

OPUS2

(1) National Bank of Kazakhstan (2) The Republic of Kazakhstan v- (1) The Bank Of New York Mellon Sa/Nv, London Branch (2) Anatolie Stati (3) Gabriel Stati (4) Ascom Group SA
(5) Terra Raf Trans Trading Limited

Day 1

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Opus 2 - Official Court Reporters

Phone: 020 3008 5900

Email: transcripts@opus2.com

Website: <https://www.opus2.com>

1 Monday, 4 May 2020
 2 (10.30 am)
 3 MR JUSTICE TEARE: Good morning everybody. Mr Malek, would
 4 you like to begin?
 5 MR MALEK: Yes thank you, good morning.
 6 My Lord, as your Lordship has seen from the
 7 skeletons, the consequential fall under three heads.
 8 The first concerns the applications for permission to
 9 appeal by my clients and also the Statis, second, there
 10 is the head of costs and then, thirdly and finally,
 11 there is the question of the use of documents/witness
 12 statements, which as we see it is an issue between the
 13 Statis and BNYM. Subject to anything your Lordship
 14 says, I propose to deal with the topics in that order.
 15 MR JUSTICE TEARE: Thank you.
 16 Application for permission to appeal by MR MALEK
 17 MR MALEK: So if we can start with my application for
 18 permission to appeal. You have seen my written argument
 19 and I propose to elaborate on what appeared to be the
 20 key issue concerning why this court did not finally rule
 21 on the debt claim, but before doing so I want to make
 22 a couple of points.
 23 The first is that the court has found in the
 24 claimants' favour on essentially all the issues in
 25 dispute. As you know, under Belgian attachment law the

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1 declaration of the bank, BNYM, has critical importance
 2 and it was because of uncertainties that the bank froze
 3 the monies held by Bank of New York Mellon London. We
 4 say that all the uncertainties identified in the bank's
 5 garnishee declaration have been resolved and we also
 6 know that RoK has no claims against Bank of New York
 7 Mellon London under the law governing the relationship
 8 under the GCA and that of course is the banker-customer
 9 relationship which we say is critical.
 10 As a matter of English law and as a matter of
 11 English substantive law, applying principles of private
 12 international law, it is clear that NBK is owed the cash
 13 by Bank of New York Mellon and we contend that there is
 14 every reason to allow Bank of New York Mellon to
 15 discharge its liabilities to its customer now that the
 16 uncertainties have been resolved.
 17 The second point is that the Statis have had every
 18 opportunity to put forward whatever arguments they want.
 19 They chose not to put forward a case on a number of the
 20 issues which were covered in the pleadings and the list
 21 of issues. There was expert evidence on Belgian law.
 22 They chose not to cross-examine my expert,
 23 Professor Allemeersch, other than on a very narrow and
 24 short basis and in our respectful submission there is no
 25 dispute on the issues that were covered by

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1 Professor Allemeersch on the basis that he was
 2 unchallenged.
 3 So let's come to the proposed appeal and of course
 4 the threshold question is whether or not there is a real
 5 prospect of success and it might be said, having
 6 succeeded on essentially all the points, why do we want
 7 to appeal? And the answer to that is that we do not
 8 challenge the vast majority of what the court has found,
 9 but we say that the court was wrong to say that there
 10 were issues that needed to go back to Belgium and that
 11 the debt claim would only succeed if the garnishee order
 12 was discharged by the Belgian court.
 13 So the building block in my arguments are these --
 14 I may need to expand on some of them, but in my
 15 submission most of the blocks are not controversial.
 16 The first one is that the reason that the cash was
 17 frozen was because of the Bank of New York Mellon
 18 declaration that you have considered and under Belgian
 19 law, as we know, the bank declaration has a critical
 20 effect and decisive effect on whether funds are frozen
 21 and therefore it follows that had Bank of New York
 22 Mellon declared that there were no claims, as appears to
 23 have been originally intended, nothing would have been
 24 frozen pursuant to the garnishment order.
 25 The second point is that the ability of NBK to bring

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1 a debt claim against Bank of New York Mellon and
 2 Bank of New York Mellon's payment obligation does not
 3 involve the setting aside of the garnishment order or
 4 perhaps more accurately setting aside the ability to
 5 levy a garnishment. It is directed to a different issue
 6 of whether or not the garnishment order has subject
 7 matter and discharge of a garnishment order and whether
 8 a garnishment order has subject matter are different
 9 concepts, so it's possible under Belgian law for
 10 a garnishment order to stand, in other words not to be
 11 discharged, but to conclude that there was no subject
 12 matter to the same garnishment order.
 13 Thirdly, the 25 May decision and you will recall
 14 what that decision is about. I don't need to, I think,
 15 take you to it, but it is in the core, but you will
 16 recall that the republic, RoK, requested the garnishment
 17 order to be set aside with the release of assets and you
 18 will also recall that NBK intervened and it requested
 19 that the garnishment order be retracted or quashed in as
 20 much as it applies to NBK or to any assets held by NBK
 21 with BNYM and the learned judge who gave the 25 May
 22 ruling dismissed the challenge to set aside the
 23 garnishment order and the argument in this court before
 24 your Lordship has necessarily proceeded on the basis
 25 that he was correct to do so, although there is a right

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1 of appeal that does exist and so it is the case that
 2 none of my arguments involve the proposition that the
 3 garnishment order has to be discharged before the court
 4 gives the relief we seek in respect of the debt, in
 5 other words the success of the debt claim has nothing to
 6 do with setting aside the garnishment order. It is
 7 focused on a different issue.
 8 And as your Lordship knows, the judge giving the
 9 25 May decision made several rulings that are important.
 10 She held that the challenge to the garnishment order
 11 failed but this did not mean that the freezing done by
 12 BNYM could not be challenged; it could be challenged on
 13 the ground of lack of subject matter. She also held
 14 that she was not competent to deal with subject matter,
 15 that that was a matter for a different court, and she
 16 held that the English court was the competent court
 17 which would decide subject matter and the main point we
 18 want to take to the Court of Appeal is your finding that
 19 NBK does not get paid unless the Belgian court considers
 20 your judgment and it decides, based on your judgment and
 21 whatever other arguments that the Statis are allowed to
 22 make, whether to discharge the garnishment order and if
 23 the garnishment order is discharged, then we get paid
 24 but if it does not, it does not get paid, and what we
 25 wish to argue is that there is a serious issue -- that

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1 we have a real prospect of success in arguing that, with
 2 respect, that there has been a conflation of the issue
 3 concerning the validity of the garnishment order with
 4 the issue of subject matter and the parts where
 5 your Lordship deals with this -- if we could just look
 6 briefly at the judgment. It is at paragraphs 41 to 42
 7 and paragraph 130 and your Lordship is familiar with
 8 those passages so I'm not going to quote them now but
 9 I may have to come back to it.
 10 MR JUSTICE TEARE: Sorry, what paragraphs did you say?
 11 MR MALEK: 41 to 42 and just look at 41, it is on page --
 12 I don't think it was page numbered -- where you say that
 13 you are not addressing the issues of Belgian law
 14 concerning the ultimate determination of the garnishable
 15 law and it should be determined by this court and then
 16 42 that:
 17 "This court cannot purport to determine the outcome
 18 of the attachment of the garnishment order proceedings
 19 in Belgium."
 20 And in fact the entire paragraph and then the other
 21 section that one wanted to look at was at 130 where it
 22 says:
 23 "In the event that the court determine that the debt
 24 in question was owed by BNYM to NBK, NBK sought judgment
 25 upon its claim against BNYM. This assumes that the

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1 Belgian court will decide in the light of the decision
 2 of this court to discharge the garnishment order."
 3 And at the very bottom, the last sentence:
 4 "Therefore whether or not the Belgian court decides
 5 to discharge the garnishment order, I would not expect
 6 there to be any need for this matter to be brought back
 7 to this court."
 8 So those are the references to discharge of the
 9 garnishment order.
 10 Now, we contend -- and this is the crux of my
 11 argument -- that there is a very important distinction
 12 between the validity of the garnishment order and
 13 whether it should be discharged or not and the issue of
 14 subject matter. They are different. The garnishee
 15 declaration plays a critical role and we say that that
 16 is reflected in the jurisdiction judgment -- and perhaps
 17 I can invite your Lordship to have another look at that.
 18 It is in bundle B and if we could turn please to tab 5,
 19 there is the decision of 4 December 2018 and
 20 paragraph 17 -- just working through it -- your Lordship
 21 records, correctly, that the claimants then sought to
 22 challenge the Belgian and conservatory attachment before
 23 the attachment judge and that the attachment judge
 24 upheld the attachment order in a judgment dated
 25 25 May 2018, which comes back to the point I made

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1 a moment ago.
 2 Turning over the page, you can see that the judge
 3 made a number of points which your Lordship is familiar
 4 with, the argument at the very top there is about
 5 subject matter and that:
 6 "The fact that the garnishee is not the debtor of
 7 the seized debtor is not a ground for the withdrawal of
 8 the authorisation nor for the lifting of the garnishment
 9 order that has been authorised. The absence of a debt
 10 towards the garnishee towards the seized debtor only
 11 leads to the conclusion that the garnishment has no
 12 subject matter. In the current case the attachment
 13 judge can only consider that the garnishment has been
 14 authorised does indeed have subject matter, the subject
 15 matter of the garnishment follows from the declaration
 16 of the garnishee. The seized debtor is entitled to
 17 challenge the declaration from the garnishee before the
 18 attachment judge. However, this challenge relates to
 19 the right of the third party and must be referred to the
 20 trial court on the proceeding on the merits under
 21 Article 1456 of the Belgian judicial code. The
 22 competent trial court is, as stated Kazakhstan itself,
 23 the English court who must apply its own national
 24 substantive law."
 25 Then there is the arguments of Bank of New York

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1 Mellon which your Lordship has seen.
 2 So the key to this is that the attachment judge has
 3 ruled that the declaration can be challenged before the
 4 trial court, but if no debt is due from the seized
 5 debtor as is to be resolved by the trial court then the
 6 garnishment has no subject matter. And we would say
 7 that there is a real logic behind all of this because
 8 the English court resolves the question referred and if
 9 the debt is between NBK and Bank of New York Mellon that
 10 decides the dispute and there is no subject matter and
 11 it cannot be right as a matter of logic to go back to
 12 Belgium so that the Statis can argue that the cash is to
 13 be treated as due from Bank of New York Mellon to RoK.
 14 That would be a recipe for confusion and we would say
 15 would be wrong in principle .
 16 One can stand back and perfectly well understand why
 17 the Belgian court judge made this decision . The essence
 18 of the dispute as to whether the indebtedness is between
 19 NBK and Bank of New York Mellon or for other -- NBK and
 20 not RoK, and a decision on that, in our respectful
 21 submission, ought to be conclusive as a matter of
 22 Britain because otherwise you get this conflict and you
 23 would put the bank in an impossible position where there
 24 would be a conflict and that, in our submission, is
 25 something that is likely to be wanted to be avoided.

