

# OPUS 2

## INTERNATIONAL

National Bank of Kazakhstan v Bank of New York

Day 2

March 27, 2020

Opus 2 International - Official Court Reporters

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1 Friday, 27 March 2020  
 2 (10.30 am)  
 3 MR JUSTICE TEARE: If we are all ready to begin, let us  
 4 begin.  
 5 Housekeeping  
 6 MR MALEK: I don't know whether Mr Quest can update us on  
 7 the question of the live link.  
 8 Mr Quest, are you there?  
 9 MR QUEST: Yes, I am. I am told it is all just about ready  
 10 and we are just waiting for the details of the link;  
 11 when we have that, that will be posted on the Stewarts'  
 12 webpage, which is the one that appears on the cause  
 13 list.  
 14 MR JUSTICE TEARE: Thank you.  
 15 Mr Quest, I was told last evening that the press  
 16 office, the judicial press office, had received  
 17 a complaint from a journalist that he had been unable to  
 18 access what he described as a directions hearing which  
 19 was being conducted remotely.  
 20 The only hearing, if such it was, that I could think  
 21 of was the meeting we had on I think Wednesday to test  
 22 the system.  
 23 MR QUEST: Yes.  
 24 MR JUSTICE TEARE: I'm not sure that that was technically  
 25 a hearing. But I simply pass that on in case you are

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1 aware of any complaint having been received at your end.  
 2 MR QUEST: I am not, and as far as I understand it there was  
 3 at least one journalist who asked for and was given the  
 4 details of yesterday's hearing.  
 5 MR JUSTICE TEARE: Thank you. Thank you very much.  
 6 Yes, Mr Malek.  
 7 MR MALEK: Yes, with your Lordship's permission I call  
 8 Professor Allemeersch.  
 9 PROFESSOR BENOIT ALLEMEERSCH (called)  
 10 Examination-in-chief by MR MALEK  
 11 MR MALEK: Can you hear me, Professor?  
 12 A. Yes.  
 13 Q. Can you give the court your full name?  
 14 A. Professor Benoit Allemeersch.  
 15 Q. Where are you speaking from?  
 16 A. I am speaking from my office at my private home in  
 17 Mechelen, Belgium.  
 18 Q. Is there anyone in the room with you?  
 19 A. No.  
 20 Q. What papers do you have in front of you?  
 21 A. I have in front of me no papers, but I have all of the  
 22 binders here next to me, and the legislation.  
 23 Q. Just to explain the protocol, the system only works if  
 24 one person is speaking. So if you are not speaking, it  
 25 probably makes sense to turn off your microphone. Do

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1 you see the button where that happens?  
 2 A. Yes.  
 3 Q. Would you please pick up bundle E1, which is the bundle  
 4 of expert evidence on Belgian law. It is right that you  
 5 have given two reports and a joint memorandum; that is  
 6 right, isn't it?  
 7 A. Yes, that is correct.  
 8 Q. Are there any corrections that you would like to make to  
 9 your reports?  
 10 A. Not to my knowledge, no.  
 11 MR JUSTICE TEARE: Mr Malek, just before we go any further,  
 12 I think we should have the witness sworn.  
 13 MR MALEK: Yes, could we do that then, please.  
 14 MR JUSTICE TEARE: Does the witness have a copy of the  
 15 affirmation or the oath, depending on which he wishes to  
 16 take?  
 17 A. Yes, I do. I have in front of me the text of the  
 18 affirmation.  
 19 MR JUSTICE TEARE: If you would like to take that, could you  
 20 state it.  
 21 PROFESSOR BENOIT ALLEMEERSCH (affirmed)  
 22 MR JUSTICE TEARE: Thank you very much.  
 23 MR MALEK: Could we turn now to your evidence. The first is  
 24 the report dated 20 December, which is at tab 1 of the  
 25 bundle. Can you please turn to the end of that document

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1 and the declaration, E1 at page 31, is that your  
 2 signature?  
 3 A. That is my signature, yes.  
 4 Q. Then if we turn to the joint memorandum of experts on  
 5 Belgian law, which is at tab 4, can you confirm that  
 6 that is your signature at E1/112?  
 7 A. Yes.  
 8 Q. Finally, can we turn to the supplemental report, which  
 9 is at tab 5, and can you confirm, please, that that is  
 10 your signature at page 146?  
 11 A. Yes, I can.  
 12 Q. Can you confirm that the evidence that you have given in  
 13 those two reports and the joint memorandum represent  
 14 your opinion on the matters that you have been asked to  
 15 express a view on?  
 16 A. Yes, it does.  
 17 MR MALEK: Thank you. I have no further questions.  
 18 (10.36 am)  
 19 MR JUSTICE TEARE: Do we have Mr Sprange?  
 20 MR QUEST: He seems to be on mute.  
 21 MR SPRANGE: How's that?  
 22 I know you are all very excited by the prospect of  
 23 me being on mute for the day.  
 24 (10.36 am)  
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1 Cross-examination by MR SPRANGE  
 2 MR SPRANGE: Professor Allemeersch, my name is Tom Sprange  
 3 from the law firm of King & Spalding. I act for the  
 4 second to fifth defendants in these proceedings and will  
 5 have some questions for you today.  
 6 Can I start by asking you this: have you ever given  
 7 evidence in any kind of proceeding before?  
 8 A. I have given expert witness evidence before, but in  
 9 writing.  
 10 Q. Yes. So this is your first time giving oral evidence?  
 11 A. Yes, although I believe I'm perhaps in an arbitration  
 12 proceedings, but that must be more than ten years ago.  
 13 But certainly in English courts it is the first time for  
 14 me.  
 15 Q. Well, welcome. I would like to start by understanding  
 16 the scope of your evidence, and in particular what  
 17 evidence on Belgian law you are able to provide the  
 18 court with to assist it in determining the issues. For  
 19 that purpose could I ask that you please take up your  
 20 second report for me, please. It is tab 5 of E1.  
 21 A. Yes.  
 22 Q. On page E1/25, paragraph 10, you make the statement:  
 23 "It was held that it was not competent to decide on  
 24 the issue of Bank of New York's debt and the  
 25 uncertainties raised by Bank of New York's declaration,

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1 and that the English courts were competent to do so."  
 2 When you say that, is the following correct: you are  
 3 referring to the Belgian garnishee judge in the  
 4 conservatory garnishee proceedings referring that  
 5 particular topic to this court; is that correct?  
 6 A. Yes, in the set aside judgment.  
 7 Q. In the set aside judgment. Do you consider, based on  
 8 your assessment of the 25 May 2018 decision and all the  
 9 materials you have seen since, there to be any Belgian  
 10 law issues encompassed within those two topics, the  
 11 question of Bank of New York's debt and the Bank of  
 12 New York declaration?  
 13 A. Could you perhaps clarify that question?  
 14 Q. You say here that "The Belgian court decided it was not  
 15 competent to decide on the issues of ..." and then you  
 16 list two issues, "and that the English courts were  
 17 competent to do so". As a Belgian lawyer, based on your  
 18 view of the judgment and all of the materials you have  
 19 seen, do you regard those two questions as arising  
 20 purely under English law, and then any foreign law that  
 21 the English court considers appropriate?  
 22 A. I understand your question.  
 23 Let me start perhaps by first saying that I did not  
 24 understand the question in relation to the competence of  
 25 the judge to be part of the instruction, so it's not an

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1 issue that I have dealt with very thoroughly in  
 2 preparing for this witness testimony. However, it is my  
 3 understanding of the set aside judgment and also of the  
 4 state of Belgian law that the question in respect of who  
 5 the debt is owed to, what debt is owed by BNYM, and the  
 6 uncertainties relating to that are a matter of the  
 7 merits between BNYM and either NBK or the Republic, and  
 8 that the substantive law that applies to that  
 9 relationship should decide those issues. And my  
 10 understanding was that that substantive law would be  
 11 English law.  
 12 Q. If you, in a similar vein, could please take up  
 13 Professor Ryelandt's first opinion, which we find at  
 14 tab 2 of the same bundle, and please go to  
 15 paragraph 7.6, which is on E1/52.  
 16 A. Yes.  
 17 Q. Could you read that, please?  
 18 A. 7.6 it is?  
 19 Q. That's correct, yes, starting:  
 20 "On the facts, the Belgian garnishment order is  
 21 a protective garnishment."  
 22 A. "I am instructed that the Stati parties ..."  
 23 Q. Sorry, you don't need to read it out, just read it to  
 24 yourself.  
 25 Just while he is reading that, Mr Malek, is the

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1 feedback problem from yesterday still arising or is it  
 2 okay?  
 3 MR MALEK: From my perspective it sounds good.  
 4 MR SPRANGE: Okay. (Pause)  
 5 You have had an opportunity to read that?  
 6 A. Yes.  
 7 Q. Have you taken, with respect to your report in this  
 8 case, your report, sorry, the same approach? In other  
 9 words, you do not consider the executionary garnishments  
 10 to be relevant to the issues that you have been asked to  
 11 address?  
 12 A. If the question relates to the executory garnishments  
 13 that have been effected or might have been effected in  
 14 this case, then the answer is no. Those garnishments  
 15 I have not involved in my analysis.  
 16 However, when discussing the law of attachment in  
 17 Belgian procedural law, some issues are sometimes common  
 18 in the area of protective or conservatory attachments on  
 19 the one hand and executory attachments and garnishments  
 20 on the other hand, and an example of that is the  
 21 Sonatrach case.  
 22 Q. So if I understand your answer correctly, the position  
 23 is as follows: you have focused on the protective  
 24 garnishee order and questions relating to its subject  
 25 matter. Correct?

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1 A. That is correct.  
 2 Q. You have not engaged with or considered questions  
 3 arising with respect to the executionary garnishee order  
 4 and those proceedings. Correct?  
 5 A. Correct.  
 6 Q. Where there is commonality of jurisprudence between both  
 7 forms of garnishee order you have referred to those.  
 8 A. Yes.  
 9 Q. Okay. Moving along, if you could go to paragraph 23 of  
 10 your supplemental report for me, please.  
 11 A. Yes.  
 12 Q. There you seem to be addressing the point that we have  
 13 just discussed, that there are a wide range of  
 14 enforcement mechanisms available, there is the  
 15 protective measures and the executionary measures, and  
 16 you regard the right of recourse of creditors to be  
 17 something that arises in the executory measures phase  
 18 and therefore not something that you considered  
 19 appropriate for the purposes of considering the subject  
 20 matter of this garnishee order. Is that a fair summary?  
 21 A. Well, perhaps not entirely. I think I have said that  
 22 creditors cannot take any protective or executory  
 23 measures solely on the basis of their right of recourse.  
 24 Protective measures might serve to protect that  
 25 recourse, and executory measures might serve to effect

1 that recourse, but the measures themselves each have  
 2 their own mechanism with their own conditions.  
 3 The right of recourse is not a standalone legal  
 4 basis on the basis of which you can exercise certain  
 5 measures.  
 6 Q. Okay. So if we look then at paragraph ...  
 7 MR JUSTICE TEARE: We seem to have frozen.  
 8 MR MALEK: Yes, that appears to be the case, my Lord. Can  
 9 the witness hear us?  
 10 Professor Allemeersch, are you there?  
 11 A. Yes, I can hear you and see you.  
 12 MR MALEK: It looks as if it is Mr Sprange who we seem to be  
 13 missing.  
 14 SPARQ TECHNICIAN: I think he's got a bad internet  
 15 connection. (Pause)  
 16 We're just trying to re connect him. (Pause)  
 17 MR BHALLA: My Lord, I have just received a message from  
 18 Mr Sprange saying he is trying to sort out his  
 19 connection and he anticipates he will be a few minutes,  
 20 possibly three or four minutes.  
 21 MR JUSTICE TEARE: Thank you.  
 22 (10.50 am)  
 23 (Pause for re connection of Mr Sprange)  
 24 (10.57 am)  
 25 MR BHALLA: Just to update you, Mr Sprange's internet

1 connection has gone down -- ah, he is back.  
 2 MR SPRANGE: Hello. The BT internet has gone down so I'm so  
 3 a dogle, much to the pleasure of my three children,  
 4 their home schooling is now over for the day.  
 5 So my apologies, and hopefully the picture quality  
 6 remains okay.  
 7 Professor, I'm not sure whether you remember the  
 8 question.  
 9 MR JUSTICE TEARE: I certainly don't.  
 10 MR SPRANGE: I'll repeat it.  
 11 You were distinguishing between the right of  
 12 recourse and the contractual question of whether debt  
 13 was owed, in the context of not addressing executionary  
 14 garnishment measures in your opinion. Do you recall  
 15 that?  
 16 A. I think I made a distinction between protective and  
 17 executory garnishment and thereby explained that the  
 18 right of recourse is an amalgam of principles and not  
 19 a standalone legal basis, yes.  
 20 Q. Okay. They are things that you say do not arise with  
 21 respect to the question that the Belgian garnishee judge  
 22 has referred to this court?  
 23 A. Could you restate that question?  
 24 Q. Why don't I do this: if you take a look at paragraphs 26  
 25 and 27 of your second report.

1 A. Yes.  
 2 Q. You will see there the last paragraph of 26 starting:  
 3 "As the Belgian garnishment order concerns this  
 4 specific enforcement ..."  
 5 If you just read that and the next paragraph.  
 6 (Pause)  
 7 A. Yes. In that paragraph I mean to say that conditions  
 8 proper to executory enforcement are not the subject of  
 9 this discussion here, yes.  
 10 Q. So boiling it down, the protective garnishee judge in  
 11 the decision of May 2018 has referred to this court the  
 12 question of the debt, and in your view that is to be  
 13 governed by English law. And there are separate Belgian  
 14 law issues that may arise on the question of an  
 15 executionary garnishment order, but you do not address  
 16 those because you do not consider them to be relevant.  
 17 A. Yes, that is correct.  
 18 Q. If we look at the question of the debt, do you accept  
 19 this as a proposition: if the English court reaches  
 20 conclusions as to who are the actual parties to the GCA  
 21 whether it be RoK or NBK, will assist the Belgian court  
 22 in answering the question that has been referred?  
 23 A. Yes. If the English court thereby clarifies to whom  
 24 BNYM owes the cash on the bank accounts of which NBK is  
 25 the account holder, that indeed, in my opinion, will

1 settle the issue.

2 Q. On that, if we could just go back to page 127 of your  
3 second report, paragraph 17.

4 A. Yes.

5 Q. So you, as I read that, accept that under whatever  
6 principles arise under English law it is concluded that  
7 RoK indeed has a claim against the bank, that that would  
8 be satisfactory for a Belgian court?

9 A. Yes, if your -- what I mean in paragraph 17 is that it  
10 does not matter under which legal system the claim that  
11 the seized debtor has on the garnishee arises for the  
12 condition of Article 45 of the Belgian Judicial Code to  
13 be fulfilled. In other words, you can garnish a debt  
14 owed to the seized debtor regardless of whether that  
15 debt falls within the ambit of a foreign law or Belgian  
16 law. As long as there is a debt owed to the seized  
17 debtor.

18 Q. Under the relevant system of law, which is English law  
19 here.

20 A. In this case I understand that it is English law, but  
21 that is, of course, not within my competence to decide  
22 on.

23 Q. No, we have the judge here for that.

24 Now, do you accept that whatever the legal principle  
25 or legal theory is under English law, whether it be --

1 I will rephrase it.

2 Do you accept that if an English court concludes  
3 that the reason RoK has a claim against the Bank of New  
4 York is because of English law principles of agency or  
5 trust or other concepts does not matter? It is simply  
6 the ultimate conclusion.

7 A. I think indeed what counts is that the English court  
8 answers the question whether the cash on the accounts is  
9 owed to NBK or the Republic. That is what counts. And  
10 what the legal rationale is for that or the legal  
11 analysis that the court makes, in principle should not  
12 make any difference.

13 Q. Okay. I want to ask you some short questions about some  
14 of the specific points that you address.

15 As I read your opinion, you accept that there are  
16 exceptions under Belgian law that can apply where the  
17 debt is not directly owed as between the garnishee and  
18 the judgment debtor.

19 A. That is correct.

20 Q. And you agree that those exceptions can arise in the  
21 context that you have addressed; in other words,  
22 a provisional garnishee order.

23 A. Yes.

24 Q. Do you accept that the application of those will involve  
25 some Belgian law issues and likely some Kazakh law

1 issues, but not English law?

2 A. Well, as I stated before, the applicable law analysis  
3 was not part of the instructions. But from my report it  
4 follows that, on the one hand, the seat of the legal  
5 norm is Article 1445 Belgian Judicial Code, and that is  
6 of course Belgian law, so the exceptions to Article 1445  
7 are also Belgian law exceptions, and I specify those,  
8 those are, for example, simulation and fraud; and then  
9 there's Kazakh law, which indeed, in my opinion, comes  
10 to play when we discuss the question of whether NBK and  
11 RoK can be equated; and then there is the English law  
12 that that applies on, to the question of how to  
13 interpret what BNYM is owing to NBK or the Republic.

14 Q. Okay, thank you. So insofar as the applicable standard  
15 and test for the exceptions -- which you have dealt with  
16 them in your report and I will take you to them in  
17 a moment, but let's call them two umbrellas, simulation  
18 and then fraud, and there is two types of fraud.

19 Leaving aside the discussion between you and your  
20 two Belgian colleagues on the test, do you accept that  
21 the actual determination of whether those standards have  
22 been satisfied is down to Kazakh law?

23 A. I'm sorry, I was on mute. No, I don't see how the test  
24 of simulation or fraud would fall under Kazakh law.  
25 That does not appear in my reports.

1 Q. Okay, can I put it to you this way: if the relationship  
2 between NBK and RoK is governed by the TMA -- and  
3 hopefully you are following the well-used acronyms in  
4 this case -- if that is governed by Kazakh law, and the  
5 nature of those two entities, the Sovereign State, RoK,  
6 and NBK, is also governed by Kazakh law, wouldn't that  
7 be the law, the applicable law that you would look to  
8 see whether there is indeed simulation?

9 A. No, because in my view the features of the legal  
10 relationship between the Republic and the National Bank  
11 do not determine or are irrelevant as to the question of  
12 knowing whether the two can be equated or not.

13 As to simulation, I've made reference to the  
14 conditions set for by Belgian law on simulation. Now,  
15 I don't express any opinion on whether the English law  
16 or the English court might apply conditions of English  
17 law relating to simulation, obviously as a Belgian  
18 expert I am only knowledgeable about the Belgian law  
19 conditions on simulation, but I don't see how Kazakh law  
20 on simulation would apply here.

