(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

May 4, 2020

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Monday, 4 May 2020

(10.30 am)

MR JUSTICE TEARE: Good morning everybody. Mr Malek, would you like to begin?

MR MALEK: Yes thank you, good morning.

My Lord, as your Lordship has seen from the skeletons, the consequentials fall under three heads. The first concerns the applications for permission to appeal by my clients and also the Statis, second, there is the head of costs and then, thirdly and finally, there is the question of the use of documents/witness statements, which as we see it is an issue between the Statis and BNYM. Subject to anything your Lordship says, I propose to deal with the topics in that order.

MR JUSTICE TEARE: Thank you.

Application for permission to appeal by MR MALEK

MR MALEK: So if we can start with my application for permission to appeal. You have seen my written argument and I propose to elaborate on what appeared to be the key issue concerning why this court did not finally rule on the debt claim, but before doing so I want to make a couple of points.

The first is that the court has found in the claimants' favour on essentially all the issues in dispute. As you know, under Belgian attachment law the

declaration of the bank, BNYM, has critical importance and it was because of uncertainties that the bank froze the monies held by Bank of New York Mellon London. We say that all the uncertainties identified in the bank's garnishee declaration have been resolved and we also know that RoK has no claims against Bank of New York Mellon London under the law governing the relationship under the GCA and that of course is the banker-customer relationship which we say is critical.

As a matter of English law and as a matter of English substantive law, applying principles of private international law, it is clear that NBK is owed the cash by Bank of New York Mellon and we contend that there is every reason to allow Bank of New York Mellon to discharge its liabilities to its customer now that the uncertainties have been resolved.

The second point is that the Statis have had every opportunity to put forward whatever arguments they want. They chose not to put forward a case on a number of the issues which were covered in the pleadings and the list of issues. There was expert evidence on Belgian law. They chose not to cross-examine my expert, Professor Allemeersch, other than on a very narrow and short basis and in our respectful submission there is no dispute on the issues that were covered by

Professor Allemeersch on the basis that he was unchallenged.

So let's come to the proposed appeal and of course the threshold question is whether or not there is a real prospect of success and it might be said, having succeeded on essentially all the points, why do we want to appeal? And the answer to that is that we do not challenge the vast majority of what the court has found, but we say that the court was wrong to say that there were issues that needed to go back to Belgium and that the debt claim would only succeed if the garnishee order was discharged by the Belgian court.

So the building block in my arguments are these -- I may need to expand on some of them, but in my submission most of the blocks are not controversial.

The first one is that the reason that the cash was frozen was because of the Bank of New York Mellon declaration that you have considered and under Belgian law, as we know, the bank declaration has a critical effect and decisive effect on whether funds are frozen and therefore it follows that had Bank of New York Mellon declared that there were no claims, as appears to have been originally intended, nothing would have been frozen pursuant to the garnishment order.

The second point is that the ability of NBK to bring

a debt claim against Bank of New York Mellon and Bank of New York Mellon's payment obligation does not involve the setting aside of the garnishment order or perhaps more accurately setting aside the ability to levy a garnishment. It is directed to a different issue of whether or not the garnishment order has subject matter and discharge of a garnishment order and whether a garnishment order has subject matter are different concepts, so it's possible under Belgian law for a garnishment order to stand, in other words not to be discharged, but to conclude that there was no subject matter to the same garnishment order.

Thirdly, the 25 May decision and you will recall what that decision is about. I don't need to, I think, take you to it, but it is in the core, but you will recall that the republic, RoK, requested the garnishment order to be set aside with the release of assets and you will also recall that NBK intervened and it requested that the garnishment order be retracted or quashed in as much as it applies to NBK or to any assets held by NBK with BNYM and the learned judge who gave the 25 May ruling dismissed the challenge to set aside the garnishment order and the argument in this court before your Lordship has necessarily proceeded on the basis that he was correct to do so, although there is a right

of appeal that does exist and so it is the case that none of my arguments involve the proposition that the garnishment order has to be discharged before the court gives the relief we seek in respect of the debt, in other words the success of the debt claim has nothing to do with setting aside the garnishment order. It is focused on a different issue.

And as your Lordship knows, the judge giving the 25 May decision made several rulings that are important. She held that the challenge to the garnishment order failed but this did not mean that the freezing done by BNYM could not be challenged; it could be challenged on the ground of lack of subject matter. She also held that she was not competent to deal with subject matter, that that was a matter for a different court, and she held that the English court was the competent court which would decide subject matter and the main point we want to take to the Court of Appeal is your finding that NBK does not get paid unless the Belgian court considers your judgment and it decides, based on your judgment and whatever other arguments that the Statis are allowed to make, whether to discharge the garnishment order and if the garnishment order is discharged, then we get paid but if it does not, it does not get paid, and what we wish to argue is that there is a serious issue -- that

we have a real prospect of success in arguing that, with respect, that there has been a conflation of the issue concerning the validity of the garnishment order with the issue of subject matter and the parts where your Lordship deals with this -- if we could just look briefly at the judgment. It is at paragraphs 41 to 42 and paragraph 130 and your Lordship is familiar with those passages so I'm not going to quote them now but I may have to come back to it.

MR JUSTICE TEARE: Sorry, what paragraphs did you say?

MR MALEK: 41 to 42 and just look at 41, it is on page -- I don't think it was page numbered -- where you say that you are not addressing the issues of Belgian law concerning the ultimate determination of the garnishable law and it should be determined by this court and then 42 that:

"This court cannot purport to determine the outcome of the attachment of the garnishment order proceedings in Belgium."

