12 familiar with these principles, so I am only going to
 13 focus on the ones that I say require particular emphasis
 14 here. There you will see we have set forth the
 15 formulation of Aikens LJ in Rolls Royce, and it is sub-7
 16 of that paragraph 420.
 17 "Is this the most effective way of resolving the
 18 issues raised? In answering that question it must
 19 consider other options for resolving the issue."
 20 Here, my Lord, what we are tasked with is a referral
 21 from a foreign court to answer an issue or a question
 22 that will then assist them in disposal of justice in
 23 their jurisdiction.
 24 When I come to the relief that is sought, what
 25 I will be saying to you is that this court should engage

1 with matters of English law. Where those matters of
 2 English law, by application of English conflicts of law,
 3 require you to consider foreign law, you ought to.
 4 However, you should go no further than that. And where
 5 there are questions which I would describe as pure
 6 questions of foreign law, in other words, they will only
 7 arise in the proceedings in Belgium and they are
 8 detached from the GCA interpretation and consideration
 9 and the issues that arise from that, you ought not to
 10 engage in them.
 11 Now, my Lord, we have some helpful guidance on this
 12 position with respect to foreign proceedings. If
 13 I could take you to page 30, and it is the passage that
 14 we have quoted there from VTB v Nutritek, paragraph 62
 15 in particular, the subparagraph there. 62 and 63.
 16 (Pause)
 17 My Lord, that, I say, neatly demonstrates where the
 18 line should be drawn. And I find myself agreeing, in
 19 a rare moment, with Mr Malek that you have
 20 a considerable amount of foreign law material before
 21 you, but really that that is pertinent to the task that
 22 you need to undertake is quite limited; and I am going
 23 to show you in a moment those passages that I think are
 24 important for your considerations.
 25 Now, if that's the approach in terms of declarations

1 and the rules that we say ought to apply, we then need
 2 to look at again the question, and I know your Lordship
 3 has seen it several times and even again today, but I do
 4 think it is worthwhile going back to your jurisdiction
 5 judgment, paragraph 37 and paragraph 38. That is the B
 6 bundle, tab 5, and it is also in the core bundle.
 7 Now, my Lord, I don't think it is from mischief or
 8 tactical strategic thinking, but from my perspective
 9 there has been some massaging in terms of the relevance
 10 of the Bank of New York declaration and the question of
 11 subject matter, and in my respectful submission one
 12 should see there your judgment clarifies it.
 13 What the Belgian judge did was raise the question of
 14 subject matter and says: there appears to be subject
 15 matter, look at the Bank of New York's declaration. If
 16 that is going to be challenged the English court is the
 17 appropriate court to do that, and really at the heart of
 18 that question is whether there is a debt owed from the
 19 Bank of New York to the Republic of Kazakhstan.
 20 Now in circumstances where the Bank of New York's
 21 declaration is no longer an issue for declaratory relief
 22 in these proceedings, I accept that it falls away.
 23 I don't, however, accept that it's not something you
 24 ought to address, because, as I referred you to earlier,
 25 we are here with a dynamic for you to give questions and

1 answers that will be helpful for the Belgian court.
 2 The fact that Kazakhstan has decided the abandon
 3 that piece of its claim doesn't mean it is no longer
 4 relevant to the Belgian court. If I am able to persuade
 5 you that that declaration gave rise to subject matter
 6 and was reasonable, and you agree and make a declaration
 7 to that effect, I will submit to you at the end of this
 8 case that that is something for the Belgian court.
 9 If you make findings and conclusions in relation to
 10 the debt position, that may have an influence on whether
 11 you do that or don't, but I don't say that the
 12 significance of the Bank of New York declaration
 13 entirely falls away.
 14 But what is clear from this, leaving aside the Bank
 15 of New York question and its declaration, is the debt
 16 and whether the debt is owed, and that is something that
 17 is clearly within the garnishee proceedings in Belgium.
 18 So the referral came from the garnishee judge on the
 19 question of whether there was subject matter for the
 20 garnishee.
 21 As your Lordship is aware -- and I will come to the
 22 reference in a moment -- there is also an execution
 23 proceeding that is pending, and as part of that there is
 24 an execution garnishee order in place. That case is
 25 currently listed for hearing in December of this year

1 and there will be questions that the Belgian enforcement
 2 judge will need to address.
 3 Now, no doubt this court's judgment in these
 4 proceedings will be significant and play a role, but it
 5 won't be the only factor and it won't be the only issue
 6 or evidence or point that will arise.
 7 In that regard, if you could stay in our skeleton
 8 and take up paragraph 79 on page 35. Mr Malek read out
 9 paragraph 79.1 and he said to you -- if you need the
 10 transcript reference, it is [draft] page 49 from today,
 11 Day 1, line 2, he said that that's a bad point to make,
 12 what we say in 79.1, on the basis that the subject
 13 matter of the garnishee order, that is the conservatory
 14 garnishee order, has been referred to you.
 15 Well, let me get it straight for you. That is
 16 right, the subject matter of the conservatory garnishee
 17 order has been referred to you, and you will determine
 18 that in accordance with the issues that have been put
 19 before you. However, separate and distinct from that
 20 there is an enforcement proceeding, and in the
 21 enforcement proceeding the enforcement judge, exercising
 22 his powers as a Belgian lawyer and relying on Belgian
 23 law and any other law he considers appropriate, will
 24 look at a range of other issues that we say are not
 25 before you, and the examples are set out for you in 79.2

1 and the various subparagraphs that follow.
 2 By way of example, 79.2.1, the right of recourse
 3 that a creditor has against a debtor, and subparagraph
 4 2.2, the availability of non-contractual claims.
 5 Now, you may, I will submit not, but you may for the
 6 purposes of considering the issues that are before you,
 7 delve into some of these points. But we say you should
 8 only do that where they arise under an analysis of the
 9 debt question under the GCA. If you are satisfied that
 10 these are really separate and distinct issues that don't
 11 arise on an enquiry or referral, with respect to the
 12 subject matter of the conservatory garnishee order, you
 13 should leave them be.
 14 My Lord --
 15 MR JUSTICE TEARE: Can you just help me with the distinction
 16 drawn between the subject matter of the conservatory
 17 order -- the conservatory order -- and the enforcement
 18 order?
 19 MR SPRANGE: Yes. Probably the best -- there are some
 20 details on this in the bundle, but I am going to where
 21 possible use neutral evidence. If you take up the E
 22 bundle, it is tab 2, and this is the report of
 23 Professor Ryelandt, and it is page E1/52, paragraph 7.6,
 24 or page 10 of the internal pagination.
 25 So, my Lord, we say the subject matter referral from

1 the Belgian judge was from the conservatory garnishee
 2 order proceedings, not from the executory garnishment
 3 proceedings.
 4 MR JUSTICE TEARE: What are the executory garnishment
 5 proceedings? I had understood that this was a further
 6 stage in the garnishee proceedings where the Belgian
 7 court, for example having been told by this court that
 8 there is subject matter, would then go on and execute.
 9 Or is that too simplistic?
 10 MR SPRANGE: My Lord, not unlike -- and it is difficult to
 11 use analogies between a common law jurisdiction and
 12 a civil law jurisdiction, for obvious reasons, but the
 13 conservatory attachment in some ways is like a freezing
 14 order, and then the executory garnishee order is more
 15 like a third party debt order, in that it's actually the
 16 process in which the debt or the asset is taken.
 17 Now, I accept that in the enforcement proceeding
 18 your judgment on the subject matter of the conservatory
 19 garnishment order, and in particular the question of
 20 a debt under the GCA, will be an important feature. If
 21 there were no other arguments, if that was the only
 22 issue it would probably be dispositive. But under
 23 Belgian law, leaving aside that question, there will be
 24 other Belgian law questions that will arise that the
 25 Belgian judge would decide. You may make his life very

1 easy, his or her life very easy, there may only be
 2 ancillary issues, but we say on our pleaded case in
 3 Belgium there is going to be other issues.
 4 My Lord, when we hear if the Belgian law experts, if
 5 you really look at the -- and I will show you the joint
 6 statement in a moment to make this clear -- when you
 7 look at the difference between the two of them, the
 8 fundamental point is whether, looking at the subject
 9 matter, you look only at the right of the account
 10 holder, NBK, vis-a-vis Bank of New York, so what is the
 11 contractual position between them.
 12 Professor Storme says you don't just look through
 13 that lens, you look through the other lens, which is:
 14 what rights does the creditor have against the debtor,
 15 so in other words the Stati parties, against the
 16 Republic of Kazakhstan to recover assets? That,
 17 my Lord, is where you see the debate about whether
 18 ownership of the assets in question or how they are held
 19 becomes relevant.
 20 Now, I will be submitting to you that you don't need
 21 to get into that to decide the questions before you.
 22 But it is also important that we are clear, given that
 23 you are making declarations to assist a foreign court on
 24 a referral, that the position in relation to the foreign
 25 proceedings and what is to come is clear.

1 MR JUSTICE TEARE: So is the question of ownership relevant
 2 to the question I have to decide as to whether in
 3 English law the RoK has a claim against the bank?
 4 MR SPRANGE: The answer is it could be. We will say it is
 5 something, if you are looking at subject matter, that
 6 you can take into consideration. But we will also be
 7 saying to you that it is not something that is
 8 appropriate for you to make declarations on.
 9 MR JUSTICE TEARE: When I read your skeleton I had
 10 understood you to be running the two arguments
 11 identified by Mr Malek; namely, that firstly the
 12 Republic was the principal of the National Bank of
 13 Kazakhstan when it entered the GCA, and secondly that as
 14 beneficiary of a trust it had a claim which would be
 15 relevant for this purpose.
 16 What I had not spotted in your skeleton argument was
 17 some third argument based on ownership.
 18 MR SPRANGE: My Lord, why don't I -- the way you have
 19 described it is, subject to a couple of tweaks,
 20 accurate. I think probably the easiest way to
 21 demonstrate it is if we take up the claimants' skeleton
 22 and look at the questions they have posed, and how they
 23 have divided their arguments for this case. That is
 24 page 18 of their skeleton.
 25 You will see in paragraph 54(a) they say the first

1 question is whether the Bank of New York owes a debt
 2 under the GCA. It's a question of English law. To that
 3 we raise two issues; (1) is agency and (2) the trust
 4 question.
 5 Now, the trust question is contingent upon
 6 establishing that the Republic of Kazakhstan owns the
 7 assets. I will come to those, obviously, in a moment.
 8 So on 54(a), you are right, those are our arguments.
 9 We will say, and I may have said it already, that you
 10 should stop at 54(a) and those considerations. But for
 11 completeness, and because of the way this case has
 12 evolved, the parties have pleaded and put evidence in
 13 before you as to (b) and (c), whether it is possible in
 14 principle to garnish in Belgium assets in the hands of
 15 a third party that are owned by a seized debtor and not
 16 owed. That is the distinction between ownership and
 17 owed.
 18 Professor Storme says you can and you should.
 19 Professor Allemeersch says you shouldn't. We can have
 20 that debate, and we think we are right on it, but our
 21 ultimate position will be you ought not to decide that,
 22 because that is a pure Belgian law question and you
 23 don't need to decide it to decide 54(a).
 24 If you do delve into 54(b) and you accept the
 25 Belgian law, then you will need to look at (c), which is

1 the question of whether it is Kazakhstan or NBK that
 2 owns the assets in question.
 3 Now, you won't be able to avoid (c), or certainly
 4 parts of (c), because it does arise in respect of our
 5 second argument on 54(a), the trust arguments, and it is
 6 a contextual point on the agency argument as well. But
 7 there you have it, my Lord, in terms of what we say the
 8 structure is.
 9 MR JUSTICE TEARE: Thank you.
 10 MR SPRANGE: So, my Lord, I think we can put away now our
 11 skeleton. I think you have the point about the distinct
 12 proceedings in Belgium and the points that will arise on
 13 both.
 14 What I would like to do now is turn to the substance
 15 and, as your Lordship is aware, our first argument is
 16 that there is very clearly an agency arrangement between
 17 the Republic of Kazakhstan and NBK.
 18 This is an issue that is pleaded. If you look at
 19 our rejoinder at paragraph 15(a) it is right to say that
 20 this didn't appear in our defence. But, my Lord, you
 21 may recall -- and indeed your Lordship provided me with
 22 some honest views about whether we should have put all
 23 of this in our rejoinder or our defence at the CMC --
 24 MR JUSTICE TEARE: (Break in audio transmission) ... for
 25 that.