21 Q. We may be at slight cross-purposes here. I am not  
22 suggesting that the Kazakh law on simulation would be  
23 relevant. I'm suggesting that, as a matter of fact,  
24 when you take the Belgian law test of simulation and you  
25 look to see whether those conditions have been

1 satisfied , you must look factually at the position  
 2 between RoK and NBK, and that requires, among other  
 3 things, consideration of the law, the legal nature of  
 4 those two entities and the legal relations between the  
 5 two of them. Do you agree with that, that that latter  
 6 factual aspect would be relevant?  
 7 A. Not entirely , because my opinion is that under the  
 8 Belgian law of simulation what is required is the  
 9 existence of two agreements, the ostensible agreement  
 10 and the real agreement, and the real agreement is kept  
 11 secret. To my mind, the agreements we are talking about  
 12 here would be -- the ostensible agreement would then be,  
 13 if someone would want to show that there is simulation  
 14 here, the agreement between NBK and BNYM, and the  
 15 so-called true agreement would then be the agreement  
 16 between the Republic and BNYM.  
 17 As those relationships , at least the relationship  
 18 between the National Bank and BNYM, is clearly governed  
 19 by, as I understand it of course, by English law,  
 20 I would expect that that matter would probably be  
 21 covered by English law.  
 22 Q. Okay. So in effect what you are saying is that when you  
 23 are dealing with simulation under Belgian law it is  
 24 a consideration of the two agreements that you have  
 25 described here, the ostensible agreement and the secret

1 agreement; and it is a pure Belgian law question and you  
 2 don't need to delve into the governing law of either the  
 3 ostensible or secret agreement. Is that fair?  
 4 A. Well, to understand what the purportedly ostensible  
 5 agreement entails, I would assume that the courts facing  
 6 that question or dealing with that question would  
 7 probably also interpret that so-called ostensible  
 8 agreement under the law that governs it. But it is --  
 9 I believe it's a delicate matter here, the interaction  
 10 between Belgian law and English law. And as  
 11 I explained, it's not a matter that I have fully  
 12 exhausted here in the report, as in my understanding it  
 13 was not within the scope of the instructions .  
 14 Q. I understand. You make reference to the Sonatrach  
 15 judgment and perhaps if you could go to appendix 5 of  
 16 your first report, page E1/42.  
 17 A. Yes.  
 18 Q. There I think you have sought to put in illustrative  
 19 terms the dynamic between the various parties. Do you  
 20 accept that the analogue to these proceedings is  
 21 distinguishable?  
 22 A. I'm not entirely familiar with the concept of -- or  
 23 rather if the concept of distinguishable here has  
 24 a legal meaning, but obviously there is a distinction .  
 25 But my view is that the distinction in the facts and

1 circumstances of Sonatrach should not determine or  
 2 should -- is not -- does not stand in the way of  
 3 applying the principle that the Court of Cassation  
 4 adopted in the Sonatrach case to the facts and  
 5 circumstances of this case; because I believe that the  
 6 Court of Cassation has formulated them in sufficiently  
 7 broad and general terms, and that the elements here that  
 8 are different from what is in the Sonatrach case are not  
 9 of -- are not fundamental to such a degree that they  
 10 would prevent us from taking into regard the reasoning  
 11 that the Court of Cassation develops in Sonatrach.  
 12 Q. Thank you. Let's look at -- so there in Sonatrach the  
 13 creditor had a claim or a judgment against SNMC, and got  
 14 a garnishee order against the assets of Sonatrach which  
 15 were held by Distrigaz. Correct?  
 16 A. Yes.  
 17 Q. The issue was whether, because of the link between the  
 18 debtor and the Algerian State on the left and the links  
 19 between the Algerian State and Sonatrach on the right,  
 20 the asset in question could be subject to a garnishee  
 21 order.  
 22 A. Yes.  
 23 Q. Do you agree that the court, in deciding whether that  
 24 was the case, looked to the foreign law of incorporation  
 25 of the entities in question?

1 A. Yes.  
 2 Q. I am going to put up on the screen a mark-up of  
 3 appendix 5 that has been prepared. It is the same  
 4 document but just with some annotations. Forgive the  
 5 amateurish artwork at the bottom; perhaps if we can take  
 6 that out and focus on what is above. Thank you.  
 7 Here we have a conservatory garnishee order against  
 8 RoK, and in particular the National Fund, and it is held  
 9 in a bank account of NBK with the Bank of New York. Do  
 10 you see that distinction?  
 11 A. I see it .  
 12 Q. I have two questions for you. First , do you accept  
 13 that, as consistent with the court's reasoning in  
 14 Sonatrach, to work out the relationship between NBK and  
 15 RoK they will need to look to the foreign law; in other  
 16 words, Kazakh law?  
 17 A. If your question is do we need to look at Kazakh law to  
 18 determine whether NBK and RoK are one and the same  
 19 person for the purpose of applying Article 1445 of the  
 20 Belgian Judicial Code, to look to Kazakh law to  
 21 determine that, then I agree.  
 22 MR SPRANGE: Okay. All right .  
 23 Subject to checking with my colleagues, my Lord,  
 24 those are the second to fifth defendants' questions for  
 25 the Professor. (Pause)

1 Thank you very much.  
 2 A. Thank you, Mr Sprange.  
 3 (11.19 am)  
 4 MR JUSTICE TEARE: Mr Malek.  
 5 MR MALEK: Yes, my Lord. I think it should be just made  
 6 very clear that if Mr Sprange is going to challenge the  
 7 opinions of Professor Allemeersch, he is required to put  
 8 his points to him. We certainly, on our side, had no  
 9 idea that it was going to go so short. I just wanted to  
 10 make that very clear. But I have no questions by way of  
 11 re-examination.  
 12 MR JUSTICE TEARE: Thank you.  
 13 Professor Allemeersch, that then I think completes  
 14 your evidence. Thank you very much.  
 15 A. Thank you very much, your Lordship.  
 16 MR SPRANGE: In terms of Professor Storme, he is available  
 17 from 12.30.  
 18 MR JUSTICE TEARE: Right. Well, presumably we must then  
 19 adjourn until 12.30, unless there is anything else that  
 20 we can do.  
 21 MR SPRANGE: No. I apologise for the fact that we couldn't  
 22 get him earlier. He was originally down for 2.00 pm and  
 23 we were able to move him forward to 12.30, but that was  
 24 the best we were able to do given his other commitments.  
 25 MR JUSTICE TEARE: Right, if we start at 12.30 are we still

21

1 going to break at 1.00 pm or shall we just carry on  
 2 through until we finish? Any views?  
 3 MR MALEK: For my part, my Lord, we are happy to press on  
 4 rather than just have half an hour.  
 5 MR JUSTICE TEARE: Right.  
 6 MR MALEK: There may need to be a break but, subject to  
 7 that, 12.30 and just pressing on is fine with us.  
 8 MR JUSTICE TEARE: Yes, Mr Sprange.  
 9 MR SPRANGE: I quite agree, it makes sense, particularly as  
 10 he is an hour ahead, so ...  
 11 MR JUSTICE TEARE: Right, let us adjourn until 12.30 and  
 12 then we will carry on from 12.30 to finish the next  
 13 witness, though, as has been indicated, we may need to  
 14 break at some stage. Right, so ...  
 15 MR SPRANGE: Thank you.  
 16 MR JUSTICE TEARE: We shall go into mute.  
 17 (11.22 am)  
 18 SPARQ TECHNICIAN: Thank you very much. If all of you could  
 19 mute.  
 20 (The hearing was adjourned until 12.30 pm)  
 21 (12.30 pm)  
 22 MR JUSTICE TEARE: It is now 12.30, so are we all here  
 23 again?  
 24 MR MALEK: Yes.  
 25 MR JUSTICE TEARE: Very well.

22

1 Mr Sprange, it is your witness.  
 2 MR SPRANGE: Thank you.  
 3 PROFESSOR MATTHIAS STORME (called)  
 4 Examination in-chief by MR SPRANGE  
 5 MR SPRANGE: Can you hear me loud and clear?  
 6 A. Yes.  
 7 Q. Can I first ask you whether you have a witness  
 8 affirmation in front of you?  
 9 A. I have an affirmation and oath in front of me.  
 10 Q. You choose which one you would like to take and when you  
 11 have made your choice, if you could please be sure to  
 12 look at his Lordship and read it out slowly and  
 13 carefully. Thank you.  
 14 A. Being a Catholic I will take the oath, if I may.  
 15 Q. Thank you.  
 16 A. They told me I had to take a bible with me, so ...  
 17 PROFESSOR MATTHIAS STORME (sworn)  
 18 MR JUSTICE TEARE: Thank you very much, Professor Storme.  
 19 MR SPRANGE: You should hopefully have in front of you,  
 20 Professor Storme, a bundle called E1 with seven tabs in  
 21 it.  
 22 A. Yes.  
 23 Q. This process that you may be familiar with under English  
 24 procedural law is that I confirm with you your evidence,  
 25 your written evidence.

23

1 A. Yes.  
 2 Q. And your signature. So, what I am going to do is to  
 3 take you to various pages and ask you to confirm certain  
 4 things.  
 5 If I could start off, please, if you could go to  
 6 tab 3.  
 7 A. Yes.  
 8 Q. Could you please identify that document for me, please?  
 9 A. This is my first expert report.  
 10 Q. Could you please identify the signature on page 25?  
 11 A. That is my signature, yes.  
 12 Q. Can you confirm that the facts and matters addressed  
 13 therein are true to the best of your professional  
 14 qualifications and abilities?  
 15 A. I do confirm.  
 16 Q. The next document is behind tab 4.  
 17 A. Joint report.  
 18 Q. Yes, and could you please identify on the first and last  
 19 page the signatures there?  
 20 A. Actually they are on every page, and on the left is my  
 21 signature and then of the two other experts. It is my  
 22 short signature, not my full signature but it is the  
 23 shorter one.  
 24 Q. Understood. Then lastly if you could take up tab 7 of  
 25 the same bundle.

24

1 A. It is my supplemental report.  
 2 Q. Thank you. Signature on page 17, could you please  
 3 identify that?  
 4 A. On page 17 it's my full signature.  
 5 Q. Can you confirm that the facts and matters stated  
 6 therein are true to the best of your professional  
 7 abilities and qualifications?  
 8 A. I do confirm.  
 9 MR SPRANGE: Thank you, Professor Storme. Mr Malek, counsel  
 10 for the claimants will have some questions for you.  
 11 A. Okay.  
 12 Cross-examination by MR MALEK  
 13 MR MALEK: That is correct. Professor Storme, can you see  
 14 and hear me?  
 15 A. I do. Do I mute the microphone meanwhile or not, during  
 16 your questions?  
 17 Q. It is up to you. The one rule that we should try and  
 18 keep is that two of us can't speak together. So when  
 19 answering if you will be quiet and I will do the same,  
 20 but you can use the mute as well.  
 21 Can we start off, Professor, by summarising what  
 22 I understand to be your opinion in this matter. We will  
 23 look at it in more detail, but if I may just summarise  
 24 what I understand to be three opinions that you are  
 25 expressing in this matter.

25

1 The first is that it has already been decided that  
 2 the garnishment order has subject matter, this remains  
 3 the case unless and until the garnishment order is set  
 4 the aside by the Belgian court, and that decision was  
 5 taken whether the garnishment order was made by the  
 6 judge. That is one of your opinions, isn't it?  
 7 A. It's one of my opinions, even if I could qualify it on  
 8 small points. But basically it's one of my opinions.  
 9 Q. We will go through them in a bit more detail, but I just  
 10 wanted to see if I have understood three of your  
 11 opinions.  
 12 The second opinion that you express is that the cash  
 13 is within the scope of the garnishment order because it  
 14 is part of the National Fund of the Republic of  
 15 Kazakhstan; in other words, ownership of the National  
 16 Fund by the Republic of Kazakhstan is enough. That is  
 17 your ownership theory, is it not?  
 18 A. Yes. Even if it is always difficult to talk in a common  
 19 law court with civil law terminology, evidently, but  
 20 apart from this ...  
 21 Q. We will try and work on that and see if we can find  
 22 a way of resolving it.  
 23 Just on that second point, it is right to say that  
 24 your opinion is based on what you describe as the right  
 25 of recourse or, in longer form, the right of recourse of

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1 creditors of Kazakhstan. That's right, isn't it?  
 2 A. Yes. Even if the right of recourse is usually  
 3 formulated in a longer way, because the statutory rule  
 4 is that the creditors have a right of recourse on all  
 5 assets of the debtor. There is always right of recourse  
 6 on something, and the statutory rule is on everything,  
 7 on all assets of the debtor. Even some assets which are  
 8 not owned by the debtor, but these are then the special  
 9 rules.  
 10 Q. We will come and look at the right of recourse in more  
 11 detail in a moment.  
 12 Then the third opinion that you have expressed is  
 13 your opinion that the real dispute in this case is about  
 14 the application of Belgian enforcement law, and it is  
 15 your opinion that it is for the Belgian court to apply  
 16 Belgian enforcement law, and not the English court.  
 17 That is your third opinion.  
 18 A. Well, in my supplemental report you will see that  
 19 I distinguish different questions, and one of these  
 20 questions was referred to the English court, which I am  
 21 not putting in doubt, and which is also based on the  
 22 rule that you will find in the Belgian judiciary code.  
 23 What I do try to explain there is that, apart from this  
 24 question, there are a number of other relevant questions  
 25 that in my opinion remain under the jurisdiction of the

27

1 Belgian courts.  
 2 Q. We'll come back to that in a moment. I just wanted to  
 3 see if we could summarise briefly three of your  
 4 opinions; you have expressed others, but those are the  
 5 three that I want to mention at this stage.  
 6 Can we now turn to the decision of the 25 May 2018.  
 7 A. Yes.  
 8 Q. You should have that in the bundle described as the core  
 9 bundle and it is at the back there.  
 10 A. Core bundle, yes.  
 11 Q. What I would like to do is look at the section of this  
 12 decision which is relevant for present purposes. For  
 13 that purpose can you turn, please, to page 14. Perhaps  
 14 we can put it on the screen so that everybody can see  
 15 it, the section 3.1.4 "Lack of legal relationship with  
 16 the garnishee". Do you have that in front of you?  
 17 A. Page 14.  
 18 Q. Yes, it is a section 3.1.4.  
 19 A. Yes, I have it.  
 20 Q. "Lack of legal relationship with the garnishee". Do you  
 21 see that?  
 22 A. Yes.  
 23 Q. Before we do that, can we just go ahead a couple of  
 24 pages to a different section, where the learned judge  
 25 was dealing at 3.1.5 with the question of immunity from

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1 execution. Do you see that on the next page?  
 2 A. I see that on the next page.  
 3 Q. If we go over the page we can see a statement by the  
 4 judge, about halfway down, where the learned judge says:  
 5 "It is uncontested that this National Fund forms  
 6 part of and is the property of Kazakhstan."  
 7 Do you see that?  
 8 A. Yes.  
 9 Q. So the judge was proceeding on the basis that the  
 10 National Fund formed part and is the property of  
 11 Kazakhstan.  
 12 A. Yes.  
 13 Q. You see that?  
 14 A. Indeed.  
 15 Q. If we could then go back to 3.1.4 to make sure that we  
 16 have understood correctly what the judge has found.  
 17 First of all, she found, or rather she declined to  
 18 set aside the garnishment order on any of the grounds  
 19 advanced by Kazakhstan. That's correct, isn't it?  
 20 A. Yes.  
 21 Q. Secondly, as regards the argument about the lack of any  
 22 obligation owed to Kazakhstan, she said:  
 23 "The argument that is raised by Kazakhstan is about  
 24 the subject matter and the consequences of the  
 25 attachment. Kazakhstan's contention is actually that

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1 the garnishment could not have any subject matter and  
 2 that the garnishees still wrongly froze the accounts."  
 3 Then she said this:  
 4 "The fact that the garnishee is not the debtor of  
 5 the seized debtor is not a ground for withdrawal of the  
 6 authorisation order nor for the lifting of the  
 7 garnishment that has been authorised. The absence of  
 8 a debt from the garnishee towards the seized debtor only  
 9 leads to the conclusion that the garnishment has no  
 10 subject matter."  
 11 Just pausing there, she was referring, was she not,  
 12 to the test under Article 1445 of the Belgian Judicial  
 13 Code? That is what she was considering in this section  
 14 of the judgment.  
 15 A. The point referred is based on Article 1456.  
 16 Q. No, Article 1456 relates to the question of who is going  
 17 to decide the matter.  
 18 A. Yes.  
 19 Q. But the question about subject matter is Article 1445.  
 20 It is not very difficult; that is the case, isn't it?  
 21 A. I am not sure what your question is.  
 22 Q. She is applying the test, she is considering the test in  
 23 1445.  
 24 A. I'm not sure.  
 25 Q. Okay, we will come back to that. Then we have the next

30

1 section:  
 2 "In the current case, the attachment judge can only  
 3 consider that the garnishment that has been authorised  
 4 does indeed have subject matter. The subject matter of  
 5 the garnishment follows in fact from the declaration of  
 6 the garnishee."  
 7 Then she sets out the terms of the declaration. Do  
 8 you see that?  
 9 A. Yes. That is on page 14.  
 10 Q. Then she says over the page:  
 11 "The seized debtor is entitled to challenge the  
 12 declaration from the garnishee before the attachment  
 13 judge."  
 14 A. Yes.  
 15 Q. "However, this challenge relates to the debt of the  
 16 third party and must be referred to the trial court in  
 17 the proceedings on the merits under Article 1456, second  
 18 paragraph, of the Belgian Judicial Code."  
 19 Do you see that?  
 20 A. Yes.  
 21 Q. Then she says:  
 22 "The competent judge on the merits is, as stated by  
 23 Kazakhstan itself, the English court, who must apply its  
 24 own national substantive law."  
 25 Then she said that the ground.

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1 Failed. If we then turn forward to 3.3 we see how  
 2 she deals with the claims by Bank of New York Mellon.  
 3 She refers to the fact that:  
 4 "The garnishee is seeking to obtain a declaration  
 5 that as a matter of law it has properly executed the  
 6 garnishment order and that it has discharged towards NBK  
 7 and Kazakhstan. Both claims relate to the subject  
 8 matter of the attachment, notably whether or not a debt  
 9 exists from Bank of New York Mellon towards Kazakhstan.  
 10 Kazakhstan disputes existence of such debt. The  
 11 attachment judge cannot and may not settle such dispute  
 12 but only the judge on the merits. The judge on the  
 13 merits is, as already mentioned above, the English court  
 14 and must apply its own national law."  
 15 Then the only other passage that I want to look at  
 16 at this stage is the limitation of the subject matter of  
 17 the attachment. You will recall that some \$22 billion  
 18 was frozen.  
 19 Then over the page:  
 20 "The Stati parties explicitly declared their  
 21 agreement to accept a limitation of the subject matter  
 22 of the attachment to its causes. They estimate that  
 23 these causes at present include interest at about  
 24 \$530 million."  
 25 Do you see that?