And in fact the entire paragraph and then the other section that one wanted to look at was at 130 where it says:

"In the event that the court determine that the debt in question was owed by BNYM to NBK, NBK sought judgment upon its claim against BNYM. This assumes that the

Belgian court will decide in the light of the decision of this court to discharge the garnishment order."

And at the very bottom, the last sentence:

"Therefore whether or not the Belgian court decides to discharge the garnishment order, I would not expect there to be any need for this matter to be brought back to this court."

So those are the references to discharge of the garnishment order.

Now, we contend -- and this is the crux of my argument -- that there is a very important distinction between the validity of the garnishment order and whether it should be discharged or not and the issue of subject matter. They are different. The garnishee declaration plays a critical role and we say that that is reflected in the jurisdiction judgment -- and perhaps I can invite your Lordship to have another look at that. It is in bundle B and if we could turn please to tab 5, there is the decision of 4 December 2018 and paragraph 17 -- just working through it -- your Lordship records, correctly, that the claimants then sought to challenge the Belgian and conservatory attachment before the attachment judge and that the attachment judge upheld the attachment order in a judgment dated 25 May 2018, which comes back to the point I made

a moment ago.

Turning over the page, you can see that the judge made a number of points which your Lordship is familiar with, the argument at the very top there is about subject matter and that:

"The fact that the garnishee is not the debtor of the seized debtor is not a ground for the withdrawal of the authorisation nor for the lifting of the garnishment order that has been authorised. The absence of a debt towards the garnishee towards the seized debtor only leads to the conclusion that the garnishment has no subject matter. In the current case the attachment judge can only consider that the garnishment has been authorised does indeed have subject matter, the subject matter of the garnishment follows from the declaration of the garnishee. The seized debtor is entitled to challenge the declaration from the garnishee before the attachment judge. However, this challenge relates to the right of the third party and must be referred to the trial court on the proceeding on the merits under Article 1456 of the Belgian judicial code. The competent trial court is, as stated Kazakhstan itself, the English court who must apply its own national substantive law."

Then there is the arguments of Bank of New York

Mellon which your Lordship has seen.

So the key to this is that the attachment judge has ruled that the declaration can be challenged before the trial court, but if no debt is due from the seized debtor as is to be resolved by the trial court then the garnishment has no subject matter. And we would say that there is a real logic behind all of this because the English court resolves the question referred and if the debt is between NBK and Bank of New York Mellon that decides the dispute and there is no subject matter and it cannot be right as a matter of logic to go back to Belgium so that the Statis can argue that the cash is to be treated as due from Bank of New York Mellon to RoK. That would be a recipe for confusion and we would say would be wrong in principle.

One can stand back and perfectly well understand why the Belgian court judge made this decision. The essence of the dispute as to whether the indebtedness is between NBK and Bank of New York Mellon or for other -- NBK and not RoK, and a decision on that, in our respectful submission, ought to be conclusive as a matter of Britain because otherwise you get this conflict and you would put the bank in an impossible position where there would be a conflict and that, in our submission, is something that is likely to be wanted to be avoided.

So put in other words, your Lordship has ruled that the debt is owed to NBK. If a Belgian attachment judge was now to find that Bank of New York Mellon must pay the Statis' Belgian Bailiff it would mean that Bank of New York Mellon would not have discharged its debt, which the competent court has held to be NBK and therefore there is in our respectful submission this important distinction between the validity of the garnishment order and subject matter and this point was heavily disputed before your Lordship at the time of the jurisdiction judgment.

If we could just look at some passages -- although your Lordship did look at this there are some paragraphs that are not specifically referred to. I'm not saying for one moment that your Lordship overlooked those paragraphs, but it is important in our respectful submission to go back to that judgment, which I think is in front of you at the moment, to see what was argued and if we could start off by looking at paragraph 25 where your Lordship can see that it reads as follows:

"Mr Sprange for the Stati party submitted that there was no serious issue to be tried as between the claimants and the second to fourth defendants. He made four submissions. First, he submitted that the declaration of this court will not affect the Belgian

court's decision since the court faces a number of Belgian law arguments unrelated to the GCA with regard to the RoK debt question."

So that was my learned friend's first question and then the submission and then at paragraph 26, in a passage not referred to in the April decision of your Lordship:

"Mr Sprange's first submission concerned what it is that falls to be decided in these proceedings. This question was at the heart of the parties' oral submissions. It can only be answered in my judgment by a proper analysis that the declaration sought in these proceedings and a proper understanding of the Belgian attachment judge's decision. It is appropriate to start with the latter decision since that was issued before the formulation of the declaration sought in these proceedings."

And if I could ask your Lordship to read perhaps to yourself paragraphs 28 and 29 because paragraph 28 sets out the Statis' position in terms of what it was about and then 29 sets out the claimants' position. So rather than reading it allowed can I just ask your Lordship to read those two paragraphs.

(Pause).

MR JUSTICE TEARE: Yes.

MR MALEK: Then we come on to another paragraph which we submit is important and what your Lordship said is this:

"In my judgment it is clear from the passages of the Belgian judgment set out above that the attachment judge considered that the correctness of the view expressed in the BNYM declaration that BNYM may hold money for the RoK was a matter for this court. It was that issue, based upon the relationship between the RoK and NBK which RoK challenged and which the Stati parties sought to support in Belgian by reference to the arguments of piercing corporate personality, sham trust and abuse of law, which was referred to this court. There is nothing in the attachment judge's decision which suggests that it is only appropriate for this court to decide the narrow contractual question of who is the counterparty to the GCA."

And then also paragraph 31 is important:

"I accept Mr Nutz's(?) evidence that Belgian law provides for a distinction between the enforcement court and the trial court, with the latter deciding the merits of the case. Mr Bridge did not dispute this distinction but merely stated that there are circumstances in which the enforcement court is competent to decide on the merits in this case. However, the enforcement court has clearly decided that the English court is the competent

court to decide the merits."