1 MR SPRANGE: My Lord, I think I have had a detention for
 2 that crime so what I am asking for is not another one.
 3 But the point is this, my Lord, if you look at our
 4 rejoinder which is at tab 7 and you look at 15(b):
 5 "The TMA is a contract between a State entity,
 6 namely the Ministry of Finance and the Republic of
 7 Kazakhstan on the one hand, and on the other hand NBK as
 8 an agent, institution or organ of the Government of
 9 Kazakhstan."
 10 Now that question has been fairly pleaded because
 11 Kazakhstan have asked their expert to address it. If we
 12 take up Professor Suleimenov's opinion at tab 2 in the
 13 English, page 80, at paragraph 87 you will see that
 14 there.
 15 MR JUSTICE TEARE: Yes.
 16 MR SPRANGE: So we say this issue is fairly and squarely
 17 before you.
 18 Now, my Lord, it is not currently in the authorities
 19 bundle, we will ensure that it is to you for closings,
 20 but you know it well, it is your decision in Filatona,
 21 and the passage, or two or three passages that I want to
 22 refer your Lordship to will be put up on the screen and
 23 it has been emailed around as well.
 24 My Lord, you may recall that at paragraph 287 you
 25 set forth the principles of English law with respect to

1 a principal not named as a party to a contract.
 2 In paragraph 292 you quoted the passage from the
 3 Court of Appeal's judgment in Kaefer v AMS Drilling, and
 4 I just draw your attention to that again.
 5 My Lord, the next two passages that I say are of
 6 relevance here and of assistance when we look at the GCA
 7 and the TMA and the relationship between NBK and RoK are
 8 in paragraphs 294 and 295 of that decision.
 9 I emphasise there, my Lord, your words:
 10 "Very clear words are, in my judgment, required to
 11 show that only the named party rather than his principal
 12 was intended to have the right to perform the contract."
 13 Lastly, my Lord, paragraph 317 is where you reach
 14 conclusions about the situation there as between
 15 Mr Deripaska and the principal, undisclosed principal,
 16 and when I come to it, obviously it's more nuanced and
 17 we have other factors to bring to bear, but I will say
 18 that here you are in a position to reach a similar
 19 conclusion.
 20 MR JUSTICE TEARE: Which paragraph are you referring to?
 21 MR SPRANGE: Paragraph 317. We say that like you concluded
 22 there with respect to the SHA, there is nothing in the
 23 GCA which makes it clear that the bank was only
 24 prepared to accept NBK as the beneficial owner of the
 25 National Fund.

1 MR JUSTICE TEARE: Yes.
 2 MR SPRANGE: My Lord, those are the legal principles.
 3 I know the time, I think I will only be about
 4 another seven or eight minutes, so I am happy to
 5 continue or happy to stop and start again at 2.00 pm.
 6 MR JUSTICE TEARE: Why don't we see if we can finish and
 7 start again at 2.00 pm.
 8 MR SPRANGE: Thank you, my Lord. I think I can see the
 9 transcribers and I can't see any looks of death, so ...
 10 My Lord, that then poses the question: what are the
 11 factual considerations for you on the agency argument?
 12 I am going to give you the headline points, and during
 13 the course of the evidence, and of course in closing,
 14 I will take you to the specific references, but it
 15 really comes down to, we say, four primary factors.
 16 The first is that it is clear from the relevant
 17 statutes relating to the National Bank that it is to
 18 perform its activities as agent of the Government of
 19 Kazakhstan. I will give you one example for reference
 20 purposes now; it is Article 26 of the National Bank law,
 21 where it says:
 22 "The National Bank shall act as the agent of the
 23 government."
 24 That is D1/7/236.
 25 That is the first of the four points.

1 The second of the points, my Lord, is this, that is
 2 that the Republic of Kazakhstan is very clearly, in our
 3 submission, the owner of the assets in the
 4 National Fund, which we say includes the assets which
 5 are in dispute in this case. That, we say, is apparent
 6 from the legal analysis of the experts, but also some of
 7 the contemporaneous evidence that has been disclosed in
 8 these proceedings, which I will show you in closing.
 9 The third point is this, my Lord: we say, and this
 10 I don't think is seriously in dispute, that the National
 11 Bank itself, NBK, cannot own assets of the National Fund
 12 in its own right. They can only be owned and be the
 13 property of the government. That is the third point.
 14 My Lord, the fourth and final is that when you look
 15 at the regime that is in place from a statutory point of
 16 view, and then the TMA, the terms of itself, and then
 17 the what I would say is the extremely limited and very
 18 carefully supervised and controlled role of NBK, it is
 19 clear that everything that NBK can and is authorised to
 20 do is very much as an agent of the government, and not
 21 as an independent party acting of its own volition with
 22 respect to its own assets. And there are various,
 23 I say, indicia of agency within the TMA relationship
 24 that I will draw your attention to in due course.
 25 So, my Lord, that's the position on agency, in terms

1 of the road map to how our case is presented and what we
 2 say is the legal test and the primary facts that you
 3 should rely upon.

4 On the question, my Lord, of the trust -- and on
 5 this perhaps I had better just go back to our skeleton
 6 at paragraph 91, the bottom of page 42. You will see
 7 there, my Lord, and no doubt have had a chance to read
 8 the subparagraphs and the legal points that arise, what
 9 I would simply wish to draw your attention to at this
 10 point in time is that it is the question of ownership,
 11 ownership of the assets, that is key to this. You see
 12 there that we say Kazakhstan is the beneficiary of the
 13 sums held on trust for it by the NBK under the terms of
 14 the TMA.

15 So in this sense, this is an example of what
 16 I referred to earlier, where in deciding a GCA English
 17 law question under English conflicts of law you will
 18 need to consider foreign law, and ought to.

19 My Lord, I say those two questions that I've raised,
 20 agency and trust, are certainly things that need to be
 21 determined in these proceedings, with the assistance
 22 that you have from the experts where appropriate.

23 I say that you ought not to, because of the
 24 authorities that I have already directed your attention
 25 to on declaratory relief, go any further and answer

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1 question 54(b) and (c) from the claimants' skeleton,
 2 relating to ownership, with respect to Belgian garnishee
 3 proceedings.

4 If that is something that your Lordship does go
 5 into, obviously you will hear from both of the experts,
 6 and what I say very simply, so you have the point when
 7 you hear the claimants' expert, is that he is, by dint
 8 of the nature of the enquiry he has been given, focused
 9 solely and only on the question of whether there is
 10 a debt between the Bank of New York and RoK as opposed
 11 to NBK, and has not considered other Belgian law
 12 principles that may arise in considering whether
 13 a garnishee order has subject matter. And if you accept
 14 that, Professor Storme's evidence on the rights of
 15 a creditor and what a creditor can bring to bear by way
 16 of argument are effectively unchallenged.

17 My Lord, I won't say anything at this point about
 18 the Kazakh law experts. The battle lines are very
 19 clear; it is really who owns the assets, and whether
 20 that ownership by the Government of Kazakhstan is
 21 impugned in any way, not by the TMA but by the GCA. On
 22 that I say to you -- and I will expand this in due
 23 course -- that it would be bizarre in the extreme if
 24 a Sovereign State's ownership of assets was handed over
 25 or impugned in any way by an agreement that was entered

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1 into between a bank and its agent, or if it's not its
 2 agent one of its instrumentalities, for the purposes of
 3 clearing trades.

4 Subject to checking with my colleagues over the
 5 lunch break, those are the second to fifth defendants'
 6 opening submissions. Like Mr Malek, I have made them
 7 short. There are obviously a lot of other issues, but
 8 we have plenty of time over the next few days to deal
 9 with those.

10 MR JUSTICE TEARE: Thank you very much indeed. We will
 11 adjourn until 2.00 pm.

12 Shall I go into mute or do anything else?

13 SPARQ TECHNICIAN: If you can all mute your microphones that
 14 will be perfect, thank you.

15 MR JUSTICE TEARE: Thank you very much. 2 o'clock
 16 everybody.

17 (1.12 pm)

18 (The short adjournment)

19 (2.00 pm)

20 MR JUSTICE TEARE: Are we all back?

21 SPARQ TECHNICIAN: It looks like everyone is back in the
 22 room now.

23 MR JUSTICE TEARE: Mr Malek.

24 MR MALEK: Mr Quest is going to take my witness.

25 MR QUEST: Yes. My Lord, we are just waiting for them to

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1 join the connection from Kazakhstan. This will be
 2 Aliya Moldabekova.

3 MR JUSTICE TEARE: Will the witness give evidence through an
 4 interpreter?

5 MR QUEST: No, she is giving evidence in English.

6 MR JUSTICE TEARE: Right. How will she be sworn?

7 MR QUEST: She wishes to affirm. She does have with her,
 8 she has been provided with a text of the affirmation,
 9 unless your Lordship wanted to administer it directly.

10 MR JUSTICE TEARE: No. So long as she speaks that
 11 affirmation that will be fine.

12 MR QUEST: Yes. We are just waiting now for Sparq to
 13 connect them in.

14 SPARQ TECHNICIAN: There is no one in the waiting room at
 15 the moment, we're just waiting for them to join.

16 Housekeeping

17 MR SPRANGE: As a matter of housekeeping, will you just
 18 check with her who is in the room, so it's on the
 19 record?

20 MR QUEST: Yes, I can do that.

21 MR HANDYSIDE: Perhaps I could take this opportunity whilst
 22 we are waiting to raise with Mr Sprange what the
 23 position is with relation to Mr Ryelandt. There was
 24 some talk of having to summons him. Like the Kazakh
 25 claimants, we don't understand how that is possible. We

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1 would like to be able to tell him that he is released,
 2 for various reasons.
 3 Would you mind if I raise that now and ask
 4 Mr Sprange to state his position?
 5 MR SPRANGE: It strikes us as something that is technically
 6 possible but practically impossible. We would like him
 7 here simply because we think his evidence is important,
 8 but given your Lordship's ruling this morning and given
 9 the content of the correspondence that has passed
 10 between the parties in relation to his status, we think
 11 his report can be dealt with by way of submission, and
 12 that no party, in particular the claimants, could take
 13 a position against the second to fifth defendants for
 14 not cross-examining him.
 15 So we are content to let matters rest as they are
 16 and proceed on the basis that he will not attend to give
 17 oral evidence.
 18 MR HANDYSIDE: Thank you. (Pause)
 19 MR QUEST: My Lord, I'm told they have joined the meeting
 20 but I don't yet see them.
 21 SPARQ TECHNICIAN: They're not in this room or my waiting
 22 room, we're just chasing them up the other side at the
 23 moment. (Pause)
 24 MR QUEST: Apparently there has been some slight technical
 25 issue. We are sending them some new joining details, so

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1 hopefully it won't be too long. (Pause).
 2 SPARQ TECHNICIAN: Okay, everyone should be in now.
 3 MS ALIYA MOLDABEKOVA (called)
 4 MR QUEST: Good afternoon. Do you have a document with an
 5 affirmation on it in front of you?
 6 THE WITNESS: Yes, I have.
 7 MR QUEST: Could you read it out for us, please.
 8 (2.10 pm)
 9 MS ALIYA MOLDABEKOVA (affirmed)
 10 Examination in-chief by MR QUEST
 11 MR QUEST: Could you please tell us for the record your name
 12 and your business address.
 13 A. Yes. My name is Aliya Moldabekova. I am the deputy
 14 governor of the National Bank of Kazakhstan.
 15 Q. Could you tell us who else is in the room with you,
 16 please?
 17 A. My colleague. She will help me with the documents, if
 18 I need to open the document.
 19 Q. Is there anyone else in the room with you?
 20 A. No, only two of us.
 21 Q. Thank you. Could your colleague, please, hand you the
 22 file that is labelled C.
 23 Could you turn to the first tab in that file. The
 24 first page in the file says:
 25 "The witness statement of Aliya Moldabekova".