1 So put in other words, your Lordship has ruled that
 2 the debt is owed to NBK. If a Belgian attachment judge
 3 was now to find that Bank of New York Mellon must pay
 4 the Statis' Belgian Bailiff it would mean that
 5 Bank of New York Mellon would not have discharged its
 6 debt, which the competent court has held to be NBK and
 7 therefore there is in our respectful submission this
 8 important distinction between the validity of the
 9 garnishment order and subject matter and this point was
 10 heavily disputed before your Lordship at the time of the
 11 jurisdiction judgment.
 12 If we could just look at some passages -- although
 13 your Lordship did look at this there are some paragraphs
 14 that are not specifically referred to. I'm not saying
 15 for one moment that your Lordship overlooked those
 16 paragraphs, but it is important in our respectful
 17 submission to go back to that judgment, which I think is
 18 in front of you at the moment, to see what was argued
 19 and if we could start off by looking at paragraph 25
 20 where your Lordship can see that it reads as follows :
 21 "Mr Sprange for the Stati party submitted that there
 22 was no serious issue to be tried as between the
 23 claimants and the second to fourth defendants. He made
 24 four submissions. First, he submitted that the
 25 declaration of this court will not affect the Belgian

1 court's decision since the court faces a number of
 2 Belgian law arguments unrelated to the GCA with regard
 3 to the RoK debt question."
 4 So that was my learned friend's first question and
 5 then the submission and then at paragraph 26, in
 6 a passage not referred to in the April decision of
 7 your Lordship:
 8 "Mr Sprange's first submission concerned what it is
 9 that falls to be decided in these proceedings. This
 10 question was at the heart of the parties' oral
 11 submissions. It can only be answered in my judgment by
 12 a proper analysis that the declaration sought in these
 13 proceedings and a proper understanding of the Belgian
 14 attachment judge's decision. It is appropriate to start
 15 with the latter decision since that was issued before
 16 the formulation of the declaration sought in these
 17 proceedings."
 18 And if I could ask your Lordship to read perhaps to
 19 yourself paragraphs 28 and 29 because paragraph 28 sets
 20 out the Statis' position in terms of what it was about
 21 and then 29 sets out the claimants' position. So rather
 22 than reading it allowed can I just ask your Lordship to
 23 read those two paragraphs.
 24 (Pause).
 25 MR JUSTICE TEARE: Yes.

1 MR MALEK: Then we come on to another paragraph which we
 2 submit is important and what your Lordship said is this :
 3 "In my judgment it is clear from the passages of the
 4 Belgian judgment set out above that the attachment judge
 5 considered that the correctness of the view expressed in
 6 the BNYM declaration that BNYM may hold money for the
 7 RoK was a matter for this court. It was that issue ,
 8 based upon the relationship between the RoK and NBK
 9 which RoK challenged and which the Stati parties sought
 10 to support in Belgian by reference to the arguments of
 11 piercing corporate personality , sham trust and abuse of
 12 law, which was referred to this court. There is nothing
 13 in the attachment judge's decision which suggests that
 14 it is only appropriate for this court to decide the
 15 narrow contractual question of who is the counterparty
 16 to the GCA."
 17 And then also paragraph 31 is important:
 18 "I accept Mr Nutz's(?) evidence that Belgian law
 19 provides for a distinction between the enforcement court
 20 and the trial court, with the latter deciding the merits
 21 of the case. Mr Bridge did not dispute this distinction
 22 but merely stated that there are circumstances in which
 23 the enforcement court is competent to decide on the
 24 merits in this case. However, the enforcement court has
 25 clearly decided that the English court is the competent

1 court to decide the merits."
 2 Then there is paragraph 32:
 3 "I now return to the declarations sought in this
 4 court. They have to be understood in the context of the
 5 Belgian proceedings which gave rise to the English
 6 proceedings. In that context I do not accept
 7 Mr Sprange's submission that the pleadings give rise
 8 only to a narrow contractual point, that consciously
 9 absent from the particulars of claim is any claim for
 10 declaratory relief as to the more general question, on
 11 the legal basis outside the GCA, whether a debt is owed
 12 by BNYM to RoK.
 13 "Again, the particulars of claim fairly read in
 14 their context do raise these issues. The declarations
 15 sought are set out in full above. Of these the first
 16 does indeed raise a narrow contractual question, but the
 17 others are wider, including a declaration that
 18 BNYM London has no obligation to pay any debt due under
 19 the GCA to Kazakhstan and a declaration that BNYM ought
 20 to have stated in terms that BNYM London was not
 21 indebted towards and held no assets of Kazakhstan
 22 capable of forming a valid subject matter under the
 23 garnishment order. Express reference could have been
 24 made to the arguments arising outside the relationship
 25 between RoK and NBK which would have put the scope of

1 the declarations beyond argument but one has read in
 2 context namely the decision of the Belgian court the
 3 declarations are fairly to be read as encompassing such
 4 arguments."
 5 Then we turn to paragraph 33, which is referred to
 6 in the April judgment, the other paragraphs are not
 7 referred to, and your Lordship knows exactly what's said
 8 there as to what the question is and records my position
 9 and concluding that:
 10 "The resolution of that question will necessarily
 11 therefore have a material effect on the Belgian
 12 executory attachment proceedings."
 13 Anyway, your Lordship has seen that there.
 14 And then there are a few other paragraphs which also
 15 shed light on what is to be determined and the first is
 16 paragraph 36 where your Lordship says this:
 17 "I am unable to accept that the Belgian court has
 18 not in substance referred the question of the content of
 19 the attachment order to this court. Whether or not the
 20 attachment judge made a formal referral is a matter of
 21 Belgian procedural law. It is in my judgment clear from
 22 the terms of the judgment set out above that the
 23 attachment judge considered that the correctness of the
 24 BNYM declaration and the existence of a chosen action by
 25 BNYM London for RoK are questions for this court as the

1 competent trial judge."
 2 And then your Lordship notes the position of BNYM
 3 and then paragraph 37 and 38, which again are paragraphs
 4 I don't think are referred to in the April decision,
 5 where your Lordship refers to:
 6 "I also do not consider the attachment judge
 7 positively determined the subject matter of the
 8 attachment."
 9 And your Lordship is familiar with that section of
 10 it.
 11 Then 38:
 12 "It follows from that passage that the judge thought
 13 that on the strength of the BNYM declaration
 14 a conservatory attachment order could properly be made
 15 but left over the correctness of the BNYM declaration,
 16 therefore the content of the attachment order."
 17 Just a couple of other references on this particular
 18 point. The next one is paragraph 43 which again is not
 19 in the April judgment and what your Lordship said is
 20 this:
 21 "It is also of significance that the Belgian
 22 attachment judge's decision was handed down some time
 23 after Mr Justice Popplewell's judgment in the Part 8
 24 proceedings and indeed a few days after the hearing
 25 before the Court of Appeal. The present proceedings

1 were issued three days later. The terms of the
 2 declarations sought in these proceedings, as I have
 3 explained above, mirror the questions referred to this
 4 court by the attachment judge. They go beyond the
 5 issues of interpretation of the English law GCA, the
 6 subject of the Part 8 proceedings, to encompass the
 7 wider question set out above arising out of the
 8 relationship between RoK and NBK."
 9 Then 49, another passage which we rely upon, where
 10 your Lordship says this:
 11 "I am unable to accept these submissions essentially
 12 for the reasons I have already set out above. In my
 13 judgment there is plainly a real and present dispute
 14 concerning the subject matter of the conservatory
 15 attachment order obtained by the Statis in the Belgian
 16 court. That court has referred that question to this
 17 court and it is a question that needs to be resolved.
 18 The Stati parties being the parties who have obtained
 19 the conservatory order are plainly affected by this
 20 issue which affects the existence or the extent of
 21 a legal right between them and the other parties to
 22 these proceedings, namely their right to attach the
 23 assets in question. Dealing with the matter by
 24 declaration in these proceedings is clearly a most
 25 effective way of dealing with the questions arising out

1 of the relationship between RoK and NBK with all the
2 affected parties present in the circumstances where
3 these questions have been referred to this court by the
4 Belgian court."

5 Then the last couple of references are paragraph 60;
6 this is in the context of a forum conveniens argument:

7 "I am unable to accept Mr Sprange's submission.
8 This court will not be asked to determine the validity
9 of the conservatory attachment order made in Belgium.
10 Rather it will be asked to determine what, if any,
11 assets constitute the subject matter of that order. The
12 Belgian attachment judge plainly considered that
13 a dispute concerning the content of the attachment which
14 on its terms constitutes only such assets, if any, as
15 are held by Bank of New York Mellon London for RoK under
16 the GCA is a question for this court. The fact that the
17 Belgian court has referred the dispute to this court is
18 a cogent reason, indeed a compelling reason for
19 concluding that this court is a proper forum for
20 determining the dispute. It would not be in accordance
21 with comity to send the dispute back to Belgium ..."

22 And that's that. So what we want to argue before
23 the Court of Appeal and why we seek permission is the
24 point that we contend that the court should have decided
25 the debt claim on the basis that it was clearly

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1 established on the material before your Lordship.
2 The court has found that the debt was owed by
3 Bank of New York Mellon to NBK and although pleaded,
4 covered in expert evidence, the Stati cases did not make
5 good their case on sham, fraud, abuse and our expert,
6 Professor Allemeersch, put forward all the evidence on
7 those issues and was not cross-examined, therefore there
8 was no dispute.

9 Our factual witness was not cross-examined and the
10 Statis completely failed to establish the factual basis
11 for their contentions and if I can just remind the court
12 what was said about that in the judgment, which I think
13 is in paragraph 46 of the April judgment of
14 your Lordship, where what your Lordship said is this:

15 "The second argument the Statis wish to advance in
16 Belgium is that with by reason of sham trust or indeed
17 fraud: BNYM owes the debt to the Republic. In the event
18 although it has been anticipated by NBK and the Republic
19 and by me that these arguments would be advanced in this
20 court, they were not advanced. The NBK adduced evidence
21 from its deputy governors, Ms Aliya Moldabekova, that
22 she was unaware that the TMA was just a sham, simulation
23 or pretense, and that as far as she was aware was no
24 part of the purpose of the TMA to create a mechanism for
25 shielding RoK's assets from the creditors and that the

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1 TMA had not been used for that purpose, but she was not
2 cross-examined on that evidence. In the circumstances
3 where these allegations have not been advanced in this
4 trial, the court has necessarily considered the question
5 as to whom BNYM owes the cash claims, the sums covered
6 by the GCA on the factual basis that there is no fraud,
7 sham, simulation, or pretense."