Then there is paragraph 32:

"I now return to the declarations sought in this court. They have to be understood in the context of the Belgian proceedings which gave rise to the English proceedings. In that context I do not accept Mr Sprange's submission that the pleadings give rise only to a narrow contractual point, that consciously absent from the particulars of claim is any claim for declaratory relief as to the more general question, on the legal basis outside the GCA, whether a debt is owed by BNYM to RoK.

"Again, the particulars of claim fairly read in their context do raise these issues. The declarations sought are set out in full above. Of these the first does indeed raise a narrow contractual question, but the others are wider, including a declaration that BNYM London has no obligation to pay any debt due under the GCA to Kazakhstan and a declaration that BNYM ought to have stated in terms that BNYM London was not indebted towards and held no assets of Kazakhstan capable of forming a valid subject matter under the garnishment order. Express reference could have been made to the arguments arising outside the relationship between RoK and NBK which would have put the scope of

the declarations beyond argument but one has read in context namely the decision of the Belgian court the declarations are fairly to be read as encompassing such arguments."

Then we turn to paragraph 33, which is referred to in the April judgment, the other paragraphs are not referred to, and your Lordship knows exactly what's said there as to what the question is and records my position and concluding that:

"The resolution of that question will necessarily therefore have a material effect on the Belgian executory attachment proceedings."

Anyway, your Lordship has seen that there.

And then there are a few other paragraphs which also shed light on what is to be determined and the first is paragraph 36 where your Lordship says this:

"I am unable to accept that the Belgian court has not in substance referred the question of the content of the attachment order to this court. Whether or not the attachment judge made a formal referral is a matter of Belgian procedural law. It is in my judgment clear from the terms of the judgment set out above that the attachment judge considered that the correctness of the BNYM declaration and the existence of a chosen action by BNYM London for RoK are questions for this court as the

competent trial judge."

And then your Lordship notes the position of BNYM and then paragraph 37 and 38, which again are paragraphs I don't think are referred to in the April decision, where your Lordship refers to:

"I also do not consider the attachment judge positively determined the subject matter of the attachment."

And your Lordship is familiar with that section of it.

Then 38:

"It follows from that passage that the judge thought that on the strength of the BNYM declaration a conservatory attachment order could properly be made but left over the correctness of the BNYM declaration, therefore the content of the attachment order."

Just a couple of other references on this particular point. The next one is paragraph 43 which again is not in the April judgment and what your Lordship said is this:

"It is also of significance that the Belgian attachment judge's decision was handed down some time after Mr Justice Popplewell's judgment in the Part 8 proceedings and indeed a few days after the hearing before the Court of Appeal. The present proceedings

were issued three days later. The terms of the declarations sought in these proceedings, as I have explained above, mirror the questions referred to this court by the attachment judge. They go beyond the issues of interpretation of the English law GCA, the subject of the Part 8 proceedings, to encompass the wider question set out above arising out of the relationship between RoK and NBK."

Then 49, another passage which we rely upon, where your Lordship says this:

"I am unable to accept these submissions essentially for the reasons I have already set out above. In my judgment there is plainly a real and present dispute concerning the subject matter of the conservatory attachment order obtained by the Statis in the Belgian court. That court has referred that question to this court and it is a question that needs to be resolved. The Stati parties being the parties who have obtained the conservatory order are plainly affected by this issue which affects the existence or the extent of a legal right between them and the other parties to these proceedings, namely their right to attach the assets in question. Dealing with the matter by declaration in these proceedings is clearly a most effective way of dealing with the questions arising out

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

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

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

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

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

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

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

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

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

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

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

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

Then at paragraph 42 your Lordship says this:

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

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

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

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

I have noted in this judgment, a matter for the Belgian court to consider having regard to the Belgian law of res judicata."

And what we would wish the ability to argue in the Court of Appeal is that the points that we have just been looking at in these paragraphs: 130, 141, 142 and the paragraphs I just mentioned, 129. They proceed, with respect, on a false premise. The Belgian attachment court has competence over the question of whether the garnishment order is valid as a garnishment which is decided by its 25 May 2018 decision, but not over the question of subject matter which has been referred to the English court in its entirety. And as you know, the claimants had asked the Belgian attachment judge to discharge garnishment on the ground of lack of subject matter and the learned judge refused to do so by the 25 May 2018 decision in which he made it clear that the claimants were perfectly entitled to challenge before this court BNYM's declaration with a view to showing that there is no subject matter. It therefore cannot, we submit, offend against principles of comity for the English court to decide the subject matter question.

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

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

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

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

Your Lordship was in the context of dealing with the declarations, but with respect --

MR SPRANGE: I seem to have lost --

MR MALEK: Can you hear me?

MR SPRANGE: Yes, sorry to interrupt you. You just dropped out for 60 seconds.

MR MALEK: I'm a learner to these things, so apologies. Is that okay?

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

MR JUSTICE TEARE: I did.

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

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

the free-standing Belgian law points. They were not established on the law. Our expert was not cross-examined, and nor were they established on the facts because there was a complete failure to do so.