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1 A. Yes, right.
 2 Q. Do you recognise this as your witness statement?
 3 A. Yes, this is my witness statement. That's right.
 4 Q. If you turn to page 11, is that your signature? Is that
 5 your signature on page 11?
 6 A. Yes, this is my signature.
 7 Q. If you turn to tab 2 in that file --
 8 A. Yes.
 9 Q. -- do you see this is another witness statement that you
 10 prepared in earlier proceedings?
 11 A. Yes, right. So this is a witness statement that I did
 12 before.
 13 Q. That is correct. If you go to page 25 of the file, is
 14 that your signature on the witness statement?
 15 A. Yes, that's my signature.
 16 Q. Yes. Have you been able to read these witness
 17 statements recently?
 18 A. Yes. I was reminded myself with both of them.
 19 Q. Thank you. And are the contents of those two witness
 20 statements true to the best of your knowledge and
 21 belief?
 22 A. Yes. That is true.
 23 Q. Is that the evidence you want to give in this trial?
 24 A. Yes.
 25 Q. Are you comfortable to give evidence in English?

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1 A. Yes, I am comfortable to give the evidence in English.
 2 But if I may, from time to time probably I will ask the
 3 translator to translate the question if I'm not sure
 4 that I get the question correctly.
 5 MR QUEST: Okay. Thank you very much. There will be some
 6 more questions now from Mr Sprange.
 7 A. Thank you.
 8 Cross-examination by MR SPRANGE
 9 (2.13 pm)
 10 MR SPRANGE: Good evening, Ms Moldabekova, my name is
 11 Tom Sprange, I represent the second to fifth defendants
 12 in this case.
 13 Just a few housekeeping points. Can you see me and
 14 hear me clearly?
 15 A. Yes, I can see you and hear you clearly.
 16 Q. Great. Thank you very much.
 17 In terms of the documents, maybe if your colleague
 18 could put in front of you now the F bundles, F1, 2 and
 19 3. They are the main documents that we will need to
 20 refer to.
 21 A. Okay.
 22 Q. Just keep them there. My next question is this: how
 23 have you prepared for giving your evidence today, what
 24 documents have you read?
 25 A. Okay, so I prepared myself. I decided to read some

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1 documents that I think are related to this issue. So
2 I read my witness statements, I reminded myself some
3 legislation acts like budget code, and also I went
4 through the document which has my witness statement in
5 Sweden.

6 Q. Okay, thank you.

7 As I understood the answers to the questions from
8 Mr Quest, I heard you say you are the deputy governor of
9 the National Bank of Kazakhstan. Is that a recent
10 development?

11 A. Yes, I was appointed as the deputy governor of NBK at
12 the end of December last year. But I'm still in charge
13 with the monetary operation department which I headed
14 before.

15 Q. Understood. Okay. So paragraph 1 of your witness
16 statement is still correct when it says you're director
17 of the monetary operations department?

18 A. Yes. I was promoted, but I'm still in charge.

19 Q. Fine.

20 My first line of questions for you relates to that.
21 You say the headquarters of NBK consists of 30 business
22 units, and I just want to understand the structure of
23 those 30 business units. There seems to me to be
24 a document that is helpful for us in this regard. If
25 you could please take up F/149, so that is F page 149,

1 and it is in F1.

2 A. Yes, yes, I have it in front of me.

3 MR SPRANGE: My Lord, one of the -- just hold on, I have
4 a point of housekeeping with the judge.

5 My Lord, one of the disadvantages of this system is
6 that I can't see so clearly as to whether you're up to
7 speed on the documents, so I am going to proceed as
8 though you are, unless you put your hand up and tell me
9 to stop.

10 A. Okay, so I found the documents.

11 MR SPRANGE: No, sorry, Ms Moldabekova, I'm addressing the
12 judge at the moment.

13 MR JUSTICE TEARE: Yes, that's fine by me. I will find
14 whatever means is possible to tell you.

15 MR SPRANGE: I'm sure you will. Thank you, my Lord.

16 Ms Moldabekova, that chart we see at F/149, is that
17 a chart that you are familiar with?

18 A. Yes, I am familiar with this chart.

19 Q. Okay. As I see it, your department that you are
20 director of is third line of boxes down, second from the
21 right, "Monetary operations department".

22 A. Yes, monetary operations department. Yes. But I think
23 there's a mistake, because it states that there are 32
24 positions in the department. There are 60 positions in
25 this department.

1 Q. Okay. Well this document is from several years ago, so
2 let's not worry so much about the number of positions.
3 But in terms of the actual departments themselves, is
4 that a fair representation of the 30 departments that
5 you refer to, or 30 business units that you refer to in
6 your witness statement?

7 A. More or less reliable chart. We changed some names of
8 some departments but in general this chart represents
9 the structure of NBK.

10 Q. Thank you.

11 Can you tell me, during the course of the matters
12 that are relevant to these proceedings, so in other
13 words, at the time of the Belgian attachment orders and
14 the response to them, and indeed the Dutch attachment
15 order and the response to them, who was in charge of the
16 legal department that we see next to the monetary
17 operations department?

18 A. The director of legal department was the lady, but now
19 we have another person who heads the department, the
20 legal department.

21 Q. Can you remember both of their names?

22 A. Yes, her name is Natalya Sarsenova, so she used to be
23 the director of legal department.

24 Q. Okay, thank you. If you go down to the bottom of the
25 page it has got "Organisation of the National Bank of

1 the Republic of Kazakhstan" and then it has got "RG
2 Kazakhstan, Inter-bank Settlement Centre of the NBRK."

3 Can you tell me what that department was responsible
4 for?

5 A. It is not the department of NBK. This is the 100% owned
6 by NBK company --

7 Q. I see.

8 A. Yes. They are responsible for settlements. So we have
9 settlement centre, this is the only one settlement
10 centre for the whole country. They are responsible for
11 paying the transactions within our local market.

12 Q. Understood. So when we get to organisations of the
13 National Bank of the Republic of Kazakhstan they are
14 subsidy companies wholly owned by NBK.

15 A. Yes, that is correct.

16 Q. Then if you go over the page, you have then got joint
17 stock companies; so they are JSCs that are further
18 subsidiaries but not necessarily wholly owned; is that
19 right?

20 A. Yes.

21 Q. What I don't see in the chart is the various
22 organisations or bodies, if I can put it that way, that
23 are involved with the National Bank. For example, you
24 refer in your witness statement -- and I am referring to
25 your first witness statement throughout for these

1 proceedings, rather than the one for the other
 2 proceedings, but I will draw that distinction to your
 3 attention if I need to. In paragraph 17 of your
 4 statement for these proceedings you refer to the council
 5 on the management for the National Fund. Where does
 6 that sit in this organisational chart?
 7 A. So, the management council of the National Fund should
 8 not sit in this chart, because this chart is part of
 9 NBK.
 10 Q. Okay, so it is just an advisory body that doesn't form
 11 part of the organisational structure. Is that correct?
 12 A. (No reply)
 13 Q. Okay. What about the board of NBK?
 14 A. Yes, we have the board of NBK. I think we have nine
 15 people in this board. The head of the board is our
 16 governor, so we have four deputy governors also the
 17 member of the board, and we have three representatives:
 18 first, the Minister of Finance, the Minister of Economy,
 19 and the representative of the President in our board.
 20 So usually this is the adviser to the President who is
 21 responsible for financial and economic area.
 22 Q. Okay. Just so we have it in illustrative form, the
 23 board would sit above the governor; it is made up of the
 24 governor, representatives from the RoK and the deputy
 25 governors, and then as an advisory to the board is the

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1 council.
 2 A. No, I am afraid I didn't get your question correctly.
 3 If I may to use the interpreter?
 4 Q. Of course. Would you like me to repeat the question?
 5 A. Yes, please.
 6 Q. Sure.
 7 So we have this chart here, and given the
 8 description in your witness statement it seems that what
 9 we would need to also insert on to the chart would be
 10 the board sitting above the governor, and then advising
 11 the board would be the council. Is that a fair summary?
 12 A. You mean the management council of the National Fund?
 13 Q. No, I mean the council that you refer to -- yes,
 14 exactly. Sorry, yes. No, you are right.
 15 A. No, it is not the advisory to the board of NBK, no.
 16 This is, as you said, consultative and supervisory body
 17 to the National Fund. So it is not related technically
 18 to NBK.
 19 Q. Okay. Understood. So in your new capacity as a deputy
 20 governor, I take it now you attend board meetings of
 21 NBK?
 22 A. Yes, I attend the board meetings, of course.
 23 Q. Okay. When did you attend your first board meeting?
 24 A. I think it was at the end of January.
 25 Q. 2020?

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1 A. 2020, yes.
 2 Q. I take it like a lot of Central Bank board meetings they
 3 have a board pack that is prepared before the board
 4 meeting, and then board minutes afterwards?
 5 A. Usually we are preparing the list of questions that
 6 should be considered during the board meeting, and
 7 I think the protocol has the minutes of the board
 8 meetings, of course they should keep these.
 9 Q. Okay. Okay. As I understand your evidence, you were
 10 not responsible for the day-to-day management of the
 11 relationship with Bank of New York under the GCAs. Is
 12 that a correct understanding?
 13 A. I am directly involved in day-to-day communications and
 14 activities with BNYM. Now, because I am the deputy
 15 governor, now I am not directly involved. But when
 16 I was heading the monetary operation department, when
 17 I had the previous positions in the monetary operations
 18 department I was always involved into the activities
 19 with our custodian BNYM.
 20 Q. So my understanding is wrong. You were one of the
 21 people that would be in regular telephone and email
 22 contact with Bank of New York, under the GCA.
 23 A. Exactly. Starting from 2002 when I started to be
 24 involved, I was exchanging emails, telephone calls,
 25 et cetera, on a daily basis.

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1 Q. Okay. Were you -- and tell me if it altered throughout
 2 the period of time that you were involved; was that on
 3 the day-to-day mechanics of the settlement of trades and
 4 instructions as to trades?
 5 A. You need to separate. My department is responsible for
 6 managing the assets. We have the separate department
 7 responsible for -- so my department, responsible for
 8 investing the assets, buying and selling financial
 9 instruments; and we have the separate department who is
 10 responsible for settlements. So we work with the global
 11 custodian, both of these departments work with
 12 the global custodians.
 13 Q. Does that mean your interactions were limited to
 14 providing instructions in relation to investments to be
 15 made and investments to be settled?
 16 A. Not only. My department is also responsible for opening
 17 the accounts, opening the accounts for our internal
 18 management team and also we are responsible for opening
 19 the accounts for the external managers. Also we give
 20 the instructions to the custodian if some of the assets
 21 should be moved between the accounts. And also my
 22 department is responsible for the reports that the
 23 global custodian produces for us.
 24 Q. What was your responsibility in that regard with those
 25 reports, to consider them and include them in the

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1 quarterly reports to the Government of Kazakhstan?
 2 A. No, actually not. Because the reports that we
 3 communicate with the global custodians, they are really
 4 very detailed; you can see any particular bond or any
 5 particular share that we bought and you can see the date
 6 when we bought the assets, you can see the price, you
 7 can see the coupon that we need to receive. This is
 8 a very detailed investment information. We do not
 9 include this kind of information on our quarterly and
 10 yearly reports to the government.
 11 Q. So you summarise those in your quarterly reports that
 12 you provide to the government?
 13 A. So this is more general report; they include the market
 14 value of the fund, they include all the contributions
 15 that we received during the quarter and all withdrawals,
 16 and also we include the investment results to the
 17 reports, we include the portfolios written of the
 18 benchmarks, and also the excess return, the difference
 19 between the actual portfolio and the benchmark. And
 20 also if, for example, new external managers were
 21 selected during the quarter, we also include this
 22 information into the reports that we provide to the
 23 government.
 24 Q. Okay, thank you.
 25 I want to get a clear understanding of the things

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1 that you have direct knowledge of with respect to this
 2 dispute, and the things that you do not have direct
 3 knowledge of. I want to start with this: when did you
 4 first become aware of the Statis' claim against the
 5 Government of Kazakhstan and the award, can you
 6 remember?
 7 A. Yes, I think it was in 2014 we have had heard that it
 8 was the Swedish proceedings, and I heard that ... (break
 9 in audio transmission) ... the Republic of Kazakhstan in
 10 Sweden, and I knew that the amount of the award was
 11 about US\$500 million.
 12 Q. Were you aware of any strategy or approach that either
 13 the government or NBK proposed to take with respect to
 14 that award in 2014?
 15 A. No. We were not involved.
 16 Q. When you say "we", do you mean your department, the
 17 monetary operations department?
 18 A. Yes, my department.
 19 Q. Having heard about it initially in 2014, could you tell
 20 me when you next became aware of its significance or
 21 relevance?
 22 A. Later, when I think it was the end of August or
 23 beginning of September of 2017, when it was the
 24 enforcement proceeding in Sweden, and when we got the
 25 freeze of part of our Swedish assets.

