IN THE SUPREME COURT OF GIBRALTAR

2020/ORD/072

BETWEEN:

(1) TOLKYNNEFTEGAZ LLP
(a limited liability partnership incorporated in Kazakhstan and in bankruptcy)
(2) ORYNBASAR KUBYGUL
(as bankruptcy manager of Tolkynneftegaz LLP)

Claimants

- and -

(1) TERRA RAF TRANS TRAIDING LTD
(2) ANATOLIE STATI
(3) GABRIEL STATI
(4) TRISTAN OIL LIMITED
(a company incorporated in the British Virgin Islands)

Defendants

Tom Leech QC with Moshe Levy (instructed by Hassans) for the Claimants

JUDGMENT

YEATS, J:

1. This is a without notice application made by the claimants for permission to serve the claim form and particulars of claim on the second, third and fourth defendants out of the jurisdiction.

Background

2. The first claimant ("TNG") is a limited liability partnership incorporated in the Republic of Kazakhstan. Between August 1998 and July 2010 it operated an oil field in that country. It is now in bankruptcy. The second claimant is TNG's bankruptcy manager ("the

bankruptcy manager"). The first defendant ("Terra Raf") is a company registered here in Gibraltar. Up until the appointment of the bankruptcy manager, it was the sole shareholder of TNG. Terra Raf has already been served with the claim form and particulars of claim and has acknowledged service. It has instructed Messrs Triay & Triay to act on its behalf. The second and third defendants are Anatolie Stati ("AS") and Gabriel Stati ("GS"). They are father and son respectively and reside in Moldova. They are the directors and co-shareholders of Terra Raf. (For convenience, when referring to AS and GS together I shall refer to them as "the Statis"). The fourth defendant ("Tristan") is a company registered in the British Virgin Islands. AS is the sole shareholder of Tristan and is its CEO and Chairman.

3. In July 2010, the authorities in Kazakhstan revoked TNG's licence to operate what is known as the Tolkyn oil field. (A licence to operate a second oil field operated by TNG's sister company Kazpolmunay LLC ("KPM") was also revoked.) As a result Terra Raf, the Statis and a company called Ascom Group S.A. (a company owned by AS and members of his family) commenced arbitration proceedings against Kazakhstan in Sweden under the Energy Charter Treaty. They obtained an award for an amount in excess of US $500m ("the award"). Kazakhstan believes that the award was obtained by fraud but have to date been unsuccessful in having it overturned. Flowing from the award, there are recognition and enforcement proceedings in a number of jurisdictions.

4. This action arises out of the alleged fraud. The claimants seek to recover sums of approximately US $470m and €36m for the benefit of TNG's creditors. (The principal creditors are two regional tax authorities in Kazakhstan.) There are four separate claims being made. The first is that in 2006 and 2007 Tristan issued two tranches of loan notes totalling US $420m ("the Tristan loan notes"). The purpose of the funding was to repay existing indebtedness of TNG and KPM and provide them both with working capital. The companies guaranteed the Tristan loan notes. The claimants say that AS fraudulently

misrepresented, in a circular dated the 13 December 2006 inviting investment in the Tristan loan notes ("the Tristan Circular"), that the sum of US $70m was to be applied by Terra Raf to repay sums which it owed to TNG and KPM. In the event, Terra Raf did not do so and instead transferred funds via other companies controlled by the Statis to interests they had in South Sudan. It is consequently said that TNG suffered a loss of US $35m (being half of the sum that was to be paid by Terra Raf to both TNG and KPM).

5. The second claim relates to the payment by TNG of approximately US $95.7m and €63.5m between 2006 and 2009 to a company called Perkwood Investment Limited ("Perkwood") from the proceeds of the Tristan loan notes. The payments are said to have been made for the purchase of equipment to construct a liquefied petroleum gas plant. Perkwood was a dormant company incorporated in England which the claimants say was used by the Statis to inflate the cost of the equipment. The true cost was only of €27,012,485.43 and US $30,596. It is alleged that most of the balance of the monies paid by TNG to Perkwood was misappropriated by the Statis.

6. Thirdly, the claimants say that between 2005 and 2010 TNG produced and exported millions of barrels of oil and gas to a Dutch company, Vitol. It did so via intermediary companies all owned by the Statis, including Terra Raf. Vitol made payments of approximately US $665m for the oil and gas but only approximately US $437m was paid to TNG. The balance was used by the Statis for other business interests or for their own personal use.

7. The last of the claims is what is referred to as the 'Laren Scheme'. In 2009 Tristan issued new loan notes with a face value of US $111.11m to Laren Holdings Limited ("Laren"). Laren was also controlled by the Statis. The issue was funded by a loan of US $30m which TNG guaranteed. The claimants say that the Statis intended to sell TNG and KPM and that would have triggered the repayment of the Tristan loan notes. The sale did not in the end materialise. If it had, the Statis would have made a profit of approximately US $81M. It is said that a number

of fraudulent misrepresentations were made by AS and Tristan to enable the issue of the loan notes. TNG also guaranteed the loan notes and remain liable to pay the sum of US $111m.

8. Tom Leech QC, who appeared for the claimants, described the modus operandi of the frauds as being similar in all four claims. The defendants pretended to the auditors and creditors that all of the transactions were at arm's length, when in fact they were not.

9. The claimants say that they are entitled to the following: Firstly damages for fraudulent misrepresentation and/or unlawful interference with TNG's economic interests; and/or unlawful means conspiracy, under the laws of Gibraltar; and secondly, damages and/or compensation under the law of Kazakhstan. In relation to the claims under the law of Kazakhstan, it is said that: (1) Terra Raf has committed the wrong of causing harm to a subsidiary organisation contrary to Article 94 of the Civil Code of Kazakhstan; (2) that the defendants have committed the civil wrongs of unlawfully or jointly causing damage to TNG which are actionable under Articles 917 and/or 932 of the Civil Code; and (3) that the defendants are liable for unjust enrichment under Article 953 of the Civil Code.

