EASTERN CARIBBEAN SUPREME COURT

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHCM2021/0171

BETWEEN:

BY WAY OF CLAIM:

JOINT STOCK COMPANY "BTA BANK"

Claimant/Respondent

and

(1) TIMUR SABYRBAEV

(2) DILARA DYUSEMBAYEVA

(3) ASSEL ZHAXYBAYEVA

(4) ASEL SUINDIKOVA

(5) MARINA AITZHANOVA

(6) JANELLE UTEMURATOVA

(7) SVETLANA CHVANOVA

(8) VERONIKA EFIMOVA

(9) SADUAKAS MAMESHTEGI Applicant

(10) DINA ABDYKALYKOVA

(11) AKZHOLTAY MUKANOVNA KALENOVA

(12) KAIRAT SADYKOV

(13) IRINA KANAPHINA

(14) MADINA NURGOZHINA

(15) AEG SYSTEMS, INC.

(16) CALERNEN FINANCE INC.

(17) ZATHEN HOLDING INVESTMENTS LIMITED (formerly CARSONWAY LIMITED)

(18) COMWORK LTD.

(19) KINMATE TRADING LIMITED

(20) **ESTAR DEVELOPMENTS LIMITED**

(21) **LINGARD INDUSTRY LIMITED**

(22) **DANIELS TRADECORP INC.**

(23) **MABCO INC.**

(24) **KLOSTRADE FINANCIAL GROUP LTD**

(25) **DANA TRADE CORP.**

(26) **GLOBAL TEAM COMPANY**

(27) **TRAMLANES INVESTMENTS LIMITED (formerly BERGTRANS CONTRACTS CORP.)**

(28) **MORANTA INVEST (CYPRUS) LIMITED**

(29) **JOHN WORTLEY HUNT**

(30) **LUIS DAVIS**

(31) **STAN GORIN**

(32) **VASILIKI ARGYROU**

(33) **LABONTE ELISANA MARIE-ANTOINETTE**

(34) **DIEGO JACINTO BATISTA VALDES**

(35) **CARLOS ALBERTO MENDOZA MURILLO**

(36) **SUSETH WALTHIA PARRIS**

(37) **KELLEE FRANCE**

(38) **GEOFFREY TAYLOR**

(39) **BELINDA LANYON**

(40) **CHRISTOPHER BLYTHE**

(41) **ROGER ALBERTO SANTAMARIA**

(42) **NICHOLETTA CHRISTODOULIDOU**

(43) **ADM-ACTI TRADE RESOURCES, INC**

(44) **ADM ASIA-PACIFIC TRADING PTE. LTD. (formerly TOEPFER INTERNATIONAL ASIA PTE. LTD.)** Applicant

(45) **ADM GERMANY GMBH (formerly ALFRED C. TOEPFER INTERNATIONAL GMBH)** Applicant

(46) **ERIC RICHARDSON**

(47) **GROVE SERVICES, INC** Applicant

(48)	**BUNGE SA**	Applicant
(49)	**BUNGE CIS LLC**	Applicant
(50)	**DAUREN BEKBERGENOV**	Applicant
(51)	**EKATERINA KUZMICHEVA**	Applicant
(52)	**MUKHTAR ABLYAZOV**	
(53)	**ROMAN SOLODCHENKO**	
(54)	**ZHAKSYLYK ZHARIMBETOV**	
		Defendant

Appearances:

Mr. David Allen, KC with Mr. Jason Robinson, Mr. David Wellford and Mr. Alex Muksinov for the Claimant/Respondent

Mr. Stephen Moverley Smith, KC with Mr. James Noble, Ms. Amelia Tan and Ms. Joni Khoo for the 9th Defendant/Applicant

Mr. Thomas Grant, KC with him Mr. Matthew Freeman and Mr. Carl Moran for the 44th and 45th Defendants/Applicants

Mr. Richard Evans, with him Ms. Marie Stewart for the 47th Defendant/Applicant

Mr. Matthew Hardwick, KC with him Mr. Oliver Clifton and Mr. Andrew Chissick for the 48th to 51st Defendants/Applicants

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2023: June 5, 6, 7, 8; December 7.

JUDGMENT

1. Introduction

1.1. Preliminary matters

[1] This is the judgment of the Court in relation to applications filed by four sets of Defendants to set aside an order of this Court made *ex parte* on 17th May 2022 (the 'Ex Parte Hearing'), which had

granted the Claimant permission to serve them out of the jurisdiction, or alternatively an order staying the proceedings on the grounds of *forum non conveniens* (collectively, the 'Applications').

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[2] On 7th December 2023, the Court handed down its decision in relation to the Applications with written reasons to follow. The Applications were granted. These are the written reasons.

[3] For ease of reference, the relevant Defendants will be referred to by number. Thus, for example, the First Defendant, Mr. Timur Sabyrbaev, will be referred to as 'D1'.

[4] The Applications were made by D9, D44 to D45 and D47 to D51.

[5] D9 is an individual, Mr. Saduakas Mameshtegi.

[6] D44 and D45 will be referred to as the 'ADM Defendants'.

[7] D47 will be referred to as 'Grove'.

[8] D48 to D51 will be referred to as the 'Bunge Defendants'.

[9] The Claimant, which will be referred to as 'BTA', is a joint stock company formed under the laws of the Republic of Kazakhstan.

[10] According to BTA's Amended Statement of Claim filed in these proceedings, between 20th May 2005 and his dismissal in February 2009, the Chairman of the BTA Board of Directors had been Mr. Mukhtar Ablyazov. Mr. Ablyazov is D52 in these proceedings.

[11] The Court is told that Mr. Ablyazov:

(1) Is a Kazakh national;

(2) His present whereabouts are said to be unknown;

(3) He was at all material times a member of BTA's 'Investment Committee', a body established in 2006 but without any formal or legal standing within BTA, which he

controlled, and which was used to approve lending decisions already taken by him or taken by others at his behest and/or instruction;

(4) He was formally removed as a member of BTA's Board of Directors on 6th March 2009;

(5) From at least July 2002 until February 2009 Mr. Ablyazov held an undisclosed majority stake in BTA through a network of offshore companies, trustees and nominees.

[12] The Defendants to the present claim may be divided into five broad categories:

(1) Various Kazakh former officers and employees of BTA: Ds 1-14, all of whom, apart from D1, are said to be resident in Kazakhstan.

(2) Certain BVI and foreign-incorporated SPV companies: Ds 15-28. The BVI companies within this general category are Ds 15-18, 20-23 and 27.

(3) Former directors of the SPV companies: Ds 29-42. None are or have ever been resident in the BVI.

(4) Various foreign commodities companies and certain of their current or former employees: Ds 43-51 ('the Commodities Sellers').

(5) Certain former senior officers of BTA: Ds 52-54.

[13] In the claim, it is said that BTA was the victim of a fraudulent scheme concerning the issue of approximately 100 high value letters of credit ('L/Cs') between approximately March 2005 and January 2009 which resulted, BTA says, in a total loss to BTA of approximately U$230 million (the 'Scheme'). The Defendants are alleged to have been involved in different ways in the Scheme and are, variously, as alluded to above,

(1) former employees of BTA (D1 - D14), all of whom apparently stopped working for BTA many years ago;

(2) SPVs alleged to have been owned and controlled by Mr. Ablyazov (D15 – D28);

(3) former directors of the SPVs (D29 - D42);

(4) commodities companies or traders, or their current or former employees (D43 – D51);

(5) Mr. Ablyazov, the former Chairman of BTA, who was dismissed in February 2009 (D52);

(6) Mr. Roman Solodchenko, a senior figure in BTA occupying multiple roles over time (D53);

(7) Mr. Zhaksylyk Zharimbetov, former First Deputy Chairman of the management Board of BTA, amongst other roles (D54).

[14] BTA alleges that, pursuant to the Scheme, employees of BTA unlawfully combined to act to the detriment of BTA and for the benefit of Mr. Ablyazov and/or his close associates.

[15] BTA brought proceedings in the English Courts, as well as in other jurisdictions, against Mr. Ablyazov in mid-2009, shortly after he had ceased being Chairman. After much strenuous litigation various judgments were entered against him in 2013 (i.e., ten (10) years ago) in the aggregate sum of over US$4.4 billion (see, e.g., **JSC BTA Bank v Ablyazov**[1]). Numerous other defendants were also sued in the same and related proceedings. This litigation generated dozens of reported judgments. As Teare J noted in the judgment just cited (at paragraph (3)), BTA pressed its claims 'with notable vigour'. In that case, the English High Court entered judgment against Mr. Zharimbetov for over US$1.5 billion (see paragraphs (349)-(350)). Judgment was also obtained in 2013 against Mr. Solodchenko.

[16] Of present relevance:

(1) On 30th April 2009, BTA obtained judgment in default against BVI SPV Mabco Inc (here D23) in the sum of US$20,739,458.27 in the Specialised Interdistrict Economic Court of Almaty, Kazakhstan.

(2) On 30th April 2009, BTA obtained judgment in default against BVI SPV Tramlanes Investments Limited (here D27) in the sum of US$65,398,505.53 in the Specialised Interdistrict Economic Court of Almaty, Kazakhstan.

(3) On 30th April 2009, BTA obtained judgment in default against BVI SPV AEG Systems, Inc. (here D15) in the sums of US$47,451,854.80 & US$43,200,000 in the Specialised Interdistrict Economic Court of Almaty, Kazakhstan.

(4) On 30th April 2009, BTA obtained judgment in default against BVI SPV Carsonway Limited (here D17) in the sum of US$70,077,920 in the Specialised Interdistrict Economic Court of Almaty, Kazakhstan.

(5) Between August 2010, and April 2011 BTA obtained orders for the appointment of joint receivers (the 'Receivers') in England ('the Receivership Orders').

[1] (2013) EWHC 510 (Comm).

(6) On 15th July 2011, BTA obtained recognition of the Receivership Order in the BVI ('BVI Recognition Order').

(7) On 13th October 2011, BTA obtained recognition of the Receivership Order in the Seychelles ('Seychelles Recognition Order').

(8) On 10th November 2011, our Court of Appeal gave judgment in relation to the BVI Recognition Order in the BVI.

(9) On 19th March 2013, Teare J (in the High Court of England and Wales) found that Mr. Ablyazov had perpetrated frauds which led to the misappropriation of sums exceeding US$1.5 billion.

(10) On 26th November 2013, Henderson J (in the High Court of England and Wales) granted BTA summary judgment in the amount of US$295 million in respect of Mr. Ablyazov's fraudulent misappropriation of assets.

[17] Upon BTA's applications, the Receivership Orders were recognised in the BVI in 2011 and were subsequently discharged some 7 to 8 years later in 2018-2019. None of the SPVs participated in or defended (at any stage) either the English or BVI proceedings. As argued by some of the Applicants, had the Receivers (being three partners in KPMG) who were appointed (and who instructed the leading firm of Freshfields LLP as their solicitors) located any assets belonging to the BVI SPVs they would have done so long ago; the discharge of the appointment of the Receivers likely occurred because they no longer served any useful purpose to BTA.

1.2 Historic standing of the BVI SPVs

[18] Between 30th December 2010 and 30th April 2020, eight of the nine BVI SPVs were struck off the Register of Companies ('the Register') and thereafter dissolved. In each case, those eight BVI SPVs were stuck off on various dates as long ago as 2010-2013, and dissolved on various dates between 2017 and 2020. Thus:

(1) On 30th December 2010, D17 and D27 were struck off the Register and dissolved on 29th December 2017.

(2) On 1st November 2011, D15, D18 and D23 were struck off the Register and dissolved on 31st October 2018.

(3) On 1st May 2013, D16, D20 and D21 were struck of the Register and dissolved on 30th April 2020.

(4) On 1st May 2020, D22 was struck off the Register (but not dissolved).

1.3 Historic standing of the Non-BVI SPVs

[19] On 5th April 2011, each of D19 and D24, Seychelles companies, had annual fees last due.

[20] On 11th May 2011, D26, a Seychelles company, had annual fees last due.

[21] On 31st August 2021, D25, a Seychelles company, had annual fees last due.

[22] On 6th December 2022 (i.e., after the Ex Parte Hearing on 17th May 2022), a company search disclosed that each of D24, D25; and D26 were dissolved.

[23] On 21st April 2021, D28 ('Moranta'), a Cyprus company, was dissolved.

[24] BTA did not apply to restore the non-BVI SPVs to their respective corporate registers, even though BTA nonetheless joined them as Defendants, and, on BTA's own case, the identity of which offshore SPV would be used to give effect to the impugned transactions was irrelevant. Put more simply, BTA chose to restore the BVI SPVs but not the non-BVI SPVs.

1.4 Restoration of eight of the BVI SPVs to the Register

[25] On 14th September 2021, BTA issued (by Fixed Date Claim Form) an urgent application ('the Restoration Application') to restore eight of the nine BVI SPVs to the Register. No application was made in respect of Daniels Tradecorp Inc. (D22) which had been struck off but not dissolved. The

locus standi BTA claimed for the purposes of the Restoration Application was as a creditor of the offshore SPVs and/or as a person who can establish an interest in having each of these companies restored to the Register, in that BTA has a cause of action against and intends to pursue a claim against each of the companies.

[26] It should be understood that BTA did not own, nor control, any of these offshore SPVs. Nor did BTA have internal documents for these companies, such as their Register of Directors.

[27] It appears to be uncontroversial between the parties who appeared before the Court at the hearings of the present Applications that these offshore SPVs were directly or indirectly owned and/or controlled by Mr. Ablyazov.

[28] As assets, or potential assets of Mr. Ablyazov, the BVI SPVs and their assets had all been made subject to the Receivership Order.

[29] There is no evidence that the offshore SPVs have conducted any business, or had been in any way active, or have had any assets, at least since the years 2005 to 2009. Nor is there any evidence that any of the offshore SPVs actively took part in the previous legal proceedings before the English and Kazakhstan courts.

[30] On 21st September 2021, the Court granted the Restoration Application.

[31] On 22nd September 2021, each of the BVI SPVs that had been dissolved (i.e. not including D22, which had not yet been dissolved) were restored to the Register.

[32] The very next day, on 23rd September 2021, each of these companies received a regulatory warning that it was liable to be struck off the Register of Companies if it failed to file a copy of the register of directors within 30 days ('the Strike Off Warnings'). Consequently (it transpired), three of these (D15, D18 and D23) were again struck off the Register of Companies on 21st March 2022.

[33] Also on 23rd September 2021, the Registrar of Corporate Affairs gave notice to each of the remaining five BVI SPVs (D16, D17, D20, D21 and D27) that they were liable to be struck from the Register if they failed to file a register of directors within 30 days. These notices were published in the Gazette dated 24th March 2022.

[34] On 24th September 2021, i.e. within three days after BTA had obtained these offshore SPVs' restoration, BTA filed its claim in these proceedings.

[35] It warrants pausing here to remark that BTA's claims, as pleaded in the form as it stood at the June 2023 hearing, i.e., in the terms of the Amended Statement of Claim, were summarized by BTA as follows:

> "226. BTA Bank has suffered a total loss of USD 231,726,685.46 as a consequence of (a) repaying the third-party international banks under the "discounting" regime, and (b) the failure of the Offshore SPVs to repay BTA Bank under the relevant L/Cs."

[36] The relief sought by BTA was, in summary, the following:

> "249. Damages for conspiracy and/or equitable compensation for knowing receipt and/or dishonest assistance, and/or restitution …
>
> 250. An equitable account verified by affidavit of all dealings with the BTA Bank employees and/or officers. …"

[37] Upon a close reading of this summary, and indeed the entire pleading, which is very lengthy and has appended to it a large number of detailed appendices, it becomes clear that something is missing. What is present, and is applied to all the Defendants, including the BVI SPVs, are claims for conspiracy and/or equitable compensation. But the careful reader will note that BTA sought the restoration to the Register of the BVI SPVs not just as an intended claimant with causes of action against these companies, but **as a creditor**, that is to say, as someone who is owed money by the BVI SPVs pursuant to contracts. The careful reader will also have picked up that, as stated at paragraph 226 of the Amended Statement of Claim, BTA has claims arising from 'the failure of the Offshore SPVs to repay BTA Bank under the relevant L/Cs'. What BTA is saying is that the offshore SPVs – that is to say the BVI, Seychelles and Cyprus SPVs owed money to BTA under the relevant L/Cs. However, missing from this Amended Statement of Claim is any relief sought in

respect of this asserted cause of action for breach of contract. ***No claim in breach of contract has been brought, even pleaded in the alternative, by BTA against the offshore SPVs***. This is curious, since BTA's learned Counsel himself acknowledged that claims in conspiracy and for equitable compensation are particularly complex legally and factually. In contrast, claims in contract are relatively straight-forward. This omission begs the question: why the omission? BTA contents itself with running only the apparently more complex and difficult claims against the offshore SPVs, instead of the apparently more straight-forward claims in contract. Ordinarily, one, of course, sees a claimant concentrating upon its more straight-forward claims. What one rarely, if ever, sees, is the converse – exclusive focus upon a most complex claim, with the ***complete omission*** of the apparently more straight-forward claim. This omission begs the question how serious BTA really was about pursuing and succeeding in claims against the offshore SPVs?