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1 Q. Okay. When I read the various emails that we see in the
 2 F bundle between NBK and Bank of New York, and also the
 3 internal Bank of New York emails, there are very few
 4 references to you personally. Can you tell me who in
 5 addition to yourself was talking to and dealing with
 6 Bank of New York during the time of the Swedish, Dutch
 7 and Belgian attachments?
 8 A. Mainly I think there were four of us; myself and my
 9 colleagues Zhanar Kenzhebayeva, Zhaynar Sarzhakov and
 10 Batur Vakhidov.
 11 Q. Okay. Who of the four of you had the most regular and
 12 intense communications?
 13 A. I think Zhanar Kenzhebayeva.
 14 Q. Why that person?
 15 A. Because we are more responsible for the investment part,
 16 and Zhanar usually she is responsible for the agreements
 17 with the custodian and, as far as I know, at that time
 18 she was responsible and was communicating with BNYM
 19 because she was responsible for that part of the
 20 National Fund which were under the freeze. I'm talking
 21 about part of the portfolio, so actually it was the
 22 Swedish equities.
 23 Q. Understood. Is that because she had historically dealt
 24 with and had knowledge of the relationship?
 25 A. Yes. Because back to 2001, Zhanar was the person who

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1 was communicating with Boston Safe Deposit and
 2 Mellon Bank and she was in charge of signing the global
 3 custodian agreement.
 4 Q. In the first instance.
 5 A. Yes.
 6 Q. Just while we are on that, as you probably appreciate
 7 there are two very important agreements amongst others
 8 in this case, the TMA and the GCA.
 9 A. Yes.
 10 Q. From what I understand from your evidence, you were not
 11 involved in the drafting or negotiation or execution of
 12 either of those agreements.
 13 A. Yes, because I joined the bank in June of 2001, and
 14 I guess TMA was already signed. The GCA was signed
 15 in December 2001, but at that time I wasn't involved in
 16 GCA issues.
 17 Q. Thank you. That's the explanation, but just to be
 18 clear, so that means you were not involved in the
 19 drafting, negotiation or execution of either of those
 20 agreements?
 21 A. Yes, that's right.
 22 Q. In a similar theme, it seems until your recent
 23 promotion, for which congratulations, you were not
 24 engaged in NBK's senior management; in other words, you
 25 weren't on the board.

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1 A. No, I wasn't in the board before.
 2 Q. You were also not a member of the council, the advisory
 3 council, consortium council for the National Fund.
 4 A. No, I am not a member and I wasn't a member.
 5 Q. I take it that as director of monetary operations you
 6 all material times -- when I say "material times" I mean
 7 up until, let's say, the end of last year -- were not
 8 the person with NBK responsible for communicating with
 9 the government regarding the attachment orders and the
 10 claims by the Statis and the developments in Belgium?
 11 A. I think we were in charge at the very beginning. But
 12 later on within our legal department we created the
 13 special team who were in charge with our legal counsels,
 14 and they were communicating also with the government
 15 regarding these enforcements, et cetera.
 16 Q. Can you remember roughly when that occurred and that
 17 team took over?
 18 A. I think the team was created in July or August of 2018.
 19 And before that period my department was in charge with
 20 our legal counsels on these issues.
 21 Q. Who within the Government of Kazakhstan were you
 22 communicating with regarding these topics?
 23 A. I think we were communicating with the Ministry of
 24 Justice in 2017, before Part 8 proceedings. So that's
 25 it that I remember. So yes, definitely it was November

1 or December of 2017.
 2 Q. Okay, thank you. In paragraph 9, and you may want to
 3 take it up, of your witness statement in these
 4 proceedings you talk about the National Fund.
 5 You can keep F1 there, but if you can just have your
 6 witness statement to hand, please.
 7 A. Yes.
 8 Q. In that paragraph you explain the purpose of the
 9 National Fund and you allude to the fact that where
 10 there is budget deficits, the National Fund can be used.
 11 A. Yes, that's right.
 12 Q. As you go on to explain, there are two ways that the
 13 government can call on funds from the National Fund: the
 14 first is by the annual budget; and the second is by
 15 reference to a specific request for particular projects.
 16 A. Actually, you are referring to the guaranteed transfers
 17 and targeted transfers, but both of them should go
 18 through the Republican budget.
 19 Q. Right, okay. I think you described them in that way in
 20 paragraph 14 of your statement, as the fixed amount to
 21 be contributed by the State budget, and then the second
 22 a targeted transfer to the State budget.
 23 A. Yes, right.
 24 Q. Other than expenses of running NBK and NBK's fees which
 25 are described in the TMA, the National Fund assets that

1 are managed by NBK only go to the government in those
 2 two ways; is that correct?
 3 A. Yes, right. The government could receive, could claim
 4 the National Fund only in the forms of a targeted or
 5 guaranteed transfer.
 6 Q. And NBK cannot dispose of assets of the National Fund
 7 for its own purposes other than for fees and expenses.
 8 Correct?
 9 A. It is the relationship between the National Fund and
 10 monetary policy, and I will explain.
 11 So the big part of the monetary policy, which we
 12 carry out as a Central Bank, this is the exchange rate.
 13 When we do the transfer, we need to sell the financial
 14 assets, then we need to convert the proceedings of the
 15 sales. Usually we receive proceedings in foreign
 16 currency, let's say in US dollars, and to execute the
 17 transfer we need to sell these US dollars, to convert
 18 these US dollars into the local currency, tenge, and to
 19 do this of course we operate on the internal market. So
 20 these sales become the part of our exchange rate policy,
 21 so usually we do it in a very distributed manner, to
 22 avoid the big impact of these sales into the exchange
 23 rate.
 24 Q. My apologies, I didn't put my question very clearly.
 25 I will put it another way.

1 It's fair to say what you have just described is
 2 activities that NBK performs in accordance with its
 3 obligations under the TMA to manage the National Fund.
 4 Correct?
 5 A. Yes, right. Because this is our obligation to execute
 6 the transfers. I don't think it's in a TMA, I think
 7 it is in a legislation, probably in the budget code,
 8 that we need to execute the transfers, or probably in
 9 the ... (inaudible).
 10 Q. Okay, so here is my proper question on this topic.
 11 Leaving aside the TMA and the legislative activities
 12 that you undertake for the government with respect to
 13 the National Fund, NBK is not able to take the National
 14 Fund assets and invest it or dispose of those assets in
 15 any other way. In other words, if the NBK thought that
 16 there was a good investment that it might like to make
 17 in its own right with the National Fund assets, it
 18 couldn't do that outside the terms of the TMA and the
 19 legislation behind the TMA. Do you agree with that?
 20 A. No, there is not any investment restrictions in TMA. So
 21 we do our investments for our own sorts or for our own
 22 investment beliefs. So there is not any restrictions in
 23 TMA which kind of investments or when we could do on the
 24 markets. So probably I disagree.
 25 Q. Let's make sure we are on the same page. I understand

1 that given the broad nature of the financial instruments
 2 that you are allowed to invest in, that have been
 3 advised upon by the council and form part of the
 4 National Fund operation rules, you have a wide
 5 discretion as to how to invest the National Funds. Do
 6 you agree with that?
 7 A. Yes, right, because the management council developing
 8 the proposals on the list of financial instruments where
 9 the National Fund could be invested. And then NBK,
 10 together with the government, decide on the particular
 11 asset classes on this list. And you are totally right,
 12 this list is a very broad. Actually, this list contains
 13 all -- almost all the financial asset classes that you
 14 could find on the financial markets.
 15 Q. Okay. So that is that position.
 16 If NBK came across an investment opportunity that
 17 had not been approved by the government and didn't fall
 18 within those parameters, let's say it was a property
 19 investment or let's say it was a loan, do you agree with
 20 me that NBK would not be permitted, under the structure
 21 that exists, to use National Fund assets for that
 22 purpose?
 23 A. Yes. For example, if you said real estate is not the
 24 financial class included to the list, we will not be
 25 able to invest in the real estate.

1 Q. Yes, and do you agree there would be two reasons for
 2 that: (a) it wouldn't be a designated asset class under
 3 the rules; and (b) NBK doesn't have the standing to
 4 agree National Fund assets for investments outside that
 5 class?
 6 A. I'm sorry but I can't agree with you. Because, for
 7 example, if I think that real estate is a good asset
 8 class to invest, I will propose to include real estate
 9 into the list of permitted asset classes.
 10 Q. Okay. But if that was refused or you hadn't got it yet,
 11 you couldn't make the investment. Do you agree with
 12 that?
 13 A. Usually in practice the case is that usually NBK
 14 proposes something to be included in this list, and
 15 I don't remember any case when we got the refusal.
 16 Q. Do you remember any case when you have done it without
 17 consent, without approval, without permission?
 18 A. No. According to the legislation and according to TMA,
 19 if we have some proposal ... together with the
 20 government. Because this list of potential financial
 21 assets should be approved by NBK and by the government.
 22 Q. Okay. Do you agree with this -- and would you please
 23 take up, for the purposes of this answer, the earlier
 24 witness statement you filed in the Part 8 proceedings.
 25 That is at tab 2. Please go to page C/15, paragraph 6.

1 A. Yes.
 2 Q. Perhaps if you just read that paragraph to yourself in
 3 footnote 2.
 4 A. Okay. (Pause)
 5 Yes, I am ready.
 6 Q. Your answer that you just gave me with respect to not
 7 doing things without permission, you said, "No,
 8 according to the legislation and according to the TMA we
 9 put some proposals together and we need approval of the
 10 government". The reason for that, is it not, is because
 11 the National Fund constitutes State property, and you
 12 are not entitled to do things with State property
 13 without the permission of the government?
 14 A. It should be the line, because the National Fund, in the
 15 broad terms, this is a State property. So the National
 16 Fund belongs to the country, to the people of
 17 Kazakhstan, yes. But National Fund is the assets which
 18 we -- not "we" -- which the State accumulates and hold
 19 at the government's account at NBK. So this is the tax
 20 revenues from oil sector. This is -- that could be
 21 commodities to that were transferred to the Stati for
 22 the paying of taxes, et cetera. So this is the National
 23 Fund in broader terms.
 24 But National Fund for us, for the National Bank, we
 25 take these assets which the government hold at the

1 account of NBK, we buy foreign currency and we put this
 2 foreign currency into the NBK's account with the global
 3 custodian, and then we invest this foreign currency from
 4 our own names. So this is the line. I mean, the
 5 National Fund in the broad terms and the National Fund
 6 as the combination of financial assets.
 7 Q. Yes, but you would agree, would you not, that it is all
 8 owned by the government?
 9 A. No. Why I was explaining that there is a line. So the
 10 assets which were accumulated by the State, it belongs
 11 to the State. But as soon as we take these assets, buy
 12 the foreign currency and buy financial instruments, so
 13 this is NBK's property. So we invest these assets from
 14 our own name and we hold these assets in our accounts.
 15 Q. And this line that you speak of, is that a legal line or
 16 a practical line?
 17 A. I am not the legal person, so probably I could talk only
 18 from the practical point of view. But I think it is
 19 like the deposit that you put with the commercial bank.
 20 So, for example, you decided to put the deposit, and
 21 later on the money ... invest money to make profit, and
 22 you do not the owner of the financial assets, you are
 23 the ... owner of the account that you have with the
 24 commercial bank. So that's why I think it is true not
 25 only from the practical point of view but also from the