The applications

10. The claimants need the court's permission to serve the claim form and particulars of claim on the Statis because they are both domiciled in Moldova. Similarly, permission to serve Tristan is required because it is a company incorporated in the British Virgin Islands. The application for permission is made pursuant to CPR rules 6.36 and 6.37. It is supported by the witness statement of Philip Maitland Carrington dated the 24 August 2020. Mr Carrington is an English solicitor whose firm, Herbert Smith Freehills LLP, has represented Kazakhstan in proceedings related to the enforcement of the award for a number of years. They also now act for the claimants. Mr Carrington also filed a second witness statement dated the 28 October 2020. In addition, I was provided with eight files containing documents

produced by Kazakhstan in proceedings in Sweden on the 25 November 2019 and a further four files containing additional documents pleaded or referred to in the particulars of claim but which were not exhibited to Mr Carrington's witness statement.

11. If permission to serve the second to fourth defendants is granted, the claimants then apply for an order for alternative service providing that service on those defendants be effected by serving the claim form and particulars of claim on Triay & Triay here in Gibraltar. Alternatively, that time for serving the claim form be extended to allow for the delays which it is anticipated will result if service has to take place abroad, particularly in Moldova.

The legal principles on service out of the jurisdiction

12. CPR 6.36 provides that a claimant may obtain permission from the court to serve a claim form out of the jurisdiction if any of the grounds in paragraph 3.1 of Practice Direction 6B apply. In this case, the claimants rely on paragraph 3.1(3) of the Practice Direction. This states:

> "3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –
> ….
> (3) A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance of this paragraph) and –
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

13. CPR 6.37 then sets out a number of requirements which the claimants must meet. In particular, I would highlight the following: 6.37(1) is concerned with certain formalities, all of which are dealt with by Mr Carrington in his first witness statement. 6.37(2) requires that, in a case such as this one where reliance is placed on paragraph 3.1(3) of

Practice Direction 6B, the claimant must state the grounds on which he believes that there is a real issue between the claimant and the foreign defendant which it is reasonable for the court to try. 6.37(3) provides that the court will not give permission unless it is satisfied that [Gibraltar] is the proper place in which to bring the claim.

14. These rules form the backbone of the test which was set out by Lord Collins in *Altimo Holdings and Investment Ltd and ors v Kyrgyz Mobil Tel Ltd and ors* [2012] 1 WLR 1804 (PC) at paragraph 71:

> "On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements: *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1994] 1 AC 438*, 453–457. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, ie a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: eg *Carvill America Inc v Camperdown UK Ltd [2005] 2 Lloyd's Rep 457*, para 24. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other: see *Canada Trust Co v Stolzenberg (No 2) [1998] 1 WLR 547, 555–557, per Waller LJ affirmed [2002] 1 AC 1*; *Bols Distilleries BV v Superior Yacht Services (trading as Bols Royal Distilleries) [2007] 1 WLR 12*, paras 26–28. Third, the claimant must satisfy the court that in all the circumstances the Isle of Man is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

15. The first consideration is therefore whether Terra Raf has been or will be served with the claim form. There should be no dispute about that. Terra Raf has acknowledged service albeit it has indicated that it intends to contest jurisdiction. It has now made an application for an extension of time to file an application contesting jurisdiction under CPR Part 11, but this has not yet been heard. On jurisdiction, the

claimants rely on Article 4 of the Brussels Recast regulation (Council Regulation (EU) No 1215/2012) which provides that a defendant shall be sued in the Member State in which they are domiciled. In *Lungowe & ors v Vedanta Resources plc & anor* [2019] UKSC 20, the Supreme Court held the following (which I quote from the first holding paragraph in the headnote):

> "that it was acte clair from the jurisprudence of the Court of Justice of the European Communities that article 4 of Parliament and Council Regulation (EU) No 1215/2012 conferred a right on any claimants, regardless of their domicile, to sue an English domiciled defendant in England, free from jurisdictional challenge upon forum non conveniens grounds, and that any exceptions to the otherwise automatic and mandatory effect of article 4 had to be narrowly construed; that in so far as the Regulation contained an implied exception based upon abuse of European Union law, that exception was limited to cases where the sole purpose for bringing proceedings against a first defendant domiciled within the jurisdiction was to enable proceedings to be brought against a second, foreign, defendant otherwise than in the state of its domicile…"

16. Mr Leech also referred the court to *Etridge and ors v Stirling and ors* a decision of this court of the 26 April 2005 which is unreported, where Schofield CJ confirmed that a company registered in Gibraltar must be sued here (pursuant to the earlier EC regulations). Mr Leech, whilst acknowledging that Terra Raf has not yet outlined its grounds for contesting jurisdiction, described any intended challenge as "hopeless". In any event, all that I need to be satisfied of at this stage is that it is arguable that the claimants will defeat a jurisdiction challenge. Terra Raf is a Gibraltar registered company and has been served. There is therefore little difficulty with this first requirement.

17. The court then has to be satisfied of the following: Firstly, is there a good arguable case that between the claimants and the anchor defendant (Terra Raf) there is a real issue which is reasonable for the court to try. Secondly, is there a serious issue to be tried as between the claimants and the foreign defendants (the Statis and Tristan). Both the question whether there is a real issue which is reasonable to try

between the claimants and the anchor defendant and the question whether there is a serious issue to be tried between the claimants and the foreign defendants, involve the application of the summary judgment test. As confirmed by the court in *Altimo*, there is no practical distinction in the wording of the questions. When it is considering whether it is reasonable to try the claim against the anchor defendant, the court must look at the claim against that defendant in isolation. As pointed out by Mr Leech, this does not however mean that the court ignores a claim which is based on a conspiracy between different defendants.