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1 A. Yes.  
 2 Q. It is as a result of that that we are now left with the  
 3 cash, which is the 530 million, which is owed by Bank of  
 4 New York Mellon, and with which we are now concerned.  
 5 Do you understand that?  
 6 A. Yes, but it's not completely my interpretation.  
 7 Q. In what way?  
 8 A. Because the limitation here of the subject matter of the  
 9 attachment is a limitation quantitatively. It has to do  
 10 with the fact that in Belgian law of garnishment, the  
 11 garnishment always, as a matter of principle, seizes the  
 12 full, all the debts of the third party. So, it is not  
 13 limited to the causes; it's not limited to the debt to  
 14 be enforced.  
 15 However, the creditor can voluntarily, as was done  
 16 here indeed, limit the amount, the quantity of what was  
 17 seized, but it does not specify in any way whether this  
 18 relates to cash or securities; the reason is that the  
 19 subject matter of the garnishment is determined at the  
 20 time of the garnishment. That is something the three  
 21 experts agreed upon. So it doesn't distinguish cash and  
 22 securities.  
 23 Q. Yes, but looking at the position as at today, the only  
 24 asset that is frozen by Bank of New York Mellon is the  
 25 530 million cash. All the securities have gone.

1 They've disappeared. They don't exist.  
 2 A. That would not be final under Belgian law, because the  
 3 assets at the time of garnishment is the relevant thing  
 4 and it fixes the rights at that moment; and when  
 5 afterwards the concrete assets change, this is -- I mean  
 6 it's like a kind of I think in English law you use the  
 7 word "tracing", tracing something into its product. So  
 8 the cash that is there could as well be the product of  
 9 the securities as the product of the cash.  
 10 Q. Can you agree with this: if there is no subject matter,  
 11 if there is no debt that Bank of New York Mellon owes to  
 12 RoK and there is no subject matter, there is no basis  
 13 for Bank of New York Mellon to freeze the cash?  
 14 A. Bank of New York Mellon froze the cash because it  
 15 believed that at least it was possible that these assets  
 16 belonged to the Republic of Kazakhstan.  
 17 Q. My question is different.  
 18 A. They made a declaration in good faith and so the third  
 19 party, in this case the bank, is discharged if it  
 20 declares in good faith, and normally the discharge will  
 21 take place when the bank will deliver the assets to the  
 22 bailiff, and then the bank is discharged. Then it is  
 23 the task of the bailiff what he is going to do with it.  
 24 So there is a strong protection for the third party,  
 25 for the garnishee, in case of good faith declaration

1 they are protected, and also if they give the money or  
 2 the securities, whatever, to the bailiff at the moment  
 3 determined by Belgian law, they will also be discharged.  
 4 And there can at that moment be no discussion that they  
 5 have paid the wrong party at that moment, because then  
 6 it is for the bailiff to make sure that the bailiff pays  
 7 the party to whom it should be paid.  
 8 Q. If you look at paragraph --  
 9 A. You are looking for the garnishee there.  
 10 Q. Can you look at 3.3 at page 18. We looked at it  
 11 a moment ago.  
 12 A. Yes.  
 13 Q. The judge refused to give Bank of New York Mellon  
 14 a discharge, didn't it?  
 15 A. The bank refused discharge in the sense that -- "dispute  
 16 the existence of such debt" -- it doesn't -- how should  
 17 I explain this? "Dispute the existence ... may not  
 18 settle such a dispute". It is the dispute between your  
 19 clients and the bank in their contractual relationship  
 20 is a dispute for the English judge, to be determined on  
 21 the basis of the English law.  
 22 However, if I understand it correctly, the dispute  
 23 that we are here now discussing is not a dispute between  
 24 the bank and your clients; but is a dispute between your  
 25 clients and the creditor. The creditor. Which is

1 a different type of dispute.  
 2 So originally there was a dispute between your  
 3 clients and the bank, and I understand that that dispute  
 4 is terminated now.  
 5 Q. We want our money. NBK wants to get paid the  
 6 530 million, and that will depend on whether or not  
 7 there is subject matter, and that is the issue that the  
 8 English court has been asked to decide. That is right,  
 9 isn't it?  
 10 A. That is a dispute between your clients and the Statis,  
 11 not a dispute between your clients and the bank, isn't  
 12 it?  
 13 Q. No, it concerns everybody.  
 14 Let me just ask you this: you say in your report  
 15 that you have read the pleadings in this action. It is  
 16 right to say that no one is challenging, are they, the  
 17 correctness of the decision of 25 May?  
 18 A. That is not true, in the sense that it is pending an  
 19 appeal.  
 20 Q. No, but in the English court; no one has said in the  
 21 English proceedings -- you have read the pleadings.  
 22 Nobody has said that it is wrong.  
 23 A. I don't think that belongs to my task to judge that.  
 24 Q. Now --  
 25 A. It's something which is in dispute between the Belgian

1 Court of Appeal, that is what I know. It's not up to me  
 2 to tell what parties are litigating in the English  
 3 court, no. I am giving advice on Belgian law.  
 4 Q. Yes, you are giving advice as an independent expert to  
 5 assist the English court in dealing with the issues that  
 6 the English court has to deal with.  
 7 A. Yes, and I received a number of questions and I have  
 8 tried to answer these questions on the basis of Belgian  
 9 law.  
 10 Q. Could we look at Belgian law in respect of some matters.  
 11 Now, first of all Article 1445, which is in a number  
 12 of places but perhaps we can pick it up from  
 13 Professor Allemeersch's report.  
 14 A. Yes.  
 15 Q. Which is at paragraph 33 of E1/7. Do you see that  
 16 there?  
 17 A. Yes.  
 18 Q. We can also see over the page the article that we looked  
 19 at in the judgment a moment ago, 1456, which is at E1/8  
 20 and the passage:  
 21 "If the garnishee disputes the debt of which the  
 22 creditor is seeking payment the case is brought before  
 23 the competent court or, as the case maybe, referred to  
 24 the competent court by the attachment judge."  
 25 Do you see that?

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1 A. Yes, but in a sense it is not what is happening in this  
 2 case because literally this only deals with the  
 3 garnishee disputing the debt, which would be the bank  
 4 disputing the debt.  
 5 Q. So are you saying that the judge was wrong in Belgium to  
 6 refer the question of the subject matter of the order to  
 7 the English court?  
 8 A. I'm not saying that. I can't judge that. That will be  
 9 for the Court of Appeal to decide that in Belgium,  
 10 whether the judge was wrong or not. It's not for me to  
 11 do that. I'm just saying that this is certainly not a  
 12 normal case of application of 1456. I have never seen  
 13 this type of case on the basis of that article. All  
 14 cases I know are cases where it is the garnishee, being  
 15 the bank, saying, "Sorry, I do not owe you so much. You  
 16 pretend that there is a claim of 100,000 but my debt is  
 17 only 50,000". That is the typical case that would be  
 18 decided on the basis of the referral in 1456.  
 19 Q. Whether you have had experience or not, it has happened  
 20 here. Have you read the jurisdiction judgment of  
 21 Mr Justice Teare?  
 22 A. Yes. I mean evidently the English court will decide  
 23 upon its own jurisdiction; it is not up to me to decide  
 24 upon the jurisdiction of the English court. And the  
 25 Belgian courts will be decided upon their jurisdiction.

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1 Q. The legal ground for a garnishment of a third party debt  
 2 is Article 1445. That's right, isn't it?  
 3 A. It is 1445 and 1446, yes.  
 4 Q. And the garnishment declaration that we have looked at  
 5 a moment ago, in the 25 May decision, was given under  
 6 1452, which you can see from Professor Allemeersch's  
 7 report is at paragraph 36.  
 8 A. Yes.  
 9 Q. The bottom of E1/7.  
 10 A. Yes.  
 11 Q. Can we see what the garnishee has to do. The garnishee  
 12 has to submit a declaration regarding the amounts or  
 13 assets that constitute the subject matter of the  
 14 garnishment, and the declaration must provide accurately  
 15 all relevant information that is useful to determine the  
 16 rights of the parties and, depending on the case  
 17 specifically, the basis and amount of the debt, the due  
 18 date, and where applicable its terms and conditions, the  
 19 garnishee's confirmation that it is no longer the debtor  
 20 of the seized debtor, the list of garnishments that it  
 21 had already notified for the debt to the garnishee; and  
 22 I don't think the rest of that is applicable.  
 23 But in essence what the garnishee is doing is  
 24 reporting on the debt that is the subject of the  
 25 garnishment order. That's right, isn't it?

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1 A. It is reporting on the debt to the best of its  
 2 knowledge, yes. And the garnishee must make this  
 3 clarification in good faith and give all relevant  
 4 information so that, in the case of dispute, on the  
 5 basis of that information parties can go to court if  
 6 there is a dispute. But it is, first of all, a very  
 7 strict obligation to inform in good faith, to make this  
 8 declaration.  
 9 Q. Yes. Now the right of recourse of creditors, and that  
 10 is just a summary, you're familiar with the garnishment  
 11 papers, the writ, the application and the decision, and  
 12 it is right, is it not, to say that the right of  
 13 recourse of creditors is not mentioned in any of those  
 14 papers? That is right, isn't it?  
 15 A. No, that is perfectly normal.  
 16 Q. It may be normal, but I am simply asking you to confirm  
 17 that there is no reference to the principle of right of  
 18 recourse of creditors.  
 19 A. I hadn't checked that. The principle is found in the  
 20 Civil Code, evidently in Articles 7 and 8 of the  
 21 so-called Mortgage Act which is a chapter in the Belgian  
 22 Civil Code, but this is a general rule which is always  
 23 applicable, and if there is no specific reason to  
 24 mention it's not mentioned, evidently.  
 25 Q. And it is not mentioned, is it, in the 25 May judgment?

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1 A. Not that I know. I would have to read it in full to be  
 2 sure.  
 3 Q. It's not mentioned in any of the pleadings in these  
 4 proceedings. That is right as well, isn't it?  
 5 A. That I don't know, because then I should know by heart  
 6 all the pleadings in these proceedings.  
 7 Q. In fact, the first time we hear of the right of recourse  
 8 of creditors is in your first report. That is right,  
 9 isn't it?  
 10 A. Yes, because if I was asked a rather general  
 11 question, question number 1, which is a very wide  
 12 question which refers to an indication of all possible  
 13 laws that may in this case apply, so evidently if you  
 14 want to give a fair overview of Belgian law you start  
 15 with the general principles, the general principles in  
 16 this case that can be found in the Civil Code. Then you  
 17 go on with the procedural rules that you have in your  
 18 judicial code, which make more detail about which  
 19 procedures you are following in order to exercise this  
 20 right.  
 21 Q. My point, Professor, is that the right of recourse  
 22 appears to have a considerable importance in your  
 23 report, and the only point I am making is that its  
 24 significance appears to have been overlooked by everyone  
 25 before you gave your report. That's right, isn't it?

1 A. Because it's -- well, it's just something -- if you look  
 2 at the text of the Civil Code this is one of the first  
 3 laws that we would teach to our students in the first  
 4 year of law, namely that the creditors can have recourse  
 5 on all assets belonging to the debtor. I mean, this is  
 6 quite evident.  
 7 Q. We will come and look at it in slightly more detail when  
 8 we look to see what its scope is and how it interacts  
 9 with Article 1445.  
 10 You refer in your report to matters that you do not  
 11 consider because they were not invoked by the Statis.  
 12 For that purpose can we turn to your first report, in  
 13 bundle E1/97.  
 14 A. Which paragraph?  
 15 Q. Paragraph 44.  
 16 A. Yes.  
 17 Q. So you don't consider the right of co-ownership because  
 18 it has not been invoked; that is right, isn't it?  
 19 A. Yes.  
 20 Q. There is another doctrine that I think you referred to.  
 21 If you could please turn to page 103 of your report,  
 22 paragraph 74.  
 23 A. Yes.  
 24 Q. I think you confirm there that you have not -- the Stati  
 25 parties have not invoked Belgian law on the actio

1 pauliana.  
 2 A. As far as I know, yes.  
 3 Q. And therefore you don't consider it.  
 4 A. No, and maybe I should have considered it because it  
 5 could have been interesting, but ... In order to get  
 6 a fair overview of the Belgian law I could have said  
 7 a little more on that, but given the fact of the case  
 8 there was no immediate -- I don't find the English  
 9 word -- cause to do this.  
 10 Q. It is also right to say that in support of their  
 11 application for the garnishment order the Statis did not  
 12 rely on simulation, did they?  
 13 A. They relied on the ownership of the Republic of  
 14 Kazakhstan over the National Fund.  
 15 Q. Correct, but that is not simulation.  
 16 A. Simulation is only a question in second rank. The  
 17 question of simulation only comes up if ownership is  
 18 disputed.  
 19 Q. It is also right that in support of the application for  
 20 the pre-judgment attachment they did not invoke the  
 21 principle of *fraus omnia corrumpit*.  
 22 A. As far as I remember, they did not do that. I will have  
 23 to check the full text, but as far as I remember.  
 24 Q. And nor did they rely on an abuse of rights principle.  
 25 A. No. But maybe I should point to the fact that I was

1 explicitly asked to give advice on these things. If you  
 2 look at the questions that were asked to the experts,  
 3 the first question explicitly asked to discuss certain  
 4 things that probably were not mentioned in the document  
 5 you are now referring to. So I had to answer what I was  
 6 asked to answer.  
 7 Q. I'm not making any criticism of you, Professor, I am  
 8 just seeing whether we can agree on what basis the  
 9 garnishment order was sought and obtained.  
 10 The point I am making is --  
 11 A. I can't read the mind of the judge, but on the basis of  
 12 the documents I do believe that the judge was convinced  
 13 that the National Fund was owned by the Republic  
 14 of Kazakhstan. But that is just intuition. I mean,  
 15 that is what I can deduce from the documents, but  
 16 I can't read the mind of the judge, evidently.  
 17 Q. Now we know, and I'm not sure whether you have accepted  
 18 this or not, but it is right to say that all the assets  
 19 other than cash have been released following the  
 20 decision of 25 May. You know that?  
 21 A. Well, if you tell so, I take -- I guess it's true, but  
 22 I was not there. So I can only see what I see in the  
 23 documents, where there was a voluntary limitation of the  
 24 amount of the garnishment from the total amount to  
 25 a certain specified amount, specified in quantitative

1 terms. \$530 million if I'm correct.  
 2 Q. We have a document which has a list of matters which are  
 3 common ground between the parties, and that includes the  
 4 Statis as well as Bank of New York Mellon and obviously  
 5 the claimants.  
 6 What is common ground between the parties, and  
 7 perhaps you can confirm whether or not you know this, is  
 8 that on 31 May 2018, with the consent of the Stati  
 9 parties, and at the request of NBK pursuant to the  
 10 Belgian set aside judgment, BNYM realised the securities  
 11 that it held pursuant to the GCA to NBK. However, BNYM  
 12 continued to freeze cash deposits of 530 million. Is  
 13 that something that you are aware of?  
 14 A. I know there was something with the consent, something  
 15 happened with the consent of the creditor, of the  
 16 Statis. That is evidently because it is a decision that  
 17 the court could not impose according to Belgian law, so  
 18 they needed the consent of the Statis to limit the  
 19 garnishment.  
 20 Q. Now the cash, the 530 million, that is held under the  
 21 GCA. You know that?  
 22 A. That is how indeed there was this debt of the Bank of  
 23 New York Mellon, yes.  
 24 Q. It is right to say that the GCA, the Global Custody  
 25 Agreement, was not before the judge who made the

1 garnishment order. It's not in the papers in support of  
 2 the application for a pre-judgment attachment, and the  
 3 agreement is not referred to anywhere in those papers.  
 4 Is that something that you are aware of?  
 5 A. Well, I guess I should check that, but that would be  
 6 perfectly normal. Under Belgian law, evidently when you  
 7 are asking for a garnishment order against a debtor  
 8 usually you have no information on the internal  
 9 relationship between the debtor and the third party.  
 10 The information may be very confidential, so it is  
 11 nearly impossible that you would have this document and  
 12 invoke it in order to obtain the garnishment order.  
 13 Creditors asking for garnishment orders very often do  
 14 not even know whether the debtor has a bank account with  
 15 a certain bank. For example, they will say, "I will ask  
 16 for a garnishment order to seize the assets on bank  
 17 accounts with all the big banks because we don't know  
 18 where they have a bank account". Because it's only from  
 19 next year on that it will be possible to obtain this  
 20 information in Belgium; today you can't obtain this  
 21 information. So in a certain sense you are shooting,  
 22 hoping that you will get something. That's what  
 23 basically happens. And on the basis of the indications  
 24 you say, "Look, we have indications that there are  
 25 assets there, so please give us an order", or it is

1 rather permission, "to seize assets that may be in the  
 2 hands of a given third party". But you will never have  
 3 the internal document at that moment.  
 4 Q. Can we just look to see what was said about the global  
 5 custody arrangement involving Bank of New York Mellon.  
 6 For that purpose, Professor, can you turn, please, to  
 7 the core bundle, where the English version appears.  
 8 It's one of the -- I think it should be under a tab  
 9 called "The garnishment order". Do you have that?  
 10 A. I have GCA. TMA, GCA, Belgian garnishment order and  
 11 Belgian declaration.  
 12 Q. Yes, that is it. If we can have a look at the  
 13 garnishment order. For this purpose could you please  
 14 turn to page F/632.  
 15 Do you have that in front of you?  
 16 A. Yes.  
 17 Q. This is what the Statis are saying:  
 18 "In the first place it should be noted that NFRK  
 19 [the National Fund of the Republic of Kazakhstan] is not  
 20 a separate legal entity but a fund that is fully part of  
 21 the State of Kazakhstan. More specifically, the  
 22 activities of NFRK are performed by the Kazakhstan  
 23 Ministry of Finance, and NFRK does not have legal  
 24 personality."  
 25 Do you see that?