[38] It also warrants observation that such claims in contract could only be brought by BTA against its direct contractual counterparts, i.e. the offshore SPVs. BTA could not bring such claims in contract against the other peripheral actors, such as the commodity traders (such as ADM, Bunge, Grove) and BTA's officers.

[39] Returning to the chronological narrative, BTA effected service upon the BVI SPVs on or by 23rd February 2022.

[40] As regards D22, on 28th February 2022, its registered agent gave notice of intention to resign and on 14th June 2022, D22 was warned that it was liable to be struck off for failure to appoint a registered agent within 30 days. D22 was already in a state of being struck off, since 1st May 2020.

[41] On 21st March 2022, D15, D18 and D23 were struck off the Register for a second time.

[42] None of the BVI SPV Defendants filed acknowledgments of service or a defence. The time for them to do so elapsed. Nor is there any evidence that they responded at all in any way to the claim.

[43] BTA has not taken any further step of applying for judgment in default against these BVI companies of which BTA claims to be a creditor. This also begs the question, why not? If BTA was or is so interested in pursuing claims against them, and ready to go to the trouble and expense of having them restored to the Register.

[44] On 12th May 2022, BTA issued three *ex parte* applications for the following orders from the Court:

(1) An order permitting service of the claim out of the jurisdiction on those defendants who were resident out of the jurisdiction (the 'Service Out Application');

(2) Permission to amend the claim form and the statement of claim (the 'Amendment Application');

(3) Permission to rely on Kazakh law expert evidence in the application to amend the pleadings (the 'Expert Evidence Application')

[45] These applications were heard before me on an *ex parte* basis on 17th May 2022 and I granted them on the basis of the representations made to the Court, making the service out order (the 'Service Out Order') which is the subject of the Applicants' present Applications.

[46] As at the date of the Ex Parte Hearing, three of the nine BVI SPVs (D15, D18 and D23) that had been restored had again been struck off, some two months prior to the Ex Parte Hearing. The Court was not informed at the Ex Parte Hearing of this further striking off.

[47] BTA then set about serving the claim documents upon the various defendants who were resident out of the jurisdiction. Of present relevance, D9 was served on 2nd August 2022. In respect of the ADM parties, D44 was served on 14th June 2022 and D45 was served on 17th August 2022. Grove, D47, was served on 15th July 2022. In respect of the Bunge parties, Ds 48 to 51 were served on dates between 4th August 2022 and 23rd September 2022.

[48] On 1st November 2022, D17 was struck off a second time.

[49] On 2nd May 2023, the remaining four BVI SPVs were struck off the Register: being D16, D20, D21 and D27. Pursuant to section 216 of the Business Companies Act, these BVI SPVs would be

treated as dissolved on the date the Registrar published a notice of the striking off in the Gazette. That notice was published in the Gazette on 12th May 2023. Accordingly, D16, D20, D21 and D27 have been dissolved since 12th May 2023. As at the hearing of the Applications in June 2023, D15, D17, D18, D22 and D23 remained struck off from the Register and they would be dissolved at the beginning of July 2023 if they had not been restored prior to that date.

[50] Thus, in relation to all nine BVI SPVs, after BTA's successful application to restore eight of them, all nine went on to be struck off again and/or be dissolved, or liable to be struck off or dissolved. No further evidence has been brought to my attention since the hearing in June 2023 that any of the BVI SPVs have again been restored to the Register nor to good regulatory standing, including to have a registered agent and to have filed a register of directors.

1.5 The Service Out Application

[51] The Notice of Application for BTA's Service Out Application specified the bases for it. It asked that 'Permission be granted to the Applicant pursuant to rule 7.3(2)(a) and/or rule 7.3(7) of the ECSC CPR to serve the claim form and all other documents within these proceedings out of the jurisdiction' on defendants resident overseas.

[52] D9 was included amongst sets of Defendants who were described at all material times as employees and/or officers of BTA.

[53] The other Defendants we are presently concerned with were described in the Notice of Application for BTA's Service Out Application as follows:

> "5. The 43rd to 44th and 47th Respondents (inclusive) are commodities companies or traders involved in agribusiness based in the United States. The 45th Respondent is a commodities company based in Germany. The 48th Respondent is a commodities company based in Switzerland. The 49th Respondent is a commodities company based in Russia.

6. The 46th, 50th and 51st Respondents are each individuals who at all material times were employed by one of the 43rd to 47th Respondents."

[54] The various Defendants were described as 'located outside of the jurisdiction but are necessary and proper parties to the proceedings'.

[55] The claim was summarised at paragraph 10 in the Notice of Application for BTA's Service Out Application in the following terms:

> "(a) Between at least 2005 and 2009, BTA Bank issued at least 98 letters of credit (the "L/C transactions") on the application of one of a number of the SPVs, including the 15th to 28th Respondents.
>
> (b) The letters of credit were issued to fund a purported commodities sale concluded with one of a number of commodities sellers and/or their employees and/or representatives, namely the 43rd to 51st Respondents (the "Commodities Sellers"). However, coterminous with that transaction was a sale back of the commodities to an affiliate of the respective Commodities Seller such that BTA Bank was left with no meaningful security for the issued letter of credit. Those sales were funded by the letter of credit, which was confirmed and discounted by a third-party international bank.
>
> (c) At the end of each transaction, the SPV received the funds produced by the discounting process, less a commission retained by the Commodities Seller. The result was that BTA Bank was left with no meaningful security or means of recovery.
>
> (d) The aim of this scheme was to divert funds from BTA Bank to the SPVs and the Commodities Sellers (the "Scheme"). As a result of the Scheme BTA Bank suffered damages in the amount of USD 231,726,685.46."

[56] At paragraph 11, the Notice of Application stated:

> "The 15th to 18th, 20th to 23rd and 27th Respondents are the SPVs incorporated and located in the BVI, and are therefore subject to the jurisdiction of this Honourable Court."

[57] It was then further explained:

> "**Serious issue to be tried**
>
> 13. There is a serious issue to be tried on the merits as between BTA Bank and the Respondents as the Claim contains complex allegations in relation to:
>
> (a) Breaches of fiduciary duties owed to BTA Bank, alternatively breaches of duties owed to BTA Bank under Kazakh law, by the 1st, 9th and 52nd to 54th Respondents;

(b) Dishonest assistance by the 1st to 54th Respondents in the said breaches of duties;

(c) Knowing receipt of the proceeds from the discounted letters of credit by the 15th to 54th Respondents;

(d) Conspiracy between the 1st to 54th Respondents by unlawful and/or lawful means to defraud BTA Bank;

(e) Unjust enrichment of the 15th to 54th Respondents by receiving proceeds from the discounted letters of credit;

(f) Further and/or alternatively, the Respondents are liable in breaching provisions of the Kazakh law as set out in the Claim Form and Statement of Claim.

There is a good arguable case

14. The Claim is intended to be served within the jurisdiction on the 15th to 18th, 20th to 23rd and 27th Respondents, which are the SPVs incorporated in the BVI, and in respect of which BTA Bank claims there is a real issue which is reasonable for the Court to try.

15. The 1st to 14th, 19th, 24th to 26th and 28th to 54th Respondents are necessary and proper parties to the Claim. BTA Bank relies on CPR 7.3(2)(a) in this regard.

16. Alternatively, BTA Bank relies on CPR 7.3(7), in that the Claim relates to the ownership or control of the BVI SPVs, which are incorporated in the BVI. BTA Bank's position is that Mr Ablyazov is, or at least was at the time of the events underlying the Claim, the ultimate beneficial owner of the BVI SPVs. Mr Ablyazov's ownership and control of the SPVs – including the BVI SPVs – is key to the Claim, because BTA Bank believes that it was for this reason that the officers and/or employees at BTA Bank implemented the Scheme (at Mr Ablyazov's behest and/or instruction), so as to embezzle funds from BTA Bank and transfer them offshore for Mr Ablyazov's benefit.

The BVI is the most appropriate jurisdiction

17. The BVI is clearly or distinctly the most appropriate forum for the trial of the dispute and, in all the circumstances, the Court ought to exercise its discretion to permit service out of the jurisdiction for the following reasons:

(a) The aim of the Scheme was to move the funds of BTA Bank offshore, which in the majority of the L/C transactions meant to the British Virgin Islands (the "BVI");

(b) A large number of parties to the Claim are the SPVs which were incorporated in the BVI;

(c) The funds received through the Scheme unjustly enriched many of the SPVs in the BVI;

(d) There is no single place where the wrongs were committed. This Claim concerns a complex and intricate multi-jurisdictional fraud, which is part of what allowed the fraud to take place. In respect of the majority of the BTA Bank employees, the wrongs are likely to

have been committed in Kazakhstan; whereas for the majority of the Commodities Sellers the wrongs were likely to have been committed in the United States, Germany, Singapore, Switzerland or Germany;

(e) The Respondents located outside of the BVI are in a diverse range of jurisdictions (including Kazakhstan, the United States, Switzerland, Germany and Singapore, Seychelles, Latvia, Panama, Cyprus, Guernsey, Russia). There is therefore no other single jurisdiction which is more appropriate than the BVI;

(f) The witnesses for the Claimant and the Defendants are likely to be based in a number of jurisdictions such as Kazakhstan, the United States, Switzerland, Germany and Singapore, Seychelles, Latvia, Panama, Cyprus, Guernsey, Russia. The witnesses are not based in another single jurisdiction;

(g) Jurisdiction clauses in contractual documents used as part of the Scheme should not apply to the causes of action BTA Bank relies upon, and even if they did they do not provide for any single jurisdiction named;

(h) Being from a diverse range of jurisdictions the BTA Bank employees and the Commodities Sellers conducted business almost exclusively in English which is confirmed by the overwhelming majority of the correspondence as described in the Statement of Case. Therefore it is anticipated that the majority of witnesses will be speaking English; and,

(i) Other potential jurisdictions – in particular, Kazakhstan – are not viable jurisdictions for the reasons explained in Ms Nartay's affidavit."

[58] The person here referred to, Ms. Nartay, occupied the role of 'Executive Director - the Director of the Far Foreign Countries Projects Department' at BTA.

[59] Ms. Nartay included in her evidence a summary of the mechanism used for the alleged fraudulent scheme. Of particular note, she stated at paragraph 87(b) '(t)he fact that the identity or active involvement of the SPV was clearly irrelevant' to the operation of the scheme was shown by an email sent on 16 July 2008. She went on to state at paragraph 99(a):

> "The identity of the SPV in respect of any given L/C transaction was irrelevant and the SPV was merely a vehicle via which deals were struck, whereby L/Cs were issued and the Commodities Sellers earned Commission. This is particularly the case given that often the Engineers agreed trades without applications having been made from SPVs."

[60] Concerning the involvement of the offshore SPVs, Ms. Nartay stated:

> "95 As a result of the L/C transactions, the SPVs – which were mainly based in the BVI – collectively received the total sum of approximately USD 781 million."

[61] Ms. Nartay gave evidence, as part of the segment of her affidavit addressing full and frank disclosure points, that four of the SPVs we are presently concerned with had been found liable to compensate BTA for substantial sums of money by the courts of Kazakhstan.

[62] BTA also relied on two affidavits provided by one of their BVI legal practitioners ('BTALP') in support of its application.

[63] In his first Affidavit, which was a lengthy document, the BTALP summarised the task BTA had set for itself as follows:

> "5 All of the defendants to the proceedings were in different ways involved in the Scheme, and BTA Bank now seeks damages and/or equitable compensation under BVI law for breach of fiduciary duties, dishonest assistance, knowing receipt, unjust enrichment, unlawful means conspiracy and/or lawful means conspiracy, alternatively under Kazakh law for breaches of the Kazakh Civil Code of the Republic of Kazakhstan ("Kazakh Civil Code") and/or other duties under Kazakh law (the "Claim").
>
> …
>
> 12 BTA Bank relies on the following gateways:
>
> (1) ECSC CPR r. 7.3(2): there is a real issue between BTA Bank and the BVI SPVs which is reasonable for the court to try, and BTA Bank now wishes to serve the claim form on the Foreign Defendants who are outside the jurisdiction, and necessary and proper parties to the claim;
>
> (2) Alternatively, CPR r. 7.3(7): the subject matter of the claim relates to the ownership or control of the BVI SPVs, which are incorporated in the BVI.
>
> 13 While it is strictly a matter for legal submissions, I am aware that BTA Bank must show that:
>
> (1) In relation to the foreign defendants, there is a serious issue to be tried on merits;
>
> (2) There is a good arguable case that the claim against the foreign defendants falls within the classes of case for which permission to serve out may be given; and,
>
> (3) In all the circumstances the BVI is clearly or distinctly the appropriate forum for the trial of the dispute, and in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

[64] With reference to the CPR 7.3(2) gateway (which I will refer to for convenience as the 'Necessary or Proper Party Gateway' or 'NPP Gateway'), the BTALP explained at paragraph 68 of his first affidavit the bases for claims against the various Defendants. He averred:

> "It is therefore my belief that BTA Bank has a claim with a realistic prospect of success and there is a serious issue to be tried in respect of the causes of action pleaded in the Statement of Claim against each of the Foreign Defendants."

[65] He stated further, at paragraph 71:

> "I believe that there is a real issue between BTA Bank and the BVI SPVs which is reasonable for the Court to try. In light of all the facts and matters set out above and in the Statement of Claim, I believe that BTA Bank has a good arguable case against the BVI SPVs for dishonest assistance, knowing receipt, unlawful means conspiracy, lawful means conspiracy and/or unjust enrichment; alternatively under Kazakh law for breaches of the Kazakh Civil Code. Even if the Foreign Defendants were not party to this Claim, BTA Bank would still have a good claim against the BVI SPVs for those causes of action".

[66] Without mentioning the BVI SPVs, nor their present status or circumstances, further, the BTALP went on at paragraph 73 to say:

> "In the circumstances, I believe that the conditions in CPR, r. 7.3(2)(a) are satisfied and that BTA Bank has a good arguable case that the Claim falls within CPR, r. 7.3(2)."

[67] **The BTALP omitted to give evidence on *why it would be reasonable for the Court to try such claims against the BVI SPVs.*** He jumped straight from an averment that BTA would have good claims against the BVI SPVs to averring a belief that BTA has a good arguable case that the Claim falls within the NPP Gateway. The BTALP missed out the step of showing that such claims would be reasonable for the Court to try.

[68] In relation to the CPR, r. 7.3(7) gateway (which I will refer to for convenience as the 'Company Gateway'), the BTALP materially stated:

> "74 … Alternatively, I believe that the subject matter of the Claim relates to the ownership or control of the BVI SPVs, which are incorporated in the BVI.
>
> 75 BTA Bank's position is that Mr Ablyazov is, or at least was at the time of the events of the Claim, the ultimate beneficial owner of the BVI SPVs. …

> 76 Mr Ablyazov's ownership and control of the SPVs – including the BVI SPVs – is key to the Claim, because BTA Bank believes that it was for this reason and by this means that the officers and employees at BTA Bank implemented the Scheme, so as to embezzle funds from BTA Bank and transfer them offshore for Mr Ablyazov's benefit.
>
> 77 In the circumstances, I believe that BTA Bank has a good arguable case that the Claim falls within CPR, r. 7.3(7)."

[69] The BTALP then turned to the question whether the BVI is the appropriate forum for trial of this claim. He observed that:

(1) The recipients of the majority of the embezzled funds were the BVI SPVs;

(2) There were nine of these and that BTA had reinstated those that had been dissolved;

(3) There were SPVs incorporated elsewhere: four in the Seychelles and one in Cyprus;

(4) Overall, therefore, by far the majority of the SPVs were BVI incorporated entities. Given the international nature of this claim, he said he believed it is significant that the BVI is the jurisdiction which, apart from Kazakhstan, has the greatest connection with the claim, both in terms of domicile of the parties and the facts of the claim.

(5) He contended at paragraph 104 of his first affidavit that:

> "…there a number of jurisdictions (sic.) that have a potential connection with this Claim other than the BVI, including: Kazakhstan (the location of BTA Bank and its former officers and employees at the relevant time); the US (the location of ADM-ACTI and Grove); Singapore (the location of Toepfer Asia); Germany (the location of ACTI and Mr Richardson); Switzerland (the location of Bunge); Russia (the location of Bunge CIS, Mr Bekbergenov and Ms Kuzmicheva); Latvia (the location of Trasta Bank); Seychelles (place of incorporation of some of the SPVs); and, Cyprus (place of incorporation of one of the SPVs).
>
> 105 However, I do not believe that any of those jurisdictions have as strong a connection to the facts of the Claim as the BVI does – save potentially for Kazakhstan, which is addressed below. The BVI is a strong common thread across each of the streams of the L/C transactions with the ADM parties, Grove and Bunge respectively, whereas none of the other jurisdictions (save for Kazakhstan and Latvia) is a common link between those streams."