1 ownership point of view.
 2 Q. So you are saying that it is from a practical point of
 3 view but also a legal point of view, and you are using
 4 an example of a commercial bank, is that right?
 5 A. Yes, but I think because I'm not -- I can't talk --
 6 I can't speak from the legal point of view.
 7 Q. Okay, if you are not comfortable speaking from a legal
 8 point of view because you are not a lawyer, that is
 9 allowed, you are allowed to say "I don't know, I am not
 10 a lawyer".
 11 A. Okay.
 12 Q. So what is your position, do you want to talk about the
 13 practical and the legal, or just the practical?
 14 A. Practical, probably. Practical.
 15 Q. Okay. Do you accept that whether it is an oil revenue
 16 part of the National Fund on one side of the line that
 17 you have imposed, or revenues from an investment that
 18 NBK has made on behalf of the government, the government
 19 has the right, in its guaranteed budget and in its
 20 targeted budget, to seek those funds; do you agree with
 21 that?
 22 A. No, the investment income of the financial instruments,
 23 they are on this side of the line, so it belongs to NBK.
 24 But, of course, if the government would like to withdraw
 25 the transfer, we will be forced to sell the part of

1 these financial instruments, to convert them into local
 2 currency and then to execute the transfer.
 3 Q. Okay. So you accept that whichever side of the line,
 4 your line, an asset falls, the government is entitled to
 5 take that asset, whichever side of the line it falls on,
 6 and deploy it for either the guaranteed budget or
 7 a targeted budget?
 8 A. To be precise, the government has the claim to withdraw
 9 the targeted or to withdraw the guaranteed transfer, but
 10 they can't tell us what kind of financial assets should
 11 be sold to execute this transfer.
 12 They are providing us local currency, so they are
 13 providing the funds and they are providing, for example,
 14 on ... (break in audio transmission) ...
 15 Q. So are you saying that if they couldn't cover the budget
 16 and the only thing available in the National Fund was
 17 income derived from investments that NBK had instituted,
 18 are you saying the government couldn't call on those
 19 assets?
 20 A. Right, right. Because according to the concept of
 21 formation and usage of the National Fund there is
 22 a restriction. If the market value of the National Fund
 23 will be less than 30% of Kazakhstan's GDP, then the
 24 government will not be in a position to withdraw the
 25 transfer. So we have minimum amount for the National

1 Fund. So in the case, for example, as you said, the
 2 investment returns will be very low or the contributions
 3 to the Fund, because of lower oil prices, will be really
 4 very moderate, in this case NBK will not be in
 5 a position to make the transfer.
 6 Q. Ignore for a moment situations where caps or maximums
 7 may be reached; is your evidence seriously to this court
 8 that if the government requires assets that are managed
 9 by NBK to be released to it for budget purposes,
 10 guaranteed or targeted, are you saying NBK can refuse?
 11 Is that your evidence?
 12 A. No, NBK could refuse if we are close to the cap. But
 13 usually it doesn't happen, because the budgeted or
 14 guaranteed transfers should go through the budget, they
 15 need to go through the parliament. And of course when
 16 the government, for example, propose to increase the
 17 transfer, the parliament could refuse their proposal
 18 because they will see that in the case of too big
 19 a transfer we will see the decreasing of National Fund's
 20 market value.
 21 Q. I want you to listen carefully to my question.
 22 A. I mean -- sorry about this, sorry. It is not the fact
 23 that NBK will refuse. It could be on the early stage.
 24 Q. Okay. I want you to listen carefully to my question.
 25 Assume we are not in a cap scenario; so in other words,

1 there is not too big a deficit in the National Fund. Is
 2 it your evidence that if the government seeks an asset,
 3 by way of targeted or guaranteed budget, from NBK, that
 4 NBK manages, NBK can refuse? Is that your evidence?
 5 A. If I change one word in your statement --
 6 Q. Why don't you answer the question first?
 7 A. Okay, no, because if you say "amount" instead of the
 8 assets, the answer will be yes.
 9 Q. Okay. And when I say "amount", if an amount is sought
 10 from assets that NBK manages, NBK will have to take
 11 steps to ensure that that amount is available, and do
 12 something with respect to assets that it is currently
 13 managing to provide that amount. Do you agree with
 14 that?
 15 A. I'm sorry, but probably I will ask you to repeat the
 16 question or I will ask the interpreter, because ...
 17 Q. Why don't you ask the interpreter? That may be easier
 18 for you.
 19 MR JUSTICE TEARE: Mr Sprange, who is the interpreter?
 20 I wasn't aware we had one.
 21 MR SPRANGE: I only know him very well as Victor, and I can
 22 see him there in the background.
 23 Victor, you may want to put up a hand.
 24 THE INTERPRETER: My Lord, this is Victor Prokofiev,
 25 a professional interpreter assisting in the course of

1 this trial . I am afraid I have not been sworn in yet.
 2 MR JUSTICE TEARE: I was about to say that you should be
 3 sworn in.
 4 THE INTERPRETER: Shall I read the affirmation , my Lord.
 5 MR JUSTICE TEARE: Yes, please.
 6 MR VICTOR PROKOFIEV (Interpreter) (affirmed)
 7 THE INTERPRETER: Would you like to repeat the question,
 8 Mr Sprange, or would you like me to use ...
 9 MR SPRANGE: Why don't you use the transcript? That may be
 10 easier. (Pause).
 11 THE INTERPRETER: I am sorry, I am losing LiveNote now. Can
 12 someone scroll up, please?
 13 I am so sorry, Mr Sprange, I think it would be
 14 better if you repeat the question. I have lost
 15 LiveNote.
 16 MR SPRANGE: That is fine. Let's do it this way. Perhaps
 17 if the witness could be shown the TMA, which is in the
 18 first tab of the core bundle.
 19 A. Yes.
 20 Q. Could you just read to yourself, please, 2.2.1 of the
 21 TMA? (Pause)
 22 Do you accept that the government can request that
 23 NBK carry out trust management activities, specific
 24 trust management activities, in accordance with 2.2.1?
 25 A. Yes, yes.

1 Q. If you could go on in that document to 2.2.5. (Pause)
 2 A. Yes. Mm-hmm.
 3 Q. And 2.2.7. (Pause)
 4 A. Yes, okay.
 5 Q. So do you accept that if the government required or
 6 requested that NBK carry out a particular act with
 7 respect to any assets that NBK is managing, NBK is
 8 required to follow that request or direction?
 9 A. When you say "assets", it could mean the financial
 10 assets that we bought, I mean NBK bought. And it is not
 11 true, they can't ask us to transfer or to withdraw the
 12 assets; they are able only to ask for the amounts.
 13 Q. Why do you make -- why do you need to make the
 14 distinction? The fact is if they write and say -- if
 15 you were managing \$20 billion in assets, here is
 16 a targeted parliamentary approved budget request for
 17 \$20 billion, you have got ten days to hand it over;
 18 correct?
 19 A. No. The paragraph 2.2.5 is a very specific paragraph;
 20 it relates to the money transfers which were transferred
 21 into the fund, and they were, let's say, wrongly
 22 transferred into the fund. So the form of compensation
 23 or whatever; so, for example, if the government
 24 transferred something to the fund and later on they
 25 understand that it shouldn't be transferred to the fund.

1 So I think this specific paragraph is about this case,
 2 it is not the general paragraph.
 3 Q. What about 2 point -- what about the earlier ones that
 4 we looked at, 2.1.1 and 2.2.1?
 5 A. 2.2.1. 2.2.1 in my version: carry out the trust
 6 management of the fund within the rules of conducting
 7 investment operations in accordance with the normative
 8 legal acts of the Republic of Kazakhstan and terms of
 9 this agreement. Do you mean this clause?
 10 Q. Yes.
 11 A. Yes, but there is nothing here that NBK should transfer
 12 NBK's assets to the government.
 13 Q. So ...
 14 A. Sorry?
 15 Q. I thought somebody else had a question. No.
 16 Going back, you are saying, and we will go through
 17 a couple more provisions but just so I am clear on this,
 18 is it your evidence that if the government makes that
 19 request that NBK hand over the equivalent value of the
 20 assets held by NBK, NBK can refuse?
 21 A. So the equivalent of the assets, no, we can't refuse.
 22 So we need to transfer money to the government, but we
 23 do not need to transfer our asset to the government.
 24 That's why I said that we will force to sell the assets,
 25 convert them into the local currency and then transfer .

1 Because we could give money to the government only in
 2 the forms of targeted and guaranteed transfer, and both
 3 of them should be in local currency, tenge.
 4 Q. Understood. You used the word just then "our" -- I will
 5 check the transcript to get the precise language, but
 6 I think you said "our assets". Is it your position that
 7 NBK owns the assets?
 8 A. Yes, my position is that NBK owns the assets, the
 9 financial ...
 10 Q. So if NBK was sued by a third party, let's say for
 11 a non-payment of rent or for anything like that, any
 12 breach of civil contract that NBK enters into, and NBK
 13 was found liable to that third party, are you saying
 14 that a third party could seize and take those assets of
 15 the National Fund that you are describing, because they
 16 would be property of NBK that could be executed against?
 17 A. From the practical point of view I can't see that
 18 somebody could obtain these assets, because as far as
 19 I know Central Bank assets are immuned. Probably if
 20 we -- if, for example, it will be fair for NBK to pay
 21 for the third party, probably we will do this. But if
 22 it is unlawful attachment I can't imagine the situation,
 23 for example, if the Central Bank assets could be seized
 24 or could be withdrawn.
 25 Q. Okay, leave aside whether the attachment is lawful;

1 assume that it is .
 2 A. Okay.
 3 Q. Assume that there is not a State immunity issue, because
 4 they are considered to be in use for commercial
 5 purposes. Is it your evidence that those assets could
 6 then be handed over as an asset of NBK to the third
 7 party who had a judgment against NBK?
 8 A. I think, yes. But anyway if, for example, these assets
 9 will be seized, anyway there is a claim from the
 10 government to NBK for the equivalent value of the
 11 National Fund, right. So in this case we anyway will
 12 need to -- kind of to substitute the part of those
 13 assets by other assets. Because anyway the market value
 14 of the claim from the government to us, it will not be
 15 lower, because we lost the part of the assets.
 16 Q. So you are saying that the government would then have
 17 a claim against NBK not for the asset but for the value
 18 of the asset lost?
 19 A. Yes. Yes. For example, if the government currently has
 20 the claim with a market value of 60 billion, because the
 21 current market value of the fund is US\$60 billion, and
 22 let's assume that the part, let's say US\$1 billion was
 23 seized from NBK because of the attachment or whatever,
 24 but even if at NBK we will be obliged, the market value
 25 of the claim from the government will not be less. They

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1 still will be claiming US\$60 billion from us. So that
 2 is NBK's problem to -- kind of to have enough assets
 3 against those 60 billion .
 4 Q. Okay. Does that mean when you receive National Fund
 5 assets to manage under the TMA, those assets get
 6 transferred to NBK so NBK becomes the owner of them; is
 7 that your evidence?
 8 A. The assets transferred in the form of local currency,
 9 tenge. Because we have the government account in tenge
 10 at NBK, so the assets were transferred; and, as
 11 I explained, we use this tenge to buy US dollars and
 12 then we bought the financial instrument. That is it .
 13 Q. So your evidence is that the owner, the beneficial owner
 14 of those financial instruments is not the government,
 15 it is NBK; is that right?
 16 A. It is the difference. If you are talking about the
 17 ultimate beneficiary, of course the ultimate beneficiary
 18 of all this structure, of all these trusts, is the
 19 State, the Republic of Kazakhstan. But the actual owner
 20 of the financial assets is NBK.
 21 Q. Ah, so are you telling me that there is a beneficial
 22 owner and a separate owner?
 23 A. Yes.
 24 Q. So there is two owners of the asset, one is
 25 beneficial --

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1 A. No, no, no. According to TMA, the ultimate beneficiary
 2 of this trust is the government. I think it is
 3 somewhere in TMA. We could check. So I am not talking
 4 about the owner of the assets, I am talking about the
 5 ultimate beneficiary of the whole structure. But if you
 6 particularly ask about the owner of the assets, no, the
 7 answer is very simple: this is NBK.
 8 Q. All right. So your evidence is that NBK owns the assets
 9 of the National Fund that it manages under the TMA. Do
 10 you accept -- again, if you are not comfortable with
 11 legal questions tell me; but do you accept that under
 12 Kazakh law there is no concept of dual ownership, so in
 13 other words, a legal owner and a beneficial owner?
 14 A. I think this is the legal question, so I can't reply.
 15 Q. You don't know the answer to that question, you can't
 16 deal with that.
 17 A. I don't know the answer. I don't know the answer.
 18 Q. Okay. When you talk about NBK owning these assets of
 19 the National Fund, does that mean you say they are the
 20 owner per se, or is it something else?
 21 A. If you mean the financial instruments that we hold, we
 22 are the owner. I don't know, do you refer to your
 23 previous question about the dual ownership? I'm not
 24 sure.
 25 Q. No, I am interested in your evidence as to what you mean

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1 by "ownership".
 2 A. So by "ownership" I mean that we are in a position to
 3 possess, use, dispose of these financial assets; we are
 4 taking the decision which kind of assets should be sold
 5 or should be bought or should be, for example, invested
 6 in other instruments.
 7 Q. I see. I understand. You were giving evidence earlier
 8 about what the government can and can't do. Do you
 9 accept that if the government has terminated the TMA it
 10 would be able to say either "Sell all of the holdings
 11 that you have and give us the proceeds", or "Transfer
 12 them to us and also transfer all of the cash to us"; do
 13 you accept that?
 14 A. I think if the government will terminate TMA we will be
 15 forced to sell all the assets and transfer them the
 16 cash; because I think the government do not have any
 17 global accounts where they could hold these assets, and
 18 I am afraid the government does not have the experience
 19 or expertise to continue to kind of keep these assets,
 20 to manage these assets. So I think in the case of
 21 termination of TMA we will be forced to transfer cash to
 22 them.
 23 Q. Are you suggesting that the Government of Kazakhstan,
 24 through any of its instrumentalities or ministries,
 25 isn't able to open a US dollar account?