1 A. Yes.  
 2 Q. Then this is where Bank of New York Mellon is mentioned.  
 3 "The Bank of New York Mellon SA/NV (BNY Mellon),  
 4 garnishee according to the present request, acts as  
 5 global custodian for the NFRK, based on which Kazakhstan  
 6 must have a claim against BNYM relating to the assets in  
 7 the NFRK that BNYM holds for the NFRK as part of  
 8 Kazakhstan."  
 9 Do you see that?  
 10 A. Yes, number 18.  
 11 Q. Yes, so it appears that, as you say, they didn't have  
 12 the agreement.  
 13 A. No. They knew there was something.  
 14 Q. Exactly, they knew there was something. And it is right  
 15 to say, is it not, that we know who the parties are to  
 16 the Global Custody Agreement, it is NBK and Bank of New  
 17 York Mellon. It is right to say that NBK, the National  
 18 Bank of Kazakhstan, is not mentioned in this  
 19 application.  
 20 A. It is not mentioned in this application as far as I can  
 21 see, yes.  
 22 Q. Now, when it says, at 19, that Kazakhstan must have  
 23 a claim against BNYM relating to the assets, that  
 24 suggests, does it not, a contractual claim that  
 25 Kazakhstan has against BNYM under that agreement? That

1 is the natural reading of that phrase.  
 2 A. It is wider than that. It doesn't specify.  
 3 Q. What other claim could there be other than a contractual  
 4 claim?  
 5 A. It depends how you define contract, evidently. If you  
 6 take for example the cases of undisclosed agency,  
 7 I think in different legal systems the qualification of  
 8 the relation between the principal and the third party  
 9 will vary. I am quite sure that not all legal systems  
 10 will use the same qualification for that relationship.  
 11 Q. In reality they were referring to a contractual claim.  
 12 That was how the case was being presented.  
 13 A. I don't see that here, but maybe. It is something you  
 14 should ask the Belgian lawyers if you want to be sure of  
 15 that.  
 16 Q. Now, in terms of the cash that is held under the GCA --  
 17 I appreciate and I am not going to ask you matters of  
 18 English contract law, for obvious reasons -- can we  
 19 agree that a bank who owes cash to its customer, the  
 20 bank is the debtor and the customer is the creditor?  
 21 A. It is always the bank who is the debtor; it's not always  
 22 the customer who is a creditor.  
 23 Q. But in relation to the 530 million the bank owes the  
 24 money to someone, doesn't it?  
 25 A. The bank owes the money to someone. And there, and

1 maybe in English common law that may be different from  
 2 Belgian law, but there are a number of situations where  
 3 the ownership relation is different from, let's say, the  
 4 customer.  
 5 There may be different types of situations, and  
 6 I have mentioned some of them I think in my reports.  
 7 A typical example just to illustrate that, and I never  
 8 pretended that it applied in this case but just  
 9 a typical example to illustrate the case is the  
 10 assignment case; because under Belgian law if, for  
 11 example, party A assigns its rights to party B without  
 12 notifying to the bank, party B would be the owner  
 13 although the bank doesn't know. So in that case the  
 14 assignor would still be the customer, but the assignee  
 15 would be the owner; and it is quite clear that in those  
 16 situations the creditors of the assignee could seize,  
 17 could garnish the amounts, although in relation to the  
 18 third party, the third party doesn't know anything about  
 19 it. That is a typical example. There are other  
 20 examples that are more relevant, that I have discussed  
 21 in my reports. I am just giving this example in order  
 22 to show you the general idea.  
 23 Q. Can we try and stick to this particular case. There is  
 24 no reference, is there, anywhere in this application to  
 25 an undisclosed agency arrangement, is there?

1 A. It's not -- the relationship is not qualified, yes.  
 2 Q. It is also right that the bank that owes -- it is right  
 3 that a bank that owes \$530 million is not holding an  
 4 asset, it has a liability. That's right, isn't it?  
 5 A. Well, the 530 million is what you have now, but in order  
 6 to judge the subject matter of the garnishment you have  
 7 to look at what was the case when the garnishment was  
 8 made.  
 9 Q. Let's just imagine, for the sake of argument, that the  
 10 only thing we are dealing with is cash of 530 million.  
 11 My question is a very straightforward question, which  
 12 is: a 530 million liability to pay a customer is not an  
 13 asset that the bank is holding; it is a liability?  
 14 A. It is an asset on the other side, evidently.  
 15 Q. But from the bank's perspective?  
 16 A. It is not an asset that -- it may be different with  
 17 securities, but we are not discussing securities,  
 18 I understand. It is not an asset that the bank is  
 19 holding, no. No. No, it is an asset that either the  
 20 customer or someone else is holding, against the bank.  
 21 Q. If we can go back, please, to the decision of 25 May,  
 22 which is in this bundle. Let's go back to the section  
 23 that we were looking at under 3.1.4, the lack of the  
 24 legal relationship.  
 25 A. Yes.

1 Q. The subject matter issue that is being considered here  
 2 is whether there is a debt owed by Bank of New York  
 3 Mellon to RoK. That is right, isn't it?  
 4 A. It doesn't say that explicitly. It is evidently related  
 5 to the debt. But in 3.1.4, in the referral earlier in  
 6 the paragraph, I do not see explicitly that the question  
 7 asked is whether the debt is owed to the RoK directly or  
 8 not.  
 9 Q. We have read this, we have read this ourselves a number  
 10 of times. But I would suggest to you that the only way  
 11 to read this section of the decision is that the subject  
 12 matter issue that has been identified is whether there  
 13 is a debt owed by Bank of New York Mellon to RoK, and  
 14 that is the issue that has been referred by the Belgian  
 15 court to the English court. That is right, isn't it?  
 16 A. That's probably right, but that would mean that the  
 17 English court is not dealing with the issue of  
 18 ownership.  
 19 Q. No, the English court is --  
 20 A. That is left to the Belgian judge.  
 21 Q. With respect, Professor, that is a nonsense. The  
 22 English judge is dealing with all matters of subject  
 23 matter. It's not -- there is nothing on the face of  
 24 this judgment to indicate that some aspects of subject  
 25 matter are going to still be determined by the Belgian

1 court. The English court is dealing with subject  
 2 matter, full stop.  
 3 A. I'm sorry, in 3.1.4 the Belgian judge has dealt with  
 4 several questions of subject matter, that have been  
 5 decided by the Belgian judge and not referred to the  
 6 English court. So evidently it is a little bit more  
 7 complex than that.  
 8 Q. Anyway, let's move on, because we can all read the  
 9 decision itself.  
 10 Incidentally, just coming back to the decision of  
 11 the English court on jurisdiction, am I right to say  
 12 that you have read that decision?  
 13 A. Not fully.  
 14 Q. Can we just have a look at it. Do you have bundle B in  
 15 front of you?  
 16 A. I don't think I have to give any advice on English  
 17 jurisdiction, isn't it? I have no expertise whatsoever  
 18 on that.  
 19 Q. I am just trying to work out to what extent your  
 20 argument is trying to undermine the jurisdiction  
 21 judgment by suggesting that issues actually remain to be  
 22 determined by the Belgian court. Let's look, if we may,  
 23 at --  
 24 A. I am only interpreting the Belgian law and to some  
 25 extent Belgian judgments, as I believe I have to

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1 interpret them from the perspective of Belgian law.  
 2 This doesn't say anything about English jurisdiction,  
 3 isn't it?  
 4 Q. Can we look at paragraph 33, which is at B1 at page 81.  
 5 What the judge said is this:  
 6 "At trial the Stati parties will be able to make  
 7 submissions based upon the relationship between RoK and  
 8 NBK which go beyond the narrow question of who is the  
 9 counterparty to the GCA, which will enable issues  
 10 analogous to the issues of piercing of legal  
 11 personality, sham trusts and abuse of law, which the  
 12 Stati parties have raised in their written submissions  
 13 in Belgium to be addressed. Those are all matters that  
 14 can be determined by this court, applying what it  
 15 determines to be the applicable law. All such claims  
 16 will go to the central question: what assets, if any,  
 17 does Bank of New York Mellon London hold for RoK? That  
 18 is a question raised by the declaration sought by the  
 19 claimants. Mr Malek submitted for the claimants this,  
 20 'It is not limited to any liability of BNYM to RoK in  
 21 contract. It includes any liability to RoK relating to  
 22 the assets'. The resolution of that question will  
 23 necessarily, therefore, have a material effect on the  
 24 Belgian executory attachment proceedings."  
 25 Do you see that?

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1 A. Yes.  
 2 Q. So it would appear on the face of it that the English  
 3 court is not simply dealing with a narrow contractual  
 4 issue; it is dealing with all issues relating to subject  
 5 matter. It is also dealing with any legal theory upon  
 6 which may be relied upon by the Statis. And as you have  
 7 seen from the rejoinder, the Statis did raise all the  
 8 exceptions of simulation of use and the like. Are you  
 9 aware of that?  
 10 A. I have seen what they have raised, yes.  
 11 Q. You are not suggesting that the English court is not in  
 12 a position to deal with those matters?  
 13 A. I'm sorry, I'm not saying anything about the  
 14 jurisdiction of the English court. How could I?  
 15 Q. I think somewhere else we have seen --  
 16 A. I am an expert on Belgian law. What has it to do with  
 17 an interpretation of English jurisdiction?  
 18 Q. You do actually do that, because you actually suggest in  
 19 your report, as we will see in a moment, that the issue  
 20 of subject matter has already been decided. That's  
 21 right, isn't it?  
 22 A. I can -- the decision of the Belgian court of 25 May has  
 23 decided a number of questions. For example, it also  
 24 says that the National Fund is the ownership of  
 25 Kazakhstan. Are these questions finally decided in

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1 Belgium now? Evidently not, because the case is pending  
 2 an appeal.  
 3 So even from the point of view of Belgian judicial  
 4 reality, we don't know what the final judgment on this  
 5 will be.  
 6 I have been asked to answer certain questions of  
 7 Belgian law that have been listed, and I have brought up  
 8 these matters because they were part of the question.  
 9 If you tell me that these questions are dealing with  
 10 things that have nothing to do with this lawsuit,  
 11 I didn't make the questions.  
 12 Q. Okay, let's look, if we may now, at Article 1445, which  
 13 is of course the provision that we need to consider in  
 14 this case.  
 15 I just want to see if we can agree in terms of what  
 16 the elements are of 1445. For that purpose, Professor,  
 17 could you be so kind as to turn to bundle E2.1.  
 18 A. Which is ...  
 19 Q. E2.1. If you could please turn to page 3.8.7. Sorry,  
 20 it is 318.7, my apologies.  
 21 A. I'm sorry, I am in E1.  
 22 Q. Let's start again. If you have got E2.1, the bundle.  
 23 A. Legislation.  
 24 Q. E2.1, there is a whole series of tabs. Can you go to  
 25 tab 46.

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1 A. Okay, 46. Yes.  
 2 Q. I am going to be looking at the English, for obvious  
 3 reasons, at 318.7. This is an extract of writings by,  
 4 excuse my pronunciation, Lenaerts(?), who I understood  
 5 is a --  
 6 A. Yes, I have known him quite well, but he died I think 10  
 7 or 15 years ago.  
 8 Q. Would he be regarded as a distinguished professor on  
 9 procedural law?  
 10 A. Yes, he was a disciple of my father. My father was  
 11 a professor of procedural law, and Lenaerts was  
 12 a disciple of my father. So I cannot deny that he was  
 13 a distinguished proceduralist.  
 14 Q. You keep it in the family.  
 15 A. To some extent, yes.  
 16 Q. Let's see if you can agree with what he says at  
 17 paragraph 2200. What he says is this, if we can work  
 18 through this -- this is at page 318.7.  
 19 A. Yes.  
 20 Q. What he says is this: that a garnishment has  
 21 a triangular structure.  
 22 A. Yes.  
 23 Q. There are five elements that play a role.  
 24 A. That is exactly the same figure that I use in my class  
 25 on explaining garnishment.

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1 Q. Good. But if we just go through it, there is the  
 2 creditor, there is the debtor, the claim between the  
 3 creditor and the debtor, the third party, and the claim  
 4 between the debtor and the third party. We were refer  
 5 to the claim between the creditor levying the attachment  
 6 from the garnishment debtor as the cause for the  
 7 attachment. The debt claim between the garnished debtor  
 8 and the garnishee is called the subject matter of the  
 9 attachment.  
 10 A. Yes.  
 11 Q. There can't be more parties. After all, a fourth party  
 12 attachment is not possible in principle.  
 13 I don't think the rest of that is applicable. So if  
 14 we can just look at the diagram to make sure that we can  
 15 fill in the gaps or the names.  
 16 The creditor in our case is obviously the Statis;  
 17 that is right, isn't it?  
 18 A. Yes.  
 19 Q. The debtor in relation to the cause is RoK. Do you see  
 20 that?  
 21 A. Yes.  
 22 Q. Then the garnishment is between the third party, which  
 23 is Bank of New York Mellon.  
 24 A. Yes.  
 25 Q. Then the subject matter, as you see at the bottom of the

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1 triangle, is as between -- I think it is described as  
 2 the seized debtor, RoK, and the third party. Do you see  
 3 that?  
 4 A. Yes.  
 5 Q. So that is the terminology. And in fact I think the  
 6 phrase "cause", I think we have seen these phrases  
 7 already, haven't we, in the decision of 25 May?  
 8 A. Yes.  
 9 Q. We have seen that "cause" was referred to and limited  
 10 and brought down to 530 million.  
 11 A. The cause is the arbitral award, basically. So the  
 12 cause evidently has a specified value, which is not in  
 13 dispute in this case.  
 14 Q. It is right to say that the issue of ownership or the  
 15 question of ownership isn't referred to anywhere in  
 16 these five elements, is it?  
 17 A. No, but why should it? This is --  
 18 Q. I am just trying to work out what the elements are of  
 19 the --  
 20 A. This is a very, very basic description for a first year  
 21 student law school book to explain what is the basic  
 22 structure of a garnishment. It's not any of the very  
 23 special, difficult questions that we are dealing with  
 24 here.  
 25 Q. So the question of ownership only become relevant, does

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1 it, according to your evidence, when you have a more  
 2 sophisticated discussion about what a garnishment is?  
 3 Let me put it in another way. If ownership had the  
 4 importance under 1445 as you suggest, why would the  
 5 professor not make a reference to ownership?  
 6 A. Because in 99% of the cases there is no dispute. In 99%  
 7 of the cases there is no dispute that the account holder  
 8 is the owner. That is a very rare case.  
 9 Q. Let's, if we can, look across the other side of the page  
 10 at the previous paragraph, which is 2189. What the  
 11 professor says there is this:  
 12 "As has been already emphasised several times in the  
 13 previous chapters, all of the debtor's assets serve as  
 14 collateral for his creditors (Article 7 and 8 of the  
 15 Mortgage Act)."  
 16 That, as I understand it, is what you are referring  
 17 to as the right of recourse.  
 18 A. Basically, yes.  
 19 Q. So is a right of recourse to be found in Articles 7 and  
 20 8 of the Mortgage Act? Is that the source of the right  
 21 of recourse? So if a judge asks, "Where do I find the  
 22 right of recourse?" where is it? Where is it stated?  
 23 Is it in Article 7 and Article 8 of the Mortgage Act?  
 24 A. A very difficult question under Belgian law because  
 25 although we are evidently a system of law that is

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1 basically codified, our code is 200 years old and  
 2 evidently the Belgian positive law does not only exist  
 3 under the code, it is the code as understood by case  
 4 law. So in that sense it is always -- it is the place  
 5 we would refer to in order to explain to our students  
 6 where they can find it, yes, evidently. And we would  
 7 say, "Yes, look there, you can see the general  
 8 principle". And if you want to know what it exactly  
 9 means, well then you have to study the case law. But  
 10 that is where you can localise it.

11 Q. Are you aware of any decision where, in the context of  
 12 Article 1445, the right of recourse has been said to be  
 13 an element, a freestanding element of 1445?

14 A. Well, maybe I don't understand the question, but how can  
 15 it be an element of 1445? 1445 is dealing with one of  
 16 the procedures that can be used in order to exercise  
 17 your right of recourse. So none of these procedural  
 18 rules are repeating this basic rule. It is basically  
 19 the explaining how you have to do it.

20 Q. Let's just read on. The professor says this:  
 21 "Such Acts include not only the debtors' movable and  
 22 immovable property but also the debtors' own claims  
 23 against third parties."

24 A. Mm-hmm.

25 Q. Then:

1 "In the case of a third party attachment or  
 2 garnishment ..."

3 Pausing there, that is what this case is about, is  
 4 it not, a third party attachment or garnishment?

5 A. Yes.

6 Q. "... the debtor's claim is attached."  
 7 Is that right, the debtor's claim is attached? That  
 8 is essentially what a third party attachment or  
 9 garnishment is about, it is attaching a debtor's claim.  
 10 Can we agree on that?

11 A. The garnishment is the attachment of a corporate assets,  
 12 chose in action, as you would probably say in English  
 13 which can consist of debt, in the sense of what I would  
 14 call right of performance; it can also include a right  
 15 of restitution of corporeal assets, because it says "any  
 16 amounts or assets", so it is wider than that. But it is  
 17 evidently something that must be owed by the third  
 18 party. Because otherwise it cannot be an obligation of  
 19 the third party, if the third party does not owe  
 20 anything.

21 Q. If it is not owed, then there is no subject matter to  
 22 the garnishment order. That's right, isn't it?

23 A. If it is -- well, if nothing is owed, then evidently  
 24 there is no subject matter. That is quite clear.  
 25 If the dispute is as to whom it belongs, that is

1 a different type of dispute. You can see it in those  
 2 cases that are dealing precisely with the rare cases  
 3 where this is the dispute, because this is very rarely  
 4 the dispute, as I said.

5 If you look at the text of 1456 it is the ...  
 6 usually it is the garnishee saying, "No no, I don't have  
 7 to pay" or "I owe you only 50,000" or "I owe you only  
 8 a debt under a suspensive condition, a condition  
 9 precedent that is not fulfilled" or "I only have to pay  
 10 under these conditions". That is what normally happens.

11 Now, the cases where the question is whether this is  
 12 an asset belonging to the account holder or not, I think  
 13 most of them have been quoted at least in my report, so  
 14 you can look at them and see what happened there, and  
 15 these are cases where different doctrines have been  
 16 applied, that I have tried to summarise in my report.