So in our submission there is no basis for saying that the Belgian court will look at subject matter having left it to the English court as the competent court. Why, one might ask, should the Belgian court now decide to get in the question of subject matter, having already held that the attachment judge was not competent to investigate this question and before what other court but this court are we supposed to litigate the question? And the Belgian court has said "Litigate the entire question in England" and given that the Belgian court has referred the entire question of subject matter to this court, as the court having jurisdiction on the merits, merits being here the entire question whether there is an attachable debt owed by Bank of New York Mellon to RoK on whatever legal theory, it plainly did not anticipate this court not making a final determination about the subject matter question and there is nothing to suggest that the Belgian court will need to revisit its decision whether or not to continue the garnishment. The garnishment order and its validity has got nothing to do, with the greatest of respect, to

the question which is the main issue which was in dispute between us and Bank of New York Mellon and it is significant, as your Lordship has noted, the Bank of New York Mellon also agree that this court should be determining subject matter and that's recorded in your judgment.

So the situation we have at the moment is that both parties to the contract, the GCA, agree -- that's NBK and Bank of New York Mellon -- that subject matter should be determined. The bank clearly does not have any defence to payment once the issue of subject matter is decided, the point falls away. In other words, it's nothing to do with the garnishment order. Once it is established that there is no subject matter, the bank can pay and the bank's position was entirely sensible. They wanted a period of time from the decision in order to enable them to do so. There was no suggestion in the submissions by the bank before your Lordship that anyone needed to go back to Belgium in order to determine whether or not they should pay. The decision was decisive, and that was a matter referred to the court.

So in our respectful submission, with the greatest of respect -- and it is never easy for an advocate to argue for permission to appeal, but the comfort I have is that all I have to do is to establish an argument

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

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

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

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

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

forward their case to him and it is not open to them to say that they would deploy them on another occasion before a different court because they didn't want -- or the English courts to rule on them.

Thus your Lordship was right to consider that he could consider the matter on the basis that there was no simulation, trust and sham, as your Lordship did in paragraph 46, but with the greatest of respect was wrong, or arguably wrong, to consider that the Statis, having failed to pursue the point before the competent trial court, in other words this court, that these points could be revived by the Statis in Belgium. Again the Belgian attachment judge had purposefully avoided ruling on these issues in the judgment of 25 May so that they could be considered, if the Statis wanted to raise them, by the English court.

So those are the reasons, my Lord, that we seek permission to appeal and unless I can assist your Lordship further, that's all I wish to say.

MR JUSTICE TEARE: Thank you, Mr Malek.

Mr Sprange?

MR SPRANGE: I'm not sure whether Mr Handyside has anything to say on this? I'm assuming not.

MR JUSTICE TEARE: He hasn't said anything in his note on this.

MR SPRANGE: No.

Submissions by MR SPRANGE

MR SPRANGE: My Lord, I think this can be dealt with very simply. Your jurisdictional judgment was not appealed by the claimants. As you have observed in your April judgment, because they are innovative, skillful lawyers, they took a sentence here and there from your jurisdictional judgment and used that as a launching pad to try and persuade you at this trial that you were entitled to effectively act as a Belgian garnishee judge and decide all issues. As you have observed in your April judgment quite rightly, they were embellishing a point that could be read in a particular way, but in reality ought not to be when you consider this very simple point of law that Mr Malek hasn't grappled with that is this: as an English law on referral you apply English law. If that English law, by reference to English conflicts of law, requires you to deploy a foreign law, you deploy it. Other than that those are the only issues that you quite rightly ought to address.

It is common ground and accepted that to determine whether this Belgian garnishment order has subject matter engages a number of issues: English law, Belgian law and Kazakh law. You have decided to the absolute

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

deciding English law issues and only foreign law issues that are engaged by conflict of laws and they still haven't explained, other than some again clever manipulation of language in your judgments to suggest why as a matter of law you ought to be considering those Belgian law issues and therefore the finality of the subject matter.

If I can conclude by saying this. It is as simple as your Lordship put it in your judgment. It is likely that your April judgment will be significant and perhaps even definitive in Belgium, but whether it is or not and what effect that has on the garnishee order and whether there is a finding that it has subject matter or not, is a matter for the Belgian court.

The last thing I would say, my Lord, is this: Mr Malek said several times, and I agree with him, that the Bank of New York declaration remains an important question, in Belgium, because that's the focus of the subject matter. They lost on that point before you, my Lord. They withdrew that declaration at the last minute and amended it and one of the no doubt good reasons for that was your observation at the pre- trial hearing that given all of the materials before you and the range of contention that existed on the Belgian and Kazakh law issues it was very hard to say that that

declaration was materially inaccurate.

So given all of that, my Lord, we say you ought not to grant permission on any of those grounds of that been set forth in the claimants' skeleton.

MR JUSTICE TEARE: Thank you. Do you want to advance your application for permission?

Application for permission to appeal by MR SPRANGE

MR SPRANGE: Yes, my Lord, and I can take this very swiftly.

I have nothing more to say on the equitable argument beyond what's in the skeleton.

With regard to the agency argument, my Lord, it simply comes down to this. As your Lordship concluded in your April judgment there are various indicia of agency and your conclusion is that whilst they may be consistent with an agency, they don't necessarily connote an agency, and that there were two points that suggested that were inconsistent with an agency relationship based on your interpretation of Article 22 to 26 of the National Bank Law and construction of the TMA.

Our point is this, my Lord. It is not fanciful and it is, we would say, with respect, a prospect, a real prospect that another court may look at those indicia and may look at those provisions and take your Lordship's finding and we say this is highly

material and important to the analysis, of the level and degree of control that RoK exercises over NBK and reach a different conclusion as to whether all of those indicia, stacked up with the very important point of control, do amount to an agency relationship.

So that, my Lord, together with the points that we have set forth in our skeleton, is the thrust of the permission application. We think it is a simple point in the sense that there's no real dispute as to the facts, they're all established, it's just a matter of weighing them up and is there a prospect of another court concluding that with that autocratic finding there was indeed an agency relationship.

MR JUSTICE TEARE: Thank you.