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1 A. I think according to the law on the National Bank, we
 2 are the bank for the government. I will give you the
 3 example. When the government does the external
 4 borrowings, so for example they are issuing eurobond,
 5 they are issuing bond and they are collecting US dollars
 6 as a proceed of issuing this eurobond, and they hold
 7 these US dollars at the account at NBK because they do
 8 not have any other accounts, because according to the
 9 law of the National Bank, NBK is the bank for the
 10 government.
 11 Q. Okay. You successfully avoided my question. I want to
 12 repeat the question, I want you to listen to it
 13 carefully and answer it.
 14 Do you accept that the Republic of Kazakhstan,
 15 through one of its ministries or instrumentalities other
 16 than NBK, can open a US dollar account; yes or no?
 17 A. I think yes, but in this case you need to change the law
 18 on the National Bank. Because now, according to the
 19 law, we are the only one bank for the government. And
 20 I will give you very simple example. When the
 21 government is transferring the money for, let's say, the
 22 advisory services or whatever, they use the accounts of
 23 NBK. They transfer us tenge, we convert this tenge into
 24 foreign currency and we make the payment.
 25 Q. Okay. So we will see what the judge ultimately thinks

1 about whether Kazakhstan could open a US dollar account
 2 or not.
 3 Assuming that the Government of Kazakhstan had the
 4 capability to open a US dollar account, do you accept
 5 that on termination under clause 7.4 of the TMA, the
 6 government could say to Kazakhstan, "Please forward that
 7 \$530 million, transfer it, that \$530 million at Bank of
 8 New York, London Branch, to this account"? Do you
 9 accept that that is something that the National Bank
 10 would have to comply with; yes or no?
 11 A. Could you repeat the question?
 12 Q. The Republic of Kazakhstan, through an instrumentality,
 13 has a US dollar account. It terminates the TMA under
 14 7.4 and it says, "Transfer", by way of example, "the
 15 \$530 million cash with Bank of New York, London Branch,
 16 to this US dollar account". Do you accept that that is
 17 a direction and a request that NBK would have to comply
 18 with?
 19 A. It is only if it will be the termination of TMA.
 20 Q. Is that a yes or a no?
 21 A. If the termination, yes.
 22 Q. All right. I asked you some questions about 2.2.1 of
 23 the TMA. Have another look at it if you would like.
 24 Now I want to be clear on this, do you accept that
 25 pursuant to this clause the government can request that

1 you carry out a specific activity with respect to
 2 a specific asset?
 3 A. I think it states that we, during the trust management,
 4 could do the investment, but these investments should be
 5 within the rules that they are mentioning here.
 6 Q. What I want you to do is not focus on the words, I want
 7 to focus on your evidence about what, in your
 8 experience, based on what you have observed, the
 9 government can or cannot request that you do
 10 a particular thing with a particular asset. In other
 11 words, can they make a request of you and tell you what
 12 to do with respect to a specific asset for a particular
 13 investment purpose?
 14 A. No, they can't.
 15 Q. Could you take up F/29, please. It is in F volume
 16 number 1.
 17 A. Yes. Which page, please?
 18 Q. Please take up page 29.
 19 A. Page 29. Okay.
 20 Q. Is that a document that you are familiar with?
 21 A. Yes, when I was -- when I went through some documents
 22 which are in the bundle, I saw the Russian version of
 23 this letter. Yes, I remember.
 24 Q. Yes. So this is a request from the Ministry of Finance
 25 to the National Bank, asking them to take measures with

1 respect to the savings portfolio, and asking you to do
 2 it from income earned from the sale of a particular
 3 joint venture. Correct?
 4 A. Yes. Right, right.
 5 Q. It is said to be in accordance with clause 2.2.1.
 6 A. Yes.
 7 Q. So would you agree with me that at least the Ministry of
 8 Finance believes that they can make specific requests in
 9 accordance with 2.2.1?
 10 A. No. My answer is still no. Because, as I said, I saw
 11 this letter and I saw the resolution of our management
 12 to this particular letter, and the resolution was for
 13 answer and for the disagreements or for the comments.
 14 So it was the resolution from our deputy governor, so
 15 the lady who was the deputy governor at that time,
 16 so November 2001, and her resolution to this letter,
 17 when she was addressing this letter to our department,
 18 the resolution was for answer and for the disagreement
 19 or for comments.
 20 Q. I will come on to any resolution that you say was put in
 21 response to that, but do you accept that the author of
 22 this letter from the Ministry of Finance is making
 23 a request of you in accordance with clause 2.2.1 of the
 24 TMA?
 25 A. Yes, I believe they were referring to 2.2.1. They are

1 saying that, yes, according to the rules of investment
 2 operations it should be two portfolios, stabilisation
 3 and savings, and Ministry of Finance were trying to
 4 advise us that we need to create the savings portfolio.
 5 So that's why their reference.
 6 Q. But they say here "request that the National Bank ..."
 7 A. Yes.
 8 Q. "... take urgent measures".
 9 A. Yes. They were requesting us to structure the fund
 10 according to the rules of operations, which are
 11 mentioned in the TMA. And I think it was only once or
 12 probably twice when the Ministry of Finance were trying
 13 to advise us what to do, how to structure the
 14 portfolios, and as I said, the reaction of our
 15 management was negative, because they are not in
 16 a position to say to us what will be the investment
 17 structure of the fund.
 18 Q. Okay. Certainly in the bundle that we all have for this
 19 trial, there is no letter back from NBK saying, "No, you
 20 are not allowed to make a request under 2.2.1". Do you
 21 say that such a letter exists?
 22 A. No, I don't know do this letter exist. As I said, I saw
 23 only the resolution to this letter from our management.
 24 But usually we reply, because this is the good practice
 25 when the authorities, when the institutes reply to each

1 other. So I am more than sure that it was the reply.
 2 Q. This took place in November 2001. You say you saw
 3 a resolution about this. Were you personally involved
 4 with this?
 5 A. No, I was not involved. I started to be involved
 6 from January/February 2002, and I believe we created the
 7 savings portfolio at the beginning of 2002, and I think
 8 we started to work with external managers -- yes,
 9 definitely it was February, I think, of 2002 when we
 10 created savings portfolio.
 11 Q. So other than thinking you may have seen a resolution,
 12 you weren't personally involved and you don't know what
 13 response was sent to this letter.
 14 A. Yes, right.
 15 MR SPRANGE: All right.
 16 My Lord, I note the time. I don't know whether the
 17 transcribers want a five minute break now. I am happy
 18 to press on. I am very much in the court's hands.
 19 A. It is really up to you. I can continue if you like.
 20 MR JUSTICE TEARE: Let's have a couple of minutes. I will
 21 put my machine on mute.
 22 SPARQ TECHNICIAN: Thank you. Everybody put theirs on mute,
 23 please.
 24 (3.27 pm)
 25 (Short break)

1 (3.32 pm)
 2 MR JUSTICE TEARE: Are we ready, Mr Sprange?
 3 MR SPRANGE: Yes, thank you.
 4 Could you explain, in your view, the role that Bank
 5 of New York undertook for NBK in the London Branch?
 6 I don't know about anybody else but I'm not hearing
 7 anything from the witness.
 8 MR JUSTICE TEARE: Is the witness still on mute? (Pause)
 9 MR SPRANGE: I don't know whether the claimants' team are
 10 able to email the witness or her assistant.
 11 SPARQ TECHNICIAN: Hello Aliya, could you move your
 12 microphone closer to yourself, please.
 13 A. Is it better?
 14 SPARQ TECHNICIAN: Yes.
 15 A. Is it better?
 16 MR SPRANGE: Yes, we can hear you now. Thank you.
 17 A. Because I think somebody switch off the sound. Can you
 18 hear me?
 19 Q. We can hear you and what I am going to do is to ask you
 20 the question again.
 21 Could you explain your understanding of the role of
 22 the Bank of New York London Branch with respect to the
 23 portfolio of assets that NBK was managing?
 24 A. Yes, sure. So BNYM London Branch is the global
 25 custodian for us. It means that BNYM carries three main

1 functions. First of all, this is the safe-keeping of
 2 the assets; second, this is the settlement of the
 3 trades; and third, this is the reports that they are
 4 producing for us.
 5 Q. I will just explore that then. In terms of
 6 safe-keeping, that simply means that they maintain the
 7 assets and they don't disappear. Do you agree? There
 8 is no magic to safe-keeping other than that they remain
 9 where you instruct them to be. Correct?
 10 A. Yes, safe-keeping means that we are opening the accounts
 11 with BNYM, we keep our assets with these accounts, and
 12 of course there are some work because of these accounts;
 13 for example, collecting the dividends, collecting the
 14 coupons, placing these coupons and dividends to the
 15 appropriate accounts, helping and advising us with the
 16 tax proceedings, et cetera. So it is quite a wide range
 17 of service.
 18 Q. Okay, but largely administrative, would you agree with
 19 that?
 20 A. Yes, I agree.
 21 Q. In terms of settlement, that is -- and it is not the
 22 MoD, your department that is doing it, but it is
 23 a daughter company.
 24 A. No, not daughter company. Another department. Not
 25 daughter company, but another department.

1 Q. Sorry, understood. On instructions from you, your other
 2 department and Bank of New York are carrying out
 3 settlements of transactions.
 4 A. Yes.
 5 Q. So either sales of assets or acquisitions of assets.
 6 Securities, typically.
 7 A. Security, yes.
 8 Q. Then the reports is what any bank customer would get,
 9 data received daily and weekly and monthly as to the
 10 holdings.
 11 A. Yes, exactly.
 12 Q. So Bank of New York is not providing any investment
 13 advice?
 14 A. No. They don't provide any investment advice.
 15 Q. And they don't acquire title to any of the assets.
 16 A. I think it is quite complicated structure with the
 17 global custodians, because NBK has the accounts with
 18 BNYM, but BNYM, according to the market practice on the
 19 local markets, has the sub-custodians; and BNYM should
 20 open the accounts with sub-custodians, and the
 21 sub-custodians should open the accounts in the local
 22 depository systems.
 23 Usually NBK the owner of the accounts in BNYM
 24 records. But on the sub-custodian level or on the level
 25 of local depository, it could be kind of a nominee. So,

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1 for example, BNYM, the name of BNYM could be at the name
 2 of the account with the sub-custodian or with the local
 3 depository. And more than this, the account could be
 4 separate or account could be omnibus. So BNYM could
 5 open the omnibus account, let's say with sub-custodian
 6 in Netherlands, and this omnibus account could have the
 7 assets from other BNYM's clients.
 8 Q. Okay, I think we have enough complication to deal with
 9 in this case not to get into that.
 10 But in simple terms do you say that Bank of New York
 11 acquires ownership of National Fund assets through NBK?
 12 A. No, it doesn't acquire the ownership.
 13 Q. Okay. In terms of the completion of documents for Bank
 14 of New York and for other parties that require you to
 15 provide data and information, including tax authorities,
 16 I take it that you are always accurate as far as
 17 possible in the completion of those documents?
 18 A. Right.
 19 Q. You need to say yes or no.
 20 A. Yes. Yes.
 21 Q. Where they are documents that relate to tax liabilities
 22 or tax benefits you will carefully consider the
 23 position, because getting it wrong can have
 24 ramifications.
 25 A. Yes.