17 I am not saying that all of them are relevant here,  
 18 because that is for the facts and I am not commenting on  
 19 the facts. But at least the Supreme Court case of 1995,  
 20 the Baitemal case would be very relevant for this.  
 21 It is a case which comes closest to the questions that  
 22 we are discussing here. There you clearly have a case  
 23 where the bank account was in the name of party A and  
 24 the enforcement judge said, "I am not going to look into  
 25 ownership", and the decision of the enforcement judge

1 was quashed because they refused to look into ownership.

2 Q. Can we just look at this section of this, just to  
 3 complete this, to see whether you agree with what is  
 4 said here in this textbook. I think we can probably  
 5 skip through -- well, let's just pick up where I left  
 6 off:  
 7 "The attachment is thus levied in the hands of the  
 8 debtor's debtor."  
 9 Do you see that?  
 10 "Typical examples are the attachment of the debtor's  
 11 bank account, which is levied in the hands of his bank."  
 12 Do you see that?

13 A. Mm-hmm.

14 Q. Would you agree that that is a fair statement of Belgian  
 15 law?

16 A. This is very basic statement of Belgian law. I mean, if  
 17 you compare the treatment of garnishment in this book,  
 18 which is a very basic general book, it is a few pages.  
 19 Then you take Dirix, Beslag for example, which is the  
 20 leading authority as we all agree. He will discuss many  
 21 more questions than the questions that are discussed  
 22 here in this book, which is only dealing with the basic  
 23 things that you teach students in the first lessons of  
 24 enforcement law.

25 Q. We will come to Justice Direx, don't worry, we will

1 definitely come to him later on. But I am trying to see  
2 if we can agree on the basics.

3 The last passage that I wanted to look at is  
4 probably eight lines from the bottom, the sentence  
5 beginning:

6 "The garnishment is therefore best defined as the  
7 attachment in the hands of the seized debtor's debtor on  
8 what the latter must pay or deliver to the seized  
9 debtor."

10 As you see, he refers to Justice Dirix in support of  
11 that proposition in the footnote. Are you happy, is  
12 that a fair summary of a definition of what garnishment  
13 is?

14 A. That is a fair definition of the normal case, yes.

15 Q. Good, then we can agree on that.

16 A. But it is not a definition meant to discuss any of the  
17 difficult questions that we have to discuss here. If  
18 you take the attachment law book by Dirix, you will see  
19 evidently that he is discussing much more.

20 Q. Can we move on to an opinion that you have expressed on  
21 a number of occasions. What I want to do is take you to  
22 four passages of your evidence, and then once I have  
23 done that I propose to ask you questions.

24 You can put bundle E2.1 away that is on your desk.

25 A. We are going to my own report now?

1 Q. Yes, please.

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

3 Q. Paragraph 12.

4 A. Of the first report or the second?

5 Q. Page E1/90. The first .

6 A. Yes.

7 Q. There is something I can't quite follow, it may be that  
8 I have missed it, but if you look at paragraph 12 there  
9 is a reference to a section 3; what is that numbering  
10 to? Similarly at 2, I couldn't work out where it was  
11 coming from.

12 A. It has something to do with the way it was drafted,  
13 I had for my own -- well, we have a different drafting  
14 style from the one which is used in English courts, and  
15 here you have to number each paragraph and in order --  
16 what I would do is to have numbering that addresses the  
17 main questions. So disregard this paragraph 3, please.

18 Q. Right. What you say is this:

19 "Both the order and the active garnishment, in  
20 conformity with the order, expressly included the  
21 National Fund of the Republic of Kazakhstan. If the  
22 cash and/or securities are part of the National Fund  
23 they thus fall within the scope of the Belgian  
24 garnishment order as long as that order is not set aside  
25 by the Belgian enforcement judge."

1 A. Yes.

2 Q. The decision that you are referring to, the judge who  
3 made the garnishment order, so that we can understand  
4 what you are referring to, if you could please take up  
5 the core again. Am I right -- if we could pick up the  
6 garnishment orders tab and turn to page F/649, there we  
7 see the decision and is that the decision you are  
8 referring to?

9 A. Yes.

10 Q. Good. We understand that.

11 Now the next section I would like to look at is your  
12 second report, Professor, which is at E1 at 169.

13 A. Yes. Paragraph?

14 Q. Paragraph 11.

15 A. Yes.

16 Q. You say at the bottom there:

17 "It is thus clear [I'm reading the last line on that  
18 page at page 168] that the enforcement judge found it  
19 likely that the Republic of Kazakhstan has a claim  
20 against BNYM and/or that BNYM holds assets for the  
21 seized debtor and more specifically, given the wording  
22 of the order, the assets of the National Fund entrusted  
23 to BNYM consist of claims of the Republic of Kazakhstan  
24 against BNYM and/or that the assets held by BNYM are for  
25 the Republic of Kazakhstan."

1 That was the second passage that I wanted to look  
2 at. I will come back with a question in a moment.

3 In fact, we can go on to paragraph 13, where you say  
4 at 13 at page 170:

5 "The decision of the enforcement judge ..."

6 That is the decision that we have just looked at,  
7 isn't it?

8 A. Yes.

9 Q. "... to authorise a garnishment of the assets of the  
10 National Fund was made on the basis of a detailed  
11 explanation of the National Fund and the relationship  
12 between Kazakhstan and NBK."

13 Do you see that?

14 A. I am quoting Mr Ryelandt here, yes.

15 Q. Presumably you agree with him, otherwise you wouldn't be  
16 quoting him. Am I right in saying that?

17 A. Sufficient detailed explanation, yes, in the context of  
18 the procedure we are dealing with here.

19 Q. What you say, we quoted Mr Ryelandt, and you have said  
20 that:

21 "The decision of the enforcement judge was made on  
22 the basis of a detailed explanation of the National Fund  
23 and the relationship between Kazakhstan and NBK ..."

24 That is what you are quoting.

25 A. That is what I am quoting.

1 Q. "... and was thus a decision on the merits of the  
 2 ownership of the National Fund, an ex parte order that  
 3 could be challenged but nevertheless a decision on the  
 4 merits, with res judicata as long as it is not reformed.  
 5 The decision was effectively challenged by Kazakhstan  
 6 and NBK, and after a final decision of the enforcement  
 7 judge in the first instance it was appealed and now  
 8 pending before the Court of Appeal in Brussels."  
 9 A. Yes, so it is not a final decision yet, because it is  
 10 still pending.  
 11 Q. Then the last passage that I want to look at before  
 12 I ask some questions is the joint memorandum, which --  
 13 A. I have it here.  
 14 Q. If we could just turn, please, to pages 114 and 115.  
 15 Then you see, just going through the bullet points,  
 16 there is a summary of the opinion:  
 17 "As to the question whether the cash and securities  
 18 fall within the scope of the garnishment order, the  
 19 first step is to analyse the garnishment order itself .  
 20 The Belgian enforcing judge has decided that the  
 21 garnishment order extends to the National Fund of the  
 22 Republic of Kazakhstan. Hence, insofar as the cash and  
 23 securities are part of the National Fund they squarely  
 24 fall within the scope of the garnishment order.  
 25 "The enforcement judge was entitled to make this

1 decision even if arguendo and the cash and securities  
 2 were not contractually due and owed to Kazakhstan under  
 3 the GCA, because this is a question of the right of  
 4 recourse of creditors and thus falls within the  
 5 jurisdiction of the enforcement judge as a matter of  
 6 Belgian law."  
 7 Then:  
 8 "Even if BNYM would arguendo contractually owe the  
 9 cash and securities placed in BNYM's custody under the  
 10 terms of the GCA exclusively to NBK, the cash and  
 11 securities will nevertheless remain within the scope of  
 12 the right of recourse of the creditors of Kazakhstan,  
 13 and therefore within the scope of the garnishment order  
 14 if any of three conditions were to apply."  
 15 We will look at that later .  
 16 A. Yes. Be aware this is evidently a summary of my report  
 17 in order to try, as we all three did, to try to point to  
 18 the main differences .  
 19 So the three experts have tried to summarise their  
 20 report, evidently. For the necessary distinguishing and  
 21 authorities you have to look into the report itself .  
 22 Q. That is a fair comment. If we can go back to look at  
 23 this in a little bit more detail to see what opinion you  
 24 are expressing. Paragraph 13 of your second report  
 25 which we looked at a moment ago at E1/170.

1 A. Yes.  
 2 Q. Where you quote from Mr Ryelandt. It is right to say  
 3 that to say that there was a detailed explanation of the  
 4 National Fund and the relationship between Kazakhstan  
 5 and NBK, that is clearly not correct, is it?  
 6 A. It depend how you define "detailed".  
 7 Q. If NBK was not even mentioned, how can the relationship  
 8 between Kazakhstan and NBK have involved a detailed  
 9 explanation? I mean, let's put it in another way. Why  
 10 don't we look at the core bundle and the garnishment  
 11 papers for the reasons. Where is there a detailed  
 12 explanation of the relationship between Kazakhstan and  
 13 NBK? What's the passage that you are referring to when  
 14 you quote Mr Ryelandt in support of that proposition?  
 15 A. Well, the explanations in the request are at number 17.  
 16 Q. Yes.  
 17 A. And NBK is one of the managers, I presume. So it gives  
 18 quite some details out of the annual accounts of the  
 19 National Bank of the Republic of Kazakhstan, so the  
 20 accounts of the National Bank are quoted several times,  
 21 footnotes, 23, 24, 25, 26, 27, and maybe also in other  
 22 places, I don't know.  
 23 Q. The question is: where is the rosehip between NBK and  
 24 RoK mentioned?  
 25 A. The relationship is discussed in the text which quotes

1 the annual accounts of the National Bank.  
 2 Q. It is right that there is no reference to the GCA being  
 3 with NBK and not RoK, is there?  
 4 A. It's not mentioning the GCA as such, no. But the Statis  
 5 had no access to that contract, as far as I know. So  
 6 the sources they had are the published sources, and  
 7 these are the sources published by the National Bank of  
 8 the Republic of Kazakhstan mainly. These are basically  
 9 the documents on which they relied to explain how it  
 10 functions .  
 11 MR MALEK: My Lord, I am wondering whether we could take  
 12 a break at this stage for 15 minutes.  
 13 MR JUSTICE TEARE: Yes, that would be perfectly fine. You  
 14 want as long as 15 minutes?  
 15 MR MALEK: Probably just to have a hot drink, yes.  
 16 MR JUSTICE TEARE: 15 minutes, then.  
 17 MR MALEK: Yes, please.  
 18 MR JUSTICE TEARE: We will adjourn until quarter past 2.  
 19 MR MALEK: Thank you. I'm grateful .  
 20 (2.00 pm)  
 21 (Short break)  
 22 (2.15 pm)  
 23 MR JUSTICE TEARE: It seems now to be 2.15.  
 24 MR MALEK: Thank you very much for that extra time.  
 25 Professor Storme, are you there?

1 A. Yes. I am here.  
 2 Q. Professor, could I ask you to turn to page 80 of E1.  
 3 A. Sorry, which page of which document?  
 4 Q. E1, the expert bundle, and page 80.  
 5 A. So my own report or ...?  
 6 Q. Yes, it is yours. It is your first report.  
 7 A. Yes.  
 8 Q. I want you to look at two -- look at paragraph 13.2 on  
 9 page E1/90. Do you have that?  
 10 A. 13.2.  
 11 Q. What you do is that you go on to say:  
 12 "On the other hand, in order to explain why the cash  
 13 and/or securities held pursuant to the GCA fall within  
 14 the scope of the Belgian garnishment order insofar as  
 15 they are part of the National Fund of the  
 16 Republic of Kazakhstan, if the English court decides  
 17 that the wording of the garnishment itself is not  
 18 decisive in this respect."  
 19 Can you explain to us what you mean when you said:  
 20 "... if the English High Court decides that the  
 21 wording of the garnishment itself is not decisive in  
 22 this respect".  
 23 A. Yes. Well, this report was made in answer to questions,  
 24 and the question that I had to answer was: in what  
 25 circumstances the cash and securities fall within the

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1 scope of the Belgian garnishment order? That was the  
 2 question.  
 3 In order to answer that question I developed two  
 4 reasonings. One is a provisional reasoning, namely,  
 5 what has been decided by the Belgian judge, knowing  
 6 evidently that this decision by the Belgian judge was  
 7 challenged and that the challenge is still pending  
 8 before the Belgian court. Nevertheless, although that  
 9 decision is challenged we cannot deny that there is one,  
 10 and I can read it and I can only read that this order  
 11 says something about what falls within the scope of that  
 12 order, which is the question number 1 I was asked to  
 13 answer.  
 14 Now, secondly, given the fact that that decision is  
 15 challenged, I thought it was necessary to try to explain  
 16 Belgian law more generally, because otherwise you  
 17 wouldn't need me evidently, I would not have been asked.  
 18 So that is why I have tried to explain the reasons why  
 19 in certain cases the, let's say -- how do you say it in  
 20 English? Don't take me on the words, because they are  
 21 not technically correct -- the nominal owner is set  
 22 aside by Belgian law as not being the true owner. Or  
 23 similar reasons why creditors can seize the assets, in  
 24 this case chose in action, that are in the name of  
 25 someone else than their debtor. So I have tried to

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1 summarise the situation in which this may apply.  
 2 Now, it is up to the court to interpret the Belgian  
 3 decisions and their own jurisdiction, and it is up to  
 4 the English court to decide which questions it wants to  
 5 decide. It was my task to explain the Belgian law in  
 6 case these questions come up, and namely the questions  
 7 that were specifically for me to answer, especially  
 8 question 1, which is evidently the most important one.  
 9 Q. But no one in these proceedings, you have read the  
 10 pleadings, is suggesting that the wording for the  
 11 garnishment is decisive on the question of subject  
 12 matter, because that is the issue that the Belgian court  
 13 has referred to the English court by the 25 May  
 14 decision. That is right, isn't it?  
 15 A. I don't think that the Belgian court -- but again, this  
 16 is not my task to have an opinion on that. I don't  
 17 think that the Belgian court has referred to the  
 18 question of whether the National Fund is owned by  
 19 Kazakhstan or by someone else. That question I don't  
 20 see any place. Also, if I am correct, in your  
 21 submissions you are not asking the English court to  
 22 decide upon the question of ownership, isn't it?  
 23 Q. No, my case is the questions of ownership have nothing  
 24 to do with 1445, it is about claims, and that ownership  
 25 does not come into it. We will come back to that point

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1 in a moment, but the point I have been asking you to  
 2 consider is on what basis can you make the statement "if  
 3 the English court decides that the wording of the  
 4 garnishment itself is not decisive", when these  
 5 proceedings are based on the fundamental premise that  
 6 it is for the English court to decide the subject matter  
 7 issue?  
 8 A. I am not stating anything, I am just explaining in which  
 9 circumstances, and there is more than one, my opinion  
 10 could, in my view, be relevant. That's all. It is  
 11 hypothetical.  
 12 Q. Can we turn to your second report, please, Professor,  
 13 and pick up something that you say in paragraph 4.  
 14 A. 4?  
 15 Q. Yes. No, let me just -- sorry, page 167.  
 16 A. Which paragraph?  
 17 Q. It is your second report, paragraph 4 of page 167.  
 18 A. Paragraph 4. In the statement on the facts by  
 19 Professor Allemeersch; it's that?  
 20 Q. Yes, that is it:  
 21 "There are some points that are in my view  
 22 incorrect. As, however, I am not instructed to give an  
 23 opinion on the facts, I will not deal with them."  
 24 Then what you say is this:  
 25 "My silence can, however, not be understood as

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1 agreement, especially in regard to paragraph 22.”  
 2 If we can just see what it is in paragraph 22 that  
 3 you have a concern with, and if we could turn, please,  
 4 to E1/5, what is said there is that:  
 5 “On 25 May, by a judgment of the same date, the  
 6 Belgian court maintained the Belgian garnishment order  
 7 but in the reduced amount of 530 million. The judgment  
 8 further referred the issue of BNYM’s debt to the English  
 9 courts. It is pursuant to that referral that these  
 10 proceedings were commenced on 28 May 2018.”  
 11 Now, what do you find inaccurate in that summary?  
 12 A. No, I am just not expressing any opinion on this,  
 13 because this is not part of my task to answer questions  
 14 on Belgian law. It is just --  
 15 Q. You pick this out as being some point that obviously you  
 16 don’t want to express any agreement with, but what is  
 17 wrong with that as a statement of fact?  
 18 A. I only want to avoid that you deduce from my  
 19 non-commenting on things that I fully agree with  
 20 statements made by other experts. That’s all.  
 21 Q. If we could just see what Professor Allemeersch says in  
 22 his second report, to see what he says, and it’s at  
 23 E1/133. What Professor Allemeersch says is this:  
 24 “In their ex parte application to the Belgian court  
 25 the Stati parties wrote that the BNYM garnishee,

1 according to the present request acts as global  
 2 custodian for the National Fund, based on which RoK must  
 3 have a claim against BNYM relating to the assets of the  
 4 National Fund. The BNYM... the National Fund as part  
 5 of the RoK.”  
 6 We have looked at that:  
 7 “The Belgian court mention the National Fund  
 8 referring to RoK as a judgment debtor in the Belgian  
 9 garnishment order, which was based on the ex parte  
 10 application. By doing so the Belgian court did not  
 11 decide that the National Fund falls within the scope of  
 12 the Belgian garnishment order, as suggested by  
 13 Professor Storme. It only decided that the Belgian  
 14 garnishment order is made against RoK, which means that  
 15 the order only relates to amounts or assets owed to RoK  
 16 as the seized debtor. Thus, while the Belgian  
 17 garnishment order refers to the assets of the National  
 18 Fund, they only fall within the scope of the order if  
 19 such assets held by the garnishee are owed to RoK. That  
 20 is apparent from the Stati parties’ own language ...  
 21 where they say that RoK must have a claim against BNYM  
 22 in relation to the National Fund.”  
 23 Pausing there, what he states there is correct,  
 24 isn’t it?  
 25 A. What who states?