[70] The BTALP sought to discount Kazakhstan as an appropriate forum for a number of reasons, including:

(1) alleged corruption of its judicial system, endemic social unrest and violence, including a government ordered 'shoot to kill' policy;

(2) that Mr. Ablyazov is an extremely divisive figure in Kazakhstan;

(3) any judgment handed down in Kazakhstan would likely be met with enforcement problems; and

(4) Kazakhstan does not recognise the concept of privileged documents, disclosure rules are limited in that a party is not obliged to disclose documents that are helpful to its opponent, and the rules in relation to expert evidence are limited in that the expert can only be cross-examined in relation to their expert report if it is deficient.

[71] The BTALP addressed the fact of the Receivership Orders at paragraph 130 of his first affidavit as follows:

> "The following SPV defendants were previously subject to English receivership: AEG Systems Inc. (D15), Calernen Finance Inc. (D16), Zathan Holdings Limited (formerly Carsonway Limited) (D17), Comwork Ltd (D18), Kinmate Trading Limited (D19), Estar Developments Limited (D20), Lingard Industry Ltd (D21), Daniels Tradecorp Inc. (D22), Mabco Inc. (D23), Klostrade Financial Group Ltd (D24), Dana Trade Corp. (D25), Global Team Company (D26) and Tramlanes Investments Limited (formerly Bergtrans Contracts Corp.) (D27). However, I understand that the receivership in England was discharged for Calernen Finance Inc. and Ester Developments Limited on 13 April 2018, and for all the remaining SPVs on 28 February 2019. I also understand that there are restrictions in place, ordered by the English Courts, regarding the use of evidence deployed in those proceedings, so that such evidence can only be used in existing proceedings in England or for the enforcement of BTA Bank's judgments obtained in England against Mr. Ablyazov. I draw this to the Court's attention only for the sake of completeness. So far as BTA Bank is aware, there is nothing about the now discharged receiverships over these SPVs that affects BTA Bank's application for permission to serve the Claim out of the jurisdiction on the Foreign Defendants."

[72] The BTALP did not bring to the Court's attention what the reason(s) was or were for the discharge of the Receivership Orders. Nor did he point out to the Court that a natural or logical inference that could be drawn from the discharge of the receivership was that its utility had been exhausted. Nor did he give evidence of circumstances which might militate against such an inference. More specifically, he did not point out the natural inference that any direct or indirectly held assets available to the BVI SPVs will already have been got in by the receivers, if they were able to do so, and applied towards compensation already awarded in favour of BTA.

[73] The BTALP addressed the status of the BVI SPVs as follows:

> "135 The BVI SPVs (with the exception of Daniels Tradecorp, Inc.) were recently restored on the application of BTA Bank …. As a result, they are also unlikely to have any assets available for recovery against them directly. The Foreign Defendants might therefore seek to argue that they are only being included in the Claim to be used as anchor defendants. However, this is not the case because, as explained already in this affidavit, the BVI SPVs are key to this Claim because the SPVs were used as a means of embezzling funds from BTA Bank and the majority of the funds (c. 65%) were paid to the BVI SPVs. In any event, even if the Foreign Defendants successfully argued that the BVI SPVs were only being included so as to be used as anchor defendants, this is only one factor for the Court when considering forum conveniens as a whole."

[74] The Second Affidavit of the BTALP was filed on 12th May 2022 in support of an application by BTA to amend its claim in respect of causes of action under Kazakh law.

[75] In BTA's skeleton for the Ex Parte Hearing, its Counsel set out the requirements of CPR 7.3(2) and 7.3(7). Then he submitted:

> "11. The grant of permission to serve out is discretionary (**KMG International NV v DP Holding SA** (2018) ECSC J0503-3, §17). Lord Collins made clear in **Nilon Limited v Royal Westminster Investments S.A.** (2015) UKPC 2, at §13, that the applicant must satisfy the Court of three things:
>
> 11.1 First, that in relation to the foreign defendants there is a serious issue to be tried on the merits, i.e., a substantial question of fact or law, or both.
>
> 11.2. Second, 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.
>
> 11.3. Third, that in all the circumstances the BVI is clearly or distinctly the appropriate forum for the trial of the dispute, and the Court ought to exercise its discretion to permit service out."

[76] He went on to say:

> "23. Necessary and proper parties (CPR 7.3(2)): there is plainly a real issue between BTA Bank and the defendant SPVs resident in the BVI (which, incidentally, have already been served with the Claim). The full gamut of claims (in BVI law and Kazakh law) are pursued against the BVI SPVs, and would be pursued even if the Foreign Defendants were not party to the Claim."

[77] In relation to CPR 7.3(7), BTA's Counsel argued:

> "25. Claim relates to ownership/control of BVI SPVs (CPR 7.3(7)): alternatively, the Claim relates to the ownership/control of BVI SPVs because:
>
> 25.1. Mr. Ablyazov was at all material times the ultimate beneficial owner of the BVI SPVs (see BSAL1/74 (Vol A/7/513), ASoC/60.2 (Vol A/10/884) & Sch A (Vol A/10/960-984))
>
> 25.2. Mr. Ablyazov's ownership/control of the BVI SPVs is central to the Claim because BTA Bank's case is that these were the vehicles by which the Scheme was capable of being effected. In other words, it was because Mr. Ablyazov was able to siphon/embezzle funds from BTA Bank pursuant to the Scheme, and move those funds offshore to the SPVs (including the BVI SPVs) that he, and/or his associates, ultimately reaped the rewards from their fraudulent Scheme (see BSAL1/75 (Vol A/7/513)).
>
> 26. Accordingly, even if CPR 7.3(2) is not satisfied, CPR 7.3(7) is satisfied because there is a good arguable case that the subject-matter of the Claim relates to the ownership or control of SPVs in the BVI."

[78] In BTA's skeleton for the hearing in June 2023, its Counsel submitted the following:

> "18. BTA Bank's primary gateway is/was CPR 7.3(2), namely that a claim was issued against defendants within this jurisdiction, there is a real issue between BTA Bank and those defendants, and the foreign defendants are necessary and proper parties to the claim. At this interlocutory stage, the relevant test is not a high one: "real issue" means the claim is not "fanciful"; "proper party" means one that would as a matter of course have been joined to the same writ; and the discretionary element of the criteria requires the Court to be satisfied that (a) there is a substantial question of fact or law between BTA Bank and the foreign defendants, (b) there is a good arguable case that the claim falls within one of the classes of case in which permission to serve out may be given, and (c) the BVI is the appropriate forum (or, put another way, there is no other, single "appropriate forum").
>
> 19. BTA Bank's alternative gateway is/was CPR 7.3(7), namely that a claim relates to the ownership or control of a BVI company (i.e., the BVI SPVs which were used by Mr. Ablyazov and his associates as the corporate vehicles for funnelling funds from the fraudulent Scheme to Mr. Ablyazov inter alios)."

[79] It is apparent that BTA's skeleton for the hearing in June 2023 also omitted direct consideration of the issue of whether it would be reasonable for the Court to try BTA's asserted claims against the BVI SPVs.

[80] This omission is notable and curious, since:

(1) the evidence filed on behalf of the ADM Defendants by Mr. Jan Heiko Koehlbrandt specifically addressed this requirement at paragraphs 36 to 40;

(2) Mr. Koehlbrandt's evidence on this and other points was adopted by Grove, in its evidence of Mr. Charles Goldblatt; and

(3) Mr. Mameshtegi (D9), in his First Affidavit, addressed the point specifically at paragraph 12(a) and 29 and also adopted Mr. Koehlbrandt's evidence.

[81] It could not have been the case that BTA or its Counsel were unaware that the omission to address the Court on this factor was contentious.

[82] The transcript of the Ex Parte Hearing reflects that the sum total of what the Court was orally told concerning the CPR 7.3(2) NPP Gateway by BTA's Counsel, in addition to what was stated in its skeleton, was as follows:

> "The second condition is the good arguable case that one of the gateways in CPR 7.3 is satisfied. Taking the necessary and proper party gateway first, the position is this. All the BVI claims and the Kazakh law claims are being pursued against the BVI SPVs, and indeed the BVI SPVs have already been served."[2]

[83] BTA's Counsel informed the Court orally of the following matters, at various different points in the Ex Parte Hearing, which could pertain to this gateway:

(1) "My Lord, I have, I believe, three more points on full and frank. The first of those three points is the status of the BVI SPVs, and I deal with this at para 57 of my skeleton. I should draw Your Lordship's attention to the fact that the BVI SPVs were recently restored to the register by us on our application, and it struck us that the foreign Defendants might argue that that had been done solely to use the BVI SPVs as anchor Defendants for the purposes of forum conveniens, but we would strongly disagree with that, My Lord. The reason the BVI SPVs were reinstated is because they are key to the present claim because they are vehicles used to embezzle funds from BTA Bank. Indeed about 65 percent of all funds that we seek compensation in respect of were paid to or through the BVI SPVs. So that deals with that particular point."[3]

(2) "THE COURT: … Let me understand this though. There are obviously BVI Defendants here who have presumably been served, right?

[2] Transcript page 11 lines 12 to 18.
[3] Transcript page 39 lines 1 to 17.

BTA's Counsel: They have been, yes … none of the BVI SPVs have actually acknowledged service or filed defences to the Statement of Claim in the time that was available to them, and so we don't anticipate there to be any actual, real prejudice to any of those parties [if the Statement of Claim were to be amended] because they've already made clear by their omission, their non-action, that they have no intention defending the claim."[4]

(3) "THE COURT: … These BVI Defendants, presumably they are SPVs, are they?

BTA's Counsel: They are, correct.

THE COURT: Very good. And are they still under 'bad actor' control or not? Don't you know?

BTA's Counsel: I don't know the answer to that, My Lord."

[84] It is plain from this that at the Ex Parte Hearing:

(1) BTA's Counsel made no mention of the requirement that a claim must be reasonable for the Court to try;

(2) Nor did he address the law and authorities on this point;

(3) Nor did he mention any arguments that BTA's opponents might make on it;

(4) Nor did he pull the various strings together in respect of the disparate facts relating to the BVI SPVs to address the reasonableness or otherwise of the Court trying the claim against the BVI SPVs.

2. The Applicants' objections

[85] A number of common threads ran through the positions taken by the four groups of Applicants at the hearing in June 2023:

(1) Apart from the Bunge parties, the other three sets of Applicants sought to argue that upon closer inspection it becomes apparent that there is no serious issue to be tried on the merits against them. This aspect took up a significant part of the hearing time, but, in the

[4] Transcript page 47 line 13 to page 48 line 6.

final analysis, the outcome of this debate (or rather debates) was not obvious to me and, in my respectful view, insufficiently clear so as to be determinative.

(2) A major, and indeed fatal, lacuna in BTA's presentation at both the Ex Parte Hearing and the hearing in June 2023 was a failure to show, as required by CPR 7.3(2) (the NPP Gateway), that there is between BTA as the claimant and the BVI resident Defendants, i.e. the BVI SPVs, a real issue which it is reasonable for the court to try.

(3) Another major lacuna in BTA's presentation, in respect of CPR7.3(7) (the Company Gateway), was BTA's failure to seek any relief in its claim pertaining to its assertion that this claim relates to the ownership or control of a company incorporated within the jurisdiction.

(4) BTA's Counsel had omitted to bring to the Court's attention a host of factors, in breach of BTA's duty of full and frank disclosure and fair presentation.

[86] Whilst each of the Applicants framed their arguments in a slightly different way, their central thrust can be summarized as follows. Nothing in this segment should be taken as a finding or endorsement of the Court.

[87] An application to set aside service out of jurisdiction amounts to a rehearing of the original application for permission to serve out and accordingly the burden of proof is on the claimant to satisfy the three-stage test for permission to serve out (see **Chi Hung Andy Chan v Noble More Group Limited**[5]). The fact that a judge at the without notice hearing granted permission to serve out creates no presumption in favour of the claimant in any way. The application falls to be determined by reference to the position at the time permission was granted, i.e., in this case 17th May 2022. However subsequent events may throw light upon considerations which were relevant

[5] BVIHC 228 of 2016 (unreported, delivered 23rd March 2017) at [25] (Ramdhani J. (Ag.)).

at the time (see **Erste Group Bank v JSC 'VMZ Red October'**;[6] **WWRT Ltd v Carosan Trading Ltd**[7]).

[88] The applicable principles relating to service out of the jurisdiction are well known. As set out in **Nilon Limited and Anor v Royal Westminster Investments S.A**.,[8] and equally by the Court of Appeal in **WWRT Ltd v Carosan Trading Ltd**,[9] on an application for service out of the jurisdiction, three requirements have to be satisfied by the applicant claimant (the 'Service Out Test'):

(1) 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, i.e. a substantial question of fact or law, or both.' This means that there must be a real, as opposed to a fanciful, prospect of success.

(2) 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.'

(3) Third, 'the claimant must satisfy the court that in all the circumstances the forum which is being seised 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.'

[89] In considering whether the claim falls within one of the jurisdictional gateways, the phrase 'good arguable case' connotes that one side has a much better argument than the other (see **Amerinvest International Forestry Group Company Limited v Kwok Ka Yik**[10]).

[90] The wording of the CPR7.3(2) (the NPP Gateway) almost exactly replicates the language of the current rule in England under Part 6B para 3.1(3) of the English Civil Procedure Rules (indeed the wording was altered to track the change in the English rules: **Nilon** at (11)-(12)). As such English

[6] (2015) EWCA Civ 379; (2015) CLC 706, at (44)-(45).
[7] BVIHCMAP2022/002 (unreported, delivered 20th July 2022) at [85] (Pereira CJ).
[8] (2015) UKPC 2; at (13)
[9] BVIHCMAP2022/002 (unreported, delivered 20th July 2022) at [16] – [17] (Pereira CJ).
[10] BVIHCMAP2014/0033 (unreported, delivered 4th March 2015) at [2] (Pereira CJ).

case law on the provision, which has been the subject of considerable analysis by the English Courts, is of very highly persuasive authority.

[91] Where a procedural rule in the BVI is worded in identical terms to its English analogue (and origin), the English common law interpretation of that rule must provide at the least a very highly persuasive indication of the meaning, effect and scope of the BVI rule; particularly where the rule has not previously been the subject of substantive *judicial dicta* in the BVI. The fact that there is but a single set of common law principles is additionally evident from the following matters: (1) **AK Investment**, which the Privy Council in **Nilon** (of course a BVI appeal) treated as authoritatively stating the law for the purpose of disposal of that appeal (see e.g. at (13) of Lord Mance's judgment), was itself an appeal to the Privy Council from the Isle of Man; (2) the judgment in **AK Investment** has been uniformly applied since by the English Courts and indeed in the BVI (see for instance in **WWRT Ltd v Carosan Trading Ltd**[11]); and (3) it would be remarkable if a gateway exactly modelled on the English version were to admit of a different interpretation.

[92] The English Court in **Gunn v Diaz**[12] identified the following general principles governing the NPP Gateway (at (86)):

> "ii) The prospect of proceedings having to take place in more than one jurisdiction will never be enough, in and of itself, to justify the joinder of a foreign defendant: AK Investment, per Lord Collins at (73), adopting the well-known dictum of Lloyd LJ in Golden Ocean Assurance Ltd v Martin (1990) 2 Lloyd's Rep 215 at 222: "... caution must always be exercised in bringing foreign defendants within our jurisdiction under Order 11 r 1(1)I. It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction.
> …
>
> v) The court must first ask itself, viewed in isolation, (a) whether there is a real issue to be tried between the claimant and the anchor defendant on the merits, (i.e. one with a real, rather than fanciful, prospect of success) and (b), if so, whether it is reasonable for the English court to try that claim: Erste Group Bank AG v JSC "VMZ Red October" (2015) EWCA Civ 379 (2015) 1 CLC 706.
>
> vi) The question whether it is reasonable for the English court to try the claim between the claimant and the anchor defendant is an objective one: it is not the same question as

[11] BVIHCMAP2022/002 (unreported, delivered 20th July 2022) at [16] – [17] (Pereira CJ).
[12] (2017) All ER (Comm) 129.

whether it was reasonable for the claimant to start proceedings against that defendant within the jurisdiction: Erste Group Bank at (48).

vii) If the anchor defendant has failed to acknowledge service or is not defending the claim, there is highly unlikely to be a real issue to be tried which it is reasonable for the court to try: a fortiori if the claimant has entered default judgment or summary judgment already, see Erste Group Bank at (78) and (136);".