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1 Q. Is that an aspect of the management of the BNY
 2 relationship that you were involved in, or colleagues of
 3 yours?
 4 A. Not directly myself, but colleagues of mine.
 5 Q. Could you name the colleagues that you are aware of who
 6 were responsible for ensuring that NBK, in exercising
 7 its obligations under the TMA, accurately provided
 8 information to Bank of New York and tax authorities?
 9 A. Yes, we have the financial accounting department. They
 10 have the special division for taxes, and usually we
 11 provide the documents, the tax documents to BNYM through
 12 this financial accounting department. Because to get
 13 the documents which proves that it should be avoiding of
 14 double tax treaty, et cetera, so that is monetary
 15 operation department and financial accounting department
 16 .
 17 Q. Okay. During the course of your work, not in
 18 preparation for this case but in the course of your
 19 day-to-day job, were you personally involved in the
 20 completion of these documents or advice as to these
 21 documents?
 22 A. No, I wasn't personally involved. But two of my
 23 colleagues from the monetary operation department were
 24 personally involved.
 25 Q. Okay. Could you please take up for me F/35, so it is

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1 volume 1 of the F bundles, page 35.
 2 A. Okay.
 3 Q. Is this a document you are familiar with?
 4 A. I think I saw the Russian version of this letter, yes,
 5 when I went through the documents, some documents within
 6 the bundle. Yes, I saw the Russian version of this
 7 letter.
 8 Q. Okay. Do you understand -- well, tell me, do you agree
 9 with this summary: this document from the budget
 10 planning and control division concludes that the
 11 beneficial owner of assets managed by NBK held in
 12 various jurisdictions should be the
 13 Republic of Kazakhstan. Do you agree with that?
 14 A. So, first this is the answer from budget planning and
 15 control department. I don't think that they were in
 16 a position to give us the answer, because I don't
 17 believe that the budget planning and control department
 18 is in charge with taxes and in charge with the double
 19 tax treaty, et cetera. But I agree, because I saw these
 20 forms that NBK completed to avoid double taxation and we
 21 sent these documents to BNYM, and we put the
 22 government -- or we put the Ministry of Finance, because
 23 the government, it is not the legal entity, so the
 24 particular minister should be included as the legal
 25 entity -- so we included the Ministry of Finance as the

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1 ultimate beneficiary in the tax forms. And it was the
 2 case, I believe, from the very beginning, of the
 3 National Fund. Yes, the date is 2002. So I believe we
 4 put the name of Minister of Finance from the very
 5 beginning.

6 Q. Okay. I think you had several pieces to your answer
 7 there. The first I think you said is you are not sure
 8 that this department was the right department.

9 Do you accept this: that, for whatever reason, this
 10 department was the department tasked with providing this
 11 data and this information on behalf of NBK?

12 A. I said this because I think these questions were
 13 addressed to the wrong department.

14 Q. Okay. I am not interested in your speculation as to who
 15 or why things were done; I am interested in your factual
 16 evidence.

17 Now, do you accept that insofar as the answer to
 18 these queries was concerned, this was the department
 19 that provided the answers?

20 A. No. I think it was -- probably it was our department's
 21 decision whom we should put in the taxation forms, or
 22 probably we relied to this answer from the budget
 23 planning and control division. No, I don't know,
 24 because I was not in charge with this, so I can't say
 25 clearly was this answer the reason why we put the

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1 Ministry of Finance, or our department decided by
 2 itself.

3 Q. Okay. Do you accept this, that NBK's official position
 4 on the answer to these important questions was as set
 5 forth in this document?

6 A. It is not the formal NBK position particularly in this
 7 letter, but it is formal NBK position that the ultimate
 8 beneficiary that we put into the tax form is the
 9 government or the Ministry of Finance.

10 Q. Okay, you have used the word "beneficiary" several
 11 times. This document uses the word "beneficial owner".
 12 Do you draw a distinction between those two words,
 13 "beneficiary" on one hand and "beneficial owner" on the
 14 other, or do you regard them as the same thing?

15 A. "Beneficial owner", I think "beneficial owner" or
 16 "ultimate beneficiary" is pretty much the same; it means
 17 that who is the final beneficiary of the assets, of the
 18 process. I think it is pretty much the same.

19 Q. Well, so you say "beneficiary" is the same thing as
 20 "beneficial owner". I want to be very clear on this.

21 A. I am not the linguist expert in English, but in Russian
 22 it seems to be the same.

23 Q. Okay. If you would like to take the benefit of the
 24 translator ...

25 A. Okay. That is probably -- yes, yes, please.

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1 Q. Mr Prokofiev, I don't know whether you picked up the
 2 question, but I will repeat it to be clear. Does the
 3 witness regard the phrase "beneficial owner" to mean the
 4 same thing as "beneficiary"? (Question interpreted)

5 A. Yes, I think it is the same.

6 Q. Thank you. Do you therefore accept that insofar as
 7 assets in Italy and France and Ireland are concerned,
 8 Kazakhstan, the Republic of Kazakhstan, whether it is
 9 through the ministry or in its own right, is the
 10 beneficial owner?

11 A. It is not particular for these markets. I am not sure
 12 why our department asked about these particular markets.
 13 But in general, according to the TMA, the ultimate
 14 beneficiary of TMA, of the trust, is the government.
 15 That's why I think it is right to put the government in
 16 these tax forms.

17 Q. Okay. Do you take a similar position in relation to the
 18 certificate of foreign status of beneficial owner for
 19 the United States withholding tax at F/65?

20 A. Yes, this is W8 form, this is a tax form for the
 21 United States. Yes. Right, right.

22 Q. And it is your understanding that the government of
 23 Kazakhstan retains a benefit, a tax benefit, in respect
 24 of these?

25 A. No, not tax benefit. The benefit of the investing the

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1 assets. Because the taxation. This is a subsequence of
 2 investing and --

3 Q. Would you agree if I used the word "tax advantage"?

4 A. "Tax advantage". Could you repeat the whole sentence.

5 Q. Do you agree that by being nominated as the beneficial
 6 owner, or in the case of Italy the actual owner, of the
 7 assets in question --

8 A. No.

9 Q. -- the government receives a tax advantage?

10 A. No. Actual owner and beneficial owner are the different
 11 things. Because actual owner, the owner of the assets;
 12 and beneficial owner, this is the beneficiary of the
 13 whole process of getting the income, et cetera. So
 14 these are two different things, I think.

15 Q. Your evidence earlier today --

16 A. And here --

17 Q. Your evidence earlier today in answer to my questions
 18 was that you did not know and could not help this court
 19 with whether there was a difference between an actual
 20 and beneficial owner. Based on what you just said, do
 21 you wish to revise that position?

22 A. No, I think it was another context, I can't recall, that
 23 we were discussing the actual ownership and beneficial
 24 ownership. If you could remind me.

25 Q. I want to be very clear with you. Do you understand and

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1 are you able to give evidence to this court on the legal
 2 distinction between "actual" and "beneficial" owner?
 3 Yes or no.
 4 A. From the legal point of view I think the answer is no.
 5 But from the practical point of view I think the answer
 6 is yes.
 7 Q. Okay. Do you accept that Kazakhstan, either directly or
 8 through the Ministry of Finance, is the actual and
 9 beneficial owner of the assets that are discussed at
 10 F/35 and F/65?
 11 A. No, it is beneficial owner but it is not actual owner.
 12 Q. Okay.
 13 MR JUSTICE TEARE: Just before we leave page 35, Mr Sprange,
 14 to whom is this letter addressed?
 15 MR SPRANGE: Yes, I don't know if you heard the judge's
 16 question --
 17 A. I am really very sorry.
 18 Q. I will put it to you this way. Could you explain who
 19 the author is and who the recipient is of the document
 20 we see at F/35?
 21 A. F/35. Okay.
 22 Q. If you would like the Russian, it is on the two pages
 23 before.
 24 A. Okay, okay. So F/35 and F/36, the letter from budget
 25 planning and control division, and addressed to our

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1 department. Because it is to Mr Zhanar, department of
 2 monetary operations, so this person was the director of
 3 department of monetary operation at that time.
 4 I think because at the very beginning this letter
 5 refers to the previous letter, that I think it was the
 6 letter from department of monetary operations to this
 7 budget planning and control division, because it looks
 8 like the answer. So it should be the previous letter to
 9 this. It should be the previous letter before this
 10 letter.
 11 Q. In this discussion we have been having about who owns
 12 assets, do you accept this: that if NBK was the actual
 13 or beneficial owner of any of these assets, that that
 14 ownership would be reflected in the financials and
 15 balance sheet of NBK?
 16 A. You mean the balance sheet of NBK? I don't know,
 17 because I'm not the part of the process of making the
 18 financial statements. I know that there is the separate
 19 process, because when we do the reports on the National
 20 Fund or our own reports, these are investment reports,
 21 it is not the financial or accounting reports. But --
 22 Q. I am perplexed by this. You are a deputy governor of
 23 NBK, and you can't tell me whether National Fund assets
 24 are recorded in your financials as NBK assets or not?
 25 A. No, I know the answer. I know the answer. I think --

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1 Q. Okay, what is it?
 2 A. We have the separate accounting for the National Fund
 3 assets, and I think it is somewhere in Civil Code of the
 4 Republic of Kazakhstan that the assets that we have or
 5 that we manage because of the trust should be shown
 6 separately. I think it is somewhere in our Civil Code.
 7 Q. Okay. I am sure Mr Quest will draw your attention to
 8 any documents that he thinks are relevant in that
 9 regard.
 10 Turning back to my question, do you accept that the
 11 National Fund assets managed by NBK under the TMA are
 12 not in NBK's financials on their balance sheet? Leave
 13 aside the reason. Yes or no?
 14 A. No, they are separately. We put them separately.
 15 Q. Sorry. So that means they don't appear on NBK's balance
 16 sheet.
 17 A. At NBK balance sheet. But first they have appeared
 18 separately, and second they appeared I think in a very
 19 limited representation, because as far as I know we are
 20 not showing any particular line. So we could check.
 21 And coming back to your question why I am, as
 22 a deputy governor, not aware about the details of
 23 financial accounting, unfortunately, or fortunately,
 24 I am responsible for ... (break in audio transmission)
 25 ... for international affairs of the bank. So the

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1 accounting, the financials, are out of area of my
 2 responsibility.
 3 Q. Okay.
 4 I want to turn to another topic. In the F bundle
 5 could you please take up for me -- we are now in
 6 volume 2 of the F bundle. Please go to page F/475.
 7 A. Page 475.
 8 Q. You will see there in the bottom emails there is an
 9 email from James Ronald.
 10 A. Yes.
 11 Q. Could you just explain who James Ronald is, please?
 12 A. Yes, of course. James Ronald is our relationship
 13 manager, and he was the relationship manager from the
 14 very beginning, from 2007, when Bank of New York was
 15 merged with ABN Ambro Mellon. So this person was
 16 responsible for our accounts since the very beginning.
 17 Q. At this time in September 2017 who was his direct
 18 contact within NBK?
 19 A. In 2017 James mostly communicated with
 20 Zhanar Kenzhebayeva, Batur Vakhidov, myself and
 21 Zhaynar Sarzhov. So probably four of us.
 22 Q. In this email he says:
 23 "I received a request from NBK to amend the
 24 registration naming of their accounts at sub-custodian
 25 level. Please advise if there is any reason as to why

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1 we should not act on these. We do not know whether such
2 action would stop any of their assets from being frozen
3 but it may make it harder for them to be identified."

4 Were you responsible or behind that question?
5 A. I think the colleague of mine, Zhanar Kenzhebayeva and
6 Zhaynar Sarzhov gave the request to BNYM, but I was
7 aware about this. As the director, of course I was
8 aware about this.