Mr Malek, do you wish to reply to that application?

Mr Malek, I think you are on mute.

MR MALEK: Yes, you are right. Can you hear me now, my Lord?

MR JUSTICE TEARE: Yes, I can.

MR MALEK: Apologies on that.

Submissions by MR MALEK

MR MALEK: As we understand the grounds of the permission to appeal it is on two grounds. The first is the conclusion that there is no express or implied agency relationship, or actual authority with regard to NBK

entering into the GCA as agent and they call that the "agency conclusion", and then secondly the conclusion that principal's equity could not assist the Statis in the circumstances of this case.

Now, as far as the agency conclusion we say that the challenge here is hopeless and should be rejected and that's essentially for two reasons. First, the challenge is to an evaluative decision and so the threshold for a successful appeal is very high. They do not say that you misdirected yourself on the relevant law. The Statis say that having evaluated the facts and evidence, your Lordship should have concluded that there was an agency relationship. But, as I say, the principles of interference in evaluative decisions indicate that that is a very high threshold to establish. There is no gap in logic, there's no lack of consistency, there's no suggestion that you failed to take into account some material factor which undermines the cogency of your conclusion and therefore we submit that that is fatal to the appeal, but we also say that your Lordship is right for the reasons given in the judgment.

Your Lordship's judgment contains a detailed consideration of the relevant evidence, I won't go through it, but your Lordship concluded the matters

relied upon did not establish an agency relationship, either individually, which is at paragraph 86, or cumulatively, which is at paragraph 89, rather certain matters relied upon by the Statis were found to be consistent with NBK having actual authority to enter into the GCA as agent for RoK but also consistent with NBK entering into the GCA as principal.

And your Lordship applies the correct test, refers to the Magdalink Spirit (?) and in our submission there is no basis to -- sorry, it follows that the Statis need to establish that the matters they relied upon were only consistent with the agency relationship, they could not do so and therefore we submit the conclusion reached by your Lordship on agency is entirely right.

As to the compelling reason, which as I understand it is raised in paragraph 12, they say that there is a compelling reason for the appeal to be heard on the agency issue and we make two short points on this.

First of all, it is highly generalised. It amounts to say that because the agency issue arises in a different context to Filatona, it deserves consideration by an appellant court. That cannot, in our submission, be a sufficiently compelling reason. Wherever an agency issue arises it will necessarily be a different context to Filatona.

Then second, the Statis' submissions on this point seek to inflate what is really a narrow and well understood question of English law -- did NBK enter into the GCA as agent for RoK or as principal -- that does not give rise to a compelling reason for an appeal.

As to the equity conclusion, again I can take this shortly. Their case is set out at paragraph 15 of the consequential submissions, so what the Statis appear to say is that your Lordship found that at some future date the debt BNYM owes to NBK could become due to RoK and that as a result the debt currently owed by BNYM to NBK can be garnished.

The flaw in this reasoning is that your Lordship did not find that the debt owed to NBK could become due to RoK at some later date and that -- if your Lordship could turn briefly to paragraph 101 of the judgment -- is clear because what your Lordship said is this:

"The claim which the Republic will be able to enforce pursuant to the equitable principles of English law is the claim which NBK has against BNYM for the payment of the debt. If the Republic were to sue, joining NBK as trustee, it would be enforcing the claim of NBK against BNYM, that is why NBK has to be made a party to the claim."

In other words your Lordship did not say that BNYM

would become entitled to the debt owed to NBK as a result of equitable principles. To the contrary, your Lordship said that the claim which RoK would enforce would nonetheless be the claim of NBK and your Lordship says:

"That is why NBK has to be a party to the claim. The debt is still owed by Bank of New York Mellon to NBK not RoK, albeit that RoK could engage a procedure to enforce the debt."

And therefore we say that this part of the application for permission to appeal simply does not work and that your Lordship's conclusion was entirely right for the reasons given.

As to the compelling reason ground which the Statis rely upon, which is set out at paragraph 16, we say the two points taken there are not compelling reasons. First, they refer to the fact that the case involved an unusual referral to the Belgian court. In my submission that's entirely irrelevant as to whether the equity issue gives rise to a compelling reason and then second the Statis suggest that the Court of Appeal should consider whether principles of equity can result in a debt becoming due for the purposes of a foreign garnishment order, but with respect, that exaggerates what is really a narrow question of law and, as

your Lordship noted correctly, we submit, at paragraph 104, you are dealing with ordinary contractual principles and the principles of equity do not allow the court to ignore these ordinary contractual principles for the purposes of a foreign garnishment order or otherwise, so there is no compelling reason for the Court of Appeal to reconsider entirely orthodox principles of English law.

Those are my submissions.

MR JUSTICE TEARE: Thank you.

(Ruling removed awaiting approval)

MR JUSTICE TEARE: Right, what next?

I think you are still on silence.

MR MALEK: Cost.

MR JUSTICE TEARE: Right.

Submissions on costs

Submissions by MR MALEK

MR MALEK: Perhaps I can start by identifying what is not in dispute. First of all, the claimants accept that they must pay Bank of New York Mellon's costs because it has a contractual indemnity from NBK under the GCA. There is a small issue in relation to the debt claim.

Second, BNYM's costs of the damages claim are already covered by Mr Justice Butcher's order of 16 January 2020. I don't think we need to look at that

but it is at B --

MR JUSTICE TEARE: When you say "the damages claim", what do you mean by that?

MR MALEK: That was the claim that we brought against Bank of New York Mellon on the basis that the garnishment declaration should not have been made.

MR JUSTICE TEARE: Right.

MR MALEK: It is to do with the point about uncertainties and the like and that claim was not pursued. So that was a damages claim. It was a claim essentially in negligence and that's gone.