[93] With respect to whether it is reasonable for the Court to try the claim, it was held in **Gunn** at (99 - 100) that:

> "99. …it may not be reasonable for the English Court to try a claim even if it plainly has jurisdiction over that claim…The court will have to consider, among other matters, if there is any utility in its trying the claims against the anchor defendant. If the claimant has nothing to gain from a trial of those issues here, even a trial to the stage of obtaining summary judgment (other than using the claim against the anchor defendant as a vehicle for bringing in the target defendant) the second limb will not be satisfied. That was the basis on which, on the facts, the claimant in Erste Group Bank failed on this limb of the gateway.
>
> 100. In the present case, as in Erste Group Bank, there would be no particular advantage for the claimants to be gained from this court trying any legal issues arising as between the claimants and Sixt that may still require determination, especially as those issues would all have to be resolved by reference to Costa Rican law. There is no evidence, for example, that Sixt has any assets outside Costa Rica against which an English judgment could be executed. In any event Sixt is undoubtedly solvent and is likely to be able to pay any damages awarded against it."

[94] In the decision relied upon in **Gunn** - **Erste Group Bank AG v JSC VMZ Red October** [13] – it was relevantly held as follows by the English Court of Appeal:

(1) The NPP Gateway requires a two-stage approach: 'At the first stage under paragraph 3.1(3)(a) (of the English rule), the court has to examine the nature of the claim which arises against the anchor defendants in isolation; that is to say on the assumption that there will be no additional joinder of the foreign defendants. The court has to be satisfied that not only is there 'a real issue' between the claimant and the anchor defendants, but also that it is an issue 'which it is reasonable for the court to try' (at (38)).

[13] (2015) EWCA Civ 379; (2015) 1 CLC 706.

(2) The Court rejected the proposition that 'the only criterion which has to be satisfied at the first stage under paragraph 3.1(3)(a) of PD6B is whether there is an arguable claim against the anchor defendants' (at (41)).

(3) While the fact that 'the anchor defendant is sued only for the purpose of bringing in the foreign defendants is not an element in deciding the question whether the gateway requirements of paragraph 3.1(3)(a) or (b) have been satisfied', the factor is relevant to the exercise of the Court's discretion under the third limb of the discretionary test i.e. whether the seised forum is clearly appropriate for the trial of the dispute (at (40)).

(4) As to whether it is reasonable for the Court to try the claim, 'We emphasise in this context the use of the word 'try'. The question is directed not at whether it is reasonable or proper from the perspective of the particular claimant to issue or bring proceedings, but rather whether it is reasonable for the English court to 'try the issue', whether in summary judgment proceedings or otherwise' (at (48));

[95] Learned Counsel for the Applicants urged that the principles in **Erste Group Bank** are dispositive of the Applications.

[96] The court in **Erste Group Bank** held that there was no 'real issue' between the claimant and the anchor defendants which it was 'reasonable for the court to try' in light of the following, *inter alia*, factors:

(1) There was no suggestion that the anchor defendants were disputing the relevant claims (at (78(i)));

(2) As at the date of the application to serve out, the anchor defendants had both failed to file any acknowledgement of service or otherwise indicated that they intended to defend the proceedings such that the claimant was entitled to obtain or apply for judgment in default of acknowledgment of service (at (78(ii)));

(3) There were no assets outside the alternative forum against which the claimant could execute judgment against one of the anchor defendants (at (78(iv))).

(4) Although the claimant was also bringing claims for conspiracy it was difficult to see any utility in the court trying the conspiracy claim, which duplicated the other claims (at (78(vi))).

[97] The relevant facts about the BVI SPVs, and BTA's attitude to them, are as follows:

(1) The BVI SPVs have been shell companies, without any real existence other than a technical one, for many years. There is no suggestion they have, or, apart from the funds which passed through certain accounts at a Latvian bank, ever had any assets. They are alleged by BTA to simply be 'siphons' for Mr Ablyazov. Their only pleaded or evidenced activities are as participants in the transactions founding the claim, which occurred between 2005 and 2009 and which BTA assert to be non-genuine.

(2) Very large default judgments were entered against four of them in 2009 in Kazakhstan which have never been enforced.

(3) BTA acquired clear and unequivocal contractual rights to repayment against the BVI SPVs under the L/Cs but, as stated in BTA's evidence, 'BTA had no means of enforcing its rights against those SPVs.because the SPVs had no assets.'

(4) They (and any assets they might have owned) were the subject of a very long receivership, made by the English High Court, and recognised by the BVI Court. That receivership was initially granted in 2010. It was discharged in 2018-2019, presumably because there was perceived by BTA to be no further purpose in its continuation.

(5) BTA was entirely content to allow the BVI SPVs to be struck off and dissolved.

(6) Although BTA has a very large judgment debt against Mr. Ablyazov (over US$4 billion), and the English court has found that he beneficially owned the SPVs, no attempt has been made in the 10 years following that judgment to appoint receivers by way of equitable execution over those shares (so allowing access to any assets they might have). Again, it is obvious why not (i.e. they were mere 'siphons').

(7) No explanation was provided in any of the materials put before the Court at the Ex Parte Hearing as to why the BVI SPVs were being sued ***now***, other than to act as anchor defendants, so as to create an artificial device to seek to bring the foreign defendants before this Court where otherwise there would be no such mechanism (other than the Company Gateway, which, as explained below, is obviously inapt). That is obvious in any event from the fact that the Claim Form naming the foreign defendants was issued 2 or 3 days after the restoration order restoring the BVI SPVs.

(8) The BVI SPVs have no directors, so they cannot do anything in relation to these proceedings.

[98] The Applicants observed that BTA's Counsel had not brought **Gunn v Diaz** or **Erste Group Bank AG v JSC VMZ Red October** to the Court's attention at the Ex Parte Hearing.

[99] The Applicants submitted that it remains clear that the BVI SPVs have no intention of defending the claim. None of the BVI SPVs have, to date, responded to the claim, (or the amended claim, which was served in June 2022) whether by filing an acknowledgment of service or otherwise. It is obvious that they never will. As at the date of the June 2023 hearing, D15, Ds17 – D18 and D23 were struck off again, shortly to be dissolved again; meanwhile D16, D20 – D21, D27 have all been dissolved, again. Indeed, even on BTA's own case, as it was put to the Court at the Ex Parte Hearing, the BVI SPVs 'clearly do not intend to participate in the Claim'; a point repeated in oral submissions. This is presumably because as at the date of the Ex Parte Hearing, as BTA was well aware: none of the BVI SPVs had filed an acknowledgment of service or a defence within the time for doing so, or at all, and as was stated in the evidence of the BTALP: 'the defendants resident in the BVI have not engaged with the claim at all, with the deadline for doing so having passed'.

3. BTA's reply

[100] BTA's attempted factual answer (in the Second Affidavit of Ms. Nartay) has been to say that although the BVI SPVs have not engaged with these proceedings to date 'they may do so in the future. This is simply not known at present…. Mr. Ablyazov may at some point in the future procure that the BVI SPVs become engaged with these proceedings.' Ms. Nartay goes on to say that the Applicants' suggestion otherwise is 'not supported by any evidence'. The Applicants treat this as 'manifestly absurd evidence'.

[101] In the same Affidavit, Ms. Nartay postulated that once a judgment is obtained against the BVI SPVs a receiver 'by way of equitable execution' may be appointed, the suggestion being that BTA might then seek to investigate and trace assets. The Applicants treat this 'evidence' as 'fantastical', ignoring, as it appears to do, that the BVI SPVs had been under a receivership for

around 10 years actively trying to locate assets, with no apparent further utility, hence its discharge in 2018 to 2019.

[102] In terms of an attempted legal answer to the objection that BTA had not referred the Court to **Gunn v Diaz**, BTA's Counsel urged that the proposition relied on in **Gunn** has not been approved or considered by any BVI cases and that the Applicants do not in fact cite any BVI case law in support of it. BTA's Counsel contends that the relevance of these *dicta* from **Gunn** is 'therefore unclear'.

[103] BTA's Counsel further argued that in any event, all that **Gunn** speaks of is likelihoods. The Court still has to consider, objectively, whether the grant of permission was justified when it was made. BTA's Counsel urged that it is obvious that there are real issues to be tried as between BTA Bank and the BVI SPVs.

[104] BTA further seeks to rely upon the Second Affidavit of Ms. Nartay, wherein, *inter alia*, she, as an employee of BTA, and resident, and native, of Kazakhstan, purports to give evidence of BVI public policy:

> "39. There are strong policy reasons why it [the principle in **Gunn v Diaz**] should not be followed in an offshore jurisdiction like the BVI. I understand from Ogier that it is a very common scenario in international fraud cases when offshore vehicles are used to implement a fraudulent scheme (of which they are the key component) and are then abandoned by the fraudsters. BVI courts do, and clearly should, have the ability to police such activity and ensure that justice is done for the victims of fraud. If the alleged principle [in **Gunn v Diaz**] were to be followed in the BVI, this would severely (and unjustifiably) limit the BVI courts' ability to provide redress to victims of international fraud in such situations. In effect, a victim of fraud would not have access to justice in the BVI in all cases where a BVI SPV used to effect a fraud is subsequently abandoned by the fraudsters. I do not understand what the policy justification would be for a rule, or a principle, that had the effect of depriving victims of fraud from the ability of pursuing claims in fraud, in the way they want, against BVI SPVs, even if those SPVs fail to acknowledge service or fails to defend itself. That is particularly the case where BVI statutory law allows, and has recently been restated to allow, claims to be issued against companies that have been struck off the Register: see paragraph 28 above.
>
> 40. The use of the BVI jurisdiction appears to have been an inherent part of the Scheme. The BVI was used, at least in part, because it seems to have been perceived by BTA Bank's officers (who are Defendants to this claim) as a jurisdiction *via* which it was easier to effect the Scheme. As the Kazakh courts have found (page 362 of the Kazakh Sentencing Decision as defined and described at para 158 below (ZN-1/25/362)):

The jurisdiction of the British Virgin Islands was chosen by Z.M. Toikubasova based on the specific instructions of Messrs. Ablyazov and Mamesh, since broker-dealer activities in this offshore zone are not licensed."

[105] Moreover, argued BTA, if **Gunn** is relevant at all, so too is the finding in the English High Court (Chancery Division) case of **Satfinance Investment Ltd v Athena Art Finance Corp**[14] that there is a real issue to be tried where a party seeks a declaration against an anchor defendant that does not intend to defend the claim (§92). BTA Bank does seek a declaration against the SPVs: as pleaded at the Amended Statement of Claim at paragraph (250A). The Applicants appear to ignore that.

[106] This declaration had been added to the Statement of Claim as part of BTA's Amended Statement of Claim filed in June 2022, i.e., after the Ex Parte Hearing on 17th May 2022. The additional relief sought was as follows:

> "Further or alternatively, a declaration that each of the L/C transactions forming part of the scheme were fictitious and/or a sham pursuant to Article 160 of the Kazakh Civil Code and a declaration that each of the L/C transactions forming part of the scheme are void (as per paragraph 214G above)."

[107] Paragraph (214G) essentially echoed the request for a declaration. The Amended Statement of Claim included such a declaration amongst a plethora of other relief sought.

[108] BTA's learned Counsel argued that any utility sufficed to satisfy the test of 'reasonable for the Court to try', which he contended was a very low test, as shown by the paucity of authorities on the point. He argued that it is only where there is no utility that it would be unreasonable to try an issue. He urged that the Court's consideration of the point must involve doing justice and fairness to the Claimant, looking at all the circumstances of the case. He urged that 'reasonableness' is not capable of universal definition. He argued that the Court should not stand in the way of justice if there is some utility.

[14] (2020) EWHC 3527 (Ch.).

[109] BTA's learned Counsel argued that the question is whether there is utility to the Claimant to obtain the declaration sought. He urged that the Claimant does not need evidence to say that a victim of fraud needs a judgment for enforcement overseas. He urged that the real utility here is to vindicate the fraud, obtaining judgment for eventual enforcement overseas, and that it would be wholly unjust, unreasonable and unfair not to have the claim heard in the Court. He stressed that a claim for a declaration makes for a real issue that is reasonable for the Court to try; it is unarguable that BTA passes the test.

[110] BTA's Counsel raised a number of other arguments, including:

> 'it would be beyond perverse if the non-engagement of BVI SPVs used by a notorious fraudster (Mr. Ablyazov) to effect a fraud could result in the victim of that fraud being unable to sue those BVI SPVs in the BVI, particularly if that non-engagement is intentional, and … in any event, non-engagement does not mean that there is no real issue to try, particularly in circumstances where BTA Bank's claims for relief include declaratory relief (as above).'

4. The Applicants' reply on Satfinance

[111] The Applicants made the following legal submissions in relation to BTA's purported reliance upon **Satfinance**.

[112] The facts and holding in **Satfinance** provide a contrasting decision on the facts. In its claim against Athena for ownership of a valuable painting by one Jean-Michel Basquiat ('the Painting'), Satfinance ('SIL') claimed that it had acquired ownership of the Painting pursuant to an agreement with the first and second defendants, Mr. Philbrick and Inigo Philbrick Ltd ('IPL') (whom SIL had served within the jurisdiction). Athena, for its part, claimed to be entitled to the painting as a result of a security interest it had (or thought or claimed it had) in the Painting. Athena was then served out of the jurisdiction pursuant to the NPP Gateway (see (6)). Athena successfully applied for an order setting aside permission to serve out on the basis that Mr. Philbrick and IPL 'were not going to defend the claims against them and, in consequence, there was no real issue between SIL and Mr. Philbrick and IPL' (at (8)). Morgan J. allowed SIL's appeal, finding that there was a 'real issue' between SIL and Mr. Philbrick and IPL that it was 'reasonable for the court to try'. The key feature of the case was that SIL sought a declaration as to its title to the Painting. In those circumstances

Morgan J. found that although Mr. Philbrick and IPL 'did not intend to defend' the claims (at paragraph [89]): '…the Court would not make a declaration as to SIL's title to the painting merely on the ground that the defendants had not presented any defence. The court would apply its conventional approach which is that a declaration of the court is a judicial act and should only be granted if supported by evidence and argument and where the court is persuaded that a declaration would be useful and appropriate…I consider that there would need to be a hearing in relation to SIL's claim to a declaration at which the court heard submissions as to the extent of SIL's beneficial interest…' (at paragraph [91]).

[113] Moreover, in **HC Trading Malta Limited v (1) K.I. (International) Limited and others**[15] the English Commercial Court noted that the NPP Gateway involves 'two distinct elements' namely (1) a 'real issue' (which the Judge explained 'denotes a claim which is jurisdictionally-founded and substantively viable, i.e. not bound to fail, according to authority'; and (2) that it '…must be 'reasonable for the court to try' such viable anchor claim…'. He went on to explain[16] that: 'The court of appeal in **Red October** stated that this formulation is a 'finely nuanced, soft-edged, question'. It is objective, not subjective; such that the claimant's own considerations or motivations cannot supply the answer. It may be reasonable for the court to try a claim against an anchor defendant even where it is found (to the relevant standard of proof) that they [*sic*] had no intention to defend such claim at the time of the relevant permission order, so long as some useful purpose or legitimate interest might be served by the prospective grant of summary or final judgment on an uncontested basis against the anchor defendant. That was the position in **Satfinance**…concerning the availability of a declaration of title in respect of the disputed painting.'

[114] The learned Judge went on to say:[17]

> "The test in this context is not exacting for a claimant. It is only where the court concludes that pursuit of an intrinsically viable anchor claim lacks discernible utility that is likely to lead to a conclusion that it is not "reasonable to try" such claim. Any utility therefore matters. It doesn't necessary [*sic*] establish reasonableness, but it all counts towards discharge of the interlocutory burden by the claimant."

[15] (2022) EWHC 1387I (Comm) (Stephen Houseman QC (sitting as a Deputy Judge of the High Court))
[16] At paragraph 16.
[17] At paragraph 18.

[115] In other words, the Applicants argued that just because BTA had introduced a claim for a declaration into its Amended Statement of Claim, this does not of itself entail that the claim is reasonable for the Court to try. The claim for a declaration must have discernible utility.

[116] The Applicants argued that in **Satfinance** the utility in obtaining a declaration was obvious. Here, however, the Applicants observed, BTA brings a money claim. The solitary declaration introduced into its Amended Statement of Claim reflects only one cause of action amongst numerous others, adding no utility to those other claims. The Applicants observed that BTA's learned Counsel did not explain how the declaration sought provides any utility, resorting to the unenlightening proposition that 'of course it has utility'. The Applicants observed that BTA adduced no evidence supporting utility, nor any reason. The Applicants posed the question: why does BTA also need a declaration that the transactions were a sham? The Applicants stressed that BTA has failed to provide an answer to that question.