18. Thirdly, is there a good arguable case that the foreign defendants are necessary or proper parties to the claim. In *Altimo* Lord Collins stated as follows at paragraph 87:

> "*… the question whether D2 is a proper party is answered by asking: "supposing both parties had been within the jurisdiction would they both have been proper parties to the action?": Massey v Heynes & Co 21 QBD 330 , 338, per Lord Esher MR. D2 will be a proper party if the claims against D1 and D2 involve one investigation: Massey v Heynes & Co , p 338, per Lindley LJ; applied in Petroleo Brasiliero SA v Mellitus Shipping Inc (The Baltic Flame) [2001] 1 Lloyd's Rep 203 , para 33 and in Carvill America Inc v Camperdown UK Ltd [2005] 2 Lloyd's Rep 457 , para 48, where Clarke LJ also used, or approved, in this connection the expressions "closely bound up" and "a common thread": at paras 46, 49*."

19. Finally, is Gibraltar the appropriate place for the trial of the claim. Mr Leech submitted that a strong reason for answering this question in the affirmative is the fact that the claimants are entitled to bring the proceedings against Terra Raf here by virtue of the provisions of the Brussels Recast regulation. The alternative forums are Moldova, the British Virgin Islands or Kazakhstan. Subject to what the defendants may in due course say, neither of the first two has a closer connection to the case than Gibraltar. As to Kazakhstan, Mr Leech suggested that it would be very unlikely indeed that the defendants would choose that country for the litigation of this claim.

20. Before I go on to consider these questions in relation to each of the four claims, I will look at the following: an application by the claimants to rely on expert evidence; the choice of law which applies to this case; and the nature of the causes of action relied on by the claimants.

Expert evidence

21. In order to enable this court to decide whether there is a serious issue to be tried, the claimants sought to rely on three reports pursuant to CPR rule 35.4. At the hearing I said that I would grant the claimants permission to rely on the reports and that my reasons for doing so would follow. The first report is by Sagidolla Baimurat of Bolashak Consulting Group. He provides expert evidence on the law of Kazakhstan. The second is by Kevin O'Gorman of Norton Rose Fulbright US LLP who gives expert evidence on New York law. The third is by Ian Clemmence of PwC who confirms the accuracy of the schedules to the particulars of claim and the volumes of oil supplied by TNG to Vitol.

22. Mr Leech submitted that the evidence of Messrs Baimurat and O'Gorman was necessary to determine the application. If the evidence is necessary then it meets the test in *British Airways PLC v Spencer* [2015] EWHC 2477 (Ch). Evidence of the law of Kazakhstan is necessary because the claimants need to satisfy the court that the torts complained of are actionable both in Gibraltar and in Kazakhstan. As to the law of New York, this is the law that governs the Tristan Trust Indenture - which is central to the claimant's claims. (The Tristan Trust indenture is a document dated the 20 December 2006 which governs the issue, placement and transfer of the Tristan loan notes.) Mr Clemmence does not strictly give expert evidence as it is simply evidence of fact that is contained in his report. He has however presented his report in the form of an expert's report. Accepting his evidence would obviate the need to go through the bank statements to decide whether the schedules to the particulars of claim are accurate

(which would be required in order to determine whether there is a serious issue to be tried).

23. I agree with Mr Leech that the admission of these reports is necessary for the proper consideration of the application. I would add the following. As is highlighted by Mr Carrington in his first witness statement, none of the three experts are independent from the claimants. All the firms for which the experts work act for Kazakhstan in litigation related to the arbitration award. In the case of Bolashak Consulting Group, it also acts for the bankruptcy manager. This however is not an impediment to relying on the reports at this preliminary stage. I am satisfied that they have the relevant expertise.

Applicable Law

24. The Rome II Regulation (Regulation (EC) 864/2007 of the European Parliament on the Law Applicable to Non-Contractual Obligations) applies to torts committed after the 11 January 2009. The claimants submit that it does not therefore apply to the first three claims because the events that gave rise to the damage occurred before that date. In respect of those claims, it is said that the common law rules prior to the enactment of the English Private International Law (Miscellaneous Provisions) Act 1995 apply. Mr Leech referred to *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 where the Privy Council held that the common law of England was that set out in Dicey & Morris Conflict of Laws 12th Ed (1993) at rule 203. This is the following:

> "Rule 203 – (1) As a general rule, an act done in a foreign country is a tort and actionable as such in England, only if it is both (a) actionable as a tort according to English law, or in other words is an act which, if done in England, would be a tort; and (b) actionable according to the law of the foreign country where it was done. (2) But a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence."

In this application the claimants ask that I apply the double actionability rule and look at the laws of Gibraltar and Kazakhstan.

25. In relation to the fourth claim, the claimants say that the Rome II Regulation may apply. Depending on what facts are found at any eventual trial, the events giving rise to the damage may have occurred after the coming into force of the Regulation. In that case, Articles 4(1) and (3) of the Regulation would apply. These provide as follows:

> "(1) Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
>
> …
>
> (3) Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

The applicable laws of Gibraltar

26. In so far as the laws of Gibraltar are concerned, the claimants rely on three different torts. Deceit (fraudulent misrepresentation); causing loss by unlawful means; and unlawful means conspiracy. They also allege breach of contract. The torts of causing loss by unlawful means and unlawful means conspiracy require particular attention as they are not torts that are commonly advanced in claims before this court. The nature of the torts are set out in the following extracts.

27. The authors of Clerk & Lindsell on Torts (23rd Edition), at paragraph 23-78, say the following about causing loss by unlawful means:

> "In OBG Ltd v Allan [a 2007 case] the House of Lords both confirmed the existence of a tort of hitherto uncertain ambit which consists of one person using unlawful means with the

> intention and effect of causing damage to another and clarified some aspects of the liability."

The paragraph then continues:

> "The key conditions of liability for causing loss by unlawful means, at least in situations where three parties are involved, are: (i) an intention to cause loss to the claimant, (ii) use of 'unlawful means' against a third party; and (iii) interference with that third party's freedom to deal with the claimant."

28. Mr Leech highlighted a passage in *OBG Ltd v Allan* [2008] 1 AC 1 at paragraph 49 where Lord Hoffman provided a relevant example of the tort:

> "In my opinion, and subject to one qualification, acts against a third party count as unlawful means only if they are actionable by that third party. The qualification is that they will also be unlawful means if the only reason why they are not actionable is because the third party has suffered no loss. In the case of intimidation, for example, the threat will usually give rise to no cause of action by the third party because he will have suffered no loss. If he submits to the threat, then, as the defendant intended, the claimant will have suffered loss instead. It is nevertheless unlawful means. But the threat must be to do something which *would* have been actionable if the third party had suffered loss. Likewise, in *National Phonograph Co Ltd v Edison-Bell Consolidated Phonograph Co Ltd* [1908] 1 Ch 335 the defendant intentionally caused loss to the plaintiff by fraudulently inducing a third party to act to the plaintiff's detriment. The fraud was unlawful means because it would have been actionable if the third party had suffered any loss, even though in the event it was the plaintiff who suffered. In this respect, procuring the actions of a third party by fraud (dolus) is obviously very similar to procuring them by intimidation (metus)."

It is said that the *National Phonograph* example closely resembles the allegations in this case.

29. As to unlawful means conspiracy, this was defined by the English Court of Appeal in *Kuwait Oil Tanker CO SAK v Al-Bader* (No 3) [2000] 2 All ER (Comm) 271 at paragraph 108:

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

The applicable laws of Kazakhstan

30. The claimants rely on various Articles in the Civil Code of Kazakhstan. These have been translated into the English language. The report by Mr Baimurat confirms the accuracy of the translations, explains the effect of the relevant Articles and reaches conclusions based on the assumption that the facts contained in the particulars of claim are true. The Articles in the Civil Code being relied on are the following:

31. The first is Article 94. This relates to liabilities as between principal and subsidiary organisations. A principal organisation is defined in paragraph 1 as follows:

> "A legal entity whose decisions may be determined by another legal entity (hereinafter referred to as the principal organisation) on the basis of the prevailing share of participation in the authorised capital or the contract concluded between them, or otherwise."

It continues:

> "The principal organisation, which in accordance with an agreement (or otherwise) with the subsidiary organisation has the right to give necessary instruction to the subsidiary company, shall bear secondary liability on the transactions which are concluded by the subsidiary company in accordance with such instructions."

32. Paragraph 3 also provides that a principal organisation may be liable as follows:

> "The participants of a subsidiary organisation shall have the right to demand from the principal organisation compensation for losses caused by its fault to the subsidiary organisation, unless it is otherwise established by legislative acts."

33. (Mr Baimurat opines in his report that TNG was a subsidiary organisation for the purposes of Article 94 and Terra Raf was its principal organisation.)

34. The claimants also rely on Article 917 (headed 'General Basis of Liability For Causing Harm') and Article 932 (headed 'Liability for Jointly Caused Damage') both of which impose liability for civil wrongs. The wording of these Articles is said to be as follows:

> Article 917
>
> "Harm (property and (or) non-property), caused by illegal actions (inaction) to the property or non-property rights and benefits of citizens and legal entities shall be compensated by the person, who caused the damage, in full."

> Article 932
>
> "The persons who jointly caused damage shall be liable to the injured party jointly and severally. Based on the application of the injured party and in his/her interests, the court may hold the persons who jointly caused harm, severally liable."

35. Finally, the Claimants also rely on the law of unjust enrichment contained in Articles 953 to 958. In particular, Mr Baimurat says the following about Article 953:

> "Article 953 provides that a person who without grounds established by legislation or transaction acquires property, is unjustly enriched at the expense of the victim and shall be obliged to return the property unjustly acquired."

36. Mr Leech presented his case on the basis that it was unnecessary to consider unjust enrichment if I am satisfied that the claims against the defendants under Articles 917 and 932 are arguable.

37. In respect of each of the four claims Mr Leech took me to the four questions that have to be considered on an application for permission to serve out of the jurisdiction as discussed at paragraphs 17 to 19 above. In doing so, he referred to some of the salient parts of the

evidence in the case which he considered would be sufficient to meet the threshold requirement for this application. It is not of course my role in this application to come to any final conclusions on the evidence.

The first claim

38. In relation to the first claim the claimants rely on fraudulent misrepresentation, unlawful interference, and unlawful means conspiracy under the laws of Gibraltar. They also say that the claim is actionable under Articles 94, 917 and 932 of the Civil Code of Kazakhstan.

39. Central to this part of the claim are the representations said to have been made in the Tristan Circular. At page 52 the following representations are made:

> "Tristan Oil intends to use $76.0 million from the net proceeds of this Note Offering to make a loan to Terra Raf, at an interest rate of 0%. Terra Raf intends to use $70.0 million of the proceeds from this loan to repay $35.0 million of accounts payable to each of TNG and KPM with respect to sales of oil and condensate."

40. The claimants say that on the 8 January 2007 Tristan transferred US $70m into Terra Raf's account but instead of paying US $35m to each of TNG and KPM, Terra Raf transferred the funds to other companies controlled by the Statis. I was taken by Mr Leech to the relevant bank statements at the hearing.

41. The particulars of claim (at paragraph 26) assert that the Tristan Circular was published on behalf of Tristan as the issuer and TNG, KPM and Terra Raf as recipients of the issue. I can see from the face of the document that it is made by Tristan, KPM and TNG. It does of course refer to Terra Raf and clearly at page 52 refers to what Terra Raf intends to do with the funds it is to receive, but it does not, as far as I can see, purport that it is made on behalf of Terra Raf. Be that as

it may, Terra Raf is TNG's principal and AS controlled both companies.

42. A representation was made to the loan note holders that the sum of US $76m would be provided to Terra Raf so that it could, inter alia, pay the sum US $35m to TNG. Terra Raf received the funds on the 8 January 2007, but then transferred the funds to other companies controlled by the Statis for their interests in South Sudan. This left TNG liable to repay the US $35m to the note holders.

43. In my judgment, on the material presently before me, the claimants have a real prospect of success in this claim between the claimants and Terra Raf. The assertion that the representation made by or on behalf of Terra Raf was a fraudulent representation is not fanciful. The same applies to the allegation that this amounted to causing loss by unlawful means and unlawful means conspiracy.

44. The claimants also say that these transactions were a breach of the Tristan Trust indenture. Section 4.12 imposed a restriction not to make a payment in excess of US $10m to any affiliate unless certain requirements were met. One of the requirements was that a fairness opinion needed to be obtained from "*an accounting, appraisal or investment banking firm of national standing*." It is said that this was necessary in relation to the payment of US $70m to Terra Raf because the funds were not applied as per the representation in the Tristan Circular but were instead channelled to other affiliated companies. Mr O'Gorman confirms in his report that as a matter of New York law, the payment by Tristan to Terra Raf was in breach of the Tristan Trust Indenture – assuming that the facts alleged are true.

45. Mr Leech submitted that for the purposes of the double actionability rule, the law of Kazakhstan also applies because what matters is where the claimant suffered damage and not where the inducement took place. TNG suffered the damage in Kazakhstan and not wherever the Tristan Circular representations were made. He relied on *Metall Und*

Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391. At page 446 of his judgment Slade LJ said:

> "The damage which M. & R. suffered as a result of the trading contract breaches was, in our view, suffered in London: M. & R. did not receive the ledger credit payment which should have been made in London, did not receive the warrants which should have been delivered in London and suffered the detrimental closing out of their accounts in London. Similarly, it appears to us that the damage caused to M. & R. by the compromise agreement breach was suffered in London since security which should have been available to M. & R. in London was (it is said) wrongly charged in London and paid out of London.
> If the acts of inducement alleged are viewed in isolation, the torts alleged here in our judgment, would, be properly regarded as, in substance, torts committed in New York. We do not think the acts inducing the compromise agreement breach would displace that conclusion. But if, as we have concluded, the question is where as a matter of substance the torts were committed, the matter must be looked at more broadly, taking account of the breaches (particularly the effective breaches) induced and the resulting damage. On this approach we conclude that as a matter of substance the torts were committed in London."

46. Mr Baimurat confirms in his report that if the facts alleged are true, then the claim against Terra Raf is actionable under Articles 94, 917 and 932 of the Civil Code of Kazakhstan.

47. On the question whether it is reasonable to try the claim against Terra Raf, the claimants say that a claim for US $35m is a substantial claim. Undoubtedly, that is so. The latest balance sheet for Terra Raf signed by the Statis and dated the 31 March 2020 (filed at Companies House in Gibraltar on the 10 June 2020) shows assets of £88m. It also shows that it has liabilities of £88m. There is, however, no information as to what those assets or liabilities may be. Mr Leech submitted that for the purposes of this application the court is entitled to proceed on the basis that there are substantial assets. I agree. Until we have further information as to the nature of the liabilities, Terra Raf appears to have substantial assets from which to meet any judgment. It is also said that if the award becomes enforceable then any judgment in this claim can

be enforced against Terra Raf's right to the award. It seems to me that it is certainly reasonable for the claim against Terra Raf to be tried.

48. Is there a serious issue to be tried between the claimants and the Statis and Tristan in relation to this first claim? The claimants say that if I am satisfied that there is a real prospect of success in the claim against Terra Raf that I can easily be satisfied that the same is the case with the other defendants. I agree that this is so. The Statis are the Directors and shareholders of Terra Raf. (TNG is wholly owned by Terra Raf.) It appears from the evidence produced by the claimants that the Statis control all the relevant bank accounts involved in the transactions. Furthermore, AS is Tristan's CEO and Chairman. He is its sole shareholder.

49. Are they necessary or proper parties? If the Statis and Tristan had been in the jurisdiction, then there is a good arguable case that the claim against all the defendants would have involved one single investigation. They are all closely bound in the alleged facts.

50. Finally, is Gibraltar the proper place to bring the claim? The claimants say that it is because they are entitled to bring a claim against Terra Raf in Gibraltar, as it is a company that is incorporated here. The Statis have chosen this jurisdiction to incorporate their business and regulate their affairs. It is submitted that the Statis' conduct as directors of Terra Raf is central to all four claims. Subject to any submissions that in due course may be made by the defendants, I agree with the claimants that Gibraltar is the appropriate forum for the trial of the dispute. This reasoning of course applies to all four claims.

The second claim

51. The payments made to Perkwood, which were ostensibly made for the purchase of equipment for the liquefied petroleum gas plant, are said to have been made in breach of the Tristan Trust Indenture. The claimants also claim fraudulent misrepresentation, unlawful interference and conspiracy under the laws of Gibraltar.

52. The contract with the supplier of the equipment was entered into by Azalia LLC ("Azalia"), a company incorporated in Russia and controlled by AS. The claimants say that between March 2006 and April 2009, TNG made payments totalling US $96m and €64m to Perkwood. Funds were then channelled into companies controlled by the Statis including Azalia and Terra Raf. Azalia paid the supplier of the equipment the sums of €27m and £17,160. It is alleged that the Statis misappropriated the remaining funds, part of which was employed in the construction of a castle in Moldova.

53. The claimants say that the payments made by TNG to Perkwood after the 20 December 2006 were made in breach of the Tristan Trust Indenture because they involved payments to an affiliate company. No certificate by the officers of the company required by clause 4.12(a)(2)(A) or the fairness certificate required by clause 4.12(a)(2)(B) were produced. Mr O'Gorman confirms in his report that if the facts set out in the particulars of claim are true, then the payments made to Perkwood by TNG after that date were affiliate transactions.

54. The claimants also say that Tristan and AS made false representations in a series of letters to Tristan's auditors KPMG. The Tristan Trust indenture required Tristan, TNG and KPM to provide representation letters to KPMG. An appendix to each letter sets out a list of related companies. In the copies of the letters that the claimants have, Perkwood is not included in the list, despite this company being controlled by AS. This was unlawful interference because the false representations caused loss to TNG. Had the auditors been advised of the relationship between Perkwood and the other parties, then the payments would have been questioned. The same basis is pleaded for claiming unlawful means conspiracy.

55. Terra Raf did not make the false representations itself. However, it is only as Director and shareholder of Terra Raf that the Statis could give

instructions to TNG to enter into contracts and/or make payments to Perkwood and the other related companies. Furthermore, Terra Raf received funds from the payments made to Perkwood.

56. TNG suffered the loss when it made the payments to Perkwood. The funds came out of its bank account in Kazakhstan. The laws of Kazakhstan therefore apply. Mr Baimurat confirms in his report that assuming the facts alleged are correct, this claim against Terra Raf is actionable under Articles 94, 917 and 032 of the Civil Code of Kazakhstan.

57. I am therefore satisfied that the claimants have a real prospect of success against Terra Raf in relation to the second claim.

58. This is also a large claim against Terra Raf for approximately US $86m. It would therefore be reasonable to try it. For the reasons given in relation to the first claim, namely the relationship between the defendants, I am also satisfied that there is a real prospect of success against the second, third and fourth defendants. They are necessary or proper parties to this claim.

The third claim

59. The third claim concerns the sale of oil and gas to the Dutch company Vitol. As has been explained above, the sale of the products was done via intermediary companies all owned by the Statis, including Terra Raf. Vitol made payments of approximately US $665m but only approximately US $437m was paid to TNG. It is said that Terra Raf retained the sum of US $112m from the amounts received from Vitol. The claimants say that the contracts with the intermediaries were all sham contracts and that there was no justification for TNG to sell the oil and gas via intermediaries at such a low price. The claimants point to the fact that the Statis would have known exactly what Vitol were paying for the products.

60. In TNG's audited financial statements for the year ended 31 December 2007, TNG reported that the prices being paid on these transactions were market rates. If the facts alleged by the claimants are true, this would be a false statement. Selling TNG's assets at less than market value would be a breach of clause 4.1 of the Tristan Trust indenture which inter alia reads:

> "(a)… [TNG] will not consummate an Asset Sale unless (1) [TNG] receives consideration at the time of the Asset Sale at least equal to the Fair Market Value of the assets or Equity Interests issued or sold or otherwise disposed of…."

61. The evidence of New York law supports the claimants' assertion that the sale by TNG was not at fair market value. Furthermore, the Tristan Trust Indenture was breached in that the sales, which exceeded US $10m, were to affiliates and no officers' certificates or fairness opinions were obtained.

62. It is also said that AS certified that Tristan had observed the covenants in the Tristan Trust Indenture for the relevant years. AS must have known that to be false as he was controlling the transactions between TNG and the affiliates. These false representations were made to TNG's auditors KPMG and caused loss by unlawful means.

63. It is alleged that Terra Raf formed part of this conspiracy to cause loss to TNG. Of course, this part of the claim includes the fact that Terra Raf received and allegedly misappropriated significant sums from that paid by Vitol. In my judgment, the claimants have a real prospect of success against Terra Raf in relation to this third claim. If the facts alleged are true, there appears to be no justification for the sale by TNG to the affiliates at the markedly lower prices.

64. TNG suffered the loss in Kazakhstan. It should have received monies that it was entitled to into its account in Kazakhstan. Mr Baimurat confirms that the claim is actionable against Terra Raf under Articles 94, 917 and 932 of the Civil Code of Kazakhstan.

65. Like with the previous claims, it is reasonable to try the claim, the prospects of success are realistic as against the second, third and fourth defendants and they are all necessary and proper parties to the claim.

The fourth claim

66. The Statis borrowed funds to purchase a further issue of Tristan loan notes. For a price of US $30m they purchased notes with a face value of US $111.11m. The notes were issued to Laren. The claimants allege that the evidence shows that the Statis' intention was to sell TNG and KPM. Had the sale gone through, it would have triggered the repayment of the Tristan loan notes and this would have netted them a profit of approximately US $80m. In the event, the sale did not materialise but TNG retained a liability to repay the amount of US $111m as it guaranteed the loan notes.

67. In the public announcement regarding the issue of the loan notes, Tristan fraudulently stated that Laren was owned by a charitable trust. Further, in a representation letter dated 25 August 2009 to KPMG, AS falsely stated that Laren was not a related party to Tristan. AS controlled both companies. These alleged fraudulent misrepresentations caused loss to TNG because it assumed the liability to repay the new loan notes. Mr Leech accepted that Terra Raf's involvement in this claim was far less than in the first three claims. However, it is said for the claimants that Terra Raf was a party to this conspiracy because the instructions to TNG to enter into the guarantee arrangements would have been made by AS or the Statis through Terra Raf.

68. As an affiliate transaction, this also breached the Tristan Trust indenture. It seems to me that the claimants' claim for that breach of contract has a real prospect of success as do their claims for causing loss by unlawful means and unlawful means conspiracy.

69. In relation to this claim Mr Leech pointed out that it is difficult to identify where the substance of the torts was committed. The documents relating to the Larens Scheme contained exclusive jurisdiction clauses conferring jurisdiction on the courts of England; it is not possible to say where the documents were executed; no place of performance was specified; and payment was to be made in the British Virgin Islands. However, he submitted that it was not the claimants' obligation to try and second guess what the defendants may seek to argue regarding what law should apply to the claim. The claimants' position is that the exception to the double actionability rule applies (as set out in *Dicey & Morris* rule 203(2)) in that this claim should be governed by the law of the country with which it is "manifestly more closely connected". I agree that there is a real prospect of successfully arguing that this should be either Gibraltar or Kazakhstan. If the law of Kazakhstan applies, again Mr Baimurat confirms that the claim against Terra Raf would be actionable under Articles 94, 917 and 932 of the Civil Code of Kazakhstan.

70. This is a substantial claim. For the reasons given in relation to the other claims, I also find that it is reasonable to try the claim, there are real prospects of success against the second, third and fourth defendants and they are necessary and proper parties.

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71. At the hearing I raised how the position with regards to GS could possibly be different to that of AS. The latter features more prominently in the documentation, transactions and allegations. Mr Leech's submission was that it was reasonable to infer that GS was also a party to the conspiracies. GS was a director of Terra Raf and owns it jointly with his father. They had to act together because neither had a majority. There must have been either active or passive agreement with what AS was doing. GS also controlled, with AS, all of the relevant bank accounts from which the funds in the various claims were channelled. I agree that for the purposes of this

application it is reasonable to infer that AS and GS must have been acting in concert.

Service

72. I am satisfied that there is a serious issue to be tried on all four claims. The other relevant requirements also having been met, I will grant the claimants permission to serve the second, third and fourth defendants out of the jurisdiction pursuant to CPR 6.36 and 6.37.

73. The next application to consider is the claimants' application that I order alternative service on these additional defendants. Specifically, I am being asked to order that they be served at the offices of Triay & Triay here in Gibraltar.

74. On the 1 September 2020, the claim form and particulars of claim were served on Terra Raf at its registered address. On the 15 September 2020 an acknowledgment of service form, which appears to have been signed by AS personally, was filed in the Supreme Court Registry indicating that jurisdiction was to be contested. (The acknowledgment is signed by a 'Director' of Terra Raf and the signature appears to be identical to AS's signature - as seen in other documents. For the purposes of this application I am proceeding on the basis that it was signed by AS.) According to Dhiraj Nagrani, a lawyer with Triay & Triay, his firm were instructed on that same day by Terra Raf. (Mr Nagrani filed a witness statement in the application made by Terra Raf seeking an extension of time for the filing of an application contesting jurisdiction.) Mr Nagrani states that his firm are instructed by Mr Egishe Dzhazoyan, a partner of King & Spalding International LLP, on behalf of Terra Raf. King & Spalding are said to be the long standing legal advisors of Terra Raf and the Statis. Triay & Triay have however confirmed to the claimants' solicitors that they are <u>not</u> instructed to accept service on behalf of the Statis or Tristan.

75. The application for an alternative form of service is made pursuant to CPR rule 6.15.This provides as follows:

> "Where it appears to the court that there is a good reason to authorise service by a method or at a place not otherwise permitted by this Part, the court may make an order permitting service by an alternative method or at an alternative place."

76. Mr Leech accepted that exceptional or special circumstances need to exist before the court makes an order in a case such as this one. In his written submissions for the hearing he referred to *Societe Generale v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS* [2019] 1 WLR 346. The case concerned an application for retrospective alternative service where the claimant had failed in its initial attempts at service, in Turkey and Dubai, and the claim had thereafter become time barred. At paragraph 33 of the judgment, Longmore LJ said the following (in relation to an application for alternative service where service would ordinarily have to take place under the Hague Service Convention):

> "the essential reasoning of Stanley Burnton LJ (with whom Wilson and Rix LJJ agreed) [in Cecil & ors v Bayat & ors [2011] EWCA Civ 135] remains binding on this court so that service by an alternative method is to be permitted "in special circumstances only."

77. In *Avonswick Holding Ltd v Azitio Holdings Ltd* [2019] EWHC 1254 (Comm) Moulder J was considering an application to set aside an order which allowed for service on a party in Ukraine to be effected by serving its lawyers in England by post. At paragraph 19 of her judgment, the learned judge referred to a number of principles identified at first instance in the *Societe Generale* case. For present purposes, I quote the following ones:

    i. "In deciding whether to authorise service by an alternative method under CPR Rule 6.15, whether prospectively or retrospectively, the Court should simply ask itself whether there is 'a good reason'."

    ii. "A critical factor is whether the defendant has learned of the existence and content of the claim form… If one party or the other is playing technical games, this will count against him…. This is because the most important function of service is to ensure that the content of the document served is brought to the attention of the defendant…. The strength of this factor

will depend upon the circumstances in which such knowledge is gained. It will be strongest where it has occurred through what the defendant knows to be an attempt at formal service. It may be weaker or even non-existent where the contents of the claim form become known through other means."

iii. "However, the mere fact that a defendant learned of the existence and content of the claim form cannot of itself constitute a good reason; something more is required"

iv. "There will be a focus on whether the claimant could have effected proper service within the period of its validity, and if so why he did not, although this is by no means the only area of inquiry."

v. "Delay may be an important consideration. It is relevant whether the application for relief has been made promptly and, if not, the reasons for the delay and any prejudicial effect."

vi. "Where service abroad is the subject matter of the Hague Convention or a bilateral treaty, it will not normally be a good reason for relief under CPR 6.15 or 6.16 that complying with the formalities of service so required will take additional time and cost."

vii. "Where the country in which service is to be effected has stated its objections under Article 10 of the Hague Convention to service otherwise than through its designated authority, as part of the reciprocal arrangements for mutual assistance on service with this country, comity requires the English Court to take account of and give weight to those objections…. In such cases relief should only be granted under Rule 6.15 in exceptional circumstances."

78. In this case Mr Leech in effect relies on the following factors in support of his application for alternative service: that the Statis (and by extension therefore Tristan) have knowledge of the claim as AS has personally acknowledged service on behalf of Terra Raf; they have instructed Messrs Triay & Triay, either directly or through intermediary solicitors; service on Terra Raf was effected formally in accordance with the laws of Gibraltar; and there will be significant delay in serving the Statis in Moldova. Unless the time allowed for serving the claim form is extended, the period of validity will expire. (There would not be any such delay in serving Tristan in the British Virgin Islands but it would make sense to treat all three additional

defendants in the same way, particularly as Tristan is controlled and owned by AS.)

79. I acknowledge that the fact that AS is certainly aware of the claim is a strong factor. He has not just learnt of its existence and content. He has acknowledged service, as he is entitled to do, on behalf of Terra Raf. What, it may be asked, is the point of serving him formally again with a second copy of the same documents via a laborious and time-consuming method? In practical terms, it will achieve nothing.

80. If service is effected via the Hague Service Convention then this will clearly take some time. Mr Carrington's evidence is that service in Moldova is likely to take up to six months from the point of delivery of the documents to the Central Authority in Moldova. Service via those channels would also require a translation into the Romanian language, which is the official language of Moldova. That too would take time. Mr Carrington also quite properly confirms that the Moldovan authorities have objected to Articles 10(a) to (c) of the Hague Service Convention which means that they object to service taking place other than through the official channels under the Convention.

81. It is of course true that the proceedings in Gibraltar are at a very early stage. Terra Raf has been served but it has indicated that it is contesting jurisdiction. There are no trial dates which will be lost by the delay in service. The time it will take to effect service in Moldova under the Hague Service Convention is not of itself a good reason for granting the order. I am also particularly mindful about Moldova's objection to direct service as this is an important factor. This requires the circumstances to be 'exceptional' before an order for alternative service is made. However, these matters need to be balanced against what appears at this time to be a 'technical game' being played by the Statis in refusing to accept service via Terra Raf's solicitors. AS signed Terra Raf's acknowledgment of service. The Statis are the directors and shareholders of Terra Raf and are therefore the controlling minds of the company. They must be personally involved

in the proceedings and must be engaged in giving instructions to Terra Raf's English solicitors. They have solicitors in Gibraltar engaged in these same proceedings who the claimants would be able to serve within a matter of days. In my judgment, these are exceptional circumstances which would allow me to make the order for alternative service sought by the claimants, and I shall do so.

82. Although the circumstances with Tristan are different in that service can be effected directly at the company's registered office in the British Virgin Islands, I see obvious merit in following the same course. AS controls and owns Tristan. I shall order that the claim form and particulars to be served on Tristan can also be delivered to Triay & Triay.

83. Mr Leech briefly raised what he described as a moot point regarding the period in which the claim form should be served on the defendants if the order for alternative service were to be made. A claim form served on a defendant within the jurisdiction must be served within four months from the date it is issued. If served out of the jurisdiction the period is six months. (CPR rules 7.5(1) and (2) respectively.) So which one is it in a case where technically the order is for service out of the jurisdiction by delivery to a place within the jurisdiction as an alternative method of service? The question is relevant because the claim form was issued on the 17 July 2020 and the four month period expired on the 17 November 2020. Rather than attempt to resolve the conundrum without having had the benefit of full argument, I will, as Mr Leech asked me to do, extend the period within which the claim form may be served to 14 days from the date of this judgment. CPR rule 7.6 allows the claimants to make an application to extend time. I have taken into account that the application for permission to serve out of the jurisdiction was made on the 25 August 2020. It was listed by the Registry for hearing to the 5 and 6 November 2020. I then reserved my judgment until today. In the circumstances, no fault can be attributed to the claimants for any delay - if indeed they are obliged to serve with a four month period.

Full and frank disclosure

84. A number of matters have been raised by Mr Carrington as part of the claimants' duty of full and frank disclosure in this without notice application. I have considered all that he has raised in paragraphs 123 to 135 of his first witness statement and in paragraphs 36 to 48 of his second witness statement. Two issues were highlighted by Mr Leech. Whether these proceedings could be said to be an abuse of process and limitation.

85. Are these proceedings in effect an attempt to re-litigate the arbitral proceedings which led to the award? It is of course accepted by the claimants that their interests are aligned with those of Kazakhstan. The claimants have Kazakhstan's support and TNG's principal creditors are tax authorities in the country. However, it is submitted that the claims are different. These proceedings do not seek to challenge the award but are separate claims, albeit relying on the same fraud. It is also said that because of the allegation of fraud the claimants could quite properly challenge the award. I agree that these are not matters for this application.

86. As to limitation, the defendants could argue that Kazakhstan would or should have been aware of any allegations it is making after it took over the oil fields in 2010. They had access to records and documentation since that time. The claimants' case is that limitation has not expired - whether under the laws of Gibraltar or under the laws of Kazakhstan. The point was made that until the bankruptcy manager's appointment, a claim by TNG could not be brought. Mr Carrington's evidence is that the appointment was made on the 26 February 2020. Further, KPMG gave notice that it was withdrawing its audit opinions on the 21 August 2019. That may be a relevant date in so far as critical aspects of the claim are concerned. In any event, limitation is a matter that will need to be determined if it is raised by the defendants.

Conclusion

87. For the reasons set out in this judgment, I will grant the claimants permission to serve the claim form, particulars of claim and associated documents on the second, third and fourth defendants. I shall also order that the claimants be allowed to do so by delivering the documents to the first defendant's solicitors here in Gibraltar.

Liam Yeats
Puisne Judge

27 November 2020