MR JUSTICE TEARE: But those costs have already been dealt with?

MR MALEK: By Mr Justice Butcher, yes. If your Lordship picks up bundle B.

MR JUSTICE TEARE: Well, I'm afraid I don't have the bundles with me.

MR MALEK: Well, just so that everybody knows what I'm referring to, it is bundle B, it is tab 18, and what Mr Justice Butcher did -- and this is the order that was a consent order made -- it may be that somebody who has got more talent than me can put it up on screen, but it basically referred to the notice of discontinuance in relation to the damages claim and gave permission to amend and we agreed, the first claimant, to pay the

costs of the damages claim subject to a detailed assessment on an indemnity basis.

MR JUSTICE TEARE: So those costs have already been dealt with and as far as the other costs of BNYM are concerned, you accept that you must pay them --

MR MALEK: Yes.

MR JUSTICE TEARE: -- on the indemnity basis because that's what the contract provides.

MR MALEK: Correct, subject to one point about the debt claim as to whether that's included or not, but I will come back to that in a moment.

Then the third point is that NBK accepts that as against the Statis it must bear its own costs in relation to the discontinued damages claim, so effectively we are accepting that as far as the discontinued damages claim, the Statis do not bear any part of those costs, so what is in issue is first of all what order should be made as to the claimants' other costs, in other words the costs other than the damages claim and the debt claim against the Statis, and then it seems whether the claimants should be allowed to recover from the Statis what they must pay to BNYM, so that's the question of whether or not we can pass on to the Statis any part of the liability that we have to Bank of New York Mellon and of course not including the

damages claim or the debt claim.

What we say in terms of costs overall, we say the claimants have succeeded, the Statis have lost. Bank of New York Mellon has incurred costs in a dispute in which it is not a willing party and it was a party because of the allegations made by the Statis. It all started with the allegations made in correspondence and absent the contractual indemnity the overall justice of the case would require an order that the Statis pay the claimants' costs and BNYM's costs and the only reason not to invite the court to make the order is because of the contractual indemnity and we accept that BNYM is entitled to the benefit of it.

Now, as far as points made by the Statis are concerned, they say -- and perhaps we can just turn up their skeleton at paragraph 3. They make a point about the costs of the securities issue and on this a securities release, so only cash remained at the end after the May 2008 decision.

MR JUSTICE TEARE: Sorry, which paragraph of the Statis' skeleton?

MR MALEK: Paragraph 3, my Lord.

So the position as to the securities could not make any difference to the Statis. In essence what we are saying is that the Statis have got no recoverable costs

in relation to securities. The securities were released and in essence didn't play any part whatsoever and in our respectful submission do not -- the question of securities has fallen away.

As to the contention that the Statis say they have incurred costs in relation to the BNYM, we don't accept that. BNYM's evidence only related to the damages claim, it has nothing to do with anything that matters to the Statis.

So as far as our costs against the Statis are concerned, what issue based order should be made? Then there is the issue of indemnity costs.

The first question about an issue based order -- as your Lordship knows the Statis invite the court to make an issue based costs order and to that extent there is common ground because the claimants also say that there should be an issue based order. The question appears to be as to the costs of which issues should not be recovered from the claimants from the Statis. And if we can just take them in the order appearing in the Statis' skeleton. The first one I have already covered, which is securities, paragraph 3, and our point is that properly analysed the argument about securities went to the damages claim. The Statis continue to say that it was relevant to the declaration claim because of their

case that there had to be some investigation as to the historic correction of the BNYM declaration which we say was wrong, and there's no reason not to regard the costs of the issues such as securities as being part of the declaration claim.

As far as the undecided subject matter question, paragraph 4, your Lordship notes that all those issues were live on the pleadings and included in the list of issues. The Statis certainly did not succeed on them. The court declined to adjudicate them, but in practical terms rejected the evidence of Professor Storme's ownership case and there was no evidential assertion for the Belgian law matters, as your Lordship knows and as I mentioned a moment ago, so with he say there is no reason why we should not have our costs in relation to that.

As far as the declaration 1E is concerned, which is paragraph 5 of their submissions, we say it is wrong to say that the claimants were unsuccessful. The court granted the declaration in somewhat reformulated terms, but still granted it and it is difficult to see how these costs could be divided out on an issue based approach and the claimants were overall successful in obtaining the declaratory relief against the opposition of the Statis on a whole series of grounds, all of which

the court rejected, and therefore we should not be deprived of any part of the declaration claim and as far as the amendment goes -- well, we have dealt with that already which I think is at paragraph 6.1, and then the discontinuance of the damages claim, that's irrelevant as between the claimants and the Statis.

So those are the points in terms of costs.

As far as indemnity costs are concerned, we have set out in our skeleton argument why we say we should recover indemnity costs. It is 45 to 55. But I just want to underscore one point which is covered in I think paragraph 52, the third point, which is the disconnect between the pleadings and the case at trial and the court is entitled to expect a party's case to be in line with its pleading so it was well outside the norm in this court for a party's case to bear so little resemblance to its pleading and connected to that was a complete failure to make any attempt to establish the sham, fraud cases and these were very serious allegations against a central bank and a sovereign and allegations about sham, not corresponding with the true relationship, were allegations amounting to effectively a deliberate attempt to mislead and tantamount to a plea of fraud. These allegations were never advanced. There was no evidence to support them. They were not put to

my factual witness and to make up and persist in a trial of an allegation of this sort, without evidence, is well outside the norm.

So, my Lord, that is all I wanted to say about costs.

MR JUSTICE TEARE: Thank you.