9 Q. It seems clear from this, and there are some other
10 emails that we will go to in a moment, that what you
11 were seeking to do was to move assets from an account
12 that might be susceptible to attachment in Belgium to
13 other accounts where it would not be susceptible to
14 attachment in Belgium; is that right?

15 A. No, I think the issue here is to amend the naming of the
16 accounts at sub-custodian. I told you that BNYM opens
17 at the sub-custodian's level, and I remember very
18 clearly that in Sweden case the name of the account at
19 SEB, the local Swedish sub-custodian; the name of the
20 account opened by BNYM at SEB contained at the naming of
21 the account the Ministry of Finance of the
22 Republic of Kazakhstan, something like this. That is
23 why the authorities in Sweden decided that the account,
24 the assets on this account belongs to the Ministry of
25 Finance, and I think that was the reason of freeze.

1 Q. What you --

2 A. So my colleagues -- that's why my colleagues asked BNYM
3 to be more precise in the naming the account, accounts,
4 at the sub-custodian level.

5 Q. Isn't it what -- sorry.

6 A. Yes, I think this issue --

7 Q. Isn't what you just said a long-winded way of saying: we
8 were trying to find a way to ensure that assets were not
9 frozen in Belgium?

10 A. No, we wanted to find the way that the name of the
11 account will be right, so the name of the account will
12 not contain the third party.

13 Q. So that it couldn't be attached in Belgium.

14 A. So it couldn't be wrongly attached in any jurisdiction.

15 Q. Okay, leave aside wrongly or rightly, because that is
16 for the court's --

17 A. Okay.

18 Q. -- jurisdiction. I want you to listen carefully to this
19 question, because the answer is of some import. Do you
20 accept that at this point in time NBK was trying to find
21 ways to avoid National Fund assets from being attached?
22 Yes or no.

23 A. No, at that time NBK was trying to protect NBK's assets
24 from the attachment. That will be the right answer.

25 Q. So protect them from attachment to avoid them being

1 attached.

2 A. Okay, okay. So I agree with you, yes, okay.

3 Q. Just to be clear on this, if you go to F/472 in the same
4 bundle, and I would like you to read Mr Ronald's email
5 of 4 October at 11.49. That is the one at the bottom.
6 (Pause)

7 A. Yes, I see. Here I can see the conversation about
8 moving our assets from BNY SA/NV, London Branch, so
9 London Branch of Belgian bank, to the BNYM London
10 Branch, so London Branch of US bank, I believe.

11 Q. Yes, okay. Then Mr Carl Pastars says:

12 "I suspect they want to avail themselves of the UK
13 privilege such as the State Immunity Act."

14 Is his speculation there accurate? Is that what the
15 intention was?

16 A. I don't know. But I remember this conversation with
17 BNYM in summer of 2017, so it was before any freeze.
18 Our relationship manager, James Ronald, said that at the
19 beginning of 2018 BNYM SA/NV is going to close London
20 Branch, so we need to decide and we need to change the
21 contract, we need to change the contract with other Bank
22 of New York entity. And I think our idea was to stay
23 under the UK legislation and to stay with London Branch
24 because of the time difference as well.

25 So I think in summer of 2017 we advised Mr Ronald

1 that the best case for us, if they are going to close
2 BNYM SA/NV London Branch, to move to the London Branch
3 of US bank.

4 So -- and I think we were waiting for the final Bank
5 of New York decision on the closing of the branch, but
6 I believe this conversation started again because of the
7 freezing orders that we were receiving that time.

8 Q. Okay. Now, these steps that were being contemplated by
9 you and your three colleagues at NBK
10 in September/October 2017, to your knowledge were they
11 discussed with the Government of Kazakhstan?

12 A. No, no. It was purely the conversation between NBK and
13 BNY.

14 Q. Is it your evidence to this court that there were never
15 any communications between you, or any of your
16 colleagues at NBK, and the Government of Kazakhstan
17 whether it be the Ministry of Justice or elsewhere,
18 regarding these attachment orders and what might be done
19 with assets?

20 A. No, I think we were discussing the attachment, but we
21 didn't discuss with the government the GCA or changing
22 the party of the GCA, no.

23 Q. What did you discuss then?

24 A. I think we started to discuss with the government,
25 I think it was through our legal people, when the

1 Swedish order came we started to discuss -- we started
2 to ask what kind of steps the government make because of
3 this freeze, because from our point of view it was
4 unlawful attachment.

5 We knew that the parties around the dispute, the
6 Stati parties and the Republic of Kazakhstan, that's why
7 we said -- I am more than sure that we said to the
8 government that they need to make all necessary steps.
9 But later on we decided to step in and we hired the
10 legal adviser. I think it was in September 2017.

11 MR SPRANGE: Okay.

12 My Lord, subject to just checking virtually with my
13 colleagues that there are no further issues arising,
14 those are our questions. So if I could just have
15 30 seconds.

16 MR JUSTICE TEARE: Yes, of course. (Pause)

17 MR SPRANGE: Confirmed, my Lord.

18 MR JUSTICE TEARE: Thank you very much.

19 (4.13 pm)

20 Re-examination by MR QUEST

21 MR QUEST: I have a couple of questions in re-examination.

22 Could you please turn back to page F/29, bundle F1,
23 page 29.

24 A. Yes.

25 Q. Do you remember you were asked some questions about this

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1 letter from the Ministry of Finance, and you said you
2 thought there had been a resolution from management in
3 relation to the letter?

4 A. Yes.

5 Q. Can I ask you to turn back in the same file to page
6 F/26.

7 A. Yes, right. Oh, excuse me, here is the resolution on
8 page F/25.

9 Q. Could you just explain to the court what you mean by
10 that, and what the relevant words mean?

11 A. Yes, right. So at 25 this is the resolutions for this
12 letter. And, as I can see, it is the resolution from
13 our deputy governor, Ms Aimanbetova, dated November 12
14 of 2001, and it states to Mr Alzhanov, this is the
15 director of monetary operation department, for answer.

16 And so this word could be translated as "disagreement"
17 or could be translated as "comment". So here is the --
18 here there is what I was --

19 Q. Sorry. Just so we are absolutely clear, what is the
20 word on the page that could be translated as
21 "disagreement", "disagree"?

22 A. (Russian spoken). If we could ask the translator to
23 give the exact translation.

24 THE INTERPRETER: It means for providing an answer and for
25 making comments, but that is purely a literal

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1 translation, and I agree "comments" may be understood in
2 several different ways.

3 MR QUEST: How do understand the word, Ms Moldabekova.

4 A. It is -- it means negative comment.

5 Q. Thank you. You remember you were also asked some
6 questions about the accounts for the National Bank, and
7 how the National Fund was accounted for. You said that
8 you thought there was something in the Civil Code
9 requiring the National Fund to be accounted for
10 separately; do you remember that?

11 A. Yes.

12 Q. Do you remember Mr Sprange said I might show you in due
13 course any relevant documents? Do you have a file D2
14 there, please? Can you go to tab 27 in file D2.

15 You should have a title page which reads "Schedule
16 of ownership and legislation, case law and
17 commentaries".

18 A. So D2, page 27.

19 Q. Tab 27. Do you have numbered tabs in your file? It is
20 page 433.

21 A. Page 433. Okay.

22 Q. That is just a title page to show you what this is.

23 This is a collection of legislation, case law and
24 commentaries that has been prepared for this case. Do
25 you understand?

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1 A. Yes.

2 Q. If you go to page D2/466 --

3 A. Yes.

4 Q. -- do you see this contains articles?

5 A. Yes.

6 Q. These are articles from the Civil Code, in Russian and
7 in translation.

8 A. Yes, right.

9 Q. Do you see Article 885, paragraph 2?

10 A. Yes, right, so that is the article that I was referring
11 to. It states that the trust managers shall account the
12 trust management property separately from the property
13 belonging to him/her on the ownership right. Economic
14 management, operational management. Yes, I think I was
15 referring to this article.

16 MR QUEST: Thank you very much. I don't have any more
17 questions for you.

18 Does your Lordship have any questions?

19 MR JUSTICE TEARE: No.

20 Thank you very much indeed.

21 A. Thank you. Thank you very much.

22 MR MALEK: My Lord, that concludes the factual evidence of
23 the claimants.

24 (4.19 pm)

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1 Housekeeping

2 MR JUSTICE TEARE: Thank you very much. So 10.30 tomorrow

3 with the experts on Dutch law?

4 MR MALEK: Belgian law.

5 MR JUSTICE TEARE: Belgian law, I beg your pardon.

6 MR MALEK: We could have Dutch, but ...

7 Could I just raise one point on the timetable.

8 I have just looked at the draft timetable and it did

9 have Professor Allemeersch and Mr Ryelandt giving

10 evidence tomorrow morning, but since Mr Ryelandt is not

11 giving evidence I wonder whether Professor Storme is

12 going to be at 2.00 pm or whether it is possible that we

13 might start his evidence tomorrow morning.

14 I suppose my question is really directed to

15 Mr Sprange.

16 MR SPRANGE: I will check. It's a possibility we had

17 envisaged. He does have lectures tomorrow for students,

18 of the virtual variety obviously, so we think he may be

19 flexible on those. We will email your team overnight

20 just to let you know. Certainly, speaking for myself,

21 I think we are on good track in terms of time. I don't

22 see us lagging behind at all so far.

23 MR JUSTICE TEARE: Thank you.

24 Could I just have a word with Mr Quest.

25 Mr Quest, it relates to the live streaming tomorrow.

1 MR QUEST: Yes.

2 MR JUSTICE TEARE: I've got a call which I must make after

3 this hearing, from those above me in the judicial

4 firmament who get very, very excited about live

5 streaming, and so could I just check with you: is the

6 live streaming which you propose for tomorrow, is that

7 what we were earlier discussing, namely live streaming

8 on YouTube?

9 MR QUEST: Yes. My understanding is that by tomorrow

10 morning we will be in a position to have a live stream

11 hosted on YouTube, and anyone who has the link for that

12 will be able to watch the proceedings. What we had

13 envisaged is that that link will be made available on

14 the Stewarts website and could, if necessary, be

15 included in the cause list.

16 MR JUSTICE TEARE: Sorry, could be included?

17 MR QUEST: Could be included in the cause list. Because

18 otherwise members of the public won't know how to get to

19 it. I think what is envisaged, if your Lordship was

20 content with that, is that when the case listed it will

21 be listed with a link that people can go to to find the

22 information.

23 MR JUSTICE TEARE: Yes. The new law which permits that, the

24 language which is used in the new law is what exactly?

25 If you've got it available.

1 MR QUEST: I will have to find it. Just give me a moment.

2 (Pause) I will put it on the screen if I can.

3 You should be able to see it on the screen. It is

4 section 85A(1)(a):

5 "May direct that the proceedings are to be

6 broadcast ... for the purpose of enabling members of the

7 public to see and hear the proceedings."

8 MR JUSTICE TEARE: For this purpose we are assuming that

9 "broadcast", in the manner specified in the direction,

10 is wide enough to include live streaming on YouTube.

11 MR QUEST: We are. It is perhaps worth mentioning that, of

12 course, in a way it is slightly different from the

13 normal arrangement; if the link is published, then

14 anyone can look at it anywhere in the world.

15 MR JUSTICE TEARE: Yes.

16 MR QUEST: So it is totally public.

17 MR JUSTICE TEARE: Yes. That presumably means it can be

18 recorded.

19 MR QUEST: I don't think there would be any practical

20 means -- I mean, I will be told if I'm wrong about that,

21 but as I understand it you couldn't prevent people from

22 recording it. They could just simply take a record from

23 the computer screen, so ...

24 MR JUSTICE TEARE: It's possible that I may have to send you

25 an email later this evening about this matter, but thank

1 you very much for that further clarification.

2 Subject to that, 10.30 tomorrow.

3 MR QUEST: Thank you.

4 MR JUSTICE TEARE: Thank you all very much.

5 MR SPRANGE: I just have one question. Will we have new

6 dial in details tomorrow or use the same?

7 SPARQ TECHNICIAN: No, you will have new dial in details

8 which will be sent to you.

9 MR SPRANGE: Okay.

10 SPARQ TECHNICIAN: Thank you. Thank you all very much.

11 (4.25 pm)

12 (The hearing was adjourned until 10.30 am on Friday,

13 27 March 2020)

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