[117] I note here in passing that BTA's evidence in support of the Amendment Application and in support of the Service Out Application made no mention of the proposed amendment to introduce a claim for a declaration. Equally, BTA's Counsel, at the Ex Parte Hearing, did not mention it. The amendment was inserted without explanation or stated justification, in circumstances where, one can infer, including a claim for a declaration had not seemed necessary, nor particularly important, in BTA's first iteration of the Statement of Claim. Nor did BTA's learned Counsel mention **Satfinance**, or, for that matter, the requirement that BTA would have to satisfy the Court that trying a claim for the declaration against the BVI SPVs would serve some useful purpose or legitimate interest. Equally, he did not bring to the Court's attention arguments the present Applicants might raise disputing such utility or alleged legitimate interest.

5. Company Gateway

[118] In relation to the Company Gateway, the Applicants submit that the ambit of this gateway is clearly defined and self-contained, and has been set out in **Amerinvest International Forestry Group**

Company Limited v Kwok Ka Yik[18] (which was not cited to the Court at the Ex Parte Hearing) thus:

(1) In order to be engaged, the claim must contain an issue relating to the ownership or control of a company (at paragraph (17)).

(2) Such an issue will arise where there is a direct challenge to the constitution and/or ownership and control of the company (at paragraph (13)).

(3) The fact that a party characterises a dispute as relating to the ownership or control of a company does not render it such (at paragraph (9)).

(4) The Court should look to the real issue in this matter rather than any perceived issue on which the case was being sought to be made (at paragraph (4)).

(5) In the context of an inappropriate attempt to use the Company Gateway, the Court held that it was 'not prepared to allow litigation in this forum in order to resolve by the back door an issue which is appropriately to be resolved in the Courts of a friendly foreign jurisdiction' (at paragraph (4)).

(6) Where a declaration is sought with respect to the membership of a company, but no party is asserting that it is a shareholder, there will be no serious issue to be tried as relates to the constitution of the membership of the company for in such circumstances it would be a 'waste of time and resources to declare by way of pre-emptive measure on behalf of the company that which the company already knows and which has not been effectively challenged' (at paragraph (9)).

(7) These considerations must apply *a fortiori* where, as in this case, no declarations or other remedies are sought relating to the ownership of the company.

[119] The Applicants observed that an example of where the Company Gateway has been successfully engaged is where a declaration was sought that certain instruments of transfers of shares were valid, i.e., an obvious company related issue. However, even then the gateway was only tentatively accepted, the Court held that there 'is an arguable case that on one view it relates to the ownership or control of the company' (**Chi Hung Andy Chan v Noble More Group Limited**[19]).

[18] BVIHCMAP2014/0033 (unreported, delivered 4th March 2015) (Pereira CJ).
[19] BVIHC 228 of 2016 (unreported, delivered 23rd March 2017) at [44] (Ramdhani J. (Ag.)).

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The Court's reticence in accepting that the Company Gateway may have been met is reflective of the very narrow scope of the gateway.

[120] BTA purports to satisfy this gateway on the basis that 'the claim does relate to the ownership or control of BVI SPVs because Mr. Ablyazov's ability to effect the fraudulent scheme was made possible by his ownership or control of the BVI SPVs'. BTA further self-servingly seeks to categorise Mr. Ablyazov's ownership and control of the SPVs as a 'key' issue to the claim. These submissions are, say the Applicants, clearly a nonsense and can be given short shrift:

(1) First, BTA's submissions wholly mischaracterise the test to be applied under the Company Gateway. The real test is as set out in **Amerinvest International**; namely, is there an issue, i.e. a challenge, relating to the ownership or control of the company? The test is not, as BTA seeks to characterise it, whether the ownership of a company is part of the factual matrix of the claim. Indeed, if it were, this would have the clearly unintended and preposterous outcome that most, if not all, claims involving a BVI company would satisfy the test.

(2) Second, the fact that BTA seeks to characterise the dispute as one relating to the control or ownership of the BVI SPVs does not render it such. No such claim is made, nor relief sought in the Amended Statement of Claim.

(3) Third, and having identified the correct test, on BTA's own case there is no issue relating to the ownership or control of the BVI SPVs for the purposes of the Company Gateway. Taken at their highest, BTA's submissions merely assert that the identity of the beneficial owner of the BVI SPVs provided a motive and means for the use of those companies in effecting the alleged fraudulent scheme. BTA does not allege a dispute between the parties as to the ownership of control of the BVI SPVs. Nor could they as no such dispute exists, manifest in the fact that no relief is sought by BTA in that regard.

(4) Fourth, and in any event, the Company Gateway cannot be engaged as against ACTI and Toepfer Asia in particular, in circumstances where they make no claim in relation to the ownership or control of the BVI SPVs and any relief concerning such ownership, even if sought, would have nothing to do with them.

(5) BTA's persistence in relying on the Company Gateway is not just lamentable, but hopeless. BTA's behaviour is also a blatant example of that which the Court in **Amerinvest International** was so disapproving; namely an attempt by the back door to seek to litigate in the BVI an issue that is manifestly more appropriately resolvable in the Courts of a friendly foreign jurisdiction.

6. "Clearly or distinctly the appropriate forum"

[121] The Applicants argued that as explained by our Court of Appeal in **WWRT v Carosan** at paragraph [17] by the Hon. Chief Justice, Dame Janice Pereira, a claimant who wishes to serve a defendant outside the jurisdiction ('service out case') must prove, at the third stage of the test, 'that the local jurisdiction must be clearly or distinctly the appropriate forum for the trial of the dispute and that it is appropriate to permit service out'.

[122] The Applicants contended that in this regard the burden falls upon the claimant: that is clear from the statement of Lord Collins in **Altimo Holdings v Kyrgyz Mobil Tel Ltd (PC)**[20] (at paragraph (71)) '…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…'

[123] The Applicants say that it is important to note that this is different to the circumstances in which a defendant, served as of right in the BVI, seeks to stay the claim on the ground of *'forum non conveniens'* ('stay case'). In that different context the burden falls upon the defendant. This was explained by our Court of Appeal in **Livingston Properties Equities Inc and others v JSC MCC Eurochem and another**[21] at paragraphs (25)-(26).

[124] These are pertinent observations, because BTA argued that:

> "What the Applicants must do to succeed is persuade the Court that there is one, single, alternative jurisdiction that is the appropriate forum. That is clear from **Wilton Trustees (IOM) Ltd & Ors v AFS Trustee Limited & Ors BVIHC (COM) 2018/154**:

[20] [2012] 1 WLR 1804.
[21] BVIHCMAP2016/0042-0046 (unreported, delivered 18th September 2018) (Webster JA (Ag.)).

"(85) … The application (for a stay of proceedings on the grounds of forum non conveniens) seems to me to have been fatally flawed from the start because of the Defendants' inability to point to a jurisdiction other than the BVI that was "the appropriate forum". It is clear that there are connections with a number of jurisdictions but that does not mean that one of them must be "the appropriate forum".

(89) I accept, of course, that much of the actual decision-making took place outside the BVI but, as the Defendants have demonstrated, there is no one place they can point to as the appropriate forum. In the circumstances, it seems to me to be perfectly credible to conclude that the BVI is the natural and appropriate forum for the trial of these claims …

(90) … in the end … the only reason the Defendants really had for objecting to a trial in the BVI was the "air miles point" and that, in my view, is not a very strong reason."

35. The Applicants cannot agree between themselves what the appropriate forum is. That is fatal (Wilton)."

[125] The Bunge parties observed the following:

"14.1. the Claimant has not pleaded or adduced evidence to indicate that any of the Defendant SPVs held or currently holds assets in the BVI … . In fact the Claimant asserts that the BVI SPVs "are unlikely to have any assets available for recovery against them directly" …
14.2. none of the First Sale and Sale Back agreements … are alleged to be governed by BVI law or subject to jurisdiction clauses in favour of the BVI Court…;
14.3. none of the goods that were secured under the L/Cs are alleged to have been located in the BVI…;
14.4. the Claimant pleads that all of the proceeds were routed through a single bank in Latvia, Trasta Bank: there is no claim that any funds (including commission payment) flowed through or were deposited in the BVI…;
14.5. neither Bunge SA nor Bunge CIS has ever held any bank accounts in the BVI or received any form of payment there…;
14.6. on the Claimant's case, the only material connection to the BVI appears to be that some of the Defendant SPVs involved in the Scheme were incorporated there…; and
14.7. the Scheme as pleaded relates to breaches of legal duties owed under Kazakh law, by Kazakh employees and officers of a Kazakh bank, in Kazakhstan, by which funds flowed to a bank in Latvia … ."

[126] Moreover, the Applicants point out (and share a position) that:

"In fact the sole connection with the BVI is the seemingly purely fortuitous fact that some of the SPVs happen to have been incorporated in the BVI. There is no suggestion in the Claimant's evidence or case that any of them conducted any business, or had an office, or had any employees, or kept (or retain) any papers in the BVI. It is the Claimant's positive

case that no alleged wrongdoing was actually perpetrated in the BVI …It is the Applicant's case that in reality the connection between these proceedings and the BVI is bordering on non-existent.

100. In addition:

100.1. witnesses: … there is no suggestion that any likely witnesses are resident or connected to the BVI – and that on the contrary all the witnesses of all the parties are 'likely to be predominantly based in Europe';

100.2. applicable law: … it is the ADM Defendants' position that BVI law is not the applicable law;

100.3. discretionary factors: … it is "obvious here that the Anchor Defendants have been joined…(as) a device to seek to found jurisdiction and this court should not condone that device";

100.4. alternative forum: …it is the position of the ADM Defendants that Germany would be a suitable alternative forum.

101. … "the ultimate beneficiaries of the Scheme were Mr Ablyazov and his associates, and by way of commission payments, certain of the Commodity Sellers. None of these Defendants are located in the BVI"."

[127] Grove considers Switzerland to be the more appropriate forum.

[128] In terms of the location of witnesses, the Applicants submitted that in the search for the appropriate forum the courts have stated repeatedly that the question of the location of witnesses 'is a factor at the core of the question of the appropriate forum': see **VTB Capital Plc v Nutritek International Corp**[22] at paragraph (62); and **Nilon** v **Royal Westminster** per Lord Collins at paragraph (14). Once again it is plain that the location of the witnesses militates against the BVI as the most appropriate forum.

[129] The Applicants observed further that in **Best Grain K/S 7 Samoran v Emerwood Ventures Ltd**[23] at paragraph [17] Adderley J. observed that 'mere incorporation in the BVI is not sufficient to found

[22] (2013) UKSC 5 per Lord Mance.
[23] BVIHC(COM) 153 of 2018 (Unreported, delivered 28th February 2019).

the BVI as the appropriate forum' and 'although it is a connecting factor very little weight should be given to it'.

[130] They pointed out further:

> "Accordingly, the key participators and key decision makers were all based in Kazakhstan; the alleged conspiracy was 'hatched' in Kazakhstan; and the most significant events took place in Kazakhstan. As pithily expressed by Teare J. in the English proceedings JSC BTA Bank v Ablyazov & Others (2013) EWHC 510 at (6) (the findings in which are relied upon at ASOC/60) "these proceedings arise out of events in Kazakhstan"."

[131] The Applicants concluded:

> "An appreciation of the Kazakh centric claim and cast of characters makes in entirely obvious that the BVI is not the 'natural forum' – and indeed would be an entirely unnatural forum. Consideration of the 'Restoration Application' in relation to the BVI SPVs – contrasted with the Claimant's inaction in relation to the Non-BVI SPVs – underscores just how unreal and insubstantial is any 'connection' of this Claim to the BVI."

[132] It would also be apposite to note here that at the Ex Parte Hearing, BTA's Counsel submitted the following, apparently oblivious that this was a further powerful reason for discounting the relevance of the BVI and in favour of a jurisdiction where the impugned transactions were in reality effected:

> "And, of course, one of the extreme oddities about the fraud as it was affected, is that the commodities sellers were having direct correspondence with BTA Bank for no good reason. The commodities sellers ought to have been corresponding with the BVI SPVs because those were the counter parties under the trade contracts, but what we see in the documents which we've pleaded out in full in the various schedules and the Statement of Claim is correspondence between certain individuals like Mr. Richardson on behalf of the commodities sellers with BTA Bank itself where the commodities sellers effectively encouraged UKB6, that's specialist department within the Bank, to enter into further trades so that Mr. Richardson can, on behalf of his employer, earn more commission in effect for doing nothing."[24]

[133] BTA maintained, nonetheless, that the BVI is the most appropriate forum for, in summary, the reasons that the BVI is (they say) a strong common thread across each of the streams of the L/C transactions and the majority of the embezzled funds were channelled through the BVI SPVs.

[24] Transcript page 42 lines 8 to 24.

7. Alleged breach of duty of full and frank disclosure

[134] The Applicants referred the Court to well established principles concerning breach of an *ex parte* applicant's duty to the court to give full and frank disclosure and to give a fair presentation. In the context of service out applications, the Applicants referred specifically to the following:

> "138. The requirements of full and frank disclosure in the context of an application for permission to serve out were addressed by Toulson J. in **MRG (Japan) Ltd v Engelhard Metals Japan Ltd** (2003) EHWC 3418 (Comm) at (23-27)53 in terms:
>
> > "24. It is for the court to determine what is material according to its own judgment and not the assessment of the applicant. This means that if the court considers there to have been material non-disclosure, it is not an answer that the applicant in good faith took a different view, although that may affect the court's exercise of its discretion in deciding what to do in the light of the nondisclosure. It does not mean that an applicant is under a duty to disclose facts which could not reasonably have a bearing on the decision which the judge has to make.
> >
> > 25. Materiality therefore depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing it…
> >
> > 29. If MRG was aware of matters which might reasonably have caused the judge to have any doubt whether he should grant permission to serve out of the jurisdiction, those would have been relevant matters and therefore ought to have been disclosed…."
>
> 139. The principles to be applied to breaches of full and frank disclosure were set out by Bryan J. in **The Libyan Investment Authority v J.P. Morgan Markets Ltd & Ors** (2019) EWHC 1452 (Comm) at (92) to (97) and in particular:
>
> > "96 ….If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process."
>
> 140. In **Chan v Noble More Group Limited** BVHIC 228 of 226, Ramdhani J observed (at (72)):
>
> > "72. It is no doubt true that important features of a case should not be hidden away in exhibits and left to the court's industry. A party making an ex parte application to serve out of jurisdiction must be sensitive to matters which showed connection to both the local and any foreign jurisdiction and ensure that these are brought to the

court's attention; it should not be left to the court's industry to discover these among the attached documents and correspondence.""

[135] The Applicants proceeded to set out the consequences of breach of the duties, with reference to leading cases (**Independent Asset Management Company v Swiss Forfaiting Limited**[25] citing paragraph 213 of **Arena Corporation Limited v Peter Schroder,**[26] **Andy Chan v Noble More Group Limited,**[27] **Thelma Paraskevaides v Citco Trust Corporation Limited**,[28] **Banca Turco Romana SA (in liquidation) v Cortuk** [29]).

[136] They contended that where the Court has found that there was non-disclosure at the *ex parte* stage the following principles apply:

(1) the Court will be justified in discharging the order, even although the party might afterwards be in a position to make another application.

(2) the general rule is that the Court should discharge the order obtained in breach and refuse to renew the order until trial. Notwithstanding, the Court has jurisdiction to continue or re-grant the order.

(3) the Court should assess the degree and extent of any culpability on the part of the applicant. While there is no general rule that a deliberate breach will always attract the sanction of the discharge of the service out order, equally there is no general rule that an innocent breach will escape that sanction.

(4) prejudice to the defendant is relevant.

(5) if an applicant who is guilty of non-disclosure wishes the court to treat it as innocent, it is incumbent upon it to explain how it came about.

(6) while there are no hard and fast rules as to whether the Court should continue or re-grant the order, the Court should incline strongly to discharging the order and not renewing it in the event of any substantial breach – and even where the breach may be innocent. Where the breach is deliberate, it would almost always be appropriate for the Court to impose the sanction.

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[25] BVIHC (COM) 44 OF 2015 (unreported, delivered 29th January 2016).
[26] (2003) EWHC (Ch) 1089.
[27] BVIHC 228 of 2016 (unreported, delivered 23rd March 2017).
[28] BVIHCMAP 2018/0046 (unreported, delivered 30th March 2020).
[29] (2018) EWHC 662 (Comm).

[137] The Applicants allege that BTA failed to give full and frank disclosure of a considerable number of factors. These can be broadly subsumed under the following heads:

(1) 'The proper approach to Limb 1 of the Necessary or Proper Party Gateway': the Claimant failed to draw to the Court's attention the principles set out in **Erste** and **Gunn v Diaz**;

(2) 'Misrepresentation of the reasons for the restoration of the Anchor Defendants': BTA falsely asserted that the BVI SPVs were reinstated because 'they are key to the present claim' (and the absence of any evidence to support the same);

(3) 'Misrepresentation as to the Claimant's intention': BTA falsely claimed that '[t]he full gamut of claims (in BVI law and Kazakh law) are pursued against the BVI SPVs, and would be pursued even if the Foreign Defendants were not party to the Claim';

(4) 'Status of the Anchor Defendants': BTA failed to inform the Court that by the time of the Ex Parte Hearing four of the BVI SPVs had been (or remained) struck off the Register (three on 22nd March 2022); and nine of the BVI SPVs had received (on 23rd September 2021) the Strike Off Warnings; and

(5) 'The Company Ownership/Control Gateway': the failure to refer to any potential objection which the Foreign Defendants might raise in relation to the applicability of this gateway.