8 So as we understand the ruling, the court thought
9 that these findings were relevant as to whether the
10 garnishment order should be discharged and that was
11 a matter for the Belgium court and in paragraph 41, just
12 going back, the passage that we looked at a moment ago,
13 where your Lordship makes the reference -- because it is
14 important perhaps I should read it:

15 "The submission made by counsel for NBK and the
16 Republic that this court should finally determine
17 whether or not the garnishment order had subject matter
18 relied heavily on the language used by me used in my
19 judgment in the jurisdiction challenge, specifically
20 paragraph 36, where I said that I was unable to accept
21 the submission that the Belgian court has not in
22 substance referred the question of the content of the
23 attachment order to this court. However, I was not
24 addressing, in that paragraph, the question whether
25 issues of law concerning the ultimate destination of the

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1 garnishment order should be determined by this court.
2 I was addressing a submission that there be no referral
3 of any question to this court and that the Belgian court
4 had determined that the attachment order did have
5 subject matter on the basis of the Bank of New York
6 Mellon declaration. In the rest of paragraph 36 I made
7 it clear that the court was concerned with the existence
8 of the chosen action held by Bank of New York Mellon for
9 RoK. That was a question which had been referred to
10 this court and will have a bearing on the question on
11 whether the garnishment order has subject matter."

12 So that was the first paragraph where this, in our
13 respectful submission, mix up between the garnishment
14 order and subject matter takes place.

15 Then at paragraph 42 your Lordship says this:

16 "I have no doubt that this court cannot, as it were,
17 purport to determine the outcome of the attachment or
18 the garnishment proceedings in Belgium. Once this court
19 has determined the question referred to it must be for
20 the Belgian court to determine the consequences of that
21 decision in Belgium. Belgium is where the Stati parties
22 have taken steps to enforce the arbitration award by
23 garnishment order and Belgium must be the place where
24 they are determined. This court's role is to answer is
25 question which the Belgian court has referred to this

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1 court. It is not to determine the outcome of the
 2 Belgian garnishee proceedings, notwithstanding that its
 3 determination of the issue referred to it may have
 4 a significant and possibly decisive role in bringing
 5 those proceedings to an end. It will be contrary to
 6 comity, that is the respect which this court has for the
 7 procedures of another jurisdiction, for this court to
 8 assume responsibility for the determination of the
 9 garnishee proceedings in Belgium. It is my judgment it
 10 is unthinkable that the court would presume to do that."

11 The other paragraph is the one that we have already
 12 looked at, I just remind your Lordship again, it is at
 13 130 and that's the passage there that I have read
 14 a moment ago. And there are other paragraphs where
 15 your Lordship refers to the ability of the Stati parties
 16 to argue matters in Belgium about fraud, sham and
 17 simulation, or pretense and we have seen that at
 18 paragraph 46 and the passage that we looked at a moment
 19 ago, and paragraph 129 is another paragraph to a similar
 20 effect where what your Lordship said is this:

21 "Whether the Stati parties are able in Belgium to
 22 advance any argument that Kazakhstan does have claims
 23 against BNYM in relation to the cash deposits held by
 24 BNYM pursuant to the GCA based upon allegations of
 25 simulation, sham trust or abuse of rights, will be, as

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1 I have noted in this judgment, a matter for the Belgian
 2 court to consider having regard to the Belgian law of
 3 res judicata."
 4 And what we would wish the ability to argue in the
 5 Court of Appeal is that the points that we have just
 6 been looking at in these paragraphs: 130, 141, 142 and
 7 the paragraphs I just mentioned, 129. They proceed,
 8 with respect, on a false premise. The Belgian
 9 attachment court has competence over the question of
 10 whether the garnishment order is valid as a garnishment
 11 which is decided by its 25 May 2018 decision, but not
 12 over the question of subject matter which has been
 13 referred to the English court in its entirety. And as
 14 you know, the claimants had asked the Belgian attachment
 15 judge to discharge garnishment on the ground of lack of
 16 subject matter and the learned judge refused to do so by
 17 the 25 May 2018 decision in which he made it clear that
 18 the claimants were perfectly entitled to challenge
 19 before this court BNYM's declaration with a view to
 20 showing that there is no subject matter. It therefore
 21 cannot, we submit, offend against principles of comity
 22 for the English court to decide the subject matter
 23 question.

24 Further, such a decision will not determine the
 25 outcome -- this is in the passage that we have already

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1 looked at from your Lordship's decision -- and a finding
 2 in favour of the claimants on the issue of subject
 3 matter will merely mean that the garnishment order is
 4 devoid of content. It will not mean that the Belgian
 5 court was wrong to grant the garnishment, it does not
 6 involve the discharge or setting aside of the
 7 garnishment, it's an entirely separate question. And
 8 what a finding on subject matter would mean is that it
 9 means that the bank can discharge its obligations to NBK
 10 by unfreezing the London assets, which is the cash, and
 11 such a finding by this court will not require nor
 12 warrant in at the further step by the Belgian attachment
 13 court.

14 The only other point I wanted to make on the
 15 judgment is that we say that paragraph 111 of
 16 your Lordship's April judgment also, with respect, is
 17 subject to the same point because your Lordship said
 18 this at paragraph 111:

19 "In the present case the English court has in effect
 20 been asked by the Belgian court to answer a particular
 21 question. The answer to that question is required in
 22 order to determine whether the garnishment the law issue
 23 by the Belgian law court has content or subject matter.
 24 That seems to me a good reason for this court to answer
 25 the question referred to it by means after declaration."

23

1 Your Lordship was in the context of dealing with the
 2 declarations, but with respect --
 3 MR SPRANGE: I seem to have lost --
 4 MR MALEK: Can you hear me?
 5 MR SPRANGE: Yes, sorry to interrupt you. You just dropped
 6 out for 60 seconds.
 7 MR MALEK: I'm a learner to these things, so apologies. Is
 8 that okay?

9 So I was reading 111 of the April judgment. Did
 10 my Lord hear that part of my submission?

11 MR JUSTICE TEARE: I did.
 12 MR MALEK: Basically what I was contending is that there is,
 13 with the greatest of respect, a confusion between the
 14 garnishment order and the question of subject matter,
 15 which is the same point that I have been making.

16 So the argument we want to make to the
 17 Court of Appeal has the elements -- we say that we are
 18 entitled to have the debt claim decided and with he
 19 submit to succeed on the debt claim. There is nothing
 20 further for the Belgian court to consider. It has
 21 referred the question of subject matter to this court.
 22 This court has decided subject matter and the only
 23 matters left over are the ones on which the Statis have
 24 given that their evidence before this court and the way
 25 that the cross-examination took place, in other words

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1 the free-standing Belgian law points. They were not
 2 established on the law. Our expert was not
 3 cross-examined, and nor were they established on the
 4 facts because there was a complete failure to do so.
 5 So in our submission there is no basis for saying
 6 that the Belgian court will look at subject matter
 7 having left it to the English court as the competent
 8 court. Why, one might ask, should the Belgian court now
 9 decide to get in the question of subject matter, having
 10 already held that the attachment judge was not competent
 11 to investigate this question and before what other court
 12 but this court are we supposed to litigate the question?
 13 And the Belgian court has said "Litigate the entire
 14 question in England" and given that the Belgian court
 15 has referred the entire question of subject matter to
 16 this court, as the court having jurisdiction on the
 17 merits, merits being here the entire question whether
 18 there is an attachable debt owed by Bank of New York
 19 Mellon to RoK on whatever legal theory, it plainly did
 20 not anticipate this court not making a final
 21 determination about the subject matter question and
 22 there is nothing to suggest that the Belgian court will
 23 need to revisit its decision whether or not to continue
 24 the garnishment. The garnishment order and its validity
 25 has got nothing to do, with the greatest of respect, to

1 the question which is the main issue which was in
 2 dispute between us and Bank of New York Mellon and it is
 3 significant, as your Lordship has noted, the
 4 Bank of New York Mellon also agree that this court
 5 should be determining subject matter and that's recorded
 6 in your judgment.
 7 So the situation we have at the moment is that both
 8 parties to the contract, the GCA, agree -- that's NBK
 9 and Bank of New York Mellon -- that subject matter
 10 should be determined. The bank clearly does not have
 11 any defence to payment once the issue of subject matter
 12 is decided, the point falls away. In other words, it's
 13 nothing to do with the garnishment order. Once it is
 14 established that there is no subject matter, the bank
 15 can pay and the bank's position was entirely sensible.
 16 They wanted a period of time from the decision in order
 17 to enable them to do so. There was no suggestion in the
 18 submissions by the bank before your Lordship that anyone
 19 needed to go back to Belgium in order to determine
 20 whether or not they should pay. The decision was
 21 decisive, and that was a matter referred to the court.
 22 So in our respectful submission, with the greatest
 23 of respect -- and it is never easy for an advocate to
 24 argue for permission to appeal, but the comfort I have
 25 is that all I have to do is to establish an argument

1 with a real prospect of success -- we say that that is
 2 worthy of consideration by the Court of Appeal. It is
 3 important, it will result in the debt being paid and it
 4 will mean also that the question referred to this court
 5 has actually been answered and, as your Lordship I think
 6 said in the judgment, the considerations of comity in
 7 fact does require the question referred to this court to
 8 be decided.

9 The only other point I would make is that if we are
 10 right on that it also follows that -- and this is the
 11 ground 6 I think in our list, concerning the
 12 declaration. We say that for the reasons I have just
 13 given the court was wrong to refuse to grant the fourth
 14 declaration in the terms sought by the claimants. If it
 15 is right, as we contend, that the court should have
 16 decided the entire subject matter question, it follows
 17 that it is right to grant declaratory relief that
 18 embodies that decision, just as the court granted the
 19 declarations it did to embody the decisions it reached.

20 So just to summarise the point, we want to be able
 21 to argue before the Court of Appeal not that
 22 your Lordship was wrong on any of the fundamental issues
 23 that were decided; our complaint, with respect, is that
 24 your Lordship did not go far enough. You made all the
 25 right findings, but did not go far enough by

1 appreciating and holding first of all that the subject
 2 matter was for the competent court, that England was the
 3 competent court and this required your Lordship to
 4 resolve the issues in dispute about subject matter, that
 5 the subject matter determination has nothing to do with
 6 concerning the validity of the garnishment order, they
 7 are separate questions, that we are not challenging in
 8 England the garnishment order and that the subject
 9 matter finding was sufficient to allow Bank of New York
 10 Mellon to pay the debt, in other words no subject matter
 11 results in the release of the funds, and your Lordship
 12 can see that in the present case. Had the bank decided
 13 that in fact there was no uncertainty and had the bank
 14 had the benefit of your Lordship's judgment, it would
 15 have paid, notwithstanding the fact that there was
 16 a garnishment order in place. So that is a good
 17 illustration of the distinction between validity of the
 18 garnishment order and subject matter and for our
 19 purposes it is all about subject matter and nothing to
 20 do with discharge, or the validity of the garnishment
 21 order, or for the matter going back to Belgium.