1 Q. Professor Allemeersch.  
 2 A. In number 22?  
 3 Q. 34. The paragraph that I have just read aloud at  
 4 page 133.  
 5 A. 34 in the supplemental report.  
 6 Q. Can you just read it to yourself again? Read it to  
 7 yourself, because I have read it out aloud. Just read  
 8 paragraph 34 to yourself. Is there anything there that  
 9 you disagree with?  
 10 A. What is the relevance for the questions that have been  
 11 asked to me on Belgian law?  
 12 Q. Because it is dealing with the issue that has been  
 13 referred to the English court, dealing with the question  
 14 as to whether or not there is a claim. Do you disagree  
 15 with that?  
 16 A. You ask questions precisely on things which I say  
 17 specifically are outside my task.  
 18 Q. So if it is outside your task then I don’t need to ask  
 19 you a question about it. As simple as that.  
 20 A. And I say explicitly I am commenting it, because I don’t  
 21 think it is part of my task to comment on the facts and  
 22 on all statement made on the facts by other experts.  
 23 Q. Can we agree on this, that the Belgian judge making the  
 24 order decision of 25 May referring the issue of the  
 25 subject matter to England did not regard the question of

1 the ownership of the National Fund as being relevant to  
 2 the subject matter of the garnishment. That is right,  
 3 isn’t it?  
 4 A. One should ask the judge, evidently. I can’t read the  
 5 mind of the judge. I read the judgment not in the sense  
 6 that the question of ownership is referred to the  
 7 English court. That’s how I read it. Evidently that is  
 8 for the English court to decide what has been referred  
 9 to them, but the way I read the judgment is that the  
 10 question of ownership was not referred.  
 11 Q. The reason I put it that way, Professor, is because, as  
 12 we saw in the section dealing with the question of  
 13 immunity, the judge made the statement that we looked at  
 14 earlier this afternoon, which is that it is uncontested  
 15 that this National Fund forms part of and is the  
 16 property of RoK. You recall that?  
 17 A. I have seen that, yes.  
 18 Q. And notwithstanding that, it said that whether the  
 19 assets were subject to the garnishment depended on  
 20 whether or not there is a debt that exists from BNYM to  
 21 RoK, which the judge rightly regarded as a question of  
 22 English law. That is correct, isn’t it?  
 23 A. I don’t know what the judge regards as a question of  
 24 English law. The only thing I have is the wording of  
 25 the judgment, which is a very short paragraph saying the

1 seized debtor is entitled to challenge the declaration  
 2 from the garnishee before the attachment judge. This,  
 3 challenging the declaration, is referred to the trial  
 4 court, being the English judge. That is all the judge  
 5 says. Now we are trying to make big reasoning on what  
 6 this could all mean. I must confess that it is a rather  
 7 strange formulation, it could have been clearer. So  
 8 unfortunately it is not very clear, that's true. Which  
 9 means that we are trying to understand this.

10 Q. Would you agree that --

11 A. I am not saying more than what I can read here, which is  
 12 not what you read.

13 Q. Would you agree with me, Professor, that if the English  
 14 court rules that the Belgian conservatory garnishment  
 15 has no subject matter, then it necessarily follows that  
 16 the executory garnishment has no subject matter?

17 A. Well, this is in your question.

18 Q. While you're thinking about that, let me just put to you  
 19 this proposition to see whether you agree or not: an  
 20 executory garnishment is nothing other than  
 21 a conservatory garnishment converted into an executory  
 22 garnishment.

23 A. That depends on the facts in the documents. Then you  
 24 have to evidently analyse the documents on which the  
 25 executory garnishment is based.

1 Q. There were no two separate garnishments, one  
 2 conservatory and one executory; it is the same  
 3 conservatory that is transformed into an executory upon  
 4 service of an ex parte award. The transformation cannot  
 5 create a subject matter for the garnishment.

6 A. That is true.

7 Q. Could we then move on to Belgian law. I think we all  
 8 agree that the writings of Justice Dirix enjoy  
 9 a particular status because he as former professor, he  
 10 is a former enforcement judge, the president on the  
 11 Court of Cassation, and the Court of Cassation is the  
 12 main court of last instance in Belgium; that's right,  
 13 isn't it?

14 A. Yes, and I can tell you very much about him if you like.  
 15 I am his successor, I have taken over his chair in  
 16 insolvency law.

17 Q. If we look at this right of recourse to creditors, and  
 18 we deal with this, we could pick it up from your first  
 19 statement, where the concept is introduced into the  
 20 proceedings. Page 91 of E1.

21 A. Which is paragraph?

22 Q. Paragraph 15.

23 A. Yes.

24 Q. You say:

25 "Under Belgian law the question whether cash and/or

1 securities ... pursuant to a custody agreement can fall  
 2 within a garnishment order or garnishment is a question  
 3 of the extent of the right of recourse of creditors to  
 4 the question which asset can be seized or attached by  
 5 a creditor."

6 As you have seen from the joint memorandum, you  
 7 refer also to the right of recourse of creditors. We  
 8 don't need to go back to that because we looked at it  
 9 earlier today. And it is right to say that this right  
 10 of recourse is one of the key parts of your evidence to  
 11 the court.

12 A. It's a key part. It's reminding you of the general  
 13 system of Belgian law as the background to which that  
 14 you have to keep in mind when understanding the more  
 15 specific rules and doctrines in order to understand what  
 16 all these different enforcement measures are about, and  
 17 in order to understand some of the more tricky cases  
 18 like the case of simulation, for example, or the case of  
 19 fraud or other cases. It is good to know what the  
 20 general background principles are, yes. That is the  
 21 reason we reason in continental law.

22 Q. Yes, and in the context of 1445 of the Belgian Judicial  
 23 Code --

24 A. Yes.

25 Q. -- it says right of recourse, which introduces the

1 ownership element in 1445, which doesn't otherwise  
 2 appear there. That is right, isn't it?

3 A. I think 1445 is not dealing with these questions. The  
 4 whole chapter on the procedural rules for the different  
 5 types of seizures are not dealing with these questions.  
 6 These questions are dealt with basically in the Civil  
 7 Code.

8 Q. But we are concerned here, are we not, with a third  
 9 party debt and the jurisdiction that was invoked and has  
 10 been considered by the court in relation to 1445?

11 A. Yes, let me tell this. These questions where you have,  
 12 let's say, a different or at least a dispute about  
 13 whether -- to say it not completely correct but to say  
 14 it a bit simple -- where the apparent owner may not be  
 15 the true owner. Don't take it literally, but yes, to  
 16 know what we are talking about. Or where the true owner  
 17 is the true owner only in fraud of creditors or  
 18 something. These questions under Belgian law, they  
 19 are -- well, they are basically found as well in the  
 20 statute as in the handbooks on property law, or maybe on  
 21 insolvency law. And to some extent, if the -- if books  
 22 on enforcement law are dealing with substantive law  
 23 questions, they will also probably deal with that.

24 If they just deal with the procedure, they will  
 25 leave out these questions and leave that, let's say, to

1 civil law or more specialised books that discuss them.  
 2 It has all to do with the fact that the principles are  
 3 not different depending on the type of assets .  
 4 So the general principles are the same whether we  
 5 are dealing with real estate , whether we are dealing  
 6 with movable assets, whether we are dealing with chose  
 7 in action, whether we are dealing with IP rights ,  
 8 et cetera .  
 9 So the general doctrines, like the doctrine on  
 10 simulation, they are the same for all kinds of assets ;  
 11 they are not specific , they are not specific doctrines  
 12 for garnishment. So evidently you will not find these  
 13 doctrines in the chapters on garnishment unless you have  
 14 a book that explains in detail everything which can  
 15 happen in the framework of a garnishment, and then we  
 16 will also deal with these questions. That is what  
 17 Eric Dirix is doing in his treaties on enforcement law.  
 18 You will see that all these questions pop up. He is not  
 19 dealing with all of them as extensively , but he mentions  
 20 all of them; he mentions them all.  
 21 Q. Can we just look at how Justice Dirix deals with this  
 22 then. If you could pick up E2.1 and turn to tab 44  
 23 towards the back there, do you find that? This is his  
 24 textbook, is it not?  
 25 A. This is it , and here you have the book in front of me.

1 Q. Excellent . Thank you.  
 2 A. That is the original .  
 3 Q. So it does exist . If we turn then to page 301, let me  
 4 just see if you agree with what Justice Dirix says:  
 5 "Garnishment is an attachment levied in the hands of  
 6 a debtor of a seized debtor, on what such debtor must  
 7 pay or give to the seized debtor. The amounts owed by  
 8 the third party are also part of the seized debtor's  
 9 assets and they ... the collateral of its creditors."  
 10 A. Where is this?  
 11 Q. It is at page 301.  
 12 A. Number? 584.  
 13 Q. Yes.  
 14 A. Number 584. Yes.  
 15 Q. Then:  
 16 "The foundation for the possibility to levy  
 17 a garnishment can therefore be found in Articles 7 and 8  
 18 of the mortgage law."  
 19 A. Yes.  
 20 Q. He goes on to say:  
 21 "The garnishment may in principle be levied on all  
 22 debt claims that the debtor, the seized debtor, has on  
 23 the third parties ."  
 24 A. Yes.  
 25 Q. "For example, garnishments in the hands of the employer

1 (wage garnishment), on a bank account, in the hands of  
 2 a tenant, et cetera, can be taken into consideration.  
 3 The creditor levies a garnishment in the hands of the  
 4 sub-debtor, who is called the garnishee. The  
 5 garnishment thus corresponds to a structure of a lateral  
 6 claim, Article 1166 of the Civil Code, thereto  
 7 a creditor takes action against his debtor's debtor.  
 8 However, the garnishment is to be regarded as an  
 9 autonomous legal mechanism."  
 10 A. Yes. This means that the garnishment is not just an  
 11 application of 1166, but that there is an analogy  
 12 between the two.  
 13 Q. Let's just think about that . If we can just work  
 14 through precisely what is being said, it's that he is  
 15 saying that although the foundation can be said to be  
 16 Articles 7 and 8 of the mortgage law, but he refers to  
 17 the garnishment is to be regarded as an autonomous legal  
 18 mechanism.  
 19 A. That sentence relates to the analogy with 1166. That  
 20 sentence ...  
 21 Q. Let's just test that . Could we look to see what  
 22 Professor Allemeersch says about this particular topic .  
 23 For that purpose you can put that Justice Dirix's  
 24 section apart. Can we see what Professor Allemeersch  
 25 says in his evidence. I should add, unchallenged

1 evidence.  
 2 A. Paragraph?  
 3 Q. Could we turn to paragraph 129.  
 4 A. 129. 129.  
 5 Q. I want to look at paragraph 23. What he says is this :  
 6 "As a preliminary matter I would like to point out  
 7 that under Belgian law a wide range of enforcement  
 8 mechanisms are available to creditors who seek to either  
 9 safeguard their means of enforcement (so-called  
 10 protective measures) and/or effectively enforce a claim  
 11 against their debtors (so-called executory measures).  
 12 The amalgam of available enforcement mechanisms  
 13 constitutes in essence what Professor Storme calls the  
 14 right of recourse of creditors throughout his opinion.  
 15 However, the right of recourse is not a standalone  
 16 ground on which creditors can rely . It encompasses the  
 17 idea that all of the debtor's assets are available for  
 18 recourse by its creditors , whether movable or immovable  
 19 and whether present or future . However, creditors  
 20 cannot take any protective or executory measures solely  
 21 on the basis of their right of recourse; they are  
 22 required to choose one or more specific enforcement  
 23 mechanisms as their means of recourse. They may use  
 24 multiple enforcement mechanisms, they are not limited to  
 25 use only one.

1 "Creditors are required to choose a specific  
 2 enforcement mechanism as applicable, depending on  
 3 inter alia whether the target property is movable or  
 4 immovable, the location of the assets, whether or not  
 5 they are being held by a third party or by the debtor  
 6 itself, and in circumstances also whether they are  
 7 tangible or intangible. For certain types of assets, eg  
 8 seizure of a ship, specific procedures apply.

9 Each of the various enforcement mechanisms is  
 10 subject to its own conditions and procedural rules, as  
 11 pointed out by Mr Ryelandt in paragraph 17.19 of his  
 12 opinion, if one is seeking to seize immovable property,  
 13 for example, the specific rules and procedural set forth  
 14 in the Belgian Judicial Code will apply. If movable  
 15 property is being targeted, special conditions may apply  
 16 depending on whether the assets are held by the creditor  
 17 or by a third party."

18 MR JUSTICE TEARE: Mr Malek, before we get to the question,  
 19 I have lost you. Where were you reading from?

20 MR MALEK: I was reading from Professor Allemeersch's --

21 A. Supplementary report.

22 Q. -- supplemental report at paragraph 23, which is in  
 23 bundle E1/129.

24 A. Paragraphs 23 and 24.

25 Q. Yes. I have just read paragraphs 23 and 24. Perhaps

1 your Lordship could just have a glance at that again and  
 2 then I will come up with a question.

3 MR JUSTICE TEARE: Thank you.

4 MR MALEK: The question, Professor Storme, is this:

5 Professor Allemeersch's analysis is correct, is it not,  
 6 that the right of recourse is not a standalone legal  
 7 doctrine, you have to bring your particular claim within  
 8 a particular category, and in this case it is  
 9 Article 1445, which is in play, dealing with the  
 10 garnishment of a third party debt; that is correct,  
 11 isn't it?

12 A. Well, I have two remarks to that. I think -- but that  
 13 is maybe not the technical answer, but I think the  
 14 expression that "the right of recourse is not  
 15 a standalone legal ground on which creditors can rely"  
 16 is misleading.

17 It is true that creditors cannot invent new forms of  
 18 enforcement. They have to take those that are available  
 19 in the codes and in the statutes. So in that respect  
 20 it is true that the creditors will have to choose  
 21 between the enforcement mechanisms that are available,  
 22 because they have to follow certain procedures, and they  
 23 cannot organise self-help, not following the procedures  
 24 that are constituted by the legislature.

25 What is missing in a certain sense, and what has to

1 be added, and there the general principle is relevant,  
 2 is that the different enforcement mechanisms and how to  
 3 interpret them must be understood in such a way that  
 4 there is no gap. Because the creditors have in general  
 5 a right of recourse upon all assets, it means that there  
 6 must be a procedure available to seize any type of  
 7 asset, not a single procedural evidently. But that the  
 8 scope of application of these different mechanisms must  
 9 be interpreted so that there is no gap, that there is no  
 10 type of assets that would -- how you say it -- that  
 11 would not be available for the creditors.

12 What we see is that that would also relate, and that  
 13 is maybe a little bit difficult in the English  
 14 constitutional order, but for us that would also relate  
 15 to questions of the constitution and even of the  
 16 European Convention on Human Rights, that has the right  
 17 to enforce, and there can only be a gap when certain  
 18 assets are, by a decision of the legislator, not  
 19 available for the creditors, like in the case of  
 20 immunity, for example.

21 But the technical rules of procedure cannot be  
 22 understood in a way that they would make it impossible  
 23 to seize certain assets because they do not at first  
 24 sight fall within these categories.

25 I give you an example, dematerialised securities.

1 Even if maybe they are out in this case, we don't know,  
 2 and I will not give an opinion on that, dematerialised  
 3 securities are, under Belgian law, not qualified as  
 4 debt. I don't know for English law, but under Belgian  
 5 law they would not be debt; they would be corporeal  
 6 movables. Nevertheless, case law has always understood  
 7 that the procedure to be followed in order to seize  
 8 dematerialised securities is the garnishment, although  
 9 one is not sure that if you take 1445 literally this can  
 10 be used.

11 Other examples, if you want to seize copyright or IP  
 12 rights, at least for some intellectual property rights  
 13 there is no procedure in the Belgian code that explains  
 14 how you can seize copyright. What has the case law  
 15 said? Well, evidently copyright is not immune, you must  
 16 be able to seize copyright, so we must interpret the  
 17 existing laws in such a way that also those assets that  
 18 are not literally covered by can indeed be attached or  
 19 can be seized by way of these procedures.

20 So although you have to choose one of the  
 21 mechanisms, the scope for this mechanism is interpreted  
 22 in such a way that there is no gap.

23 I did not explain that in my report because this is  
 24 a new argument made by Professor Allemeersch in his  
 25 supplemental report, on which I could not anticipate.

1 Q. In this case we are concerned with a conservatory  
 2 garnishment governed by Article 1445 to 1460 of the  
 3 Belgian Judicial Code.  
 4 A. Yes. You refer to Dirix. If you take -- the problem is  
 5 I don't know where it is in the materials, because  
 6 I have the book here in front of me. But Dirix, in the  
 7 framework of garnishing bank accounts, explicitly states  
 8 that you can garnish a bank account that apparently  
 9 belongs to someone else. So the appearance, the banking  
 10 contract is with someone else than your debtor.  
 11 Nevertheless, under certain circumstances it is possible  
 12 to seize this cash or debt, or whatever you want to call  
 13 it, on the basis that it is only apparently owned by the  
 14 account holder.  
 15 That is something which is explicitly explained in  
 16 the book by Dirix. Then he refers to several decisions  
 17 of the Supreme Court and also French and Dutch case law,  
 18 and amongst these decisions of the Supreme Court is the  
 19 Belgian Supreme Court, the one which is closest in its  
 20 facts to this case is the Baitemal case of 1995.  
 21 Q. Can we agree this: your analysis that an ownership  
 22 requirement can be read into 1445, you have not  
 23 identified in your reports any material that supports  
 24 your view. It is a personal view that you have; no  
 25 doubt it is held sincerely but it is not backed up by

1 any material.  
 2 A. It doesn't matter where you read it; yes? The question  
 3 is whether it is positive law or whether this is the  
 4 doctrine of the Supreme Court in interpreting Belgian  
 5 law. And although we have a codified system, the  
 6 relation between case law and statute is different from  
 7 the English law. Because in English law a statute is  
 8 normally seen as a specific rule which is an exception  
 9 to the common law. Whereas in Belgium, statutory  
 10 provision are seen as expressions of the common law, and  
 11 that means that they are read differently. We have  
 12 different techniques of interpretation.  
 13 Q. Article 7 of the Mortgages Act, which you referred to,  
 14 I'm not sure the text was actually in the papers but is  
 15 it a fair summary to say that that sets out the general  
 16 principle that a debtor is liable for the debts with all  
 17 of the assets in its estate? That is what Article 7  
 18 states.  
 19 A. That is what it basically says.  
 20 Q. It doesn't say anything about garnishment and the  
 21 conditions that apply to a third party garnishment.  
 22 A. Evidently not, because that is a question of procedure  
 23 under Belgian law.  
 24 Q. And Article 8 of Mortgages Act, that reiterates the  
 25 principle of equality of creditors in the absence of

1 specific rules of priority between them.  
 2 A. Yes.  
 3 Q. That principle is not relevant to this case, is it?  
 4 A. It is basically not relevant because here we have  
 5 a single creditor only involved. It is a principle  
 6 which explains certain technical rules of garnishment,  
 7 but it is not at stake, I believe, in this case. It's  
 8 just a normal way of saying that we always quote it  
 9 together. Look in all handbooks on Belgian law, they  
 10 always say Articles 7 and 8.  
 11 Q. If we can come back to Article 1445 and the creditor's  
 12 right of recourse. If you could turn, please, to your  
 13 first report, E1/93.  
 14 A. Paragraph?  
 15 Q. 23. This is a section under the heading "The general  
 16 approach of Belgian law - grounds on which seizure is  
 17 possible. Relevance of contract law".  
 18 A. Yes.  
 19 Q. We can then look at 25 and you say:  
 20 "A creditor's right of recourse against an asset can  
 21 under Belgian law be based on three types of ground.  
 22 "In the first place, evidently where the asset is  
 23 property of the debtor and unless by law it cannot be  
 24 seized, I would add that under certain conditions there  
 25 is a right of recourse when the asset is merely co-owned

1 by the debtor.  
 2 "Secondly, under certain conditions where the asset  
 3 is merely apparently the property of the debtor."  
 4 Then 25.3:  
 5 "Thirdly, under certain conditions when the asset is  
 6 not the property of the debtor but of the third party,  
 7 but the property right of a third party is disregarded  
 8 because of the fraudulent, abusive and/or abnormal  
 9 character of the behaviour of the debtor and/or third  
 10 party."  
 11 You very helpfully in your joint memorandum  
 12 summarise your views. If we can just go back to the  
 13 joint memorandum, because I think I stopped reading as  
 14 I was about to reach this point. Could you please turn  
 15 to page 115. In that third column where you summarise  
 16 your views and where I stopped, you say:  
 17 "If any of the three conditions were to apply ..."  
 18 Then you set them out there in summary form. Do you  
 19 see that?  
 20 A. I seem to have written three cases rather than three  
 21 conditions, but --  
 22 Q. It is right to say you have read the pleadings in these  
 23 proceedings and it is the right to say that the  
 24 rejoinder, which is the last pleading, raises a number  
 25 of these issues.