[138] More specifically, at the Ex Parte Hearing, BTA did not explain at all why or how there was any issue that would be reasonable for this Court to try.

[139] Furthermore, although BTA stressed that 'about 65% of all funds that we seek compensation in respect of were paid to or through the BVI SPVs', BTA made no mention of the fact that the single most heavily indebted SPV is the Cypriot SPV (Moranta Invest D28) which BTA says owes it US$48,026,340.70.

[140] Moreover, the Court was not told that:

(1) BTA had not made any attempts to restore/sue the non-BVI SPVs incorporated in Seychelles and Cyprus (D19, D24-26, and D28); yet its case is that both BVI and non-BVI SPVs were used as vehicles to embezzle funds;

(2) BTA had not taken any steps to pursue the default judgment debts entered against certain of the BVI SPVs by the Kazakh Court for over US$246 million, to appoint liquidators, or to investigate/trace the SPVs' transactions and assets.

(3) The BVI SPVs had been subject to receivership for many years in England, but that the orders had long since been discharged – it is to be inferred because they no longer served any utility. That was of particular significance given that BTA has since suggested that it might wish to appoint receivers by way of equitable execution.

(4) The BVI SPVs are, in BTA's own words, 'unlikely to have any assets available for recovery directly'.

[141] The Applicants observed that BTA inexplicably failed to draw to the Court's attention the BVI SPVs' history of non-participation in related proceedings, which was clearly evidence that the Applicants would reasonably have sought to rely on as a further indication that the BVI SPVs had no intention of participating in this claim and that therefore there was no real issue which it was reasonably to try.

[142] The Applicants contend that BTA failed to draw the Court's attention to the Receivership Orders, which had been discharged after many years. In light of the discharge of the Receivership Orders and in circumstances where there is no suggestion that the Receivers did not perform their duties effectively, it is to be inferred that there is no utility (and therefore no intention on BTA's part) in BTA pursuing the BVI SPVs and appointing a receiver by way of equitable execution 'over their shares and assets pursuant to CPR 51'. The Applicants submitted that this suggestion is simply absurd.

[143] The Applicants also remarked that there was no explanation as to why, if BTA really was bent on suing the BVI SPVs and obtaining a judgment against them, they had not taken the simple step of suing them on the L/Cs. There remains no explanation of this failure.

[144] The Applicants concluded that BTA breached its duty of full and frank disclosure in numerous and material respects. Both individually and collectively, BTA's breaches were of a high order of culpability, the Applicants contended. The arguments and evidence that BTA failed to raise and

which are now relied on by the Applicants are not marginal: they should have been obvious to BTA as points that the Applicants would reasonably have wished to make and which were centrally material to the decision the Court had to make.

[145] BTA presented a concerted effort to explain away these omissions. The net impression given thereby was that it had weighed up all the relevant considerations and taken the view that it need not have addressed these points. In other words, BTA does not claim innocent error or omission on its part, but that the omissions had been immaterial.

8. Non-restoration of the non-BVI SPVs

[146] In response, apparently, to the Applicants raising the question as to why it was that BTA had not restored the non-BVI SPVs to the register of companies, BTA relied upon the Second Affidavit of Ms. Nartay. Ms. Nartay exhibited and referred to (1) advice (dated 31st March 2023) from Seychelles Counsel ('the Seychelles Advice') to the effect that it 'it would not be practically possible' to restore the Seychelles SPVs; and (2) advice (dated 3rd April 2023) from Cypriot Counsel ('the Cypriot Advice') to the effect that 'it may take up to 18 months to restore' the Cyprus SPV to the register.

[147] The Applicants observed that both these advices appear to have been obtained to supply retrospective justification for the non-restoration of the Seychelles and Cyprus SPVs. They observed, moreover, that Ms. Nartay's recapitulation of the Cypriot advice, that it might take 'up to 18 months to restore' Moranta Invest (D28) is inaccurate and misleading: the Cypriot Advice in fact states that if 'the other parties do not appear or if they choose to accept the issuance of the order' 'the application can be satisfied within three to five months'.

9. DISCUSSION

[148] It bears stating at the outset that the arguments summarised above are by no means the totality of the points contended for by the parties. I have confined myself to what I consider the essential. The arguments and material presented were voluminous and clearly an enormous amount of work,

thought, and imagination has been invested in the matter on all sides. I make this observation, lest a party, dissatisfied with the result, should object that I have omitted some detail or failed to recount some train of argument that the party puts more store by than I have done.

[149] For all the reasons advanced by the Applicants' learned Counsel that I have summarised above, which reasons I adopt, the Applicants succeed.

[150] Without detracting from this general reference to and adoption of the Applicants' arguments, I would add the following.

[151] It warrants recalling that the Applications concern applications to set aside an *ex parte* order of this Court made on 17th May 2022 which had granted the Claimant permission to serve the Claim out of the jurisdiction.

[152] I should approach the question whether the permission to serve the claim out of the jurisdiction was rightly given as at 17th May 2022, and not as at the subsequent hearing in June 2023. This follows from the decision of our Court of Appeal in **WWRT Ltd v Carosan Trading Ltd**,[30] where the Court of Appeal (by the Hon. Chief Justice, Dame Janice Pereira) stated:

> "[85] Furthermore, to my mind it would be incongruous to say that an order setting aside service out made by the court below may be considered to be wrong on appeal because by the time of hearing the appeal circumstances had changed as it relates to the forum limb of the service out test. The same may be said in relation to an appeal against the stay granted on the ground of forum non conveniens. It may be that an application to the court on a different basis may be possible. That said, I hasten to add that I express no view thereon. I agree with Mr. Morgan, QC that to allow such a course would be like 'shooting at a moving target' with outcomes dependent on circumstances as they may develop at different points in time. In **ISC Technologies Ltd. & Another v James Howard Guerin & Others,** ([1992] 2 Lloyd's Rep 430) Hoffman J expressed the view that the determination of the question whether leave to serve out was rightly given must be at the time when it was given and should not be discharged simply because circumstances have changed. As it relates to a stay on forum grounds, he opined that the appropriate time for considering the matter is the date of the hearing. These statements were approved by the English Court of Appeal in **Erste Group Bank AG (London) v JSC (VMZ Red October)** ([2015] 1CLC; [2015] EWCA Civ 379.) at paragraphs 44 and 45 (See also **Satfinance Investment Ltd v**

[30] BVIHCMAP2022/002 (unreported, delivered 20th July 2022) at [85] (Pereira CJ).

Inigo Philbrick & Ors [2020] EWHC 3527 (Ch) paras 41-43.). This approach to my mind is sound in principle and I adopt it."

[153] The reason why the date matters is because BTA amended its claim shortly after the hearing on 17th May 2022 (it was amended on 26th May 2022 and filed on 7th June 2022). It was thus **after** the hearing on 17th May 2022 that BTA introduced its claim for a declaration. As at 17th May 2022, it was not open to BTA to argue that **Satfinance** offered it a way of satisfying the requirement to show that its claim raised an issue as between it and the BVI SPVs that was reasonable for the Court to try. The **Satfinance** route could thus only avail BTA if the Court was minded at the June 2023 hearing to set aside the Service Out Order and to re-grant it. If BTA were to object that this is not correct, because it had sought permission to amend its Statement of Claim at the same hearing, and its draft Amended Statement of Claim had been before the Court for the Court to take cognizance of, it should be noted that BTA's learned Counsel had not mentioned the proposed amendment to include a claim for a declaration, nor taken the Court to that part of the draft Amended Statement of Claim, and the Court could not be expected to alight upon the relevant amendment on its own amongst the considerable volume of materials that had been laid before the Court, nor, necessarily to understand its significance for the issue of gateways without prompting from BTA's learned Counsel.

[154] A further important fact to be borne in mind from the outset is that the only BVI Defendants BTA brings claims against are the nine BVI SPVs already mentioned. BTA was not able to identify and commence proceedings against even one BVI company which was active and in good standing. The only BVI Defendants BTA could bring to the Court were these BVI SPVs, none of which were active or in good standing. Even when restored to the register of companies by BTA, those were never in regulatory good standing, in that they were not able to file registers of directors and/or they lacked a registered agent.

[155] The fact that all of the BVI Defendants that BTA wished to bring before the Court were, to various extents, defunct begs an obvious question why BTA went to the expense and trouble to do so.

[156] BTA's answer was to avow an intent to pursue claims against them, as if they were normal, active, corporate defendants in good standing, and to exude brave optimism that they might yet participate

in the proceedings and they might yet be found to hold assets amenable to execution; in other words, that there was simply nothing to see in their apparent ephemeral, decrepit, empty, long-dead state. The Court is not obliged, however, to play along with, nor to affirm, delusions, or far-fetched speculation, nor for that matter with contrived artifices calculated to persuade the Court into allowing its processes and resources (and thus BVI taxpayers' money) to be used to litigate claims which have no genuine utility here.

[157] This is not a case of BTA being delusionally convinced that there was 'nothing to see here' in the state of the BVI SPVs. I accept the Applicants' submissions, for all the reasons they gave, that BTA restored and joined the BVI SPVs as Defendants purely to serve as anchor defendants, in order for BTA to get through the NPP Gateway in CPR 7.3(2), so that it could bring perceived 'deep-pocket' defendants, in the shape of the commodity traders ADM, Bunge and Grove, here to sue them. I do not believe BTA's unconvincing blandishments to the contrary.

[158] I am persuaded that the Applications should succeed for the following main reasons:

(1) I do not consider it is reasonable for this Court to try the purported issues between BTA and the BVI SPVs, thus BTA fails to satisfy the CPR7.3(2) NPP Gateway;

(2) This claim does not engage the CPR 7.3(7) Company Gateway, in that the claim must contain an issue relating to the ownership or control of a company, but it does not;

(3) The BVI is not clearly and distinctly the most appropriate forum for the trial of the claims raised; rather, that forum is Kazakhstan, or Germany or Switzerland; and

(4) BTA failed in its duty of full and frank disclosure and fair presentation at the Ex Parte Hearing in significant and material ways and such failure was not innocent. This warrants the Service Out Order made on 17th May 2022 being set aside and not re-granted.

9.1 Criteria for permission to be granted for service out

[159] There is no dispute between the parties as to the law in relation to the requirements for obtaining permission to serve a claim out of the jurisdiction. The criteria are:

(1) Pursuant to CPR 7.3(2): there is a real issue between BTA and the BVI SPVs which is reasonable for the court to try, and BTA now wishes to serve the claim form on the Defendants who are outside the jurisdiction, and who are necessary and proper parties to the claim. CPR 7.3(2) provides:

"2. A claim form may be served out of the jurisdiction if a claim is made –

(a) Against someone on whom the claim form has been or will be served, and

(i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and

(ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary or proper party to claim;

(b) for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction; or

(c) for a remedy against a person domiciled or ordinarily resident within the jurisdiction."

(2) Alternatively, pursuant to CPR 7.3(7): the subject matter of the claim relates to the ownership or control of the BVI SPVs, which are incorporated in the BVI.

(3) BTA Bank must show that:

(a) In relation to the foreign defendants, there is a serious issue to be tried on merits;

(b) There is a good arguable case that the claim against the foreign defendants falls within the classes of case for which permission to serve out may be given; and,

(c) In all the circumstances the BVI is clearly or distinctly the appropriate forum for the trial of the dispute, and

(d) In all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

9.2 CPR 7.3(2) – The Necessary or Proper Party Gateway

[160] For present purposes, I am prepared to proceed on the basis that there is a real issue between BTA and the BVI SPVs and that BTA now wishes to serve the claim form on the Defendants who are outside the jurisdiction, and who are necessary or proper parties to the claim.

[161] I am also prepared to proceed on the basis that in relation to the foreign Defendants, there is a serious issue to be tried on the merits. That said, I stop short of making a specific, formal finding that BTA has established the existence of such a serious issue in respect of all the present Applicants. Whilst this may disappoint some of the Applicants, particularly in light of the very considerable effort they have invested in breaking down the claim to show that, upon close analysis, BTA has no serious issue against some of them, far more direct and obvious points are dispositive of the Applications. I am also conscious that the more intricate and involved one has to immerse oneself in teasing out from a lengthy and complex pleaded case that a serious issue is lacking, the more one drifts into the territory of an inappropriate mini-trial and becoming embroiled in contrasting arguments – establishing the very point that there is a serious issue between those parties. Hence, having noted these matters, I will focus on what in my respectful judgment are the clearly dispositive aspects.

[162] As noted in earlier segments of this Judgment, the real point of contention in respect of this gateway is whether the issue between BTA and the BVI SPVs is reasonable for the court to try.

[163] BTA's learned Counsel did not, at the Ex Parte Hearing, address this point. But the Court must now do so.

[164] I accept that our CPR 7.3(2) is materially identical to the prevailing English provision in stipulating that the issue(s) between the claimant and the intended anchor defendant(s) must be reasonable for the court to try. I also accept that in such a case, the courts of the Eastern Caribbean Supreme Court ordinarily look to reported cases from England and Wales as being persuasive, albeit not binding. I do not accept BTA's evidence (or rather submissions dressed up as evidence) to the effect that there is a public policy in the BVI that the BVI's courts should extend their services to police and vindicate international fraud using companies incorporated in the BVI. As the Applicants contended, the public policy of the BVI is enshrined and reflected in the CPR – including the mandatory, non-discretionary requirement that an applicant for permission to serve out must satisfy the Court that there is a real issue which it is reasonable for the Court to try. The BVI taxpayer would be surprised indeed to discover that the BVI courts have some kind of long arm responsibility to have international fraudsters, located overseas, brought here to be sued, using the

BVI taxpayer funded court system, merely on grounds that BVI shell companies were used as part of the fraudulent scheme. BTA's 'evidence' for such a public policy was given by Ms. Nartay, who claims no experience or any other connection with the BVI whatsoever. Such 'evidence' is not credible, and it carries no weight. It is obviously an artificial attempt to argue that this Court should not do what it normally would and should do, which is to follow the English authorities on the English materially identical provision, because those authorities are damning for BTA's case.

[165] The authorities in question are the English High Court decision in **Gunn v Diaz**[31] and the English Court of Appeal decision in **Erste Group Bank AG v JSC 'VMZ Red October'**.[32]

[166] In relation to **Gunn v Diaz**, BTA offered the argument that this Court should not follow that case because it has not yet been followed in this jurisdiction and BTA has 'evidence' that the BVI has the policy Ms. Nartay contends for, i.e., it is open to this Court not to apply that decision and it should not do so. Once the existence of such a policy is discounted (this Court categorically states here that there is no such policy), there is no reason why this Court should not follow or apply **Gunn v Diaz** in the usual way. There is no sensible reason why **Gunn v Diaz** would not be followed, particularly as the BVI courts rely heavily on English reported cases as a matter of course and the CPR provisions being interpreted are materially identical.

[167] I have already quoted extensively from **Gunn v Diaz** in an earlier segment in this Judgment. The key points for present purposes are, as stated there at paragraph (86), with emphasis added:

> "v) The court must first ask itself, **viewed in isolation**, (a) **whether there is a real issue to be tried between the claimant and the anchor defendant on the merits**, (i.e. one with a real, rather than fanciful, prospect of success) and (b), **if so, whether it is reasonable for the English court to try that claim**: Erste Group Bank AG v JSC "VMZ Red October" (2015) EWCA Civ 379 (2015) 1 CLC 706.
>
> vi) **The question whether it is reasonable for the English court to try the claim between the claimant and the anchor defendant is an objective one**: it is not the same question as whether it was reasonable for the claimant to start proceedings against that defendant within the jurisdiction: Erste Group Bank at (48).

[31] (2017) All ER (Comm) 129.
[32] (2015) EWCA Civ 379 (2015) 1 CLC 706.

vii) **If the anchor defendant has failed to acknowledge service or is not defending the claim, there is highly unlikely to be a real issue to be tried which it is reasonable for the court to try**: a fortiori if the claimant has entered default judgment or summary judgment already, see Erste Group Bank at (78) and (136);".

[168] Moreover, at paragraph (99) that:

> "99. …it may not be reasonable for the English Court to try a claim even if it plainly has jurisdiction over that claim…**The court will have to consider, among other matters, if there is any utility in its trying the claims against the anchor defendant**. **If the claimant has nothing to gain from a trial of those issues here,** even a trial to the stage of obtaining summary judgment (other than using the claim against the anchor defendant as a vehicle for bringing in the target defendant) **the second limb will not be satisfied**."