22 The so-called Belgian doctrines that we have looked
 23 at were all in play. They were determined in favour of
 24 the claimants because Professor Allemeersch's evidence
 25 was in substance unchallenged and the Statis did not put

1 forward their case to him and it is not open to them to
 2 say that they would deploy them on another occasion
 3 before a different court because they didn't want -- or
 4 the English courts to rule on them.
 5 Thus your Lordship was right to consider that he
 6 could consider the matter on the basis that there was no
 7 simulation, trust and sham, as your Lordship did in
 8 paragraph 46, but with the greatest of respect was
 9 wrong, or arguably wrong, to consider that the Stasis,
 10 having failed to pursue the point before the competent
 11 trial court, in other words this court, that these
 12 points could be revived by the Stasis in Belgium. Again
 13 the Belgian attachment judge had purposefully avoided
 14 ruling on these issues in the judgment of 25 May so that
 15 they could be considered, if the Stasis wanted to raise
 16 them, by the English court.
 17 So those are the reasons, my Lord, that we seek
 18 permission to appeal and unless I can assist
 19 your Lordship further, that's all I wish to say.
 20 MR JUSTICE TEARE: Thank you, Mr Malek.
 21 Mr Sprange?
 22 MR SPRANGE: I'm not sure whether Mr Handyside has anything
 23 to say on this? I'm assuming not.
 24 MR JUSTICE TEARE: He hasn't said anything in his note on
 25 this.

1 MR SPRANGE: No.
 2 Submissions by MR SPRANGE
 3 MR SPRANGE: My Lord, I think this can be dealt with very
 4 simply. Your jurisdictional judgment was not appealed
 5 by the claimants. As you have observed in your April
 6 judgment, because they are innovative, skillful lawyers,
 7 they took a sentence here and there from your
 8 jurisdictional judgment and used that as a launching pad
 9 to try and persuade you at this trial that you were
 10 entitled to effectively act as a Belgian garnishee judge
 11 and decide all issues. As you have observed in
 12 your April judgment quite rightly, they were
 13 embellishing a point that could be read in a particular
 14 way, but in reality ought not to be when you consider
 15 this very simple point of law that Mr Malek hasn't
 16 grappled with that is this: as an English law on
 17 referral you apply English law. If that English law, by
 18 reference to English conflicts of law, requires you to
 19 deploy a foreign law, you deploy it. Other than that
 20 those are the only issues that you quite rightly ought
 21 to address.
 22 It is common ground and accepted that to determine
 23 whether this Belgian garnishment order has subject
 24 matter engages a number of issues: English law, Belgian
 25 law and Kazakh law. You have decided to the absolute

1 limit the relevant English law questions and they have
 2 been resolved and in doing so you considered some Kazakh
 3 law issues. In Belgium there are still a number of
 4 things to be decided and the point of real contention is
 5 if you look at paragraph 41 of Mr Malek's skeleton for
 6 this hearing, he suggests that there are two points to
 7 be run in Belgium. We say there are in fact more than
 8 that. There is of course the point that
 9 Professor Storme referred to -- I will call it the right
 10 of recourse point. There is also the sham/fraud point.
 11 But there is also simulation and there are two forms of
 12 that. There is veil piercing, there is agency under
 13 Belgian law and there is also the question of whether
 14 because the garnishee order itself encompasses NBK the
 15 account is covered in any event. Now, in your judgment,
 16 my Lord, you made the point that there could be issues
 17 raised by the claimants in Belgium as to whether some of
 18 those arguments -- and perhaps I will argue all of those
 19 arguments aren't available -- but again they are matters
 20 for the Belgian court and so we say there is a simple
 21 answer to all of the grounds. Your jurisdictional
 22 judgment was right, your confirmation of the correctness
 23 of the jurisdictional judgment in the April judgment is
 24 correct. They haven't explained to you on any grounds
 25 why there is an error of law as to your approach of

1 deciding English law issues and only foreign law issues
 2 that are engaged by conflict of laws and they still
 3 haven't explained, other than some again clever
 4 manipulation of language in your judgments to suggest
 5 why as a matter of law you ought to be considering those
 6 Belgian law issues and therefore the finality of the
 7 subject matter.
 8 If I can conclude by saying this. It is as simple
 9 as your Lordship put it in your judgment. It is likely
 10 that your April judgment will be significant and perhaps
 11 even definitive in Belgium, but whether it is or not and
 12 what effect that has on the garnishee order and whether
 13 there is a finding that it has subject matter or not, is
 14 a matter for the Belgian court.
 15 The last thing I would say, my Lord, is this:
 16 Mr Malek said several times, and I agree with him, that
 17 the Bank of New York declaration remains an important
 18 question, in Belgium, because that's the focus of the
 19 subject matter. They lost on that point before you,
 20 my Lord. They withdrew that declaration at the last
 21 minute and amended it and one of the no doubt good
 22 reasons for that was your observation at the pre-trial
 23 hearing that given all of the materials before you and
 24 the range of contention that existed on the Belgian and
 25 Kazakh law issues it was very hard to say that that

1 declaration was materially inaccurate .
 2 So given all of that , my Lord , we say you ought not
 3 to grant permission on any of those grounds of that been
 4 set forth in the claimants ' skeleton .
 5 MR JUSTICE TEARE: Thank you . Do you want to advance your
 6 application for permission?
 7 Application for permission to appeal by MR SPRANGE
 8 MR SPRANGE: Yes , my Lord , and I can take this very swiftly .
 9 I have nothing more to say on the equitable argument
 10 beyond what's in the skeleton .
 11 With regard to the agency argument , my Lord , it
 12 simply comes down to this . As your Lordship concluded
 13 in your April judgment there are various indicia of
 14 agency and your conclusion is that whilst they may be
 15 consistent with an agency , they don't necessarily
 16 connote an agency , and that there were two points that
 17 suggested that were inconsistent with an agency
 18 relationship based on your interpretation of Article 22
 19 to 26 of the National Bank Law and construction of the
 20 TMA .
 21 Our point is this , my Lord . It is not fanciful and
 22 it is , we would say , with respect , a prospect , a real
 23 prospect that another court may look at those indicia
 24 and may look at those provisions and take
 25 your Lordship 's finding and we say this is highly

1 material and important to the analysis , of the level and
 2 degree of control that RoK exercises over NBK and reach
 3 a different conclusion as to whether all of those
 4 indicia , stacked up with the very important point of
 5 control , do amount to an agency relationship .
 6 So that , my Lord , together with the points that we
 7 have set forth in our skeleton , is the thrust of the
 8 permission application . We think it is a simple point
 9 in the sense that there 's no real dispute as to the
 10 facts , they 're all established , it 's just a matter of
 11 weighing them up and is there a prospect of another
 12 court concluding that with that autocratic finding there
 13 was indeed an agency relationship .
 14 MR JUSTICE TEARE: Thank you .
 15 Mr Malek , do you wish to reply to that application ?
 16 Mr Malek , I think you are on mute .
 17 MR MALEK: Yes , you are right . Can you hear me now ,
 18 my Lord?
 19 MR JUSTICE TEARE: Yes , I can .
 20 MR MALEK: Apologies on that .
 21 Submissions by MR MALEK
 22 MR MALEK: As we understand the grounds of the permission to
 23 appeal it is on two grounds . The first is the
 24 conclusion that there is no express or implied agency
 25 relationship , or actual authority with regard to NBK

1 entering into the GCA as agent and they call that the
 2 "agency conclusion " , and then secondly the conclusion
 3 that principal 's equity could not assist the Statis in
 4 the circumstances of this case .
 5 Now , as far as the agency conclusion we say that the
 6 challenge here is hopeless and should be rejected and
 7 that 's essentially for two reasons . First , the
 8 challenge is to an evaluative decision and so the
 9 threshold for a successful appeal is very high . They do
 10 not say that you misdirected yourself on the relevant
 11 law . The Statis say that having evaluated the facts and
 12 evidence , your Lordship should have concluded that there
 13 was an agency relationship . But , as I say , the
 14 principles of interference in evaluative decisions
 15 indicate that that is a very high threshold to
 16 establish . There is no gap in logic , there 's no lack of
 17 consistency , there 's no suggestion that you failed to
 18 take into account some material factor which undermines
 19 the cogency of your conclusion and therefore we submit
 20 that that is fatal to the appeal , but we also say that
 21 your Lordship is right for the reasons given in the
 22 judgment .
 23 Your Lordship 's judgment contains a detailed
 24 consideration of the relevant evidence , I won't go
 25 through it , but your Lordship concluded the matters

1 relied upon did not establish an agency relationship ,
 2 either individually , which is at paragraph 86 , or
 3 cumulatively , which is at paragraph 89 , rather certain
 4 matters relied upon by the Statis were found to be
 5 consistent with NBK having actual authority to enter
 6 into the GCA as agent for RoK but also consistent with
 7 NBK entering into the GCA as principal .
 8 And your Lordship applies the correct test , refers
 9 to the Magdalink Spirit (?) and in our submission there
 10 is no basis to -- sorry , it follows that the Statis need
 11 to establish that the matters they relied upon were only
 12 consistent with the agency relationship , they could not
 13 do so and therefore we submit the conclusion reached by
 14 your Lordship on agency is entirely right .
 15 As to the compelling reason , which as I understand
 16 it is raised in paragraph 12 , they say that there is
 17 a compelling reason for the appeal to be heard on the
 18 agency issue and we make two short points on this .
 19 First of all , it is highly generalised . It amounts
 20 to say that because the agency issue arises in
 21 a different context to Filatona , it deserves
 22 consideration by an appellat court . That cannot , in
 23 our submission , be a sufficiently compelling reason .
 24 Wherever an agency issue arises it will necessarily be
 25 a different context to Filatona .

1 Then second, the Statis' submissions on this point
 2 seek to inflate what is really a narrow and well
 3 understood question of English law -- did NBK enter into
 4 the GCA as agent for RoK or as principal -- that does
 5 not give rise to a compelling reason for an appeal.
 6 As to the equity conclusion, again I can take this
 7 shortly. Their case is set out at paragraph 15 of the
 8 consequential submissions, so what the Statis appear to
 9 say is that your Lordship found that at some future date
 10 the debt BNYM owes to NBK could become due to RoK and
 11 that as a result the debt currently owed by BNYM to NBK
 12 can be garnished.
 13 The flaw in this reasoning is that your Lordship did
 14 not find that the debt owed to NBK could become due to
 15 RoK at some later date and that -- if your Lordship
 16 could turn briefly to paragraph 101 of the judgment --
 17 is clear because what your Lordship said is this:
 18 "The claim which the Republic will be able to
 19 enforce pursuant to the equitable principles of English
 20 law is the claim which NBK has against BNYM for the
 21 payment of the debt. If the Republic were to sue,
 22 joining NBK as trustee, it would be enforcing the claim
 23 of NBK against BNYM, that is why NBK has to be made
 24 a party to the claim."
 25 In other words your Lordship did not say that BNYM

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1 would become entitled to the debt owed to NBK as
 2 a result of equitable principles. To the contrary,
 3 your Lordship said that the claim which RoK would
 4 enforce would nonetheless be the claim of NBK and
 5 your Lordship says:
 6 "That is why NBK has to be a party to the claim.
 7 The debt is still owed by Bank of New York Mellon to NBK
 8 not RoK, albeit that RoK could engage a procedure to
 9 enforce the debt."
 10 And therefore we say that this part of the
 11 application for permission to appeal simply does not
 12 work and that your Lordship's conclusion was entirely
 13 right for the reasons given.
 14 As to the compelling reason ground which the Statis
 15 rely upon, which is set out at paragraph 16, we say the
 16 two points taken there are not compelling reasons.
 17 First, they refer to the fact that the case involved an
 18 unusual referral to the Belgian court. In my submission
 19 that's entirely irrelevant as to whether the equity
 20 issue gives rise to a compelling reason and then second
 21 the Statis suggest that the Court of Appeal should
 22 consider whether principles of equity can result in
 23 a debt becoming due for the purposes of a foreign
 24 garnishment order, but with respect, that exaggerates
 25 what is really a narrow question of law and, as

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1 your Lordship noted correctly, we submit, at
 2 paragraph 104, you are dealing with ordinary contractual
 3 principles and the principles of equity do not allow
 4 the court to ignore these ordinary contractual
 5 principles for the purposes of a foreign garnishment
 6 order or otherwise, so there is no compelling reason for
 7 the Court of Appeal to reconsider entirely orthodox
 8 principles of English law.
 9 Those are my submissions.
 10 MR JUSTICE TEARE: Thank you.
 11 (Ruling removed awaiting approval)
 12 MR JUSTICE TEARE: Right, what next?
 13 I think you are still on silence.
 14 MR MALEK: Cost.
 15 MR JUSTICE TEARE: Right.
 16 Submissions on costs
 17 Submissions by MR MALEK
 18 MR MALEK: Perhaps I can start by identifying what is not in
 19 dispute. First of all, the claimants accept that they
 20 must pay Bank of New York Mellon's costs because it has
 21 a contractual indemnity from NBK under the GCA. There
 22 is a small issue in relation to the debt claim.
 23 Second, BNYM's costs of the damages claim are
 24 already covered by Mr Justice Butcher's order of
 25 16 January 2020. I don't think we need to look at that

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1 but it is at B --
 2 MR JUSTICE TEARE: When you say "the damages claim", what do
 3 you mean by that?
 4 MR MALEK: That was the claim that we brought against
 5 Bank of New York Mellon on the basis that the
 6 garnishment declaration should not have been made.
 7 MR JUSTICE TEARE: Right.
 8 MR MALEK: It is to do with the point about uncertainties
 9 and the like and that claim was not pursued. So that
 10 was a damages claim. It was a claim essentially in
 11 negligence and that's gone.
 12 MR JUSTICE TEARE: But those costs have already been dealt
 13 with?
 14 MR MALEK: By Mr Justice Butcher, yes. If your Lordship
 15 picks up bundle B.
 16 MR JUSTICE TEARE: Well, I'm afraid I don't have the bundles
 17 with me.
 18 MR MALEK: Well, just so that everybody knows what I'm
 19 referring to, it is bundle B, it is tab 18, and what
 20 Mr Justice Butcher did -- and this is the order that was
 21 a consent order made -- it may be that somebody who has
 22 got more talent than me can put it up on screen, but it
 23 basically referred to the notice of discontinuance in
 24 relation to the damages claim and gave permission to
 25 amend and we agreed, the first claimant, to pay the

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1 costs of the damages claim subject to a detailed
 2 assessment on an indemnity basis .
 3 MR JUSTICE TEARE: So those costs have already been dealt
 4 with and as far as the other costs of BNYM are
 5 concerned, you accept that you must pay them --
 6 MR MALEK: Yes.
 7 MR JUSTICE TEARE: -- on the indemnity basis because that's
 8 what the contract provides .
 9 MR MALEK: Correct, subject to one point about the debt
 10 claim as to whether that's included or not, but I will
 11 come back to that in a moment.
 12 Then the third point is that NBK accepts that as
 13 against the Stasis it must bear its own costs in
 14 relation to the discontinued damages claim, so
 15 effectively we are accepting that as far as the
 16 discontinued damages claim, the Stasis do not bear any
 17 part of those costs , so what is in issue is first of all
 18 what order should be made as to the claimants' other
 19 costs , in other words the costs other than the damages
 20 claim and the debt claim against the Stasis , and then it
 21 seems whether the claimants should be allowed to recover
 22 from the Stasis what they must pay to BNYM, so that's
 23 the question of whether or not we can pass on to the
 24 Stasis any part of the liability that we have to
 25 Bank of New York Mellon and of course not including the

1 damages claim or the debt claim .
 2 What we say in terms of costs overall , we say the
 3 claimants have succeeded, the Stasis have lost .
 4 Bank of New York Mellon has incurred costs in a dispute
 5 in which it is not a willing party and it was a party
 6 because of the allegations made by the Stasis . It all
 7 started with the allegations made in correspondence and
 8 absent the contractual indemnity the overall justice of
 9 the case would require an order that the Stasis pay the
 10 claimants' costs and BNYM's costs and the only reason
 11 not to invite the court to make the order is because of
 12 the contractual indemnity and we accept that BNYM is
 13 entitled to the benefit of it .
 14 Now, as far as points made by the Stasis are
 15 concerned, they say -- and perhaps we can just turn up
 16 their skeleton at paragraph 3. They make a point about
 17 the costs of the securities issue and on this
 18 a securities release , so only cash remained at the end
 19 after the May 2008 decision.
 20 MR JUSTICE TEARE: Sorry, which paragraph of the Stasis'
 21 skeleton?
 22 MR MALEK: Paragraph 3, my Lord.
 23 So the position as to the securities could not make
 24 any difference to the Stasis . In essence what we are
 25 saying is that the Stasis have got no recoverable costs

1 in relation to securities . The securities were released
 2 and in essence didn't play any part whatsoever and in
 3 our respectful submission do not -- the question of
 4 securities has fallen away.
 5 As to the contention that the Stasis say they have
 6 incurred costs in relation to the BNYM, we don't accept
 7 that. BNYM's evidence only related to the damages
 8 claim, it has nothing to do with anything that matters
 9 to the Stasis .
 10 So as far as our costs against the Stasis are
 11 concerned, what issue based order should be made? Then
 12 there is the issue of indemnity costs .
 13 The first question about an issue based order -- as
 14 your Lordship knows the Stasis invite the court to make
 15 an issue based costs order and to that extent there is
 16 common ground because the claimants also say that there
 17 should be an issue based order. The question appears to
 18 be as to the costs of which issues should not be
 19 recovered from the claimants from the Stasis . And if we
 20 can just take them in the order appearing in the Stasis'
 21 skeleton . The first one I have already covered, which
 22 is securities , paragraph 3, and our point is that
 23 properly analysed the argument about securities went to
 24 the damages claim. The Stasis continue to say that it
 25 was relevant to the declaration claim because of their

1 case that there had to be some investigation as to the
 2 historic correction of the BNYM declaration which we say
 3 was wrong, and there's no reason not to regard the costs
 4 of the issues such as securities as being part of the
 5 declaration claim .
 6 As far as the undecided subject matter question ,
 7 paragraph 4, your Lordship notes that all those issues
 8 were live on the pleadings and included in the list of
 9 issues . The Stasis certainly did not succeed on them.
 10 The court declined to adjudicate them, but in practical
 11 terms rejected the evidence of Professor Storme's
 12 ownership case and there was no evidential assertion for
 13 the Belgian law matters, as your Lordship knows and as
 14 I mentioned a moment ago, so with he say there is no
 15 reason why we should not have our costs in relation to
 16 that .
 17 As far as the declaration 1E is concerned, which is
 18 paragraph 5 of their submissions, we say it is wrong to
 19 say that the claimants were unsuccessful . The court
 20 granted the declaration in somewhat reformulated terms,
 21 but still granted it and it is difficult to see how
 22 these costs could be divided out on an issue based
 23 approach and the claimants were overall successful in
 24 obtaining the declaratory relief against the opposition
 25 of the Stasis on a whole series of grounds, all of which

1 the court rejected , and therefore we should not be
 2 deprived of any part of the declaration claim and as far
 3 as the amendment goes -- well, we have dealt with that
 4 already which I think is at paragraph 6.1, and then the
 5 discontinuance of the damages claim, that's irrelevant
 6 as between the claimants and the Statis .
 7 So those are the points in terms of costs .
 8 As far as indemnity costs are concerned, we have set
 9 out in our skeleton argument why we say we should
 10 recover indemnity costs . It is 45 to 55. But I just
 11 want to underscore one point which is covered in I think
 12 paragraph 52, the third point, which is the disconnect
 13 between the pleadings and the case at trial and
 14 the court is entitled to expect a party's case to be in
 15 line with its pleading so it was well outside the norm
 16 in this court for a party's case to bear so little
 17 resemblance to its pleading and connected to that was
 18 a complete failure to make any attempt to establish the
 19 sham, fraud cases and these were very serious
 20 allegations against a central bank and a sovereign and
 21 allegations about sham, not corresponding with the true
 22 relationship , were allegations amounting to effectively
 23 a deliberate attempt to mislead and tantamount to a plea
 24 of fraud . These allegations were never advanced. There
 25 was no evidence to support them. They were not put to

1 my factual witness and to make up and persist in a trial
 2 of an allegation of this sort , without evidence, is well
 3 outside the norm.
 4 So, my Lord, that is all I wanted to say about
 5 costs .
 6 MR JUSTICE TEARE: Thank you.
 7 MR MALEK: I don't know if we are taking a break at some
 8 stage but I just thought I would remind your Lordship
 9 that there is a possibility of that at some stage.
 10 MR JUSTICE TEARE: Okay. So on costs, you simply seek your
 11 costs of the proceedings, leaving outwith the costs of
 12 the damages issue which have already been dealt with.
 13 MR MALEK: That's correct.
 14 MR JUSTICE TEARE: And you say that you should get your
 15 costs on the indemnity basis and thirdly you say -- is
 16 this right? -- that you should get from the Statis the
 17 costs you have to pay BNYM?
 18 MR MALEK: Correct, but not in relation to the damages claim
 19 but we're not seeking to recover the damages part of the
 20 claim from the Statis .
 21 MR JUSTICE TEARE: Thank you.
 22 MR MALEK: And we also seek a payment on account -- an
 23 interest --
 24 MR JUSTICE TEARE: We will come to the payment on account
 25 separately .