1 A. Right. They were made after my report.  
 2 Q. Yes. Therefore they fall to be determined in these  
 3 proceedings. As we have seen from the judgment in the  
 4 jurisdiction judgment, they are on the agenda for  
 5 determination.  
 6 I just want to see if I can understand, if  
 7 I understand correctly, what you are saying. For that  
 8 purpose can we go back to your first report, to  
 9 paragraph ...  
 10 A. Can I just explain in one sentence, these three cases,  
 11 the difference between them is the second and the third  
 12 case the true ownership will be disregarded in favour of  
 13 either apparent ownership or some other ground, whereas  
 14 in the first case it is the opposite. In the first case  
 15 is the apparent ownership that is disregarded in favour  
 16 of true ownership. That may be explains a little bit  
 17 the structure.  
 18 Q. If we can go through the implications of this analysis.  
 19 As I have said, if you could turn to your first report  
 20 at page 93 at paragraph 28.  
 21 A. Yes.  
 22 Q. What you say is:  
 23 "As to the role of contract law, and more generally  
 24 the law of obligations in the case of garnishment in  
 25 Belgium, contract law is evidently relevant in order to

1 determine what the third party owes ..."  
 2 MR JUSTICE TEARE: Again, where are you please, Mr Malek?  
 3 MR MALEK: My Lord, I am at page E1/93 and I am reading from  
 4 Professor Storme's first report at paragraph 28.  
 5 MR JUSTICE TEARE: Thank you.  
 6 MR MALEK: "As to the role of contract, more generally the  
 7 law of obligations in the case of garnishment in  
 8 Belgium, contract law is evidently relevant in  
 9 determining what the third party owes. There is in  
 10 principle no right to payment of cash or the right of  
 11 restitution or delivery of securities that can be seized  
 12 by garnishment if there is no duty of the third party to  
 13 pay or deliver, and the amount seized is determined in  
 14 principle by the extent of the obligations of the third  
 15 party."  
 16 A. Yes.  
 17 Q. "The contract law does not determine, or has at least  
 18 not the final say, as to the question who owns the cash,  
 19 who owns the right to cash or securities (the asset),  
 20 and by whose creditors it can be seized. This is  
 21 a matter of enforcement law."  
 22 So --  
 23 A. That is my view on Belgian law, yes.  
 24 Q. And it is right to say that you don't give any  
 25 references to decisions or textbooks or anything to

1 support it; this is your personal view. I am not saying  
 2 you don't have that view, I am just saying that this is  
 3 a personal view of yours.  
 4 A. No, I am giving references when I develop the cases  
 5 where there is a difference. This is a general  
 6 statement to say that there are cases where indeed the  
 7 contract law conclusion is not the final. Evidently  
 8 I am not spelling them out here. I have given a summary  
 9 of that in number 25, and I am then developing them at  
 10 length in paragraph 32, paragraph 35, paragraph 38, and  
 11 that's where you will find the references.  
 12 Q. So if I understand, what you are saying is that as far  
 13 as there are two questions, one is of contract law and  
 14 the other is enforcement law.  
 15 A. Yes.  
 16 Q. And you say that contract law is concerned with what the  
 17 third party owes, and in the context of this case is the  
 18 "what" the cash or the figure?  
 19 A. Yes, the amount. The amount of cash, which securities  
 20 or whatever.  
 21 Q. Let's just focus on cash for the sake of it. So it is  
 22 concerned with what the third party owes, and so that  
 23 question is the 530 million for the purpose of our case.  
 24 Then you have got the question on enforcement law,  
 25 which is at 28.2. Contract law does not determine, or

1 at least not the final say, as to the question of who  
 2 owns the right to cash and by whose creditors it can be  
 3 seized.  
 4 And I think we deal with cash in more detail at  
 5 29.1, where you say:  
 6 "As to cash, BNY is a debtor of an obligation to pay  
 7 money arising under the contract between BNYM and its  
 8 contracting party. That contract then determines what  
 9 is owed. It is said as a matter of Belgian law contract  
 10 law does not have the last word as to the question of  
 11 whose creditors the right to cash can be seized."  
 12 Then at 30, just going forward, you say this:  
 13 "These distinctions are all highly relevant because  
 14 this dispute is, in my understanding, not a dispute  
 15 about the content of the obligation of the third party  
 16 but about the property and/or right of recourse of  
 17 creditors of the assets that owed the cash or in custody  
 18 of the securities, unless about enforcement law instead  
 19 of contract law. These questions are clearly different  
 20 questions, also for matters of jurisdiction on  
 21 applicable law."  
 22 A. Where are you reading from?  
 23 Q. I'm reading from paragraph 30 of your report at page 94.  
 24 Do you have it in front of you?  
 25 A. I am back.

1 Q. Read paragraph 30 to yourself.  
 2 A. Yes, I did.  
 3 Q. Would you agree with me that this analysis is wholly  
 4 inconsistent with the 25 May decision that is referred  
 5 to the English court, the issue of subject matter?  
 6 A. I don't think so.  
 7 Q. There is nothing on the face of the decision to indicate  
 8 that the English court is being invited to determine the  
 9 question of cash, it is not a very difficult question,  
 10 and not everything to do with subject matter. Why would  
 11 the Belgian court refer to the English court on the  
 12 question of contract?  
 13 A. Maybe I am not very respectful in saying this, that when  
 14 I read the decision of the 25 May, excuse me to be  
 15 unrespectful, but when I read the decision of 25 May it  
 16 gives me the impression that the judge says, "Oh, come,  
 17 what are you putting up again? If you really wanted to  
 18 discuss that, go somewhere else. I don't think this is  
 19 relevant. But if you really think this is relevant,  
 20 okay you can do it."  
 21 I am sorry to say it in these terms but ...  
 22 Q. That is utterly ridiculous, Professor.  
 23 A. You can say that this is ridiculous, but I think I am  
 24 a little bit used to the style of judgments in Belgium  
 25 and how I think Belgian judges are reasoning.

1 Q. Are you appearing here as an advocate or as an  
 2 independent expert?  
 3 A. No, I am just trying to explain you something. I am not  
 4 saying that the judge is right, I am not saying -- I am  
 5 just trying to explain how, as someone who has  
 6 experience of having read thousands of judgments and  
 7 have been pleading cases before enforcement judges, how  
 8 they reason.  
 9 And I am not saying that anyone is bound by this.  
 10 I am just trying to explain it.  
 11 Q. Can we see if we can read what Article 1445 is about.  
 12 Do you agree with me that it is concerned with claims?  
 13 A. It's concerned with -- it is concerned with those assets  
 14 that are in the power of a third party, which can be  
 15 paid or delivered by a third party in order to  
 16 enforce -- yes, to make these assets available for the  
 17 enforcement by the creditor.  
 18 Basically you have two techniques. Either you  
 19 can -- you have a two-party relationship or  
 20 a three-party relationship. Do you need a third party  
 21 in order to be able to get to these assets? Well, for  
 22 these kind of assets you need a third party. If you  
 23 need a third party, then you have to find -- you have to  
 24 follow a procedure which involves the third party,  
 25 evidently. That procedure is described in these

1 Articles .  
 2 Q. Could we go to Professor Allemeersch's first report to  
 3 look at some of the materials that he refers to in terms  
 4 of what Article 1445 is about. Can we turn to E1/9.  
 5 A. Number 43.  
 6 Q. Yes. In fact it is at page 9, and I was wanting to  
 7 look, if we may, at paragraph 42, where he sets out  
 8 1445, where he says this :  
 9 "The subject matter, if any, of a garnishment is  
 10 therefore the obligation owed by the garnishee to pay  
 11 certain amounts and to deliver certain assets to the  
 12 seized debtor."  
 13 Are you happy that that is an accurate statement of  
 14 Belgian law?  
 15 A. That is the -- not fully. It is the starting point of  
 16 reasoning, but it does not take into account the  
 17 exceptions to this main rule.  
 18 Q. If we can --  
 19 A. Very often, if you quote selectively from books you will  
 20 always find -- also in my own writings, you will find  
 21 you can quote a sentence where it says "Look, this is  
 22 the general rule", but if you just read a little bit  
 23 further then it turns out that there are a lot of  
 24 qualifications often to be made. It is the same thing  
 25 with these expressions. He is just quoting the general

1 introduction, the way it is generally presented to the  
 2 reader, without going further and mentioning the  
 3 qualifications .  
 4 Q. We can see in footnote 5 that Professor Allemeersch  
 5 cites Justice Dirix, where he says the garnishment is  
 6 the attachment in the hands of a debtor of the seized  
 7 debtor and what the former has to pay or deliver to the  
 8 seized debtor. Do you see that?  
 9 A. Yes.  
 10 Q. Then you see the other professor, where he says this in  
 11 the case of a garnishment:  
 12 "A claim of the seized debtor is being attached.  
 13 A garnishment can therefore be best defined as the  
 14 attachment in the hands of the debtor of the seized  
 15 debtor of what the former has to pay or deliver to the  
 16 seized debtor."  
 17 A. I have commented on this in my supplemental report.  
 18 Q. Yes. So those are the propositions, and if we can just  
 19 go over the page to footnote 7, which is cited, so if we  
 20 can read paragraph 43 to ourselves. In fact,  
 21 paragraph 43:  
 22 "Applied to the Belgian garnishment order this means  
 23 that it only has a subject matter if BNY owes an  
 24 obligation to pay the cash and/or deliver the securities  
 25 to RoK personally. In other words, the cash and its

1 security fall within the scope of the garnishment order  
 2 against BNY to pay cash and/or deliver the securities to  
 3 RoK.  
 4 "A claim is [and this is a quote from Justice Dirix]  
 5 The entitlement of one party (the creditor) to  
 6 a certain obligation of another party (the debtor). A  
 7 claim is therefore necessarily personal as it relates to  
 8 the direct entitlement of the creditor against the  
 9 debtor."  
 10 Just pausing there, is there anything in  
 11 paragraph 43 that you disagree with?  
 12 A. Yes.  
 13 Q. What is wrong with it?  
 14 A. Well, it is wrong that it gives again a description of  
 15 the normal case, without taking into account the  
 16 qualifications and exceptions. I have commented on that  
 17 in my supplemental report and all the authorities that  
 18 were quoted in the footnote. For example, why the  
 19 reference to the Supreme Court case in Tegisse (?),  
 20 approved 2017, does completely not lead to the  
 21 conclusion that Professor Allemeersch wanted us to  
 22 reach. You will find that in my supplemental report in  
 23 paragraph 30.71, point 72, point 73, et cetera.  
 24 Q. If we can just go to your second report to see what you  
 25 said at page 165, I just wanted to look briefly at what

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1 you say at 12.4 and 12.5 at page 170.  
 2 Just read those paragraphs to yourself. (Pause)  
 3 The proposition that I suggest is the true position,  
 4 Professor Storme, is that it doesn't make any sense to  
 5 say that subject matter makes a distinction between what  
 6 is owed without reference to the specific debt towards  
 7 a specific creditor; in other words, to whom. This  
 8 distinction between what and who doesn't make any sense,  
 9 I suggest.  
 10 A. That it just doesn't make any sense, that means that  
 11 several judgments of our Supreme Court do not make any  
 12 sense. Maybe they do not make any sense from the point  
 13 of view of English law, but they do make sense under  
 14 Belgian law.  
 15 Q. This distinction that you are seeking to make is not to  
 16 be found in, for example, the declaration that a bank  
 17 has to make in response to the garnishment, the  
 18 declaration that we see, which is all about debt. It is  
 19 nothing to do with making a distinction between what is  
 20 owned and who it's owed; the bank is required to make  
 21 a declaration covering both matters.  
 22 A. The bank is required to make the declaration -- well,  
 23 you have read the Article earlier today -- of what it  
 24 owes and giving sufficient details on the causes,  
 25 et cetera, so that it is possible in case of dispute to

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1 check this. That is what the declaration -- it's more  
 2 than just "I owe this amount".  
 3 Q. Yes, exactly. The declaration covers not only the  
 4 question of what the amount is, it also deals with the  
 5 question who the debt is owed to.  
 6 A. It deals with the question to whom the garnishee has to  
 7 pay.  
 8 Q. Yes.  
 9 A. Which is, under Belgian law, not necessarily the same  
 10 question. And I remind you that I gave you, to make it  
 11 a little bit more easy to understand how we reason,  
 12 I gave you the example of assignment. It is perfectly  
 13 possible that the debtor ... sorry.  
 14 It is perfectly possible that a debtor can discharge  
 15 its debt by paying to the assignor, although the  
 16 assignee is the owner of the claim. When the assignment  
 17 is not yet notified, the debtor can discharge his debt  
 18 by paying the assignor, although the question  
 19 authorities of the assignee can already garnish it. And  
 20 there are cases in Belgian law, court decisions that are  
 21 examples of that.  
 22 Q. As far as the 25 May decision which gives rise to the  
 23 reference in these proceedings, can we agree that there  
 24 is nothing on the face of that decision to indicate that  
 25 the English court is only concerned with a question of

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1 what is owed and not the question to whom the debt is  
 2 owed?  
 3 A. Well, as you thought, the referral there is based on  
 4 a specific Article in the judiciary code, which is  
 5 mentioned. We have been reading that Article. I have  
 6 tried to explain in my supplemental report what the  
 7 function of that Article is, and you will find it in  
 8 12.5 that we have just been reading, that the function  
 9 is there to protect the garnishee. The garnishee cannot  
 10 be deprived of its own judge. If the garnishee, being  
 11 here the bank, has contracted under English law, it  
 12 cannot be deprived of English jurisdiction when the  
 13 discussion is what the garnishee owes.  
 14 That is the reason why there is an article in the  
 15 judiciary code to protect the garnishee by saying: if  
 16 that is the problem, then you have to refer it to, let's  
 17 say, the natural judge under which the garnishee has  
 18 contracted. That is the purpose of the Article.  
 19 MR MALEK: Professor, I have no further questions for you.  
 20 Thank you.  
 21 A. Thank you.  
 22 (3.18 pm)  
 23 Re-examination by MR SPRANGE  
 24 MR SPRANGE: Professor Storme, it is Tom Sprange again from  
 25 King & Spalding. Can you see and hear me clearly?

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1 A. Yes, yes.  
 2 Q. I have a few questions for you.  
 3 At [draft] page 65 of the transcript you made  
 4 reference to the Baitemal case, a Supreme Court  
 5 decision, and you described it as very relevant. That  
 6 decision we find in the E2.1 bundle at -- sorry, it is  
 7 at it is E2, tab 7.  
 8 A. Yes, I have it.  
 9 Q. I would like to give you the opportunity of telling his  
 10 Lordship why you regard that Supreme Court decision as  
 11 very relevant to the issues in this case?  
 12 A. Yes.  
 13 So what is the situation here --  
 14 MR JUSTICE TEARE: Before you do so, Mr Sprange, did you  
 15 mean E2.1?  
 16 MR SPRANGE: Sorry, yes. E2.1, yes, tab 7.  
 17 A. Which is E2, 23 and for the English translation page 25.  
 18 MR JUSTICE TEARE: Thank you.  
 19 MR SPRANGE: Perhaps, Professor Storme, in giving your  
 20 explanation, if you could start by telling the judge the  
 21 factual matrix of this case.  
 22 A. Yes. So you have in this case four parties involved,  
 23 just like in our case. You have the creditor, which was  
 24 in this case a bankruptcy, an insolvency administrator,  
 25 so a trustee in bankruptcy was the creditor; you had the

1 third party, which was the Banco Central  
 2 Hispanoamericano, which later merged into Banco  
 3 Santander, so one of the big Spanish banks; and you had  
 4 two, I think, private parties, Mr El Abar(?) and the  
 5 fourth one was Mr Delai(?).  
 6 The insolvency administrator, so the seizing  
 7 creditor, practised the garnishment in the hands of the  
 8 Banco Central Hispanoamericano, against the debtor, and  
 9 the account, bank account, was in the name not of the  
 10 debtor but in the name of the other party.  
 11 The matter went to the enforcement judge, and the  
 12 enforcement judge said: these are two different parties  
 13 to the account holder and the debtor, cannot be  
 14 identified, it is not the same party, and it's not my  
 15 task to see whether there is any situation of fraud or  
 16 simulation, and it is not my task to judge, or I do not  
 17 have jurisdiction to who that they are not the real  
 18 owner of the seized account.  
 19 So the enforcement judge said: it is not part of my  
 20 job to check whether the real owner of the cash is the  
 21 seized debtor and not the contractual party of the bank.  
 22 And the decision was quashed by the Supreme Court  
 23 because the enforcement judge had refused to look into  
 24 this question. And the Supreme Court repeats -- and  
 25 it is a little bit, I think I have tried to say in my

1 report -- that evidently the normal case, the general  
 2 rule is that an attachment -- here as a translation for  
 3 garnishment -- can only be exercised against a debtor  
 4 and not against a third party, this is evidently the  
 5 normal case, but nevertheless this is not so in the case  
 6 of simulation. When the real holder of the bank account  
 7 opened in the name of another legal entity is the debtor  
 8 of the creditor, then you can seize this bank account  
 9 which is in the name of someone else than your debtor.  
 10 There are two things that are important here in  
 11 order to explain the case or to comment on the case.  
 12 First of all, this is a case where the creditor had  
 13 a judgment against the debtor, and seized under the  
 14 Banco Central Hispanoamericano, seized against the  
 15 debtor bank accounts in the name of someone else.  
 16 Why do I stress this? Because in some of the  
 17 reports Mr Ryelandt, for example, he said: if you want  
 18 to do that, then you have to obtain an order against the  
 19 fourth party so to say. Clearly in this case this is  
 20 not so, certainly.  
 21 The second point of importance is what the role of  
 22 simulation is here. And why do I say this? Because  
 23 Professor Allemeersch, in his report, he keeps repeating  
 24 that simulation only applies when you have two  
 25 ostensible and in secret contract. This is clearly

1 a case where it is not the case. A case which is found  
 2 on simulation is nothing to do with an ostensible and  
 3 a secret contract. First of all, it is quite clear in  
 4 this case that the Banco Central Hispanoamericano had  
 5 a contract only with the account holder and that there  
 6 was no simulation on the side of the Banco Central  
 7 Hispanoamericano. They were in good faith, so to say.  
 8 They only knew their account holder.  
 9 Apparently, as to the relationship between the  
 10 account holder and debtor, there is no indication at all  
 11 that there were two contracts between them, an  
 12 ostensible contract and a secret contract. We don't  
 13 know even whether there was a contract between them.  
 14 The judge is not investigating this at all. He is  
 15 investigating whether the seized debtor is the true  
 16 owner of the assets, of the cash in the bank account.  
 17 It's not true that you need to identify two  
 18 contracts in order to have simulation, because the  
 19 simulation here is not dealing with the content of a  
 20 contract, it is dealing with the question of the assets.  
 21 So these are, I would say, the important elements of  
 22 this central case of the Belgian Supreme Court.  
 23 Q. Professor Storme, at pages 106 and 107 of the [draft]  
 24 transcript of the hearing today Mr Malek put the  
 25 proposition to you --

1 A. I'm missing you.  
 2 Q. I think we have some lag in the feed. I'll try again.  
 3 At pages 106 to 107 of the [draft] transcript  
 4 Mr Malek put the proposition to you that it made no  
 5 sense to distinguish between what is owed and what is  
 6 owned when looking at subject matter. In response to  
 7 that, you said that means several Supreme Court  
 8 judgments make no sense. My question is this: is this  
 9 one of those Supreme Court judgments?  
 10 A. Yes. Precisely. That is the most important one. It's  
 11 the most relevant --  
 12 Q. Are you able to --  
 13 A. Because the facts are very similar.  
 14 Q. Okay. Just for our owned edification, are you able to  
 15 name other Supreme Court judgments?  
 16 A. Well, I have to go back to my supplementary report.  
 17 (Pause)  
 18 I am sorry to say that the one I had in mind was  
 19 a Court of Appeal case, excuse me. The one  
 20 I recollected from the facts is a Court of Appeal case.  
 21 Q. Just give us the reference from your report.  
 22 A. There's another ... (break in audio transmission) ...  
 23 Sorry.  
 24 Q. Professor Storme, you also mentioned in your evidence  
 25 earlier the problem with selectively quoting from books.

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1 I want to take you back to Dirix, and if you could  
 2 please take up in the E2.1 bundle, tab 44. If you  
 3 prefer to use the book, I am looking at paragraph 585,  
 4 which is in chapter 8, "Garnishment", section 1,  
 5 "General", under the heading "Concept".  
 6 A. Yes.  
 7 MR JUSTICE TEARE: Where would I find this?  
 8 MR SPRANGE: My Lord, it is E2.1, tab 44, page 301. It is  
 9 E2/301. It should be a very small English translation.  
 10 MR JUSTICE TEARE: This is the passage that has already been  
 11 referred to.  
 12 A. Yes.  
 13 MR SPRANGE: I am at paragraph 585. I don't believe we  
 14 have --  
 15 MR JUSTICE TEARE: Right, the next one. Thank you.  
 16 MR SPRANGE: Professor, feel free to read the English or the  
 17 original language. Once you have -- can you hear me  
 18 Professor?  
 19 A. It is a very bad, very bad connection. I am losing you  
 20 all the time.  
 21 Q. Okay. I will put the question very simply. What is the  
 22 significance of this passage to the issues that we have  
 23 been discussing, particularly in relation to the "owned"  
 24 and "owed" distinction?  
 25 A. It's not dealing with that question, because

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1 Professor Dirix is dealing with those questions in other  
 2 chapters, and he is dealing with these situations in the  
 3 general part, because these questions do not only arise  
 4 in relation to garnishments, they can also arise in  
 5 relation to other forms of enforcement, and that is the  
 6 reason why you would find them in chapter 1, section 5  
 7 of his book, where he is, for example, discussing the  
 8 Baitemal case.  
 9 So first he deals with general questions, including  
 10 these, and then he has several chapters on the  
 11 technicalities of the different procedures. Then, for  
 12 example, the garnishment is chapter 8, and then he  
 13 explains in a very general statement what garnishment is  
 14 in general, without entering into that. Then he  
 15 discusses some other technical detailed questions in  
 16 relation to garnishment, but not this question, because  
 17 it was already dealt with in chapter 1.  
 18 Have you been able to follow that?  
 19 Q. Most of it. You dropped out a little towards the end.  
 20 As far as you understand paragraph 585, what  
 21 proposition does it support with respect to garnishee  
 22 orders?  
 23 A. Well, I think 585 is -- 585 is dealing with the main  
 24 practical application of garnishment, and the first main  
 25 practical application is to seize debts, so monetary

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1 rights. And in 585 he is explaining that it is not only  
 2 debt that can be seized by way of garnishment, but  
 3 I think also in English law you would say in cases of  
 4 availment when a third party has movable goods or also  
 5 it could also be meant to cover securities, for example.  
 6 So if you take the two together he gives a general  
 7 description of what in general can be covered by the  
 8 instrument of garnishment, rather than by other  
 9 instruments.  
 10 Q. Thank you. At [draft] page 35 of the transcript today  
 11 you explained how, from a Belgian law perspective, the  
 12 key date for considering whether a garnishee order has  
 13 subject matter is the date of the garnishee order. What  
 14 I would like to ask you is this: can you explain what is  
 15 the --  
 16 A. The date of the bailiff ...  
 17 Q. Please continue.  
 18 A. It is the date that the bailiff -- yes, it is the date  
 19 at which the bailiff notifies the third party.  
 20 Q. Okay.  
 21 A. It is on that moment the third party has to freeze  
 22 immediately. And for bank accounts it means, for  
 23 example, that a sum of money that only arrived one day  
 24 later would not be covered by the garnishment order. It  
 25 is fixed at that moment.

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1 Q. Could you explain to his Lordship the rationale, the  
 2 legal rationale for that approach under Belgian law?  
 3 A. Well, I am not sure it is the only one, but one of the  
 4 main reasons is that under Belgian law, as well  
 5 garnishment as executory seizures -- which would be  
 6 under English law a third party debt order, or something  
 7 like that I guess -- that under many Belgian law these  
 8 enforcement measures do not give priority to the seizing  
 9 creditor, which means if other creditors want to join,  
 10 they will have to share. Just like in the case of  
 11 bankruptcy. Whereas there are many other countries  
 12 where if you practice a garnishment you will be paid  
 13 first, even if there are other creditors and there is  
 14 not enough for all of them. For example, in the German  
 15 law and in the French law, when a creditor garnishes he  
 16 will be paid first, he gets a priority.  
 17 That is not the case in Belgian law. So you have  
 18 a date where things are fixed.  
 19 And the second purpose is that this is also the date  
 20 at which you have to judge the defences that the  
 21 garnishee can raise. For example, if the garnishee pays  
 22 the account holder three hours after the garnishment, he  
 23 will not be discharged. He cannot raise as a defence,  
 24 "Sorry, I have no debt because I have paid". It is the  
 25 exact moment at which the content of the gap is, well,

1 frozen or fixed. That is how we would express this.  
 2 Q. Okay. You mentioned just then, and you said earlier in  
 3 your evidence on page 117, that if money arrives a day  
 4 after the date of the order being noticed to the third  
 5 party, it isn't covered. What about this: if the  
 6 parties, by agreement, reduced the amount of money  
 7 caught by the garnishment order, would that change the  
 8 analysis of whether the garnishment order had subject  
 9 matter at the time it was made or not?  
 10 A. No. No. It would just reduce the possibility for the  
 11 creditor. There is always a risk, for example, if he  
 12 has to share with other creditors.  
 13 Q. Mr Malek asked you a question at [draft] page 82 of the  
 14 transcript about things that the English court might  
 15 decide and the impact on Belgian proceedings. I don't  
 16 think there was a clear answer given to that, so I want  
 17 to be sure that we have your views on it.  
 18 My question to you is this: if the English court  
 19 decides that there is no debt owed to Kazakhstan under  
 20 the terms of the GCA, will there or will there not still  
 21 be scope for the garnishment order to have subject  
 22 matter?  
 23 A. Sorry, I lost you.  
 24 Q. Would you like me to start from the beginning?  
 25 A. No, no, just the last sentence: "If the English court

1 would decide ..."  
 2 Q. -- that there is no debt owed to Kazakhstan under the  
 3 terms of the GCA, will there or will there not still be  
 4 scope for the garnishment order to have subject matter  
 5 under Belgian law?  
 6 A. Well, we would have to see that judgment evidently, but  
 7 at least some of the possible arguments would still  
 8 stand.  
 9 If, for example, the Statis would allege that was  
 10 fraud, that certain assets had been hidden in  
 11 a fraudulent way, for example, that would certainly not  
 12 be covered by, I believe, by an English judgment on the  
 13 debt.  
 14 As to simulation, it's not entirely clear to me  
 15 because it would depend on what exactly was at stake.  
 16 If the simulation invoked would have something to do  
 17 with the relationship with the Bank of New York Mellon  
 18 then evidently that would be a part of the English  
 19 jurisdiction and English law to be applied. But if  
 20 simulation has to do with another relationship, I think  
 21 there is room for the Belgian enforcement judge to take  
 22 that into account. It really depends a little bit on  
 23 the precise points, I would say, but in general there  
 24 certainly is room left, yes.  
 25 Q. In your answer you said that the simulation had to do

1 with another relationship. Could you give an example of  
 2 the other relationship that may be relevant?  
 3 A. It's not completely clear what the question is. I don't  
 4 know if it is helpful, but in my supplemental report  
 5 I made a small figure distinguishing four types of  
 6 situations --  
 7 Q. Yes.  
 8 A. -- where it can be discussed.  
 9 Q. Just for the benefit of his Lordship, just tell him  
 10 exactly where you are in your supplemental report so we  
 11 may all follow.  
 12 A. In my supplemental report it is on -- can I give the  
 13 paragraph number, or do you need the page, because  
 14 I have my report here outside of the bundle?  
 15 Q. If you give us the paragraph number I will give the  
 16 judge --  
 17 A. 37.  
 18 Q. So, my Lord, this will be E1 tab 7. It is page E1/7/6.  
 19 A. So I distinguish four cases on the basis of two  
 20 criteria. And just to clarify, the Baitemal case, the  
 21 Court of Cassation 1995 case, is the case in the upper  
 22 right column.  
 23 Q. Understood. So proprietary; seizing assets of the  
 24 debtor nominally belonging to another?  
 25 A. Yes. So it is not a case where you have two contracts.

1 The cases with two contracts are in the left column.  
 2 The situations where simulation is related to property  
 3 are in the right column. It is where assets are in the  
 4 name of one party but, according to the analysis made,  
 5 belong to another party.  
 6 MR SPRANGE: Understood.  
 7 Professor Storme, subject to his Lordship having any  
 8 questions for you, thank you very much for your  
 9 evidence.  
 10 MR JUSTICE TEARE: I have no questions, thank you very much.  
 11 MR MALEK: If I could just mention one point, which may be  
 12 of importance, but simply just to flag it .  
 13 There were a number of points that were made in  
 14 re-examination in relation to matters that were not put  
 15 to my expert.  
 16 I am not asking you to make any kind of ruling now  
 17 but it will certainly be part of my closing submissions  
 18 that a case that was not put to Professor Allemeersch  
 19 should not be allowed to be made in closing .  
 20 The whole purpose of cross-examination was that  
 21 there should be cross-examination on the points of  
 22 Belgian law.  
 23 My learned friend, no doubt for tactical purposes,  
 24 decided not to cross-examine. But I think he has to  
 25 face, in my submission, the consequences of that, but

1 that will be a matter for closing submissions and not  
 2 now. But it is only right that I should record my  
 3 position at this stage.  
 4 MR JUSTICE TEARE: Thank you.  
 5 Professor Storme, that completes your evidence, for  
 6 which many thanks indeed.  
 7 Mr Malek, for some reason your picture has  
 8 disappeared.  
 9 MR MALEK: It has disappeared because I have switched it  
 10 off. I apologise for that.  
 11 Housekeeping  
 12 MR MALEK: Can I just deal with a housekeeping point in  
 13 terms of where we go from here.  
 14 Monday is going to be about Kazakh law from  
 15 Professor Suleimenov and Professor Maggs. That will  
 16 take place on Monday.  
 17 I think we have marked out Wednesday for closing  
 18 submissions. I haven't discussed this with my learned  
 19 friend Mr Sprange but it seems to us that it may assist  
 20 your Lordship if we were to provide some form of note in  
 21 advance of the oral closing. What I would suggest we do  
 22 is, we can agree the precise timing, but I would have  
 23 thought that if we could get notes to your Lordship some  
 24 time on Tuesday, plainly not too long and not too late,  
 25 then at least your Lordship can have something in front

1 of him to follow the submissions that we are making.  
 2 It is probably not sensible to have very detailed  
 3 submissions but really picking up the points that  
 4 perhaps have not already been covered in the written  
 5 submissions. But it seems to us, again it is a matter  
 6 for your Lordship, it probably would assist to have  
 7 something in writing in advance of the hearing because  
 8 one day in quite tight. But we are quite happy to  
 9 finish the submissions in one day.  
 10 MR JUSTICE TEARE: I would very much welcome something in  
 11 writing from each of you prior to final submissions.  
 12 It is not clear to me from reading the opening  
 13 submissions precisely which of the issues which we have  
 14 heard discussed today, and which of the issues which we  
 15 will hear discussed on Monday, I will have to be  
 16 deciding, or mentioning, or not dealing with. So  
 17 something in writing would obviously assist. The sooner  
 18 it could be got to me on the Tuesday the better.  
 19 I assume that I will get it electronically .  
 20 MR MALEK: I am not sure there is any other way of dealing  
 21 with it but, yes.  
 22 MR SPRANGE: My Lord, certainly if you want things in  
 23 writing we have a mechanism by which we can get them to  
 24 you as well as in soft copy.  
 25 MR JUSTICE TEARE: I would like them in hard copy if that

1 were at all possible as well.  
 2 MR SPRANGE: As long as you don't tell me now that you are  
 3 located in a study in the North Pole that will be  
 4 achievable.  
 5 MR JUSTICE TEARE: No, the sun is shining here. So we will  
 6 be sitting on Monday and Wednesday. Thank you.  
 7 Could I just ask about the transcript. When the  
 8 computer was delivered to me I was also provided with  
 9 a set of the documents, but do they include the  
 10 transcript?  
 11 MR MALEK: I am not sure I know the answer. I don't know  
 12 whether anyone else knows in the team. But if we are  
 13 sending hard copies to you on Tuesday presumably we can  
 14 provide a set of the transcripts at the same time.  
 15 MR JUSTICE TEARE: Thank you very much. Right, yes.  
 16 MR MALEK: And anything else that your Lordship can think  
 17 of. But we are happy to arrange that.  
 18 MR JUSTICE TEARE: Very good. Anything else that anybody  
 19 else wants to mention?  
 20 MR SPRANGE: Two things from us, my Lord.  
 21 We are fine with Mr Malek's suggestion. We will  
 22 probably try and agree with him a time and also a page  
 23 limit.  
 24 The only point I would raise now also is this. It  
 25 may be after we have addressed you orally on Wednesday

1 that there will be a call for precise closing 1  
2 submissions after that on particular topics, so we just  
3 don't rule out that possibility. 2  
4 Then the second thing is --  
5 MR JUSTICE TEARE: What does that mean? 3  
6 MR SPRANGE: My Lord, let's say after we have finished our  
7 oral submissions there is a particular point, whether 4  
8 it is a forensic point on the foreign law that you would  
9 like to hear from the parties specifically on, or if we 5  
10 think there is something that you may be assisted by, we  
11 might say we would like to put in two pages on this or 6  
12 that.  
13 I just don't want to agree that what we send you on 7  
14 Tuesday is the final written word, if we conclude at the  
15 end of Wednesday that something else might be of 8  
16 assistance.  
17 MR JUSTICE TEARE: Right. 9  
18 MR SPRANGE: The second point is that I have sent an email 10  
19 to Mr Quest with respect to the public link. There is 11  
20 a copyright issue. So I don't know whether Mr Quest 12  
21 wants to address you on that now, but it was something 13  
22 we thought ought to be raised fairly swiftly given its 14  
23 importance. 15  
24 I can't see Mr Quest right now. I don't know if ... 16  
25 MR QUEST: There was nothing particularly that I was going 17  
125 18  
19  
20  
21 to say about it. It is a point raised by Mr Sprange 21  
22 about the copyright status of the live stream. But 22  
23 I have to say I am not entirely clear what it is 23  
24 suggested your Lordship would be asked to do about it. 24  
25 MR SPRANGE: That is helpful in the sense that I think, 25  
6 my Lord, what we will do is we will do a short note to  
7 you via your clerk and we can address it on Monday once 127  
8 you have an opportunity to consider it.  
9 MR JUSTICE TEARE: Right. I will look forward to that with 128  
10 interest.  
11 Anything else? No. Right. Then we will adjourn  
12 until 10.30 on Monday. Thank you all very much indeed.  
13 (3.51 pm)  
14 (The hearing was adjourned until 10.30 am on Monday  
15 30 March 2020)  
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