[169] The first point to perceive from these passages is that the question whether there is a real issue which it is reasonable for this Court to try must be taken in isolation from claims intended to be brought against foreign target defendants. The Court has to proceed on the assumption that there will be no additional joinder of the foreign defendants.[33] This restriction may seem artificial, and indeed unrealistic, but that misses the fundamental purpose of the gateway. This is to delimit to a small number of circumstances the exercise of the Court's extraterritorial jurisdiction to bringing foreign parties here in order to defend a claim. The circumstance we are concerned with here is when it can be said that a foreign defendant is a 'necessary or proper party' to a claim pursued here in the BVI, against (usually but not always) a BVI defendant. That defendant would be the defendant that anchors the proceedings in this jurisdiction, hence the often-used shorthand designation of 'anchor defendant'. **The point is that it is the BVI claim against the anchor defendant which would be assisted by the addition of the foreign defendant**. Excluded from that consideration is the reasonableness of trying claims against the foreign defendant. In other words, utility in suing foreign defendants cannot be used to overcome lack of utility in trying the claim against the BVI defendant.

[170] A second point to be perceived from these passages is that the assessment of reasonableness to try an issue is to be done **objectively**. The stipulation of reasonableness inherently entails having an objective regard. Thus, averments by the claimant of its intentions concerning pursuit of claims against the BVI defendants should be treated with caution and are not determinative, even if they

[33] Per **Erste** at paragraph 38.

may be relevant. That is because a claimant's averments of intention could be fanciful or a contrivance to contort a matter through the gateway. The Court has to consider whether, on all the facts evidenced before it, there would, **viewed objectively**, be any utility in trying the purported claim brought against the anchor defendant, stripped of the proposed claims against the foreign defendants.

[171] In **HC Trading Malta Limited v (1) K.I. (International) Limited and others**[34] the English Commercial Court considered that the formulation 'reasonable for the court to try', raises a 'finely nuanced, soft-edged, question', and, in essence, that what would satisfy this limb of the gateway test is if **some useful purpose or legitimate interest might be served** by the prospective grant of summary or final judgment on an uncontested basis against the anchor defendant. The need for an objective assessment introduces an element of realism into the exercise: a claimant, through clever Counsel, can often create the impression of utility where none exists, viewed objectively, and judged against reality.

[172] A third point to be derived from these passages (as BTA itself argues) is that the Court is concerned with 'likelihoods'. The Court can only perceive matters the best it can, on the material before it, using its knowledge and experience, including of human nature, and common sense. Complete certainty may not always be possible. That is not to say that the test whether it is reasonable for the Court to try an issue is to be resolved on a balance of probabilities. The fact that a defendant has not acknowledged service nor filed a defence, nor otherwise engaged with the claim brought against him/it, serves as a strong pointer that it is not reasonable for the Court to try the claim. In **HC Trading Malta Limited v (1) K.I. (International) Limited and others**[35] the English Commercial Court considered at paragraph 18 of the decision:

> "The test in this context is not exacting for a claimant. It is only where the court concludes that pursuit of an intrinsically viable anchor claim lacks discernible utility that is likely to lead to a conclusion that it is not "reasonable to try" such claim. Any utility therefore matters. It doesn't necessary [*sic*] establish reasonableness, but it all counts towards discharge of the interlocutory burden by the claimant."

[34] (2022) EWHC 1387I (Comm) (Stephen Houseman QC (sitting as a Deputy Judge of the High Court)).
[35] (2022) EWHC 1387I (Comm) (Stephen Houseman QC (sitting as a Deputy Judge of the High Court)).

[173] It also appears to me that what constitutes utility sufficient to render it reasonable to try an issue can also vary, depending upon the circumstances of a particular case. In other words, I do not understand it to be sufficient for anything whatsoever that could somehow be described to be 'useful' to entail that the issue is reasonable to try. If that were so, every well-spun and packaged 'utility' devised by clever Counsel would satisfy the requirement. Rather, the Court has to look at the practical reality, including extent or degree, of a professed 'utility'.

[174] In my respectful judgment, precisely the same considerations apply to claims formulated to include declaratory relief. In the present case, in essence, BTA submits that because it has included a claim for a declaration, which cannot be granted on a default basis, then, without more, there is an issue which it is reasonable for the Court to try. But that is false logic. In **Satfinance**, there was an important issue which was reasonable for the English Court to try: which of Satfinance or Athena owned the Painting. There was a real utility there in the English Court trying that issue. Here, on the other hand, the declaration sought is that the L/Cs were a sham. Now, a finding that the L/Cs were a sham might be something the Court might possibly (but not necessarily inevitably) have to make in determining the various money claims brought against the BVI SPV Defendants. But why BTA would need a **declaration** to that effect is unclear and that was not explained by BTA's Counsel. Leaving out the foreign defendants, I have serious difficulty discerning any utility in trying a claim for a declaration against the BVI Defendants alone:

(1) Such a declaration could not operate as an issue estoppel or *res judicata* as between BTA and other Defendants;

(2) The BVI SPVs are defunct companies with no assets here or overseas and no **realistic** prospect of any assets being discovered after the almost decade long receivership which has already been discharged and no realistic prospect of the defunct BVI SPVs honouring any judgment.

In short, I can see no point, no utility, whatsoever in this Court trying a claim against the BVI Defendants alone for this declaration.

[175] I am indeed persuaded that, as Mr. Moverley Smith, KC, for D9, submitted, BTA added the claim for a declaration by way of amendment to its Statement of Claim, simply to get around the fact that

the BVI SPVs' failure to acknowledge service or file a defence otherwise indicated that it would be highly unlikely to be reasonable for this Court to try the claim.

[176] A fourth point that I derive from these passages from **Gunn v Diaz** and from the wording of CPR 7.3(2) itself is that the issue has to be reasonable for the **BVI Court** to try. The point is not whether there is an issue it would be reasonable to try somewhere, anywhere, in the abstract. The question is whether **this Court** should try the issue between the claimant and the anchor defendant.

[177] All the English High Court in **Gunn v Diaz** was doing, when it referred to a failure on the part of a local defendant to acknowledge service or to defend a claim, was to identify these as indicators of a very probable lack of utility. The reason is not difficult to understand. Whilst in such a case there would be a point – indeed a lot of point - in applying for default judgment, when such a remedy is available, it is more difficult to see the point in allowing the Court's processes to be allowed, more ponderously and expending more scarce resources to reach the same result, when the defendant has represented by his omission that he will not be contesting the claim.

[178] At the same time, since the lack of acknowledgment of service and/or defence are mere indicators (albeit powerful ones), the Court should have regard to other indicators as well. Such was the approach taken by the English High Court in **Gunn v Diaz**. There, one of the questions before the court was whether there was an issue as between the claimant and the fourth defendant, the car hire company Sixt, which it was reasonable for the Court to try. The Court found there was not, basing its finding in this regard upon a number of cumulative factors. Sixt was a foreign defendant, but on the facts of that case it would be an anchor defendant. Sixt had acknowledged service of the claim, indicating an intention to challenge jurisdiction, but it had then failed to serve a defence, and judgment in default of defence was then entered against it.[36] The court, by Andrews J. (as she then was, after a pre-eminent career as a Queen's Counsel specialising in shipping and international trade, and before her elevation to the English Court of Appeal) ruled that:

[36] See paragraphs 47 to 49.

> "[50] The effect of entering judgment is that neither of those defendants would be entitled to contest liability or quantum. In any event, it is unrealistic to suppose that Diaz or Sixt are going to seek to engage in the process, which means that there will be no trial of the claims against them. The assessment of damages is likely to be carried out on the basis of uncontested evidence, including expert evidence, adduced by the claimants."
>
> And:
>
> [100] In the present case, as in Erste Group Bank, there would be no particular advantage for the claimants to be gained from this court trying any legal issues arising as between the claimants and Sixt that may still require determination, especially as those issues would all have to be resolved by reference to Costa Rican law. There is no evidence, for example, that Sixt has any assets outside Costa Rica against which an English judgment could be executed. In any event Sixt is undoubtedly solvent and is likely to be able to pay any damages awarded against it."

[179] The English Court's approach in **Sixt** was to take various indicative factors cumulatively, in an assessment of the probability that a trial by the English court would have utility. By 'utility', the English Court included any 'particular advantage'. The indicative factors considered ranged from the likelihood Sixt would engage in legal proceedings to and through trial, to Sixt's ability, on the state of the evidence before the Court, to pay any damages awarded against it and availability of assets for enforcement. Thus, it is apparent that the approach taken by the English Court in **Gunn v Diaz** was to consider all the circumstances in the round and to deduce from them such utility as there might be in trying a claim between the claimant and the proposed anchor defendant. This is hardly surprising, nor indeed revolutionary (since this is what a court generally should do anyway). What **Gunn v Diaz** is not a proposition for is that a failure to acknowledge service or serve a defence can be branded as a talisman and taken as conclusive that this means it is not reasonable for the court to try the case. If utility, viewed in the round, is the main touchstone of the test in respect of this limb to the gateway, another is realism.

[180] In **Erste Group Bank v VMZ Red October**[37] the English Court of Appeal approached the limb as follows:

> "30. The key issue which arises under this head is whether the Bank had established that there was between the Bank and D1/D2 'a real issue which it is reasonable for the [English] court to try' (as required by paragraph 3.1(3)(a)). This issue in turn involves consideration of the following three sub-issues:
> (i) had the Bank submitted to the jurisdiction of the Russian insolvencies of D1 and D2 and the Russian courts;
> (ii) irrespective of whether there had, or had not, been such submission, was it reasonable to try claims in England against entities in liquidation in another jurisdiction (D1/D2) in circumstances where:
> (a) the Bank had (admittedly) lodged claims in their insolvencies and participated in proceedings in Russia;
> (b) as alleged by D3/5, no additional sum would be recovered against D1 and D2 as a result of any judgment in English proceedings, beyond the amounts that had already been proved in the Russian insolvency proceedings;
> (c) as alleged by D3/5, as a matter of practical reality D1 and D2 were not going to take any part in any English Commercial Court proceedings as they were irrelevant to the process of insolvency in the jurisdiction of their centres of main interest ('COMI'); and
> (iii) was it reasonable to try claims in England as against D1 and D2 which necessarily involved consideration of the propriety (or otherwise) of decisions of the Russian courts and actions taken by the defendants, creditors or others in the context of Russian insolvency proceedings."

[181] In **Erste**, the English Court of Appeal contrasted the 'stark' or 'hard-edged' approach[38] taken by the lower court judge with a 'more nuance, soft-edged' approach. Thus, at paragraph 47, the English Court of Appeal recounted:

> "…the judge appears to have regarded the issue as being the hard-edged question as to whether, by putting in a proof in the insolvency of D1 in Russia, the Bank had submitted its claims against D1 to the exclusive jurisdiction of the Russian courts and therefore it was not open to the Bank to pursue its claims against D1 in England; and likewise, in relation to the Bank's claims against D2, whether by participating in the proceedings concerning the validity of the Guarantee, the Bank had submitted its claims against D2 to the exclusive jurisdiction of the Russian courts, so that the English court no longer had jurisdiction over the Bank's claims against D2."

[37] [2015] 1 CLC (Gloster LJ).

[38] See paragraph 48.

[182] The English Court of Appeal then stated that in contrast, the limb of the gateway raises a 'much more finely nuanced, soft-edged, question'.[39]

[183] In **Erste**, the English Court of Appeal considered[40] that there were, in that case, no ''real issues' as between the Bank and D1'. It went on to find (in the same paragraph) that in any event there were no issues that it was reasonable for the English Court to try. That was for a number of reasons:

> "(ii) As at the date of the application to serve out, D1 and D2 had both failed to file any acknowledgement of service or otherwise indicated that they intended to defend the proceedings within 14 days of service of the Claim Form as required by CPR Part 58.6(2). Consequently, as at that date the Bank was entitled to obtain or apply for judgment against both D1 and D2 in default of acknowledgement of service under CPR Part 12.
>
> (iii) The fact that D1 was not **substantially challenging** its indebtedness under the Loan Agreement was subsequently confirmed by the **attitude** taken by D1 on the summary judgment proceedings in front of HH Judge Mackie QC on 14 December 2012, in so far as it is legitimate to consider such subsequent events as 'casting light' upon what should have been relevant considerations as at the date of the application to serve out: see Hoffmann J in ISC Technologies Ltd v Guerin (above). As stated above, the only consideration put forward in the letter from the liquidation manager of D2 was an indication that D1 might have a defence to the English claim on the grounds that it was subject to insolvency proceedings in Russia.
>
> (iv) In such circumstances, as at the date of the application before Cooke J, there was no real issue as between the Bank and D1 in relation to the debt and contractual claims under the Loan Agreement and certainly none which it was 'reasonable' for the court to try." [Emphasis added.]

[184] What can be derived from this is that the Court must have regard to whether the intended anchor defendant '**substantially challenges**' the claim made by the claimant against it. The anchor defendant's **'attitude'** towards this question can be indicated by absence of acknowledgment of service or lack of service of a defence on his part. The answer to the question whether it is reasonable for the Court nonetheless to try the claim is not just to be gleaned from the intended anchor defendant's attitude, but also whether the claimant is entitled to request judgment in default.

[39] At paragraph 48.
[40] At paragraph 78.

It is logical, and should not be hard to understand, that it would be a pointless waste of time and resources to indulge pursuit of an ordinary trial process when (a) the anchor defendant, viewed objectively and realistically, will not be substantially challenging the claim and (b) the claimant could obtain a judgment against him through a much quicker and less resource intensive default route.

[185] I further note that events subsequent to the hearing at which permission to serve out was given can be considered, to 'cast light' upon what should have been relevant considerations as at the date of the application to serve out. Again, that makes sense, because otherwise the Court would be confined to considering only the material placed before it by the Claimant, which may have been incomplete, or indeed selective or attractively arranged.

[186] In **Satfinance**, the intended anchor defendants were an individual, Mr. Philbrick, and his company IPL. The English Court received argument over whether the evidence indicated that Mr. Philbrick and IPL were or were not going to be active defendants in the litigation. That issue had arisen because Mr. Philbrick had not engaged with a hearing notice, his London art gallery had closed, and he had 'disappeared' from England, taking himself off to Vanuatu *via* Australia, before being extradited to Guam and then being moved under compulsion by United States' authorities to New York to face claims there. The Court noted[41] that there, insufficient time had passed in which Mr. Philbrick or IPL could be expected to indicate whether they intended to defend the intended English proceedings. The English Court thus did not decide the issue whether the gateway was satisfied on the basis of any finding as to the likelihood of these defendants actively participating in the litigation or 'substantially challenging' the claim. Instead, it considered that irrespective of what Mr. Philbrick and/or IPL might do in respect of the claim, there would be utility in allowing the claimant to seek a declaration as to title to the painting in dispute, which required a non-summary process.

[187] The Court in **Satfinance** considered how the Court should approach the matter where it might encounter difficulty in discerning the likelihood of intended anchor defendants actively participating in the claim. At paragraph 51 of the judgment, the English Court stated:

[41] At paragraph 67.

> "In the past, the court asked whether the claimant had the better of the argument in relation to the relevant question. However, recent cases have elaborated the test and have offered guidance as to the approach where there are difficulties, on the evidence, in making a confident assessment on the relevant question. This guidance is contained in two decisions of the Supreme Court, namely, *Brownlie v Four Seasons Holdings Inc [2018] 1 WLR 192* and *Goldman Sachs International v Novo Banco SA [2018] 1 WLR 3683*, and both these cases have been considered by the Court of Appeal in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV [2019] 1 WLR 3514* at [72]-[80]. The relevant guidance can be taken from *Goldman Sachs* at [9] and is in these terms:
>
> > "For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had "the better of the argument" on the facts going to jurisdiction. In *Brownlie v Four Seasons Holdings Inc [2018] 1 WLR 192*, para 7, this court reformulated the effect of that test as follows: "(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it." It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced."

[188] What I take, in particular, from this guidance is that it is for the claimant to provide a '**plausible evidential basis for the application of a relevant jurisdictional gateway**' and if the Court is still left in doubt, the claimant is entitled to the benefit of such doubt, but only if the claimant's evidential basis for satisfying the gateway is plausible.

[189] It merits remarking that the English Court places stress on '**plausible**'. That is entirely understandable. The whole point about the restrictions upon the gateway is to limit use of the Court's extraterritorial jurisdiction to genuine cases where foreign defendants are necessary or proper parties to support proceedings in this jurisdiction. That is needed to prevent the Court from simply purporting to exercise an unchecked extraterritorial jurisdiction. At the same time, it is very common for claimants to have no true interest in pursuing anchor defendants but to target foreign defendants as their real litigation counterparts, and then to contrive a presentation that persuades the Court that the claimant satisfies the restrictions in the gateway. In this regard, **the Court is not obliged to accept an evidential narrative which the Court does not consider to be plausible**.

Thus, the objective nature of the Court's discernment process is protected to avoid self-serving contrivances or delusions proffered by claimants prevailing.