1 MR MALEK: Of course.
 2 MR JUSTICE TEARE: Does Mr Handyside want to say anything on
 3 costs?
 4 MR HANDYSIDE: My Lord, yes. Just some short submissions
 5 please .
 6 Submissions by MR HANDYSIDE
 7 MR HANDYSIDE: This is to cover a point which Mr Malek
 8 mentioned but didn't develop. His draft order provides
 9 at paragraph 7 --
 10 MR JUSTICE TEARE: Well, hang on, let me see if I can find
 11 that. Yes, paragraph 7?
 12 MR HANDYSIDE: Yes. That the costs of the debt claim be
 13 reserved . And our submission is that there is no reason
 14 or justification for that order and we dealt with this
 15 in paragraph 7 of our note.
 16 MR JUSTICE TEARE: Sorry, paragraph 7:
 17 "The costs of NBK and of BNYM in relation to that
 18 debt claim be reserved ."
 19 MR HANDYSIDE: Yes.
 20 MR JUSTICE TEARE: Right.
 21 MR HANDYSIDE: And our position is that those costs -- it is
 22 unclear exactly what costs the claimants have in mind
 23 there, but those costs should be included in the order
 24 for costs that the claimants accept should be made in
 25 BNYM's favour. And we have dealt with the witness

1 reasons why we say that in paragraph 7 of our note, if
 2 your Lordship has that, or I can just go through it if
 3 it is easier .
 4 MR JUSTICE TEARE: Well, let me just see if I can find it .
 5 Which paragraph?
 6 MR HANDYSIDE: Paragraph 7, my Lord.
 7 MR JUSTICE TEARE: I don't have in mind the first and second
 8 formulations .
 9 MR HANDYSIDE: Right. Well, just to remind your Lordship of
 10 that, in the pleading -- which I know you don't have --
 11 in the particulars the claimants advanced a debt claim
 12 on two different bases. They said in the first basis --
 13 they made a demand on BNYM for payment on
 14 25 September 2018 and that BNYM's obligation to pay that
 15 sum was not suspended by the Belgian garnishment order
 16 and therefore -- and you may recall they also pleaded
 17 that BNYM's response was erroneous, the response to the
 18 Belgian garnishment order, and therefore there was
 19 an existing debt. So that was the primary way in which
 20 the claim was put.
 21 The alternative basis on which it was put was that
 22 if in this court your Lordship found essentially that
 23 the garnishment order had no subject matter, then the
 24 garnishment order could no longer found any basis for
 25 BNYM to refuse to pay the money to NBK and at that point

1 BNYM would be indebted to NBK.
 2 MR JUSTICE TEARE: Right.
 3 MR HANDYSIDE: And your Lordship may recall that you made an
 4 order on the first day of the trial when the claimants
 5 applied successfully to amend their claim and one of the
 6 things that they applied for permission to amend and
 7 obtained permission to amend was to drop the first
 8 formulation of the debt claim.
 9 MR JUSTICE TEARE: Right.
 10 MR HANDYSIDE: So that went. So all we are left now with is
 11 if the court finds that the order has no subject matter
 12 then there will then be a debt at that point. So that's
 13 the explanation of our point in 7(a).
 14 The point in 7(b) is that this debt claim -- our
 15 costs are inseparable from the common costs of the
 16 declaratory relief. There's no separate point here,
 17 because the declaration that was sought was that the
 18 garnishment order had no subject matter, so there are no
 19 discrete costs to be hived off which refer to this
 20 second formulation of the debt claim.
 21 Then next we say we are contractually entitled to
 22 all our costs in any event, as is conceded in relation
 23 to the vast bulk of our costs.
 24 Fourth, the debt claim is unnecessary. The bank's
 25 position has always been that it would pay as and when

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1 it is able to to the person who is entitled to payment
 2 once determined by a court with jurisdiction.
 3 Our last point, my Lord, is that as your Lordship
 4 observes towards the very end of your judgment there's
 5 no reason to think that the debt claim will ever need to
 6 come back before the English court on the approach that
 7 the court has taken and therefore there's nothing to
 8 reserve these costs to.
 9 So for those reasons we would simply invite
 10 your Lordship to make a single order for costs in our
 11 favour, including the costs of the debt claim.
 12 MR JUSTICE TEARE: Right. Thank you very much.
 13 Mr Sprange, shall we have a short break now? Would
 14 that be convenient?
 15 MR SPRANGE: Yes, my Lord.
 16 MR JUSTICE TEARE: Let us break then for five minutes.
 17 (11.50 am)
 18 (Short Break)
 19 (11.59 am)
 20 MR JUSTICE TEARE: Right, Mr Sprange, if you are ready.
 21 MR HANDYSIDE: My Lord, before Mr Sprange starts there is
 22 one small point I should have mentioned. I don't think
 23 it will be contentious but the costs order that we seek
 24 should also include the costs that were reserved in
 25 your Lordship's order of 26 March so that was the order

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1 when you gave the claimants permission to amend. The
 2 costs were reserved under that order. It's a small
 3 point, the costs order made should pick those costs up
 4 as well.
 5 MR JUSTICE TEARE: Right, thank you.
 6 Yes, Mr Sprange.
 7 Submissions by MR SPRANGE
 8 MR SPRANGE: My Lord, so, I will give you our overall
 9 position as to costs and then deal with the detail.
 10 We say there should be an issues based detailed
 11 assessment of costs, that the States parties ought to
 12 recover their costs associated with either those
 13 declarations that weren't granted, or that failed, or
 14 that were withdrawn, and that the claimants ought to
 15 recover their costs of effectively declarations A, B and
 16 C and that should all be done at a detailed assessment.
 17 We say that there should be no Bullock order or
 18 Sanderson order and there certainly shouldn't be
 19 indemnity costs.
 20 So, my Lord, if I could just break those down. In
 21 relation to costs overall, this is, as your Lordship has
 22 observed, a very unique and unusual case and in my
 23 submission it is not one that you can simply say there
 24 has been success by one party or the other. It is a bit
 25 like in the Six Nations, Mr Malek needed a bonus try win

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1 to win this case. If you look at his closing
 2 submissions, written closing submissions submitted to
 3 you several weeks ago, if you read the first four or
 4 five paragraphs, the essence of them was "You must
 5 decide the central issue in our favour", and that
 6 central issue is that this Belgian garnishee order has
 7 no subject matter. So this whole case for them was
 8 always about overall success of obtaining a declaration
 9 and judgment from this court that meant the entire
 10 Belgian proceedings were over and they would get their
 11 money back and indeed, putting it bluntly, Mr Malek said
 12 at the beginning of the trial "We want our money back"
 13 and one of the aspects of relief that he wanted to make
 14 submissions to you about was the release of the money
 15 within a set period after your judgment.
 16 None of that has happened. Yes, some important
 17 issues have been decided in their favour, but what that
 18 means in the overall scheme of things is yet to be seen
 19 and in getting to that result they have failed on some
 20 important points and some other points they have put all
 21 of us -- when I say "us", all of the defendants to
 22 considerable cost.
 23 If I look at it this way, my Lord -- picking up the
 24 last page of your judgment and the declarations there,
 25 if you look at what's ultimately been granted the

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1 contracting parties point is a relatively narrow one --
 2 sorry, my Lord, I will let you catch up.
 3 MR JUSTICE TEARE: Which paragraph would you like?
 4 MR SPRANGE: It is 131 of your judgment.
 5 MR JUSTICE TEARE: Yes.
 6 MR SPRANGE: So, my Lord, we accept and it is set forth
 7 there in very simple terms, they have prevailed on 1(a)
 8 which was "Who are the contracting parties ". If you
 9 then look really at 2, 3 and 4, those questions are
 10 really caught up in the agency argument and to a lesser
 11 extent the trust argument and really rise and fall on
 12 the Kazakh law evidence, but they are relatively narrow
 13 and contained and once your Lordship rejected those two
 14 arguments, agency and trust, 2, 3 and 4 fell into place
 15 and we accept that the claimants ought to have their
 16 costs associated with that.

17 What the claimants put the Stati parties to the cost
 18 of and either lost or abandoned were (a) the securities,
 19 so that's the old declaration 1D. Now, it is right to
 20 say that that became an issue that wasn't ultimately
 21 relevant because of what happened in practical terms,
 22 but until the eve of trial it was still a live issue.
 23 A lot of ink was spilt on it, a lot of expert evidence
 24 was spilt on it and it was a live issue between the
 25 parties. They haven't got the declaration so the Stati

1 parties ought to recover their costs.
 2 The old declaration 1E, my Lord, was the suggestion
 3 that the Bank of New York declaration was materially
 4 inaccurate. That was abandoned and we say would have
 5 been lost because it was a hopeless argument based on
 6 all of the evidence. We had to prepare for that. We
 7 obviously carefully read your judgment and see what you
 8 have said about the significance of that declaration to
 9 these proceedings and we accept that. Nevertheless, it
 10 is still something that we had to prepare for and deal
 11 with and we say its failure in this action is something
 12 that will be very significant in Belgium. You only had
 13 to hear Mr Malek this morning say several times that the
 14 subject matter of the garnishee order is the key point
 15 and let's bear in mind that the referral judge referred
 16 to the Bank of New York declaration as the reason for
 17 that, concluding that it was subject matter, and it is
 18 common ground between all the Belgian law experts that
 19 the actual date when you consider whether the attachment
 20 had subject matter is the date of service.

21 So that we say will have some significance in
 22 Belgium, so it is something that (a) we ought to recover
 23 our costs for because we were put to the expense of it,
 24 but also it is something they have failed on and that is
 25 likely to have significance in Belgium.

1 Then lastly, my Lord, the amended -- so I would call
 2 it the new 1E. That has largely failed, although you
 3 have given a declaration that there aren't any claims in
 4 relation to the cash deposits, you have not pursued, we
 5 say quite rightly, the notion that that's under any law
 6 which was sought and most significantly you accepted our
 7 position that the subject matter aspect ought not to be
 8 included in that declaration, so that declaration 4
 9 doesn't really take matters any further than 1, 2, and
 10 3, it really follows from them, and the really critical
 11 bits -- the central part, as Mr Malek put it in his
 12 written closing, and the aspect that he sought
 13 permission to appeal today on, they have lost on and so
 14 we should certainly have our costs of those aspects of
 15 the declaration which we say are the guts of it.

16 Now, where that gets us to, my Lord, is this. The
 17 question of costs and assessing them in this case will
 18 be an exercise where the devil will certainly be in the
 19 detail and the outcome of the proceedings will be one of
 20 those whereby both parties will, as they have in the
 21 press, claim victory. The ultimate relevance of this
 22 decision will be determined in Belgium at a time in the
 23 future and although we suggest it as an option, it is
 24 really not something where we say, on reflection, that
 25 you should reserve until the outcome of the Belgian

1 proceedings, so really the right way to deal with cost
 2 is send it off to detailed assessment on the basis of
 3 the pleaded declarations with an order that we recover
 4 our costs of those ones that I have highlighted and that
 5 the claimants recover their costs of the ones that they
 6 actually succeeded on.

7 So that's the overall approach we say you should
 8 take to costs.

9 My Lord, this is simply not a case for a Bullock
 10 order. As your Lordship probably knows far better than
 11 I, Bullock orders are really designed for cases where
 12 you have a claimant in a tort action who is not quite
 13 sure whether it is the supplier or the manufacturer who
 14 should be liable, or a contract claim where there's
 15 potentially two breaching parties and they really don't
 16 have a choice as to who they pursue and so they pursue
 17 both and win against one, but then the cost of the
 18 successful defendant will either outweigh the benefit or
 19 significantly impact the benefit and there is therefore
 20 a Bullock order. This is simply not one of those cases
 21 for several important reasons.

22 The most significant, my Lord, is the contractual
 23 indemnity. It would be extraordinary if we would have
 24 to effectively indemnify the claimants for a contractual
 25 indemnity that they had given the bank.

1 The second, my Lord, is this. This case was not one
 2 where we dragged the bank in, or suggested that they
 3 should be in. The claimants pursued both parties and
 4 they wanted the relief that they sought, a lot of which
 5 they have failed on, against both parties. It wasn't
 6 a situation where they chose the relief against one of
 7 us and just pursued that, they wanted these orders
 8 against anybody and I don't see any way that they could
 9 have divided them out, or that they could have pursued
 10 these proceedings without both parties in, and the
 11 evidence of that, my Lord, is in now
 12 Lord Justice Popplewell's Part 8 judgment where he
 13 refused the relief and one of the grounds was because
 14 the Stati parties weren't in.

15 The second point is this, my Lord. If we had only
 16 been joined, they wouldn't have had the bank in, which
 17 would mean that the majority of the relief that they
 18 originally sought, including relating to the
 19 Bank of New York declaration and the debt claim,
 20 wouldn't have had the right party here. So that was
 21 their risk, they took it and there is no reason why we
 22 ought to be responsible for the risk they took against
 23 the bank.

24 My Lord, that then brings me to indemnity costs and
 25 this is simply not a case for indemnity costs and I'm

1 picking up page 20 of their skeleton and I'm just going
 2 to pick off the points one by one.

3 The first point that's made is our repeated attempts
 4 to avoid an adjudication by this court to the issues
 5 referred by the Belgian court. Well, quite right,
 6 my Lord, we did and we have prevailed and that is not
 7 a reason we should pay indemnity costs, it is a reason
 8 why they should pay our costs because we were right
 9 ultimately as to the scope of the court's enquiry.

10 The second point is the reasonableness of the
 11 Bank of New York's declaration. Now, granted, my Lord,
 12 that has taken less prominence ultimately given your
 13 findings but until the eve of trial it was an issue and
 14 it was an issue that we felt was very important that we
 15 prevailed on because of the position and the likely
 16 relevance of it in Belgium. So that we say is -- turns
 17 reality on its head. We should have our costs of that.
 18 It is certainly not a reason why they ought to have
 19 indemnity costs and bear in mind, my Lord, this was
 20 something that you made a pointed and accurate
 21 preliminary comment about on the eve of trial that it
 22 was impossible to see how the Bank of New York
 23 declaration wasn't fair and reasonable.

24 My Lord, the next point is the pleadings point and
 25 I saw the word that you used in the judgment regarding

1 agency. I think you used the work "oblique" and
 2 I accept that. That alone, certainly taken with
 3 everything else, is not a reason for indemnity costs and
 4 in this case, my Lord, both primary parties, that is the
 5 claimants and the second to fifth defendants, their case
 6 has evolved throughout. It's the reality of how the
 7 case has worked. That didn't aggravate the proceedings
 8 and in fact it probably reduced costs because it was an
 9 easier legal point to deal with on the basis of all of
 10 the evidence, so that shouldn't be taken against us.

11 Paragraph 53, my Lord, is -- the way Mr Malek has
 12 presented it is unfair and unreasonable. The way this
 13 came about, my Lord, is you may recall -- and I will
 14 read it out because it is -- I appreciate you don't have
 15 your bundles present, but in paragraph 13 of their reply
 16 the claimants said this:

17 "As a matter of Belgian law a garnishment may only
 18 be leveled in respect of a debt if that debt is owed
 19 towards the judgment debtor. A judgment creditor can
 20 obtain by garnishment no greater rights than the
 21 judgment debtor himself."

22 So that was the contention they made under Belgian
 23 law.

24 In response to that we denied paragraph 13 in our
 25 rejoinder and we said that's an incomplete general

1 statement. We then said this:

2 "In cases of simulation or pretense a Belgian court
 3 would be entitled to look behind ..."

4 And then we raised a series of points. We knew that
 5 we felt we were right on the whole question of whether
 6 the subject matter ought to be determined by you or the
 7 Belgian court. But we still at the same time had to
 8 address the question of whether they were right or wrong
 9 on that question of whether a Belgian garnishee order
 10 was so limited. So we raised those points in response,
 11 not because we felt they were right to be decided or
 12 litigated here.

13 They are points that when you look at
 14 your Lordship's conclusions relating to the question of
 15 who ultimately is the owner of these assets and the way
 16 that the bank, the NBK, and Kazakhstan work were fairly
 17 taken. And they are not points, my Lord, that we
 18 pleaded and then abandoned and ought not to have made.
 19 They are points that, subject to anything the Belgian
 20 court has to say procedurally and on the res judicata,
 21 will be fully litigated and decided in Belgium with the
 22 benefit of your Lordship's judgment.

23 So it is unfair to present these points as serious
 24 allegations made with no basis and for no purpose. They
 25 were made in response for a good purpose, in good faith,

1 on solid grounds and will be decided elsewhere in due
 2 course in accordance with your Lordship's judgment.
 3 The points in 54 and 55 haven't been advanced
 4 further orally so I won't address them any further.
 5 So, my Lord, subject to questions about whether
 6 there should be payment on account and the quantum and
 7 so on, those are our submissions on the high level as to
 8 what the costs order should look like.
 9 My Lord, I think you are still on mute.
 10 MR JUSTICE TEARE: Thank you.
 11 (Ruling removed awaiting approval)
 12 MR JUSTICE TEARE: Yes.
 13 Submissions on payment on account of costs
 14 Submissions by MR MALEK
 15 MR MALEK: My Lord, there are a few other points on costs
 16 that remain to be dealt with and if your Lordship could
 17 please turn to our skeleton submission where the points
 18 are set out and dealt with shortly. The three issues
 19 are: payment on account, interest on cost and then
 20 section 51. We do apply for a payment on account. The
 21 figure that we suggest -- rather let me repeat that,
 22 paragraph 58 puts forward a figure on the basis of
 23 indemnity costs which of course your Lordship has found
 24 against us on that, but that is the headline figure so
 25 really it is just a question of what figure

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1 your Lordship considers is appropriate to be paid on
 2 account. Clearly it is a matter for your Lordship's
 3 discretion, but we would submit that a substantial
 4 payment is justified.
 5 Interest on costs, I've got nothing further to add,
 6 and section 51 we just simply do not know the position
 7 so what we would want to do is to reserve our position
 8 and that's why we include the paragraph set out at
 9 paragraph 63.
 10 So those are the three issues. I have nothing
 11 further to say.
 12 MR JUSTICE TEARE: Just on interest on costs, is this an
 13 order courts typically make, or is it unusual?
 14 MR MALEK: No, I think it is -- I think in my experience it
 15 is usual. There may be a point in terms of -- as to
 16 when the default provision kicks in under the
 17 Judgment Act, but awarding pre-judgment interest on
 18 costs, I'm not going to say is the norm, but in my
 19 experience is an order that is often seen.
 20 MR JUSTICE TEARE: Thank you.
 21 Mr Handyside, I don't suppose you have anything to
 22 say on this, have you?
 23 Submissions by MR HANDYSIDE
 24 MR HANDYSIDE: I have my own points, my Lord, principally
 25 around an interim payment for my clients; that's the

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1 only point I have on cost.
 2 MR JUSTICE TEARE: I hadn't picked that up, I'm sorry.
 3 MR HANDYSIDE: It is the Kazakh claimants have agreed that
 4 they will make an interim payment of 60% of our costs.
 5 The 60% figure comes out at just over 2 million, so we
 6 ask for interim payment of 2 million, just rounding down
 7 slightly in their favour.
 8 MR MALEK: That's not in dispute.
 9 MR HANDYSIDE: Thank you. And there's a small point, if
 10 I can just raise this now -- it is not on costs but it
 11 is just convenient to tick it off. The adjournment of
 12 the debt claim, the claimants' draft order seeks to
 13 adjourn paragraphs 26 to 29, but the only paragraph that
 14 should be referred to is 29 because the primary debt
 15 claim was abandoned. I just mention that, if
 16 Mr Malek --
 17 MR JUSTICE TEARE: I'm sorry, I was thinking of your first
 18 point. What was that latter point?
 19 MR HANDYSIDE: It is a point to do -- in the draft order
 20 that the claimants have produced the provision where
 21 they say that the debt claim should be adjourned, they
 22 give a reference to paragraphs in the particulars of
 23 claim but those paragraphs they refer to include the
 24 ones that have been abandoned, so the cross-reference in
 25 their order -- your Lordship need not get into this for

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1 a moment, but it may be that Mr Malek will agree it, but
 2 just for his understanding the reference should just be
 3 to paragraph 29.
 4 MR MALEK: Correct, correct. That's agreed, my Lord.
 5 MR JUSTICE TEARE: Right. Thank you.
 6 So Mr Sprange.
 7 Submissions by MR SPRANGE
 8 MR SPRANGE: Yes, my Lord.
 9 So it seems the only issue that I need to address
 10 you on is the quantum of any payment on account.
 11 My Lord, have you had an opportunity to see the detail
 12 that's been provided in the claimants' summary schedule
 13 of costs?
 14 MR JUSTICE TEARE: I have. I'm just trying to find it.
 15 MR SPRANGE: So, my Lord, I just want to make some
 16 observations as to these costs which are obviously
 17 separate from the submissions I have already made and
 18 you have addressed on costs and the headline points are
 19 this.
 20 The claimants' team was double the size of the
 21 Statis' team, both in terms of counsel and solicitors.
 22 The second point, my Lord, is this, that when you
 23 look at the hours spent -- and I always say this when
 24 I make submissions about costs: I'm not attacking the
 25 work that was done or the approach taken by people, I'm

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1 simply looking at what would be recoverable on
 2 a detailed assessment. If you look at the weighting of
 3 hours, Ms Gillett who is one of the most senior
 4 partners, and Mr Gatt who is also a senior partner,
 5 between them cumulatively they have spent close to
 6 1,000 hours on this matter, whilst the two more junior
 7 associates have spent less than that, in the vicinity of
 8 700 hours, and then the senior associate himself has
 9 spent the same as the two junior associates, so in that
 10 sense, my Lord, there is a strong likelihood, we say, of
 11 the costs judge considerably hacking into those hours
 12 that were spent by senior lawyers, particularly in this
 13 case where there is such a substantial and significant
 14 counsel team with two silks and two juniors and also,
 15 my Lord, where a good chunk of this case was taken up
 16 with expert evidence on Belgian and Kazakh law, and the
 17 factual evidence really formed the one witness statement
 18 from the National Bank employee and it wasn't
 19 a particularly document heavy case, so there weren't
 20 huge volumes of disclosure and management of a case that
 21 you would normally see. So in those circumstances,
 22 my Lord, we say that these costs are likely to get
 23 significantly reduced on a detailed assessment.
 24 The second thing, my Lord, is this. In relation to
 25 the Bank of New York costs, that agreement may have been

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1 struck between the Bank of New York and the claimants.
 2 That's not something that we have been privy to or have
 3 seen. I hear and obviously I will have something to ask
 4 you on that in a moment about the indemnity order that
 5 you have made, but we say it would not be appropriate at
 6 this point for us to make the interim payment to the
 7 bank. That ought to be made by the claimants who can
 8 then seek to recover that from us, but that will then
 9 give us an opportunity to look at the -- look in detail
 10 at what's been agreed and whether we think it is
 11 reasonable and raise any points that we may have on the
 12 indemnity.
 13 MR JUSTICE TEARE: Have you seen a costs schedule from the
 14 bank?
 15 MR SPRANGE: My Lord, I asked that question. We have seen
 16 a letter from Linklaters of 1 May that sets out the
 17 number and gives very, very scant detail, but we haven't
 18 seen anything beyond that.
 19 MR JUSTICE TEARE: When you say it sets out the number and
 20 gives scant detail, what detail does it give?
 21 MR SPRANGE: It sets out the Linklaters' professional fees,
 22 counsel fees, the experts' fees and other disbursements
 23 and gives numbers for those and then it comes to a total
 24 of just over €3.3 million.
 25 MR JUSTICE TEARE: So it breaks down the costs for the

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1 solicitors, counsel and experts?
 2 MR SPRANGE: That's correct.
 3 MR JUSTICE TEARE: So in that sense -- but it doesn't
 4 give -- does it give the rates and hours or not?
 5 MR SPRANGE: Not from the document that I have seen,
 6 my Lord. I have asked my colleagues if there is
 7 anything else because this is what I have seen and I'm
 8 yet to get a positive response. I have not seen rates
 9 or anything else like that and I haven't seen the kind
 10 of breakdown that you see here.
 11 MR JUSTICE TEARE: And Mr Handyside told me that the total
 12 is a sum of 2 million. Is that the total in the figure
 13 you've got?
 14 MR SPRANGE: The total in the figure I've got is 3.3 million
 15 but that on my rudimentary quick maths, that's -- 60%
 16 would be just on the 2 million that Mr Handyside has
 17 referred to.
 18 MR JUSTICE TEARE: I see. I had understood him to say --
 19 I obviously got this wrong -- that his costs were about
 20 2 million and he asked for 60% of that but you say his
 21 costs are 3.3 million --
 22 MR SPRANGE: Exactly and there seems to have been agreement
 23 for the payment of 60% of those but of course we know
 24 nothing about them and I don't criticise their desire to
 25 reach an agreement, but if we're going to be the ones,

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1 subject to what I have to say, to be footing the bill,
 2 we ought to have an opportunity to consider those on
 3 a detailed basis and we just simply haven't seen that
 4 and I have had it confirmed that the only detail we have
 5 seen is what I have given your Lordship, which is simple
 6 Linklaters, 2.4 million, et cetera, et cetera.
 7 MR MALEK: My Lord, I don't want to interrupt --
 8 MR JUSTICE TEARE: Hang on.
 9 So Mr Sprange, what are your sides' costs?
 10 MR SPRANGE: My Lord, that's a question I have also asked
 11 and it has been sent to me. I am told they are less but
 12 I haven't got a number yet, my Lord.
 13 MR JUSTICE TEARE: Less than what?
 14 MR SPRANGE: Less than both Linklaters and Stewarts.
 15 MR JUSTICE TEARE: But you haven't got a figure?
 16 MR SPRANGE: I haven't got a figure, no, my Lord.
 17 MR JUSTICE TEARE: Right. And what sums do you say I should
 18 award by way of payment on account?
 19 MR SPRANGE: I say it should be 40%. We ought to pay 40% on
 20 account of claimants and that is it.
 21 MR JUSTICE TEARE: So that would be what, about 1.2 million?
 22 MR SPRANGE: Correct.
 23 MR JUSTICE TEARE: Thank you.
 24 Anything else?
 25 MR SPRANGE: My Lord, I am instructed to seek permission to

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1 appeal your decision on the indemnity. I am happy to do
 2 that at the end but I just wanted to flag that up.
 3 MR JUSTICE TEARE: Right.
 4 Mr Malek, you wanted to say something?
 5 MR MALEK: Yes, just by way of clarification, my Lord. We
 6 aren't seeking a Bullock interim order. Our claim for
 7 costs is only in relation to our costs, so we're not
 8 seeking to recover on an interim basis anything that we
 9 might want to pass on to the Stasis under the so-called
 10 Bullock order. I just wanted to clarify on that.
 11 MR JUSTICE TEARE: I see. So you have agreed to pay
 12 Mr Handyside's clients 1.2 million by way of an interim
 13 payment.
 14 MR MALEK: We have agreed to pay 2 million. His figure.
 15 MR JUSTICE TEARE: 2 million by way of an interim payment.
 16 MR MALEK: Yes.
 17 MR JUSTICE TEARE: But you're not seeking an interim payment
 18 from the Stasis parties in relation to that liability?
 19 MR MALEK: That's correct.
 20 MR JUSTICE TEARE: Thank you.
 21 MR MALEK: The only other thing is that although Mr Sprange
 22 didn't deal with it, we are also seeking interest on
 23 costs and also the section 51. I hope he -- it may be
 24 that he doesn't oppose that but I just thought I would
 25 stress that those two items are also being sought.

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1 MR JUSTICE TEARE: Mr Sprange, is there anything else you
 2 want to say?
 3 MR SPRANGE: Other than the permission point, no, my Lord.
 4 MR JUSTICE TEARE: Thank you.
 5 (Ruling removed awaiting approval)
 6 MR JUSTICE TEARE: I hope that is all the points.
 7 MR MALEK: My Lord, as far as we are concerned, it does
 8 cover everything and we will prepare a draft order
 9 working with the Stasis and BNYM for your approval.
 10 MR JUSTICE TEARE: Thank you very much.
 11 Mr Sprange, you've got an application for permission
 12 to appeal?
 13 MR SPRANGE: Yes, my Lord. I will make this swift.
 14 It is a difficult job making two in the same day.
 15 Application for permission to appeal by MR SPRANGE
 16 My Lord, it is as simple as this. These Bullock and
 17 Sanderson orders are we say not common. As I submitted
 18 to you earlier, this is an unusual case and does not
 19 fall, we say, in the category of cases that normally
 20 attracts this type of order.
 21 In this case it was not a situation where the two
 22 groups of defendants, the second to fifth on the one
 23 hand and the bank on the other, were blaming each other
 24 and from the outset took a different position. Although
 25 the bank described themselves as neutral they did at

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1 times take important pleading positions that were not
 2 neutral and in particular they defended the declaration
 3 that they gave. They defended the notion that there was
 4 justification for concluding that the funds could be
 5 caught by the garnishee order and they also supported
 6 the position that the English proceedings were unlikely
 7 to be dispositive and there would be a need for further
 8 proceedings in Belgium.
 9 In those circumstances we say there is a prospect
 10 that another court will reach a different conclusion on
 11 whether there ought to be a Bullock order in this
 12 particular case and I therefore seek permission to
 13 appeal that aspect of your Lordship's order.
 14 MR JUSTICE TEARE: Thank you very much, Mr Sprange.
 15 (Ruling removed awaiting approval)
 16 MR SPRANGE: Thank you, my Lord.
 17 MR JUSTICE TEARE: Right, now, we have almost run out of
 18 time.
 19 MR SPRANGE: Yes, my Lord. There is a lingering question
 20 and I appreciate that it may be an issue that
 21 your Lordship doesn't wish to deal with, or doesn't
 22 think you ought to deal with and it is simply as to the
 23 use of three witness statements that were on the core
 24 reading list for your Lordship prior to trial.
 25 MR JUSTICE TEARE: That's opposed by Mr Handyside, so --

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1 MR SPRANGE: It is opposed by Mr Handyside.
 2 MR JUSTICE TEARE: So there has to be an argument about it.
 3 MR SPRANGE: There does, my Lord, and it seems to us --
 4 although there has been some correspondence it is
 5 certainly something that can be explored in more detail
 6 in correspondence and also one thing that I have
 7 observed and spoken to my colleagues about this morning
 8 is the fact that there may be a solution that involves
 9 redactions or something else that we haven't explored,
 10 so given the time, my Lord, and where we are up to, our
 11 preference at this moment in time would be to continue
 12 the dialogue. If we can't reach agreement, we may need
 13 to come back to the court and although you may grow
 14 with considerable reluctance when I say this, my Lord,
 15 we may need to come back to you given your knowledge of
 16 the case, but I think that's probably the most efficient
 17 way to deal with things today.
 18 MR JUSTICE TEARE: Right. Well, Mr Handyside?
 19 MR HANDYSIDE: My Lord, we are obviously content: if
 20 Mr Sprange doesn't want to push the applications today
 21 that's absolutely fine.
 22 Can I just mention one last very small point, which
 23 is in relation to the liberty to restore provision in
 24 the order. We said in our skeleton we would like that
 25 to be on 28 days' notice to give my clients the

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1 opportunity to consider any judgment that the NBK might
 2 obtain in its favour to allow us time to make payment.
 3 MR JUSTICE TEARE: Sorry, what's the provision in the order
 4 you are dealing with?
 5 MR HANDYSIDE: It is Mr Malek's paragraph 6 and I'm looking
 6 at him and seeing whether he can agree this. It is
 7 provision for the debt claim to come back, ie liberty to
 8 (inaudible) on 28 days' notice and give us a chance to
 9 consider any judgment that his clients may obtain in
 10 their favour in (inaudible) where this ends up and to
 11 (inaudible).
 12 MR MALEK: That's fine.
 13 MR JUSTICE TEARE: Good.
 14 MR HANDYSIDE: I'm grateful.
 15 MR JUSTICE TEARE: Thank you very much.
 16 Well, if that's everything, thank you all very much.
 17 It seems we might meet again. I look forward to that.
 18 On the other hand, we might not and I would also look
 19 forward to that for slightly different reasons. Thank
 20 you all very much indeed. It has been a pleasure to
 21 listen to you in this new format. Thank you all very
 22 much.
 23 MR MALEK: Thank you.
 24 MR SPRANGE: Thank you.
 25 (12.51 pm)

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1 (The hearing concluded)
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