MR MALEK: I don't know if we are taking a break at some stage but I just thought I would remind your Lordship that there is a possibility of that at some stage.

MR JUSTICE TEARE: Okay. So on costs, you simply seek your costs of the proceedings, leaving outwith the costs of the damages issue which have already been dealt with.

MR MALEK: That's correct.

MR JUSTICE TEARE: And you say that you should get your costs on the indemnity basis and thirdly you say -- is this right? -- that you should get from the Statis the costs you have to pay BNYM?

MR MALEK: Correct, but not in relation to the damages claim but we're not seeking to recover the damages part of the claim from the Statis.

MR JUSTICE TEARE: Thank you.

MR MALEK: And we also seek a payment on account -- an interest --

MR JUSTICE TEARE: We will come to the payment on account separately.

MR MALEK: Of course.

MR JUSTICE TEARE: Does Mr Handyside want to say anything on costs?

MR HANDYSIDE: My Lord, yes. Just some short submissions please.

Submissions by MR HANDYSIDE

MR HANDYSIDE: This is to cover a point which Mr Malek mentioned but didn't develop. His draft order provides at paragraph 7 --

MR JUSTICE TEARE: Well, hang on, let me see if I can find that. Yes, paragraph 7?

MR HANDYSIDE: Yes. That the costs of the debt claim be reserved. And our submission is that there is no reason or justification for that order and we dealt with this in paragraph 7 of our note.

MR JUSTICE TEARE: Sorry, paragraph 7:

"The costs of NBK and of BNYM in relation to that debt claim be reserved."

MR HANDYSIDE: Yes.

MR JUSTICE TEARE: Right.

MR HANDYSIDE: And our position is that those costs -- it is unclear exactly what costs the claimants have in mind there, but those costs should be included in the order for costs that the claimants accept should be made in BNYM's favour. And we have dealt with the witness

reasons why we say that in paragraph 7 of our note, if your Lordship has that, or I can just go through it if it is easier.

MR JUSTICE TEARE: Well, let me just see if I can find it. Which paragraph?

MR HANDYSIDE: Paragraph 7, my Lord.

MR JUSTICE TEARE: I don't have in mind the first and second formulations.

MR HANDYSIDE: Right. Well, just to remind your Lordship of that, in the pleading -- which I know you don't have -- in the particulars the claimants advanced a debt claim on two different bases. They said in the first basis -- they made a demand on BNYM for payment on 25 September 2018 and that BNYM's obligation to pay that sum was not suspended by the Belgian garnishment order and therefore -- and you may recall they also pleaded that BNYM's response was erroneous, the response to the Belgian garnishment order, and therefore there was an existing debt. So that was the primary way in which the claim was put.

The alternative basis on which it was put was that if in this court your Lordship found essentially that the garnishment order had no subject matter, then the garnishment order could no longer found any basis for BNYM to refuse to pay the money to NBK and at that point

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

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

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

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

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

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

parties ought to recover their costs.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So that was the contention they made under Belgian law.

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

statement. We then said this:

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

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

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

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

on solid grounds and will be decided elsewhere in due course in accordance with your Lordship's judgment.

The points in 54 and 55 haven't been advanced further orally so I won't address them any further.

So, my Lord, subject to questions about whether there should be payment on account and the quantum and so on, those are our submissions on the high level as to what the costs order should look like.

My Lord, I think you are still on mute.

MR JUSTICE TEARE: Thank you.

(Ruling removed awaiting approval)

MR JUSTICE TEARE: Yes.

Submissions on payment on account of costs

Submissions by MR MALEK

MR MALEK: My Lord, there are a few other points on costs that remain to be dealt with and if your Lordship could please turn to our skeleton submission where the points are set out and dealt with shortly. The three issues are: payment on account, interest on cost and then section 51. We do apply for a payment on account. The figure that we suggest -- rather let me repeat that, paragraph 58 puts forward a figure on the basis of indemnity costs which of course your Lordship has found against us on that, but that is the headline figure so really it is just a question of what figure

your Lordship considers is appropriate to be paid on account. Clearly it is a matter for your Lordship's discretion, but we would submit that a substantial payment is justified.

Interest on costs, I've got nothing further to add, and section 51 we just simply do not know the position so what we would want to do is to reserve our position and that's why we include the paragraph set out at paragraph 63.

So those are the three issues. I have nothing further to say.

MR JUSTICE TEARE: Just on interest on costs, is this an order courts typically make, or is it unusual?

MR MALEK: No, I think it is -- I think in my experience it is usual. There may be a point in terms of -- as to when the default provision kicks in under the Judgment Act, but awarding pre-judgment interest on costs, I'm not going to say is the norm, but in my experience is an order that is often seen.

MR JUSTICE TEARE: Thank you.

Mr Handyside, I don't suppose you have anything to say on this, have you?

Submissions by MR HANDYSIDE

MR HANDYSIDE: I have my own points, my Lord, principally around an interim payment for my clients; that's the

only point I have on cost.

MR JUSTICE TEARE: I hadn't picked that up, I'm sorry.

MR HANDYSIDE: It is the Kazakh claimants have agreed that they will make an interim payment of 60% of our costs. The 60% figure comes out at just over 2 million, so we ask for interim payment of 2 million, just rounding down slightly in their favour.

MR MALEK: That's not in dispute.

MR HANDYSIDE: Thank you. And there's a small point, if I can just raise this now -- it is not on costs but it is just convenient to tick it off. The adjournment of the debt claim, the claimants' draft order seeks to adjourn paragraphs 26 to 29, but the only paragraph that should be referred to is 29 because the primary debt claim was abandoned. I just mention that, if Mr Malek --

MR JUSTICE TEARE: I'm sorry, I was thinking of your first point. What was that latter point?

MR HANDYSIDE: It is a point to do -- in the draft order that the claimants have produced the provision where they say that the debt claim should be adjourned, they give a reference to paragraphs in the particulars of claim but those paragraphs they refer to include the ones that have been abandoned, so the cross-reference in their order -- your Lordship need not get into this for

a moment, but it may be that Mr Malek will agree it, but just for his understanding the reference should just be to paragraph 29.

MR MALEK: Correct, correct. That's agreed, my Lord.

MR JUSTICE TEARE: Right. Thank you.

So Mr Sprange.

Submissions by MR SPRANGE

MR SPRANGE: Yes, my Lord.

So it seems the only issue that I need to address you on is the quantum of any payment on account. My Lord, have you had an opportunity to see the detail that's been provided in the claimants' summary schedule of costs?

MR JUSTICE TEARE: I have. I'm just trying to find it.

MR SPRANGE: So, my Lord, I just want to make some observations as to these costs which are obviously separate from the submissions I have already made and you have addressed on costs and the headline points are this.

The claimants' team was double the size of the Statis' team, both in terms of counsel and solicitors.

The second point, my Lord, is this, that when you look at the hours spent -- and I always say this when I make submissions about costs: I'm not attacking the work that was done or the approach taken by people, I'm

simply looking at what would be recoverable on a detailed assessment. If you look at the weighting of hours, Ms Gillett who is one of the most senior partners, and Mr Gatt who is also a senior partner, between them cumulatively they have spent close to 1,000 hours on this matter, whilst the two more junior associates have spent less than that, in the vicinity of 700 hours, and then the senior associate himself has spent the same as the two junior associates, so in that sense, my Lord, there is a strong likelihood, we say, of the costs judge considerably hacking into those hours that were spent by senior lawyers, particularly in this case where there is such a substantial and significant counsel team with two silks and two juniors and also, my Lord, where a good chunk of this case was taken up with expert evidence on Belgian and Kazakh law, and the factual evidence really formed the one witness statement from the National Bank employee and it wasn't a particularly document heavy case, so there weren't huge volumes of disclosure and management of a case that you would normally see. So in those circumstances, my Lord, we say that these costs are likely to get significantly reduced on a detailed assessment.

The second thing, my Lord, is this. In relation to the Bank of New York costs, that agreement may have been

struck between the Bank of New York and the claimants. That's not something that we have been privy to or have seen. I hear and obviously I will have something to ask you on that in a moment about the indemnity order that you have made, but we say it would not be appropriate at this point for us to make the interim payment to the bank. That ought to be made by the claimants who can then seek to recover that from us, but that will then give us an opportunity to look at the -- look in detail at what's been agreed and whether we think it is reasonable and raise any points that we may have on the indemnity.

MR JUSTICE TEARE: Have you seen a costs schedule from the bank?

MR SPRANGE: My Lord, I asked that question. We have seen a letter from Linklaters of 1 May that sets out the number and gives very, very scant detail, but we haven't seen anything beyond that.

MR JUSTICE TEARE: When you say it sets out the number and gives scant detail, what detail does it give?

MR SPRANGE: It sets out the Linklaters' professional fees, counsel fees, the experts' fees and other disbursements and gives numbers for those and then it comes to a total of just over č3.3 million.

MR JUSTICE TEARE: So it breaks down the costs for the

solicitors, counsel and experts?

MR SPRANGE: That's correct.

MR JUSTICE TEARE: So in that sense -- but it doesn't give -- does it give the rates and hours or not?

MR SPRANGE: Not from the document that I have seen, my Lord. I have asked my colleagues if there is anything else because this is what I have seen and I'm yet to get a positive response. I have not seen rates or anything else like that and I haven't seen the kind of breakdown that you see here.

MR JUSTICE TEARE: And Mr Handyside told me that the total is a sum of 2 million. Is that the total in the figure you've got?

MR SPRANGE: The total in the figure I've got is 3.3 million but that on my rudimentary quick maths, that's -- 60% would be just on the 2 million that Mr Handyside has referred to.

MR JUSTICE TEARE: I see. I had understood him to say -- I obviously got this wrong -- that his costs were about 2 million and he asked for 60% of that but you say his costs are 3.3 million --

MR SPRANGE: Exactly and there seems to have been agreement for the payment of 60% of those but of course we know nothing about them and I don't criticise their desire to reach an agreement, but if we're going to be the ones,

subject to what I have to say, to be footing the bill, we ought to have an opportunity to consider those on a detailed basis and we just simply haven't seen that and I have had it confirmed that the only detail we have seen is what I have given your Lordship, which is simple Linklaters, 2.4 million, et cetera, et cetera.

MR MALEK: My Lord, I don't want to interrupt --

MR JUSTICE TEARE: Hang on.

So Mr Sprange, what are your sides' costs?

MR SPRANGE: My Lord, that's a question I have also asked and it has been sent to me. I am told they are less but I haven't got a number yet, my Lord.

MR JUSTICE TEARE: Less than what?

MR SPRANGE: Less than both Linklaters and Stewarts.

MR JUSTICE TEARE: But you haven't got a figure?

MR SPRANGE: I haven't got a figure, no, my Lord.

MR JUSTICE TEARE: Right. And what sums do you say I should award by way of payment on account?

MR SPRANGE: I say it should be 40%. We ought to pay 40% on account of claimants and that is it.

MR JUSTICE TEARE: So that would be what, about 1.2 million?

MR SPRANGE: Correct.

MR JUSTICE TEARE: Thank you.

Anything else?

MR SPRANGE: My Lord, I am instructed to seek permission to

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

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

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

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

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

(The hearing concluded)

INDEX