[190] In the present case, Counsel for BTA had difficulty articulating what the utility of trying the claims brought against the BVI SPVs would be. He resorted to the unenlightening line that the utility, here, was 'obvious'. If it was so obvious, it bears asking why he could not describe the utility. He submitted that there would be utility in obtaining judgment after trial for the purposes of enforcement overseas.

[191] On the basis that the Court has to consider the claims against the BVI SPVs in isolation, such enforcement overseas would have to be against the BVI SPVs themselves, not other foreign defendants, and as we have seen, these BVI companies appear to be well and truly dead, without assets and already raked over for many years during a now discharged receivership. I confess I cannot see any utility nor advantage to BTA in having this Court try the claim against the BVI Defendants alone.

[192] When BTA omitted to include evidence that it would be reasonable for this Court to try the claim, this was not just a minor technical omission, it was primordial: on the facts of this case it is by no means obvious that there would be any point whatsoever in the Court allowing its limited resources, and those of the BVI taxpayer that very largely funds it, to be used for the pursuit of claims against the BVI SPVs. That is because the BVI SPVs:

(1) appear to be defunct and thus unlikely to intend to participate in the claim;
(2) have not satisfied regulatory requirements to avoid further striking off;
(3) have no known assets;
(4) had been under a lengthy receivership (running from 2010 until 2018 or 2019), the utility of which appears to have been exhausted;
(5) have been inactive for over a decade; and
(6) did not participate in, nor resist previous legal proceedings, from which it can be inferred that those who own and control the BVI SPVs were unconcerned at the prospect of

judgments being made and enforcement attempts effected against them. That position does not appear to have changed now.

[193] A further factor underlines that it is unrealistic to suppose that the BVI Defendants will ever be found to own assets. BTA's own case is that the offshore SPVs were used as 'siphons' or vehicles for funnelling money from BTA to Mr. Ablyazov and his close associates. It is in the nature of a 'siphon' or a 'funnel' that it acts purely as a ***channel*** not as a container. On BTA's own case, the BVI SPVs cannot be expected to own any assets, whether directly or indirectly, any longer.

[194] These factors suggest that if BTA were to be allowed to press claims against these BVI SPVs in isolation from claims against the other foreign Defendants, the resulting judgments would be nugatory and academic. There would be no genuine utility in a trial of claims against the BVI SPVs.

[195] That is all the more so, where, as here, BTA could obtain judgment in default of acknowledgment of service or of Defence against them, but it has not. BTA could also have obtained the appointment of an office holder, such as a receiver by way of equitable execution or indeed a liquidator over the BVI SPVs, which would enable them to participate actively in this claim and search for undisclosed assets at the same time, but BTA has not. It would appear that BTA itself perceives that there would be no point in doing so.

10.3 CPR 7.3(7) - The Company Gateway

[196] BTA had sought to rely upon CPR7.3(7), the Company Gateway, as an alternative to its primary case that it satisfied the CPR7.3(2) gateway.

[197] The Company Gateway is stated in CPR7.3(7) thus:

> "A claim form may be served out of the jurisdiction if the subject matter of the claim relates to –
>
> a. the constitution, administration, management or conduct of the affairs; or

b. the ownership or control of a company incorporated within the jurisdiction."

[198] I accept the Applicants' submission that the test for satisfying the Company Gateway is as set out in **Amerinvest International Forestry Group Company Limited v Kwok Ka Yik**;[42] namely whether there is an issue, in the sense of a challenge, relating to the ownership or control of the company. The test is not, as BTA seeks to characterise it, whether the ownership of a company is part of the factual matrix of the claim. Indeed, if it were, I agree with the Applicants that this would have the clearly unintended and preposterous outcome that most, if not all, claims involving a BVI company would satisfy the test.

[199] There is no issue here relating to the ownership or control of any of the BVI SPVs. BTA has not contended that it is in dispute, seriously or at all, that the BVI SPVs were ultimately owned or controlled, directly or indirectly, by Mr. Ablyazov. Indeed, those BVI SPVs have not contested, or in any other way participated, in the claims made against them. Nor did they participate in earlier proceedings, in particular in England, where the BVI SPVs were made the subject of receivership orders on the basis that they were assets of Mr. Ablyazov.

[200] That there is no issue is further borne out by the fact that BTA sought no relief in respect of its undisputed contention that the BVI SPVs were assets of Mr. Ablyazov.

[201] To put the matter beyond doubt, BTA had no real answer to the Applicants' submission that the interpretation of the rule as set out in **Amerinvest International** is the applicable one.

10.4 Forum

[202] I am satisfied that upon an application to set aside a service out order, the burden of proof remains on the claimant, here BTA, to show that the BVI is clearly and distinctly the appropriate forum for determination of this claim. Conversely, where a defendant seeks to have a claim against it stayed

[42] BVIHCMAP2014/0033 (unreported, delivered 4th March 2015) (Pereira CJ).

on grounds of *forum non conveniens*, the burden lies upon that defendant to satisfy the Court that a different jurisdiction is the appropriate one.

[203] Where a claimant applies for permission to serve claim documents outside of the jurisdiction, it is well settled, following **Nilon Limited v Royal Westminster Investments S.A.**,[43] that the applicant must satisfy the Court that in all the circumstances the BVI is clearly or distinctly the appropriate forum for the trial of the dispute.

[204] In this case, it is clear to me that the BVI is not the appropriate forum. The BVI is certainly not 'clearly or distinctly the appropriate forum for the trial of the dispute'.

[205] The alleged scheme which is the subject of the claim was perpetrated mainly in Kazakhstan, by officers and employees, located in Kazakhstan, of a Kazakhstani bank, dealing with commodity traders operating out of various jurisdictions, such as Germany and Switzerland, but not from the BVI, with funds being channelled to a bank in Latvia. None of the witnesses are in the BVI.

[206] BTA's own case was that the choice of offshore SPV was 'irrelevant'. At paragraph 192.1, 192.2 and 192.3 of the Amended Statement of Claim, BTA pleaded the following:

> "192.1. The identity of the Offshore SPV in respect of any given L/C transaction was irrelevant and the Offshore SPV was merely a vehicle via which deals were struck whereby L/Cs were issued and the Commodities Sellers earned Commission, not least because: (a) Mr Richardson, Mr Bekbergenov and/or Ms Kuzmicheva approached BTA Bank on more than one occasion to try to agree trades, without any "application" having been made by any Offshore SPV, and (b) they often struck deals with BTA Bank before the identity of the Offshore SPV "applicant" was even discussed, let alone alighted on;
>
> 192.2. No KYC was being carried out with respect to the Offshore SPVs before L/C transactions were agreed between employees of BTA Bank and the Commodities Sellers. Further, neither Mr Richardson, Mr Bekbergenov nor Ms Kuzmicheva requested information about the Offshore SPVs (save for their names and bank details) unless third-party international banks requested that information, save that Mr Bekbergenov and Ms Kuzmicheva did on a few occasions request that "checklists" be completed with respect to the Offshore SPVs;

[43] (2015) UKPC 2, at paragraph 13.

> 192.3. Mr Richardson encouraged BTA Bank to use Offshore SPVs for L/C transactions whose names gave the impression that they actively traded in commodities and sought to dissuade BTA Bank from using Offshore SPVs whose names did not imply that they actively traded in commodities. They did so in order to avoid or limit questions being asked about the identity of the Offshore SPVs by the third-party international banks."

[207] BTA's case that the identity of the offshore SPVs was 'irrelevant' does not sit well with BTA's averment, now, in Ms Nartay's Second Affidavit, that 'the BVI SPVs played the key role in the Scheme…'. That statement gives the impression (as it was no doubt intended to) that offshore SPVs were active participants in the alleged scheme, as opposed to passive tools whose identity was 'irrelevant', and that their connection with the BVI was a special feature. The Court is left to ask itself, which version of the narrative is the Court supposed to believe? What, in my respectful judgment, has been going on here is BTA first pleading what it really thinks happened, but then, when it needed to elevate the importance and involvement of the BVI SPVs in order to represent the BVI as central to the alleged scheme, BTA and/or its legal team have been applying their best endeavours to cast the BVI SPVs in a more, and indeed most, important light.

[208] However, it was not only BVI SPVs that were chosen – Seychelles and Cypriot companies were used too. Moreover, the single largest indebted SPV (in an amount of approximately US$48 million) was a Cypriot company. This begs the question why Cyprus was not an, or the most, appropriate forum for determination of the claim. The Court was not apprised of this at the Ex Parte Hearing. Instead, BTA stressed that some 65% of the allegedly embezzled funds were nominally transferred to BVI SPVs. But, as a matter of fair presentation, this needed to be balanced with the fact that some 35% - not an insignificant percentage - was channelled through non-BVI SPVs and that the single largest indebted SPV was a Cypriot company.

[209] It was only after the Applicants had observed the fact that BTA had chosen to restore only BVI companies to the register but had left the Seychelles and Cypriot SPVs to remain defunct, that BTA sought to justify that decision. BTA did so by obtaining Seychelles and Cypriot legal opinions to demonstrate that those companies could either not practically be restored at all or that an application to do so would take an unduly long time. The most those legal opinions could do is retrospectively to justify BTA's decisions, taken months earlier, not to seek their restoration. They could not stand as evidence of the reason(s) that BTA did not seek their restoration.

[210] The interpretative key to understanding BTA's entire approach to its application for permission to serve the foreign Defendants out of the jurisdiction was given away by Ms. Nartay's purported summary of the Cypriot law advice that that 'it may take up to 18 months to restore' the Cyprus SPV to the register. On one level, that summary was true. On another, it was not. It crucially omitted to say that if the application were to be unopposed, it could take only three to five months. As such, the statement was misleading, and the entity that would be misled was none other than this Court. The extent of its misleading nature is magnified when it is seen in the light of another apparently uncontroverted fact, that there is no evidence that any of the BVI SPVs' restorations had been opposed, and that the various offshore SPVs and Mr. Ablyazov, their putative owner, had not participated in the many prior legal proceedings. There is no evidence that any opposition to the restoration of the Cypriot SPV was at all likely. All the evidence suggests that it was most improbable that such restoration would be opposed.

[211] This was a blatant and telling example of misrepresentation. It shows that BTA, whether through Ms. Nartay or through such other wordsmiths as have been preparing BTA's material on these aspects of the matter, are quite prepared to proffer self-serving, exaggerated half-truths to serve their ends.

[212] This example is also of a piece with the representations that BTA intended to pursue the whole gamut of its claims against the BVI SPVs, with a view, so BTA intimated, of seeking a receivership by way of execution at the end of such a claim process to look for assets against which judgment could be enforced. These representations do not tally with the apparent availability of relatively straight-forward claims in debt under the letters of credit that would appear to be open to BTA against the offshore SPVs. Usually, a claimant who is concerned to make recoveries against debtors who are possibly or probably not good for the money will proceed against such a debtor as quickly as he can, to be able to hunt down even a partial recovery before the debtor's assets might be too far out of reach. Here, though, BTA's approach is marked by a distinct degree of leisure and opting to pursue notoriously more difficult and complicated causes of action that it would need to persuade the Court to accept, and even though BTA could move ahead with default judgments against these Defendants. BTA has shown no interest in doing so, however. It would be no

answer for BTA to say (although it has not done so) that it could not bring such claims in contract on grounds that, for example, such claims are time-barred or barred by issue estoppel, because such counterpoints are defences that the BVI Defendants might not take – and indeed most probably would not take because these BVI Defendants are defunct companies. Nor do these representations tally with the fact that these BVI SPVs had been the subject of receivership orders made by the English High Court, and that those receivership orders had been discharged in 2018 to 2019, it can be supposed, because their purpose of locating and getting in assets of Mr. Ablyazov had been exhausted. The Court is thereby forced to ask itself whether BTA is really being serious, and if it is, whether it is not suffering from fanciful delusions. The alternative is that BTA is spinning a yarn that it knows is not true and that it hopes the Court will fall for. Regrettably, it pains me to say that I am persuaded that this latter scenario is what the Court is presently dealing with.

[213] The reality, it seems to me in my respectful judgment, of BTA's approach is simply to wish to use the otherwise defunct BVI SPVs to unlock the door (or 'gateway') to commence a suit in this jurisdiction against commodity trader Defendants whom BTA perceives to have deep pockets, whereupon the defunct entities can be dropped. I accept the Applicants' submissions that this is the case. I accept their submissions that BTA's invocation of the BVI SPVs is no more than an artifice. BTA's words to the contrary sound as hollow as the corporate husks they briefly resurrected wherewith to accomplish their sole purpose of opening the gates of litigation against BTA's real targets.

[214] I am satisfied that the connection with the BVI was merely tangential, or peripheral. BTA described the BVI SPVs as 'based in' the BVI, but it is clear to me that was unduly loaded language. These companies were merely incorporated here. There is no evidence that they had any operational offices, or operational or executive staff, or documents located in the BVI. As Adderley J. observed in **Best Grain K/S 7 Samoran v Emerwood Ventures Ltd**[44] at paragraph [17], 'mere incorporation in the BVI is not sufficient to found the BVI as the appropriate forum' and 'although it is a connecting factor very little weight should be given to it'. The BVI was not a strong thread running

[44] BVIHC(COM) 153 of 2018 (unreported, delivered 28th February 2019).

through the Scheme; it was as incidental and irrelevant as the identity of the offshore SPVs themselves.

[215] I am thus entirely satisfied that the BVI is not an appropriate forum for the trial of this claim and it is certainly not clearly or distinctly the most appropriate forum.

10.5 Full and frank disclosure

[216] The Claimant's failure to draw to the Court's attention the principles set out in **Erste** and **Gunn v Diaz**; and to anticipate the Defendants' arguments in this regard were both extremely serious and, for a clearly experienced Counsel team, inexcusable.

[217] Whilst the threshold for a claimant to show that it is reasonable for the Court to try the claim is low, and whilst the number of authorities on the point are few, the authorities are quite prominent when the point is looked into and they should have been brought to the Court's attention.

[218] BTA is correct in submitting that usually this criterion does not present an issue. I can readily say this I the first time I have come across the problem in almost 12 years sitting in this Court. But that makes it all the more important for Counsel to bring such authorities to the Court's attention.

[219] The difficulty for BTA was – so it would appear – that it had no real answer to the objection that it would not be reasonable for the Court to try the claim, including the claim for the declaration, so BTA did not deal with it.

[220] This alone warrants the immediate setting aside of the *ex parte* Service Out Order and denial of a re-grant.

[221] I would go further and accept that the Court had been misled into believing that the BVI SPVs 'are key to the present claim' and that the Court had not been made aware that there was absence of any evidence to support this representation.

[222] I also accept that BTA had misrepresented that '[t]he full gamut of claims (in BVI law and Kazakh law) are pursued against the BVI SPVs, and would be pursued even if the Foreign Defendants were not party to the Claim'. That appears not to be so: not least because the more straight-forward claims in contract against the BVI SPVs have not been brought – only those which could be brought against the foreign, non-contractual counterparty, Defendants.

[223] BTA moreover failed to give full and frank disclosure at the Ex Parte Hearing that by the time of the Ex Parte Hearing four of the BVI SPVs had been (or remained) struck off the Register (three on 22nd March 2022); and nine of the BVI SPVs had received (on 23rd September 2021) the Strike Off Warnings.

[224] BTA also failed to bring the circumstances concerning the discharged receivership order to the Court's attention. From the fact that the BVI SPVs had been subject to a lengthy receivership which had eventually been discharged, it can readily be inferred that its utility had been exhausted. This was extremely relevant to a proper understanding of whether it would be reasonable for this Court to try the claim against the BVI SPVs. This was an important omission.

[225] BTA also failed to bring to the Court's attention the authorities in relation to the Company Gateway and arguments the Defendants might raise in respect thereto. Again, for an experienced Counsel team, this was inexcusable.

[226] In my respectful judgment these omissions were not innocent. The Court was presented with a pre-packaged case concept by BTA, and that which did not fit that narrative was omitted. I am persuaded that the omissions must have been deliberate.

[227] Following these failures, BTA's response was to double down on its positions, raising barely comprehensible arguments and frankly far-fetched and opportunistic 'evidence' of invented BVI public policy, and not to forget the inexcusable and crudely misleading summary of the Cyprus law opinion that 'it may take up to 18 months to restore' the Cyprus SPV to the register.

11. Disposition

[228] The Applicants' case against maintenance of the Service Out Order is overwhelming: properly viewed, BTA fails to satisfy either of the NPP and Company Gateways, the BVI is not the appropriate forum for trial of the action and, if that was not enough, BTA failed in its duty of full and frank disclosure and fair presentation in a non-innocent way.

[229] In the cumulation of all these circumstances, I have no hesitation in exercising the Court's discretion to set aside the *ex parte* Service Out Order and to refuse to re-grant it, with costs to the Applicants.

[230] I take this opportunity to thank both sides' learned Counsel for their assistance with this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar