Neutral Citation Number: [2015] EWHC 996 (Comm)
Case No: 2012 Folio 1055
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building
Fetter Lane
London
EC4A 1NL
Date: 16/04/2015

Before:

MR JUSTICE WALKER

- -

BETWEEN:

KAZAKHSTAN KAGAZY PLC & OTHERS

Claimants/Respondents

- and -

BAGLAN ZHUNUS

First Defendant/Applicant

- -

Mr P Lowenstein QC and **Mr D Head** (instructed by **Peters & Peters Solicitors LLP**) appeared on behalf of the **applicant (first defendant)**
Mr M Brindle QC, Mr J Cutress and **Mr J Miller** (instructed by **Zaiwalla & Co LLP**) for the **respondents (claimants)**

Hearing dates: 11 July, 14 November 2014.
Written submissions were lodged during the period 27 November 2014 to 4 March 2015.

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Paul Walker, 16 April 2014.

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Mr Justice Walker:

A. Introduction 3
A1. Mr Zhunus's application under CPR 25 3
A1.1 The application notice and the evidence 3
A1.2 The need for a sense of proportion 3
A1.3 Some suggested universal guiding principles 4
A1.4 What happened on Mr Zhunus's application until February 2015 4
A2. The February 2015 application by the claimants 5
A3. My overall conclusions 5
B. What CPR 25 requires 5
C. Background, issues, & events up to 12 July 2014 6
C1. Background, substantive issues & events to 17 April 2014 6
C1.1 Background: introductory 6
C1.2 The 2013 fraud allegations: the PEAK fraud 7
C1.3 The 2013 fraud allegations: the Astana fraud 7
C1.4 Freezing order and other orders on 2 August 2013 8
C1.5 Particulars of claim and responses to the freezing order 8
C1.6 HHJ Mackie QC's assessment of Mr Arip's objections 9
C1.7 The Court of Appeal's assessment of Mr Arip's objections 9
C1.8 Mr Zhunus's defence and Tickner 3 12
C2. Events between 17 April and 10 July 2014 inclusive 13
C2.1 Tickner 3, the MGAP Report, Zaiwalla 2 and Signum Law 1 13
C2.2 Tickner 4 and Linkage & Mind 1 13
C2.3 Zaiwalla 3, Crestohl 5, and Signum Law 2 14
C3. The hearing on 11 July 2014 14
C4. Events between 12 July and 13 November 2014 inclusive 17
C4.1 Tickner 6 and Linkage & Mind 2 17
C4.2 Zaiwalla 7 and a request concerning additional matters 17
C4.3 The claimants' supplementary outline submissions 18
C4.4 Tickner 7 and the joint note on timetable 19
C4.5 McGregor 4, Crestohl 6, and Tickner 8 19
C5. The hearing on 14 November 2014 20
C5.1 Objectionable aspects of Zaiwalla 7 20
C5.2 Other opening submissions by Mr Lowenstein 22
C5.3 Submissions by Mr Brindle, and Mr Lowenstein's objection 22
C5.4 Mr Lowenstein's reply 23
C6. Events: 15 November 2014 to 18 February 2015 23
C7. Events after 18 February 2015 23
C7.1 The February 2015 application 23
C7.2 The 20 February 2015 questions and request 24
C7.3 Werner 2 and the March 2015 submissions 25
D. The inability to pay pre-condition 25
D1. Principles in an inability to pay pre-condition case 25
D2. The staged approach 27
D3. Application of the staged approach 27
D3.1 Analysis of stage 1 evidence, including Beber 1 27
D3.2 Stage 2: financial material dealt with in Zaiwalla 7 29
D3.3 Tickner 7, Beber 2 and the Zhunus supplemental skeleton 31
D3.4 McGregor 4 and Crestohl 6 35

D3.5 14 November: Mr Lowenstein's opening submissions....38
D3.6 14 November: Mr Brindle's response submissions & Beber 3....39
D3.7 14 November: Mr Lowenstein's reply submissions....42
D3.8 The note of objection....43
D4. Conclusion on the inability to pay pre-condition....43
E. The residence pre-condition....46
E1. Residence pre-condition: general....46
E2. Residence pre-condition: the Kazakh claimants....47
E3. Residence pre-condition: KK Plc....50
E4. Residence pre-condition: the proposed undertaking....51
E5. Conclusion on the residence pre-condition....51
F. The justice test....51
F1. Justice test: general....51
F2. Justice test: inability to pay and obstacles to enforcement....51
F3. Justice test: other factors....52
F1. Justice test: overall assessment....53
G: The February 2015 application....53
G1. February 2015 application: general....53
G2. February 2015 application: principles as to stifling....54
G3. February 2015 application: the March 2015 material....55
G4. February 2015 application: conclusions....56
H. Quantum and conclusion....56

A. Introduction

A1. Mr Zhunus's application under CPR 25

A1.1 The application notice and the evidence

1. By notice dated 24 April 2014 the first defendant ("Mr Zhunus") applied for an order under CPR 25 requiring the claimants to provide security for the costs of this action. The main evidence in support of the application was provided in witness statements made by Mr Jonathan Tickner of Peters & Peters LLP ("Peters & Peters"), solicitors for Mr Zhunus. The main evidence opposing the application was provided in witness statements made by Mr Sarosh Zaiwalla and Mr Leigh Crestohl of the claimants' solicitors Zaiwalla & Co. LLP ("Zaiwalla & Co").

A1.2 The need for a sense of proportion

2. This case is an example of something which the court is seeing with increasing frequency. Claims are made for large sums. Emergency orders are obtained, without notice to the other side, which freeze assets worldwide up to the value of the sums claimed. From then on there is a series of interlocutory applications. They are heavier than they should be. Not weeks, but months, are spent assembling material to be put in evidence. Correspondence is exhibited. In some cases it includes something which correspondence should never include, namely the trading of insults between the solicitors for the parties. There has been little, if any, attempt to agree facts or issues. Time estimates for pre-reading are given which underestimate the time needed to read the key evidence and gain a grasp of what the real issues may be. The time needed is far more than it ought to be, largely because no expense has been spared in taking

every point. There is an urgent need for commercial practitioners to bring a sense of proportion to this type of litigation.

A1.3 Some suggested universal guiding principles

3. In that regard it seems to me that there are universal guiding principles which practitioners should always have in mind. Below I make some suggestions as to what those universal guiding principles may include. I stress that they are not rules. They are not intended to define or to limit. My suggested universal guiding principles would include:

    (1) The court expects solicitors and counsel to take appropriate steps to conduct the debate, whether in advocacy or in correspondence, in a way which will lower the temperature rather than raise it.

    (2) This remains the case even where – indeed particularly where – any concession is perceived as anathema by one or other or both sides. It is perfectly possible to be vigorous without being insulting.

    (3) Imputations on others, whoever they may be, should only be made if they are both necessary and justified. If they are not strictly necessary, or they are not objectively justified, they should be rigorously excluded. Sometimes they are necessary, for example when seeking a freezing order, or when an allegation of bad faith is necessary. They must be confined to what is necessary. As to what is objectively justifiable, regard should be had to the degree of proof that is needed. What is needed in order to support an application for a freezing order may differ from what may be required if an imputation is to be made and sustained in a different context.

    (4) Rather than focus on criticisms of the other side, the focus should be on working out a timetable which will enable opposing parties to consider what facts and issues can be agreed, and what information and revised estimates for reading and hearing time can be given to the court prior to the hearing so as to ensure that the court's time is used efficiently and productively.

    (5) If it is likely that a point which might be taken by a party, or it becomes likely that a point previously taken by a party, will not significantly advance that party's case, or will require a disproportionate amount of time or resources if it is to be resolved, then notification should be given that the point will not be relied upon for present purposes. The notification can be accompanied by an appropriate reservation as to the position in future.

A1.4 What happened on Mr Zhunus's application until February 2015

4. In the present case, the hearing was listed for 11 July 2014. On that day Mr Lowenstein QC and Mr Head appeared for Mr Zhunus. Mr Brindle QC, Mr Cutress and Mr Miller appeared for the claimants. As explained below I adjourned the hearing that afternoon and gave directions for further evidence. Oral submissions resumed on 14 November 2014 and occupied the entire day. Further written submissions were lodged by the parties.

A2. The February 2015 application by the claimants

5. On 30 January 2015 the written submissions appeared to be complete. The timetable thereafter envisaged was that I would circulate the present judgment in draft in the week of 23 February 2015.

6. However by letter dated 19 February 2015 the claimants applied to reopen the hearing of Mr Zhunus's application, so as to allow the claimants to adduce further evidence relating to what was described as a "changed factual situation" which had arisen since the last hearing. A response by Mr Zhunus dated 24 February 2015 identified substantive and procedural objections to this course.

7. I shall refer to the application made by the claimants in the letter dated 19 February 2015 as "the February 2015 application". In relation to the February 2015 application I gave directions on 26 February 2015 that the claimants should provide:

   (1) a full set of the additional evidence that they wish to rely upon, and

   (2) full written submissions setting out their case as to why, despite the substantive and procedural objections advanced on the part of the first defendant, they contend that the new evidence would justify a refusal by the court to make an order for security for costs.

8. Evidence and written submissions in response to my directions were provided by the claimants on 4 March 2015.

A3. My overall conclusions

9. For reasons given in this judgment:

   (1) I grant Mr Zhunus's application for security in the amount of £1m; and

   (2) I refuse the claimants' February 2015 application.

B. What CPR 25 requires

10. CPR 25.12 enables the court to make an order for security for costs. The circumstances in which the court may do so are set out in CPR 25.13:

> (1) The court may make an order for security for costs under rule 25.12 if –
> (a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and
> (b) (i) one or more of the conditions in paragraph (2) applies, or
> (ii) an enactment permits the court to require security for costs.
>
> (2) The conditions are –
> (a) the claimant is –
> (i) resident out of the jurisdiction; but

> (ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982;
>
> ….
>
> (c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;

11. Mr Zhunus accepts that in the present case he must satisfy both the test in CPR 25.13(1)(a), which I shall refer to as "the justice test", and the test in CPR 25.13(1)(b), which I shall refer to as "the pre-conditions test". He says that as regards the pre-conditions test, although it is sufficient to show that only one of the pre-conditions is met, he can show that both 25.13(2)(a) and (c) are met. I shall refer to pre-condition (a) as "the residence pre-condition" and to pre-condition (c) as "the inability to pay pre-condition".

C. Background, issues, & events up to 12 July 2014

C1. Background, substantive issues & events to 17 April 2014

C1.1 Background: introductory

12. Various disputes in the present case have been the subject of court judgments. In setting out the background for the purposes of this judgment I have drawn on, and in some respects updated, explanations of the background set out by Longmore LJ in the Court of Appeal decision in *Kazakhstan Kagazy Plc v Zhunus* [2014] EWCA Civ 381 (2 April 2014) and by Males J in *Kazakhstan Kagazy Plc v Zhunus* [2014] EWHC 2928 (Comm) (15 August 2014).

13. The first claimant ("KK Plc") is a company registered in the Isle of Man and quoted on the main board of the London Stock Exchange. It is the ultimate owner of entities comprising what I shall call "the KK Group" (or simply "the group"). The KK group includes the second to seventh claimants, each of which is either a Kazakhstan company or a Kazakhstan limited liability partnership ("LLP"). The group's core business is the manufacture of paper and packaging. Currencies used by the group include the Kazakh Tenge ("KZT"), the United States Dollar ("USD" or "$") and the Russian Ruble ("RUB"). In recent years financial results for the group have been presented in USD. These results include earnings before interest and taxation ("EBIT") and earnings before interest, taxation, depreciation and amortisation ("EBITDA").

14. I shall refer to the second to seventh claimants together as "the Kazakh claimants", and individually as "KK Jsc", "PEAK", "Peak Akzhal", "Peak Aksenger", "Astana Jsc" and "Paragon Development" respectively. The main operating company is KK Jsc.

15. KK Plc was incorporated in the Isle of Man on 5 March 2007. In July 2007 there was an Initial Public Offering ("IPO") of shares in KK Plc on the London Stock

Exchange. The IPO raised around $273m of capital for investment in the claimants' businesses.

16. KK Plc was, from February 2003 until the IPO, beneficially owned in equal shares by Mr Zhunus and the second defendant, Mr Arip. Both were directors of the company. Mr Zhunus was chairman of the board. Mr Arip was "General Director" – in effect the chief executive officer. Each remained in these positions until April 2008.

17. The third defendant ("Ms Dikhanbayeva") formerly held senior posts at KK Jsc: finance director from its incorporation in 2001, a board director from around 29 April 2008, and chairman of the board from around 5 September 2008. She ceased to hold all these posts in mid-July 2009.

18. In 2009 Mr Tomas Werner acquired substantial shareholdings in the group and became chairman of KK Plc. He later became chairman also of KK Jsc.

19. When this action was begun in August 2013, two frauds were alleged which have been referred to as the PEAK fraud and the Astana fraud. I shall refer to these alleged frauds, as described below, as "the 2013 fraud allegations".

C1.2 The 2013 fraud allegations: the PEAK fraud

20. As to the PEAK fraud, the claimants say that Mr Zhunus, Mr Arip and Ms Dikhanbayeva caused companies/partnerships in the KK Group to enter into, and KK Jsc to act as guarantor for, bank loans and credit facilities ostensibly for use in development and construction projects in Kazakhstan. The PEAK fraud is said to have involved payments to a Kazakh construction contractor Arka-Stroy LLP ("Arka-Stroy") for purportedly carrying out the development of a logistics centre and industrial park in the outskirts of Almaty, Kazakhstan. The payments were made by KK Jsc, PEAK, and Peak Akzhal using loan and credit facilities with Alliance Bank Jsc ("Alliance"). The claimants say that the construction work was not carried out, or was deliberately over-valued, and that Arka-Stroy was controlled and operated by Mr Zhunus, Mr Arip and Ms Dikhanbayeva. The sums allegedly misappropriated totalled $102.2m.

C1.3 The 2013 fraud allegations: the Astana fraud

21. As to the Astana fraud, the claimants say that it had two limbs. The first limb ("Astana 1") concerns what I shall call "the Astana acquisition". It is said that Mr Zhunus, Mr Arip and Ms Dikhanbayeva caused Peak Aksenger to acquire the Astana-Contract Group (consisting of Astana Jsc and its subsidiary, Paragon Development) in or around April 2008, at a grossly inflated price. Peak Aksenger paid $42m for the Astana-Contract Group, whereas the claimants say that the true value of the net assets on the date of acquisition was a mere $2.7m.

22. The second limb ("Astana 2") involves assertions as to what happened after the Astana acquisition. It is said that Mr Zhunus, Mr Arip and Ms Dikhanbayeva installed relatives and associates as the directors of Astana Jsc, including Mr Yuri Bogday, the brother-in-law of Mr Zhunus. Astana Jsc entered into contracts with counterparties ("the Astana counterparties"), including GS Construction LLP ("GS"), for the construction of an industrial and logistics plant in Astana. Payments to the

counterparties were financed by borrowings on the part of Astana Jsc from the Development Bank of Kazakhstan ("DBK"). The claimants say that works and goods relied on as justifying these payments were neither carried out nor provided, and that sums paid to the Astana counterparties were channelled back to Mr Zhunus, Mr Arip and Ms Dikhanbayeva or their associates or associated companies. The sums allegedly misappropriated totalled $14.2m.

C1.4 Freezing order and other orders on 2 August 2013

23. When the action was commenced in August 2013, Mr Zhunus was resident in England and was personally served here. Mr Arip and Ms Dikhanbayeva were served out of the jurisdiction. Permission to do this was granted by His Honour Judge Mackie QC at a without notice hearing on 2 August 2013 on the basis that they were necessary or proper parties to the claim against Mr Zhunus.

24. The need for a without notice hearing arose because the claimants applied for a worldwide freezing injunction against Mr Zhunus and Mr Arip. The injunction sought, which was in respect of all the 2013 fraud allegations, was granted by His Honour Judge Mackie QC. This was at a stage when there had been no evidence or argument from the defendants. The judge concluded that on the material furnished by the claimants there was a good arguable case against both Mr Zhunus and Mr Arip in relation to all the 2013 fraud allegations, and there was a risk of dissipation of assets such as to require the protection of a freezing order.

C1.5 Particulars of claim and responses to the freezing order

25. The stance taken by Mr Zhunus in relation to the freezing order differed from the stance taken by Mr Arip. Whereas Mr Arip contested the grant of the freezing order, Mr Zhunus did not do so. Instead by a consent order dated 25 October 2013 Mr Zhunus voluntarily provided undertakings, on the basis that he could apply to vary or be released from them if there were a material change in circumstances or other good cause. In taking this stance Mr Zhunus did not seek to contest that there was a good arguable case against him.

26. By this time the claimants' case had been set out in particulars of claim served on the defendants. The particulars said that the three defendants "put in place and concealed" the PEAK fraud, and that in relation to Astana 1 and Astana 2 the defendants "repeated the modus operandi" of the PEAK fraud. The account given of the 2013 fraud allegations was an account of matters which occurred entirely in Kazakhstan. There was no assertion that any relevant event took place in the United Kingdom or the Isle of Man. It was said that under Manx law the defendants were liable to KK Plc for an account, for equitable compensation, and for damages. As regards the Kazakh claimants it was said that under Kazakh law the defendants were liable to them for damages. No proprietary claim was advanced.

27. Mr Arip's objections to the injunction were the subject of a hearing in which Mr Zhunus was not involved. The hearing again took place before His Honour Judge Mackie QC.

C1.6 HHJ Mackie QC's assessment of Mr Arip's objections

28. In his judgment dated 20 November 2013, [2013] EWHC 3618 (Comm), the judge rejected all save two of Mr Arip's objections to the freezing order. The first objection which he accepted concerned KK Plc's claim. The entirety of that claim was for "reflective loss" - loss suffered by other entities in the KK Group but nevertheless claimed by KK Plc. The judge held that the claim for reflective loss was so weak as not to meet the standard of a good arguable case.

29. The second objection accepted by the judge concerned Astana 1. Allegations by the claimants of fraud on the part of Mr Arip in relation to Astana 1 were held by the judge not to meet the standard of a good arguable case. For this reason he reduced the amount of the injunction from £100m to £72 million. It is noteworthy that as regards the PEAK fraud and Astana 2 Mr Arip conceded that, for the purposes of continuation of the injunction, there was a good arguable case that he had been guilty of fraud.

30. The judge, however, was not persuaded by other objections advanced by Mr Arip. They included a contention that under Kazakh law, as made applicable by the Foreign Limitation Periods Act 1984, the claims were barred because the Kazakh claimants ought, at least three years prior to commencing proceedings, to have been aware that he had violated their rights.

C1.7 The Court of Appeal's assessment of Mr Arip's objections

31. Mr Arip appealed and the claimants cross-appealed in relation to costs (which the judge had reserved) and reflective loss. Longmore LJ (in the judgment cited at the start of this section) rejected both aspects of the cross-appeal, holding in relation to reflective loss that in law KK Plc had no such claim. The remaining members of the Court of Appeal, Jackson and Elias LJJ, agreed with what was said by Longmore LJ in this regard.

32. All members of the Court of Appeal also agreed that the appeal failed. On the limitation point, however, their reasoning was not identical. Longmore LJ in paragraph 25 noted that the judge had regarded the test of "good arguable case" as requiring the claimants to show that they had "a much better argument" than the defendants. Longmore LJ said that this set the hurdle "a little too high". "Much the better of the argument" had recently emerged as a test on applications for service out of the jurisdiction. Longmore LJ saw no reason why that test should apply to freezing injunctions. On this basis Longmore LJ at paragraph 33 described his assessment (set out in detail at paragraphs 19 to 24) as being that it was "well arguable" that the claims were not time-barred.

33. Jackson LJ at paragraph 52 agreed with Longmore LJ's reasons on both the appeal and cross appeal. However in paragraph 53 Jackson LJ added:

> … I regard the arguments raised by [Mr Arip's counsel] as formidable. There is a very real possibility that the defendants' limitation defence will prevail at trial on the basis of Kazakh law (the effect of which has been agreed by the parties). It is only by a narrow margin that [the claimants'] case is strong enough to support their entitlement to a freezing injunction.

34. More generally, Jackson LJ said at paragraphs 54 to 56:

> 54 This whole litigation leaves me uneasy. The essence of the limitation defence is that the Defendants' fraud was so obvious that KK ought to have discovered it and issued proceedings before 2013. If the Defendants ultimately succeed on that defence, they might then have achieved the 'perfect' fraud. The money which has been stolen (over $100 million) will become irrecoverable as a consequence of the judgment of the English court.
>
> 55 This is a case in which there are many unanswered questions. KK allege that the Defendants are fraudsters and thieves. The Second Defendant alleges that Mr Werner is lying. There is a suggestion that some senior staff within KK have been colluding with the Defendants: see Mr Werner's first affidavit, paragraphs 62 to 69. The Court of Appeal at the present interlocutory stage cannot, and is not required to, resolve any of these questions.
>
> 56 The principal losers are the creditors of and investors in KK. They may think it appropriate to take a close interest in this litigation.

35. Elias LJ at paragraph 57 agreed that both the appeal and cross appeal should be dismissed. He said that he agreed entirely with Longmore LJ's reasoning on the cross appeal. On the appeal, however, he set out some observations of his own at paragraphs 58 to 72, and added at paragraph 73 that he associated himself with the remarks of Jackson LJ.

36. At paragraph 58 Elias LJ outlined what he described as "cogent arguments" that claims by the Kazakh claimants were time-barred. At paragraphs 59 to 62, however, he identified three factors which powerfully supported the contrary argument that the Court of Appeal should not interfere with the judge's conclusion on this point. The second of these concerned the need for cogent evidence before fraud can be asserted. The third concerned the principle that the Court of Appeal ought to respect the instincts of experienced commercial judges on the question whether there is a good arguable case and should only interfere if it is plain that the judge was wrong. As to the first, he commented at paragraphs 59 and 60:

> 59 … it is inherently unattractive for the Appellant to submit that the fraud should have been manifestly obvious and yet at the same time to assert that he has a complete defence to the allegation (albeit that he has not condescended to reveal it even in bare outline). Indeed, there is a logical difficulty in submitting that a claimant ought to have been aware of wrongdoing even though there was none. The contention has to be that in so far as [the claimants] had grounds for alleging

> fraud (albeit mistakenly), they were present, and manifestly so, by August 2010 at the latest.
>
> 60 I recognise that Mr Arip is not obliged to reveal his defence at this stage even where – perhaps particularly where – serious fraud has been alleged, and his failure to do so cannot be held against him: see *Behbehani v Salem* [1989] 1 WLR 723 ,735 per Woolf LJ, as he then was. But the court is in my view permitted to have regard to the fact that the Appellant is asserting that what should have been an obvious inference from the facts would in fact have been an entirely mistaken one. It inevitably casts doubt on how compelling that inference must have been.

37. Notwithstanding these factors, however, Elias LJ said at paragraph 65 in relation to the limitation defence in the present case:

> 65 I confess that even allowing for the significant hurdles facing Mr Arip in relation to the limitation defence, I have considerable reservations as to whether the judge could properly find that [the claimants have] "much the better of the argument".

38. At paragraph 66 Elias LJ made reference to the Court of Appeal decision in *Lakatamia Shipping Company Limited v Nobu SU Limited* [2012] EWCA Civ 1195. In that case Longmore LJ at paragraph 27, in a judgment with which the Master of the Rolls and Sullivan LJ agreed, approved an observation by Mustill J sitting at first instance in a freezing order case, *Ninemia Maritime Corporation v Trave Shisfarhtsgesellschaft mbH Und Co KG (The Neidersachsen)* [1983] 2 Lloyds Rep 600:

> In these circumstances I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success.

39. In paragraph 68 Elias LJ said that, assuming that the appropriate test was that approved in *Lakatamia*:

> … I have no doubt that [the claimants have] an argument on limitation which is more than barely capable of serious argument, even if it cannot be said that it has much the better of the argument.

40. The decision of the Court of Appeal was handed down on 2 April 2014. On 16 April 2014 an additional paragraph 74 was added to the judgment. This recorded that Mr Zhunus had (subsequent to judgment) asked the court to make clear that he had already served a substantive defence to the claim of fraud made against him well before the appeal was heard or determined.

C1.8 Mr Zhunus's defence and Tickner 3

41. Mr Zhunus's defence was in fact served on 27 January 2014. A third witness statement of Mr Tickner ("Tickner 3"), made on behalf of Mr Zhunus on 24 April 2014, summarised certain of the assertions made in the defence:

> (1) Between 2003 and 2008, he [Mr Zhunus] was the Chairman of the Board of Directors of KK Jsc, and was at no time a member of its Executive Body. As such (and in accordance with the company's charter and the relevant laws of Kazakhstan) he had limited responsibilities and duties and no day to day executive management role;
>
> (2) At all material times he acted honestly and in good faith, and (insofar as he acted on behalf of entities within the KK Group) in a manner that he honestly believed to be in the best interests of the KK Group, as well as in compliance with all other duties incumbent upon him. Mr Zhunus has never, whether on his own or with others, sought to defraud the KK Group, to misappropriate its property or funds, to make secret profits or otherwise illicitly to benefit from his relationship with the KK Group. During his involvement with the KK Group he was not aware of, and did not assist, any attempt by others to do so;
>
> (3) Except for his properly authorised remuneration by the KK Group, comprising a salary and occasional bonuses, he has not from 2004 to date taken or received money from companies within the KK Group or from other companies alleged to have received illicit funds from Arka-Stroy or GS Construction, or otherwise knowingly benefited from the frauds alleged;
>
> (4) He does not know and does not admit whether, unknown to him, any other party sought to or did defraud or misappropriate funds from the KK Group, but denies that the matters pleaded in the Particulars of Claim are sufficient of themselves to give rise to an inference or otherwise establish that any such fraud or misappropriation took place. In particular, neither the retrospective valuation of construction work in the absence of commercial context nor the incidence of intra-group transfers of money is sufficient to establish fraud;
>
> (5) In any event the claimants' claims are defective and unsupportable as a matter of law. Among other things, all of the Kazakh law claims advanced by the [Kazakh claimants] are time barred under the relevant (i.e. Kazakh) law of limitation, being 3 years from the date on which the claimants were or should have been aware of the alleged violation of a right.

C2. Events between 17 April and 10 July 2014 inclusive

C2.1 Tickner 3, the MGAP Report, Zaiwalla 2 and Signum Law 1

42. Tickner 3 was made in support of the present application. In addition to the passage cited in section C1.8 above, it complained of alleged inadequacies in the claimants' reply served on 22 April 2014 and in further information supplied on that day.

43. At paragraphs 26 and 27 Mr Tickner produced a schedule estimating costs to date and up to and including disclosure and inspection of documents in an amount of just over £1,485,000.

44. At paragraphs 29 to 42 Mr Tickner gave an account of correspondence relating to security for costs. For present purposes it suffices to note that Mr Tickner referred to correspondence in which the claimants offered a limited amount of security without prejudice to contentions that none was required, and that this was not acceptable to Mr Zhunus. In later evidence Mr Tickner explained that he considered that the relevant correspondence in this regard had been written on an "open", rather than a "without prejudice", basis.

45. The remainder of Tickner 3 comprised evidence concerning the position in relation to the inability to pay pre-conditions, the position in relation to the residence precondition, and the position in relation to the justice test. Among other things, Tickner 3 exhibited a short report from MGAP (UK) LLP, a law firm specialising in Russian and Kazakh law, dated 11 April 2014 ("the MGAP Report").

46. A second witness statement of Mr Zaiwalla dated 23 June 2014 ("Zaiwalla 2") responded to points made in Tickner 3. Additional points made in Zaiwalla 2 included assertions that the court would consider the effect that any order may have on shareholders and creditors, and should exercise caution in requiring liquid assets of the claimants to be tied up in security arrangements, that the outstanding debts of the KK Group were intrinsically intertwined with the frauds pleaded against Mr Zhunus and his co-defendants, and that it would be prejudicial to the claimants' attempts to restructure debt were they required to tie up significant liquid resources for the purpose of security. In so far as Mr Zhunus founded his application for security upon the residence pre-condition, Zaiwalla 2 added that Mr Zhunus had now chosen to relocate to Kazakhstan, and could not be heard to complain about obstacles he might face in relying upon his own judicial system to enforce whatever rights he might in future have under a costs order. Moreover Mr Zaiwalla relied upon a memorandum ("Signum Law 1") prepared by a Kazakh law firm, Signum Law, and signed by Mr Talgat Sariev of that firm, in order to counter assertions by Mr Zhunus that enforcement in Kazakhstan would be impossible.

C2.2 Tickner 4 and Linkage & Mind 1

47. A fourth witness statement of Mr Tickner was made on 7 July 2014 ("Tickner 4"). It claimed that numerous factual assertions in Zaiwalla 2 were wrong, misleading or simply irrelevant. In addition it complained of various aspects of the claimants' conduct after Mr Zhunus had given undertakings.

48. In response to Signum Law 1, Tickner 4 exhibited a report ("Linkage & Mind 1") by Mr Nurlan Makenov, a lawyer and partner of Linkage & Mind LLP, a Kazakh law firm.

C2.3 Zaiwalla 3, Crestohl 5, and Signum Law 2

49. On the following day, 8 July 2014, Mr Zaiwalla made a third witness statement ("Zaiwalla 3"). It exhibited a letter from Alliance dated 4 July 2014. The letter stated:

> … following several weeks of constructive discussions, Alliance and KK have discussed mutually acceptable terms of settling the defaulted loans made to KK Group by Alliance, which are to be embodied in the term sheet which the parties are intending to sign on Wednesday, 9 July 2014 after receiving relevant approvals of the parties' boards.
>
> Parties expect that upon completion of the arrangements set out in the relevant documentation, KK will have fully and finally settled defaulted loans with Alliance, and enforcement actions being taken by Alliance against KK Group companies will be cancelled.

50. Zaiwalla 3 also complained of certain aspects of the conduct of Mr Zhunus in the present proceedings.

51. On 10 July 2014 Mr Crestohl made a fifth witness statement ("Crestohl 5"). It exhibited an email ("Signum Law 2") setting out comments by Mr Sariev on Linkage & Mind 1.

C3. The hearing on 11 July 2014

52. At the outset of the hearing on 11 July 2014 I noted that Jackson and Elias LJJ considered that "by a narrow margin" the claimants' case against Mr Arip was strong enough to be described as "more than barely capable of serious argument". I said that if either party wished me to reach a different conclusion as regards the claimants' case against Mr Zhunus I proposed to allow no more than half an hour of oral submissions to that party for that purpose. In the event, neither side asked me to reach a different conclusion.

53. Also at the outset there was a discussion of timetable. It emerged that there had been a misunderstanding. The matter had been listed on the basis that the parties' time estimate of a day included time needed for the giving of judgment. I was told that the court had recently been advised that the entire day would be needed for argument. Mr Lowenstein proposed to complete his submissions by 1pm. This would leave sufficient time for Mr Brindle's submissions in answer, and reply submissions by Mr Lowenstein, during the afternoon.

54. Mr Lowenstein summarised the claimants' case in relation to the inability to pay pre-condition and the inability to pay outcome as involving three submissions. Submission one was that the claimants easily satisfied the inability to pay pre-condition on the evidence as it stood prior to 8 July, and that the claimants' evidence

set out in Zaiwalla 4 on 8 July was "very flimsy" and easily surmounted. Submission two was that a complaint that an order for security would stifle the claim was not, and could not be, alleged. Submission three addressed an argument by the claimants that Mr Zhunus's conduct contributed to or caused the claimants' impecuniosity. Submission three was that this was not something to which the court should have any regard, either as a matter of law, or as a matter of fact.

55. A considerable amount of time was then taken up with submission one. Eventually Mr Lowenstein reached a stage where he sought to deal with points made on this aspect in the claimants' skeleton argument. A first point relied on unaudited financial statements as at 30 September 2013. Mr Lowenstein's answer was that those accounts were "very historic", and that a positive balance sheet alone was not enough to determine whether a company could pay a costs liability. Mr Lowenstein then added that in the last ten minutes he had been told that there was now more up to date accounting information for the claimants. It seemed, he said, that the position had worsened significantly in the period to 30 June 2014. I suggested that the new information should be dealt with in the afternoon, following discussion between counsel over the short adjournment. Mr Lowenstein then made some comments on the gross total asset figure asserted in the claimants' skeleton argument.

56. Mr Lowenstein then turned to what was said in the claimants' skeleton argument about what it acknowledged were "significant liabilities" of the KK Group. On that, the new point made in Zaiwalla 4 on 8 July was that claims in Zaiwalla 3 about the prospects of an agreement with Alliance had been borne out by the Alliance letter dated 4 July 2014. In this regard, Mr Lowenstein made strenuous submissions that the letter of 4 July provided no basis for any such conclusion. Moreover, there was no evidence that the debt position in relation to other creditors had been resolved. Mr Zaiwalla's assertion that "any cloud… has cleared" was a generalisation which was inappropriate on this sort of application.

57. The last aspect of the claimants' skeleton argument in this regard was an assertion that the KK Group's core business was profitable. Mr Lowenstein said that Mr Zhunus accepted this. The concern, however, was that the group was burdened with debt and other liabilities.

58. Turning to submission two, Mr Lowenstein said he did not know whether it was going to be said that an order for security would stifle the claim. Mr Brindle responded by accepting expressly that Mr Zhunus's application for security would not stifle the claim.

59. Mr Lowenstein then turned to submission three. He outlined what he proposed to say in this regard. At this stage I had considerable concern as to whether Mr Lowenstein would meet his timetable. I suggested that on the factual questions as to what had caused the claimants' inpecuniosity, the best course would be to deal in reply with such factual points as were taken on behalf of the claimants. Mr Lowenstein adopted that course, but even so, after abridging the short adjournment his submissions on the residence pre-condition went well into the afternoon. By the time that Mr Lowenstein had completed his submissions on the justice test and on quantum, and had handed in the recent information on the KK Group financial position, it seemed unlikely that argument would be complete that day. Mr Lowenstein urged that Mr Brindle should be limited to the remainder of the afternoon, with reply submissions on behalf of Mr

Zhunus being lodged in writing. Alternatively, in order to meet a concern that there would be more rounds of evidence, Mr Lowenstein suggested that the claimants should be tied to the current evidence.

60. I enquired whether anything was going to happen which made it important to have a decision about security for costs before the summer vacation. Mr Lowenstein replied that there was no crucial date in that regard. My conclusion was that, in part because of the recent financial information, the interests of justice required that a further hearing date be fixed in the new term. By that time there would have been an opportunity to analyse what appeared to be an important transaction, and there would be an opportunity to adopt a fair and efficient timetable for further skeleton arguments and such further evidence as might be permitted.

61. There was then a discussion as to the matters on which further evidence would be permitted. The first area for such evidence concerned Kazakh law as to the ability in Kazakhstan to seek an order of the Kazakh court which would require payment of sums which had been ordered to be paid by this court by way of costs. Both sides agreed that there should be only one piece of additional evidence, namely evidence on behalf of Mr Zhunus in reply to Signum Law 2.

62. The other area for additional evidence concerned the financial position of the claimants as a whole. On that, I gave directions under which the claimants' evidence was to be provided fifteen working days before the resumed hearing, and evidence in answer was to be provided by Mr Zhunus five working days before the resumed hearing. If, and only if, there were any true reply evidence, that was to be provided two days before the hearing.

63. During the course of submissions about additional evidence a further point arose. The claimants had indicated that KK Plc would give an undertaking to pay costs awarded against the Kazakh claimants. Mr Zhunus contended that this would give him no practical advantage, as KK Plc's assets were all in Kazakhstan. I had enquired whether remedies were available in the Isle of Man which would enable KK Plc's creditors to take over and call in the assets of KK Plc. I was initially sympathetic to a suggestion by Mr Brindle that the claimants should be allowed to adduce further evidence on this point. However it became apparent that any such assertion would require evidence of the legal position in relation to not merely the Isle of Man, but also the Netherlands and Cyprus, where intermediate holding companies were based. It seemed to me that as regards the main issues a clear and pragmatic approach had been worked out. The evidence likely to be needed on the additional aspect as to ability to call in assets would add a considerable measure of complexity to what was already a complex set of tasks to be carried out prior to the resumed hearing. In those circumstances I refused to allow additional evidence on this further aspect.

64. Thus the position was that at the close of argument on 11 July 2014 the matter was adjourned after hearing initial submissions from Mr Brindle. In those submissions he distinguished between the "general merits" of the claim against Mr Zhunus without considering defences such as limitation, and the separate question of the strength of the limitation defence. On that separate question Mr Brindle did not suggest that I should take any different view from that taken by the Court of Appeal. On what Mr Brindle called the "general merits", but which I prefer to call "the Zhunus participation assertions", Mr Brindle developed submissions seeking to show that they

were highly likely to be established. Mr Brindle then made submissions on the law concerning relevance to an application for security for costs of a defendant having caused the claimants' impecuniosity, and on other matters relevant to discretionary aspects of the inability to pay outcome. He also made submissions on the legal position in relation to the residence pre-condition.

C4. Events between 12 July and 13 November 2014 inclusive

C4.1 Tickner 6 and Linkage & Mind 2

65. As noted above, my order dated 11 July 2014 permitted Mr Zhunus to serve further evidence on Kazakh law. In conformity with this order, Mr Tickner made a sixth witness statement on 29 July 2014 ("Tickner 6"). At exhibit JT7 Mr Tickner produced a letter from Linkage & Mind dated 15 July 2014 ("Linkage & Mind 2").

C4.2 Zaiwalla 7 and a request concerning additional matters

66. My order dated 11 July 2014 also made provision for the claimants to file further evidence in relation to matters arising after 9 July 2014 which affected the claimants' financial position. Pursuant to that provision Mr Zaiwalla made a seventh witness statement on 23 October 2014 ("Zaiwalla 7"). In paragraph 5 of Zaiwalla 7 Mr Zaiwalla referred to that provision. He added that in Zaiwalla 7 he also sought the court's permission:

> to put before it some other matters relating to the period before 9 July 2014 which have come to light since the last hearing.

67. The matters for which Mr Zaiwalla sought permission were set out in paragraphs 6 to 18 of Zaiwalla 7. Paragraph 6 asserted that permission to take this course was sought because it was "trite law that, in the exercise of the court's discretion, the court must have before it all the relevant facts".

68. Paragraphs 7 to 12 asserted that the request made by Mr Lowenstein on 11 July 2014 to restrict the subject matter of further evidence was:

> … most likely to have been motivated by an attempt in whole or in part to prevent relevant evidence, which is prejudicial to the First Defendant's position, from being brought to the court's attention.

69. In paragraphs 9 to 12 of Zaiwalla 7 Mr Zaiwalla argued that Mr Zhunus had been aware of "an entirely false and vexatious criminal complaint against Mr Werner". This was said by Mr Zaiwalla to have been an attempt both to intimidate and malign Mr Werner, and an attempt to pressurise the claimants with a view to frustrating the claim. Mr Zaiwalla added that Peters & Peters were "most likely" to have also been aware of this.

70. At paragraph 13 of Zaiwalla 7 Mr Zaiwalla said that the criminal complaint against Mr Werner was a contempt of court, "being an obvious breach" of an undertaking given by Mr Zhunus on 18 October 2013 not to intimidate, harass or malign any witnesses on behalf of the claimants.

71. Paragraphs 14 to 18 of Zaiwalla 7 accused Mr Zhunus of "a conscious and intentional attempt to mislead the court", and added that Mr Tickner's evidence was:

> … misleading by omission, because it suggests (unjustifiably) wrongdoing on the part of the Claimants for having recourse to the criminal authorities while concealing from the Court that the First Defendant had himself done the same thing.

72. Mr Zaiwalla noted in paragraph 11 of Zaiwalla 7 that he had sought from Peters & Peters, but had not received, details of the complaint and the allegations upon which Mr Zhunus relied. Even though he had not received those details Mr Zaiwalla, apparently on the basis of what Mr Werner had been led to understand, felt able to add in paragraph 18:

> In my respectful submission, Peters & Peters have refused to allow [the details in question] to be placed before the Court because the allegations are, on their face, palpably vexatious and an overt attempt to intimidate and malign Mr Werner in breach of the undertaking that the first defendant has given to the Court.

73. In paragraphs 19 to 66 of Zaiwalla 7 Mr Zaiwalla turned to matters arising after 9 July 2014. Paragraphs 19 to 25 concerned the judgment of Mr Justice Males cited in section C1.1 above. Mr Zaiwalla's evidence in these paragraphs did not concern matters affecting the claimants' financial position, and thus was not permitted by my order dated 11 July 2014. However I was told by Mr Lowenstein at the hearing on 14 November 2014 that, as the evidence had been prompted by what had been said in a court judgment since the last hearing, there was no objection to these paragraphs. At the present stage I need say no more about them.

74. As regards matters after 9 July 2014 affecting the claimants' financial position, what had happened in relation to Alliance's claim was dealt with Mr Zaiwalla at paragraphs 26 to 30 of Zaiwalla 7. Unaudited financial results of KK Plc for the first half of 2014 were dealt with at paragraphs 31 to 42. An update on the preparation of the 2013 audited financial statements appeared at paragraphs 43 to 46.

75. Certain aspects of the settlement with Alliance and its impact were dealt with by Mr Zaiwalla at paragraphs 47 to 60 of Zaiwalla 7. Paragraphs 61 and 62 dealt with a share buy back announced on 1 October 2014 by KK Plc. Paragraphs 63 and 64 dealt with KK Plc's willingness to stand behind the claimants collectively to make good any adverse order as to costs.

76. Paragraphs 65 and 66 dealt with quantum of any order for security. In paragraphs 67 and 68 various concluding remarks were made.

C4.3 The claimants' supplementary outline submissions

77. Also on 23 October 2014 the claimants served supplementary outline submissions. The submissions were settled by Mr Miller and Mr Cutress, but not Mr Brindle. At the present stage I need only note that while they dealt with many of the matters set

out in Zaiwalla 7, they made no reference at all to paragraphs 6 to 18 of that witness statement.

C4.4 Tickner 7 and the joint note on timetable

78. On 7 November 2014 Mr Tickner made a seventh witness statement ("Tickner 7"). At the outset of this witness statement Mr Tickner complained of material in Zaiwalla 7 including paragraphs 7 to 18. I deal with this complaint in section C5.1 below.

79. Paragraphs 8 to 13 of Tickner 7 dealt with matters arising since 9 July 2014 that affected the claimants' financial position.

80. Paragraphs 16 to 19 of Tickner 7 dealt with Mr Zaiwalla's citations from the judgment of Males J. Mr Tickner noted that Males J had agreed with Mr Zhunus's submissions that, there being no proprietary claim in respect of his assets, the provenance of those assets was irrelevant to the application. Mr Tickner then explained that consistently with this stance, the material put before Males J did not include evidence as to provenance of assets. Males J was thus not informed of the letter of 22 May 2014 sent by Peters & Peters to Zaiwalla & Co explaining the provenance of "the large part of" Mr Zhunus's assets. Mr Tickner added:

> It may be that Males J assumed that the First Defendant's refusal to be drawn into explaining the provenance of his assets in the context of the application under consideration equated to a general refusal to do so – but that is not the case.

81. On 7 November 2014 leading counsel for each side filed a joint note on the timetable for the resumed hearing scheduled for 14 November 2014. Mr Zhunus estimated that the argument that day would take more than half a day but a little less than a day. The claimants, by contrast, considered that both parties should be able to complete their submissions over the course of two and a half hours, permitting judgment to be delivered in the afternoon. If the argument required longer than the claimants suggested, then both Mr Zhunus and the claimants strongly preferred that the court should hear argument on 14 November and reserve judgment.

C4.5 McGregor 4, Crestohl 6, and Tickner 8

82. Further evidence was then filed by the claimants. This included a fourth witness statement of Mr Hugh McGregor made on 11 November 2014 ("McGregor 4"). It was confined to evidence as to the claimants' financial position, and responded to particular assertions that had been advanced in the evidence lodged on behalf of Mr Zhunus in that regard on 7 November 2014.

83. The further evidence lodged on behalf of the claimants also included a sixth witness statement of Mr Crestohl made on 11 November 2014 ("Crestohl 6"). Paragraphs 5 to 18 dealt with certain matters said to arise in relation to the observations of Mr Justice Males in the judgment mentioned earlier. Paragraphs 19 to 24, 25 to 28, and 29 to 30 were respectively headed "first defendant's criminal complaint", "the Criminal complaints against Arka-Stroy", and "Conclusion: Discretion". These paragraphs sought to add to what had been said in Zaiwalla 7 about the criminal complaint

against Mr Werner, and to reply to responsive material in the evidence lodged in answer.

84. Paragraphs 31 to 37 of Crestohl 6 dealt with evidence concerning the claimants' financial affairs. Paragraph 38 of Crestohl 6 said that KK Plc had proposed to Mr Zhunus the wording of undertakings it was prepared to give in respect of the costs of other claimants. Mr Crestohl said that it was hoped that this would be agreed prior to the hearing on 14 November 2014.

85. On 13 November 2014 Mr Tickner made an eighth witness statement ("Tickner 8"). It dealt with assertions that had been made by Mr Crestohl in paragraphs 5 to 18 of Crestohl 6.

C5. The hearing on 14 November 2014

C5.1 Objectionable aspects of Zaiwalla 7

86. Mr Lowenstein opened the submissions on 14 November 2014 with observations on the new evidence. Those observations included objections to material in Zaiwalla 7 which he described as irrelevant, inadmissible and, in part, highly inflammatory material which should never have been filed. In response to questions from me, Mr Brindle accepted that Zaiwalla 7 had gone beyond the types of evidence permitted by the order of 11 July 2014, and that before Zaiwalla 7 was filed there should have been an application for permission to file evidence going beyond what was permitted under the order of 11 July 2014.

87. As noted earlier, there was no objection to paragraphs 19 to 25 of Zaiwalla 7. Turning to paragraphs 6 to 18, Mr Brindle said that he did not feel able to support those paragraphs. In those circumstances I made an order striking them out. I also ordered that the claimants should pay Mr Zhunus's costs of and occasioned by the inclusion of that evidence, to be assessed on the indemnity basis. This order reflected my concern at what seemed to me to be wholly unwarranted conduct on the part of the claimants in including this material in Zaiwalla 7.

88. I gave a short judgment in that regard recording the concessions made by Mr Brindle. Because there was considerable pressure of time at the hearing on 14 November 2014, I did not in my judgment that day expand upon my concerns as to what had happened. My concerns in that regard are serious, and it is important that they are recorded. Accordingly I do so here, beginning with three aspects of the complaint made by Mr Tickner at the outset of Tickner 7.

89. The first aspect was set out at the start of paragraph 5 of Tickner 7:

> At least six pages of Zaiwalla 7 (paragraphs 7 to 25) are devoted to material which is highly inflammatory and of no relevance to the issues at stake on this application and for which the Claimants do not have permission. This is not the first time Mr Zaiwalla has spent large tracts of evidence advancing similar material, and in the past it has often simply been ignored by those presenting the case on the Claimants' behalf.

90. As explained above, I did not need at the hearing on 14 November 2014 to take up time by examining whether in the past Mr Zaiwalla had produced large tracts of evidence of a similar kind. Nor did I need to investigate whether in the past such material had often simply been ignored by those presenting the case on the claimants' behalf. What I do observe is that on this occasion there was in paragraphs 7 to 18 a substantial tract of inflammatory material, and that it was ignored in the claimants' supplementary outline submissions of 23 October 2014. This was unsatisfactory. The court needed to know whether there was indeed an application for permission to file and refer to this material, and if so on what grounds.

91. The second aspect was set out in the remainder of paragraph 5 of Tickner 7:

> Much of it is factually incorrect or presented in a grossly unfair manner, for example using inflammatory headings, which is irritating and wasteful of costs. Some of what is said by Mr Zaiwalla, especially insofar as it amounts to allegations of very serious misconduct against this firm and/or Mr Lowenstein QC and Mr Head of counsel, goes far beyond what can be tolerated, even in hard fought litigation of this nature.

92. The third aspect of the complaint was set out in paragraph 6 of Tickner 7. In that paragraph Mr Tickner asserted that Mr Zaiwalla's evidence was designed to distract from and obscure the real issues engaged by Mr Zhunus's application. As to that, I have not found it necessary to investigate Mr Zaiwalla's intentions. I stress that in this judgment I make no finding as to what those intentions may have been.

93. At a general level, I stress the suggested universal guiding principles identified in section A1 above. Observance of those principles will enable the parties to identify and focus on the real issues which the court will need to resolve in order to decide the application.

94. I return to the second aspect of Mr Tickner's complaint. My order of 11 July 2014 had provided for further evidence on two aspects only. The financial evidence permitted by my order would inevitably be complex. The matters to be argued at the resumed hearing were not straight forward. On any objective view, the matters which Mr Zaiwalla sought to introduce in evidence in paragraphs 7 to 18 were insufficient to establish the criticisms which he sought to make of Mr Zhunus, and still less were they sufficient to establish the very serious allegations made by Mr Zaiwalla against Mr Zhunus's legal advisers. It was inappropriate for Mr Zaiwalla to seek to introduce evidence which could not possibly be of assistance at the resumed hearing. It was even more inappropriate to do this in a manner which accused Mr Zhunus's legal advisers of professional misconduct.

95. After the hearing of 14 November, Mr Zaiwalla wrote a letter to the court dated 27 November 2014. He said that he genuinely believed that as an order of security for costs is a discretionary remedy, it was "trite law" that the court must have before it all the facts relevant for the purpose of exercising its discretion. If he was wrong in his belief that the court would find the material in question relevant and helpful, then he unreservedly apologised to the court.

96. This was a conditional apology. Mr Zaiwalla did not recognise that the belief referred to in his letter was wrong both in law and in fact. Nor did he recognize that there was a need to stand back and consider any proposed imputation on another person, whoever that person may be, and an even greater need to stand back and consider proposed imputations of gross misconduct on the part of professional advisers.

97. Far from it being "trite law" that the court should have everything which Mr Zaiwalla thought might be relevant to its discretion, the position was that if my order of 11 July were to be varied to permit additional evidence then this needed to be the subject of a separate application. Moreover good cause would need to be shown before that order could be varied.

98. For all these reasons I do not regard the letter of 27 November 2014 as providing any adequate excuse for a course of action which, whether or not it was Mr Zaiwalla's intention to do so, inevitably and unnecessarily required a considerable amount of additional work for Mr Zhunus and his legal advisers.

99. As to the inflammatory matters, Mr Tickner noted at paragraphs 14 and 15 of Tickner 7 that they were dealt with in a separate witness statement made by Mr Zhunus himself. In this regard there was a separate witness statement by Mr Zhunus dated 7 November 2014 responding to those matters. It is not necessary for me to make any observations about that response.

100. The same concession was made in relation to paragraphs 19 to 30 of Crestohl 6 as was made in relation to paragraphs 6 to 18 of Zaiwalla 7. Accordingly my order dated 14 November 2014 struck out paragraphs 19 to 30 of Crestohl 6.

C5.2 Other opening submissions by Mr Lowenstein

101. Before turning to the matters of complaint outlined in section 5.1 above, Mr Lowenstein had dealt with the new evidence of Kazakh law in Linkage & Mind 2, and its impact on Mr Zhunus's application. Once the matters of complaint had been dealt with, Mr Lowenstein made submissions about the additional evidence on the claimants' financial position. This was followed by short submissions on the amount of security sought. Mr Lowenstein then reserved for reply such matters as might arise from Mr Brindle's submissions about enforcement of an English costs order in Kazakhstan, any submissions in relation to financial matters that could not have been foreseen, and matters concerning merits and discretion. As noted earlier, I had suggested on 11 July 2014 that factual matters said to have caused the claimants' impecuniosity should be dealt with in reply. On 14 November as well as on 11 July 2014 Mr Lowenstein adopted that approach. He nevertheless identified what he described as "one or two headlines" on those aspects and on the justice test.

C5.3 Submissions by Mr Brindle, and Mr Lowenstein's objection

102. Mr Brindle's submissions began with financial matters. Towards the end of that aspect of his submissions, when criticising evidence lodged on behalf of Mr Zhunus, he sought to rely upon matters that he had been told on instructions during the course of the short adjournment. Mr Lowenstein responded with an objection to the oral introduction of new evidence.

103. Mr Brindle then submitted that he could advance a modification of the point in question in a different way which did not rely upon new evidence. I was concerned that valuable time would be spent arguing about what submissions were or were not permissible on the basis of the evidence before the court. In those circumstances I took what I described as an unusual course. It was taken only because of pressure of time at the hearing on 14 November 2014. The course I took was to direct that if in the course of the remainder of Mr Brindle's submissions, or in the course of reply submissions by Mr Lowenstein, any reference were made to material which the other side considered should not be permitted, they need not raise that point immediately. Unless there was something really quite extraordinary, the preferable course would be that once the transcript was available, any objection to a particular piece of information being relied upon should be advanced in writing.

104. After completing his submissions on the claimants' financial position, Mr Brindle turned to make submissions in support of an assertion that it was Mr Zhunus, among others, who had caused a loss of funds to the claimants. In that regard he placed reliance upon the judgment of Mr Justice Males mentioned earlier. Mr Brindle then concluded his submissions on the justice test and dealt with the question of the amount of security if Mr Zhunus's application were to succeed in principle.

C5.4 Mr Lowenstein's reply

105. Mr Lowenstein made submissions in reply both as to the claimants' financial position and as to the other matters advanced by Mr Brindle. He added that there had been an exchange of correspondence concerning proposed undertakings, and submitted additional material to the court in that regard.

C6. Events: 15 November 2014 to 18 February 2015

106. Regrettably, despite an order for expedition, the transcript of the hearing on 14 November 2014 was not available until 10 December 2014. On 17 December 2014 a note of objection was filed by Mr Zhunus. It identified passages in the transcript where, it alleged, Mr Brindle made submissions unsupported by the evidence which had been filed.

107. On 28 January 2015 the claimants filed written submissions in answer to the note of objection. An emailed message in reply was sent on behalf of Mr Zhunus on 30 January 2015.

108. In the meantime an application had been made by the claimants seeking permission to make amendments alleging a further fraud by Mr Zhunus and Mr Arip and advancing a proprietary claim. The application was dismissed by Leggatt J on 21 January 2015.

C7. Events after 18 February 2015

C7.1 The February 2015 application

109. By letter dated 19 February 2015 the claimants sought to make the February 2015 application. The letter ran to 17 paragraphs, and included sections concerning:

(1) what was said to be a material change of facts;

(2) what would be dealt with in proposed new evidence;

(3) a request to reopen the hearing;

(4) applicable legal principles; and

(5) submissions on the legal test.

110. For present purposes I need only cite from paragraph 15 of Zaiwalla & Co's letter:

> … The Claimants now believe that circumstances have changed, and that they should have the opportunity to produce the requisite evidence to show that an order of security might stifle a genuine claim and to have the opportunity of that argument being put to the Court at a further hearing.

111. Later that day Peters & Peters emailed stating that they would provide a response on behalf of Mr Zhunus before close of business on 20 February 2015. They asked that I defer taking any action in response to Zaiwalla & Co's letter pending consideration of that response.

C7.2 The 20 February 2015 questions and request

112. I advised both sides on the morning of 20 February 2015 that before Peters & Peters provided their proposed response, I considered it desirable that Zaiwalla & Co on behalf of the claimant should answer two questions ("the 20 February 2015 questions"). These questions were:

(1) whether it was accepted that the financial conditions described in letter from Zaiwalla & Co dated 19 February 2015 have had the consequence that, whatever the position may have been earlier, the position now is that the condition in CPR 25.13(2)(c) is met, in particular because there is reason to believe that the claimant will be unable to pay the first defendant's costs if ordered to do so; and

(2) if this is not accepted, then why not, and how this was compatible with a contention that the claim would be stifled if an order for security were made.

113. Also on 20 February 2015 I made a request ("the 20 February 2015 request") for clarification of aspects of the message emailed by Mr Lowenstein on 30 January 2015. A response to this request was provided in a letter from Peters & Peters dated 25 February 2015.

114. In the meantime:

(1) on 23 February 2015 Zaiwalla & Co emailed the claimants' response to the 20 February 2015 questions; and

(2) in a letter dated 24 February 2015 Peters & Peters set out contentions detailing numerous substantive and procedural objections to the course proposed by the claimants.

C7.3 Werner 2 and the March 2015 submissions

115. After consideration of what had been said by the parties I gave the directions set out in section A2 above, requiring a full set of the additional evidence that it was proposed to rely upon, along with full written submissions setting out the claimants' case that this evidence would justify a refusal by the court to make an order for security for costs.

116. In response to my directions the claimants on 4 March 2015 served:

(1) a second witness statement of Mr Werner dated 4 March 2015 ("Werner 2"); and

(2) written submissions settled by Mr Miller ("the March 2015 submissions").

117. I deal with Werner 2 and the March 2015 submissions in section G below. Before doing so I set out my analysis on the basis that the February 2015 application is put on one side. This analysis is in three parts. The first part, in section D below, considers the inability to pay pre-condition. The second part, in section E below, considers the residence pre-condition. The third part, in section F below, considers the justice test.

D. The inability to pay pre-condition

D1. Principles in an inability to pay pre-condition case

118. Relevant principles in an inability to pay pre-condition case were discussed by the Court of Appeal in *Jirehouse Capital v Beller* [2009] 1 WLR 751. In the course of argument I referred the parties to the analysis of that discussion by Briggs J in *Chemistree Homecare Limited v Teva Pharmaceuticals Ltd* [2011] EWHC 2979 (Ch). At paragraph 3 Briggs J identified 6 principles as follows:

> (1) The applicant must show that on all the material presently available to the court there is reason to believe that the claimant will be unable to pay the applicant's costs if ordered to do so.
>
> (2) The question is whether the claimant companies will, rather than might, be unable to pay.
>
> (3) Inability to pay means to pay when the costs fall due for payment (see *Re Unisoft Group (No 2)* 1993 BCLC 532 at 534, approved in *Jirehouse Capital* at paragraph 23. This calls for an assessment of what the claimants may be expected to have available for payment at the due date or dates in the form of cash of other readily realisable assets (see *Longstaff International v Baker and McKenzie* [2004] 1 WLR at paragraphs 17 and 18.

> (4) In respect of a costs order made at the end of a two-week trial, where there is no possibility of summary assessment, the relevant due dates, as it seems to me, are (a) the payment date of any order made by the trial judge for a payment on account, and (b) the date when an order for the balance is made upon completion of detailed assessment.
>
> (5) If this ability to pay threshold is passed, then the court has a broad discretion whether to order any, and if so how much, to be paid or secured by way of security. The reported cases have identified specific aspects which have to be taken into account (see for example *Sir Lindsay Parkinson and Co v Triplan* [1973] QB 609 per Lord Denning, summarised in the White Book at paragraph 25.13.13).
>
> (6) But overall the question is whether the court is satisfied, having regard to all the circumstances of the case, that it is just to make such an order (see CPR 25.13(1)(a)).

119. Principle (5) refers to specific aspects of the court's discretion identified in *Sir Lindsay Parkinson.* They are summarised at paragraph 25.13.13 of *Civil Procedure 2014* in this way:

> **Particular discretionary factors where condition (c) relied on**
>
> The Court has a discretion under r.25.13 whether to order security for costs having regard to all the circumstances of the case. Among the circumstances which the court might take into account are the following:
>
> (1) Whether the claimant's claim is bona fide and not a sham;
>
> (2) Whether the claimant has a reasonably good prospect of success;
>
> (3) Whether there is an admission by the defendants in their defence or elsewhere that money is due;
>
> (4) Whether there is a substantial payment into court or an "open offer" of a substantial amount;
>
> (5) Whether the application for security was being used oppressively, e.g. so as to stifle a genuine claim;
>
> (6) Whether the claimant's want of means has been brought about by any conduct by the defendant, such as delay in payment or in doing their part of any work;
>
> (7) Whether the application for security is made at a late stage of the proceedings.

(*Sir Lindsay Parkinson & Co v Triplan Ltd* [1973] Q.B. 609, CA, per Lord Denning M.R.)

D2. The staged approach

120. In argument on 11 July Mr Lowenstein adopted a staged approach. The first stage considered the evidence as it stood on 7 July 2014. Mr Lowenstein's second stage considered the impact of late evidence filed by the claimants on 8 July 2014 onwards. I am, for present purposes, concerned with an assessment of the future position in the light of evidence filed on or before 14 November 2014. It nonetheless remains helpful to continue to consider the evidence in stages. In what follows I extend the second stage so as to take account of the evidence at the time of the 14 November hearing.

D3. Application of the staged approach

D3.1 Analysis of stage 1 evidence, including Beber 1

121. Mr Lowenstein submitted that the evidence as it stood on 7 July 2014 established beyond doubt that the claimants had "very serious ongoing financial difficulties". I agree that this was an accurate description of the future position on the basis of the evidence at that date. That evidence justified contentions in Mr Zhunus's main skeleton argument ("the Zhunus skeleton") that:

(1) All of the assets of the KK Group are held in Kazakhstan.

(2) The 2012 Annual Report, which on 7 July 2014 comprised the most recent audited financial statements for the KK Group, recorded annual group losses of approximately $35m and showed total borrowings of $229.1m against group equity of $48.6m, giving a debt to equity ratio of 4.7 to 1.

(3) The KK Group's auditors, Pricewaterhouse Coopers ("PwC"), wrote a letter to the board of KK Plc for inclusion with the 2012 Annual Report. It warned that doubts as to the ability of the KK Group to restructure debts to Development Bank of Kazakhstan ("DBK") and Alliance Bank Jsc ("Alliance") gave rise to "material uncertainty which may cast significant doubt about the ability of the group to continue as a going concern".

(4) KK Plc's unaudited consolidated statement on comprehensive income for the quarterly period up to 30 September 2013 ("the Q3 2013 Results") showed that the group had incurred losses of $38m up to September 2013.

(5) No consolidated statements on comprehensive income for the quarterly period up to 31 December 2013 had been published. A statement of "financial highlights" for the 12 month period ending 31 December 2013 ("the Q4 2013 Statement") had been published. However it did not include finance and other costs. The result was that this information, even if reliable, did not make it possible to determine precise overall profitability or the claimants' cash position as of December 2013.

(6) DBK obtained judgments against Astana Jsc and Paragon Development in February 2013. These judgments were assigned to the Investment Fund of

Kazakhstan ("IFK") in August 2013. Following an unsuccessful asset auction the business and assets of Astana Jsc and Paragon Development were transferred to IFK at a value of $32.83m, against a book value of $59.5m in the 2012 Annual Report.

(7) Alliance obtained judgments against KK Jsc and PEAK for the full amount of relevant debts. After being reversed on appeal in August 2013 the judgments were reinstated on a further appeal on 13 November 2013.

(8) On 18 February 2014 the KK Group announced that IFK had signed an "agreement of support and cooperation" in relation to the present litigation.

122. A report dated 16 April 2014 was prepared for Mr Zhunus by a firm of Chartered Accounts, Fisher Corporate plc. It was prepared by Mr Paul Beber of that firm. I shall refer to it as "Beber 1". It concluded, among other things, that:

(a) in light of probable finance costs of $67m, overall losses for the period to 31 December 2013 are likely to have been around $49m before exceptional items;

(b) net assets declined from $85.1m in 2011 to $10.9m as of 30 September 2013; while the Q4 2013 Statement does not disclose net assets, the balance sheet position as of 31 December 2013 is likely to be at or approaching an overall net liability position; and

(c) the KK Group's gearing (total borrowing divided by total capital and reserves) had increased to 21.3:1 as of September 2013 from 8.6:1 in June 2013 and 4.7:1 as of December 2012; such an increase is unsustainable, and is indicative of a company at or approaching insolvency.

123. It is not, however, necessary for me to refer to Beber 1 in order to reach the conclusion that, on the evidential position at 7 July 2014, Mr Zhunus satisfies the inability to pay pre-condition. Zaiwalla 2 asserted that the KK Group was "a growing business with a bright commercial future". It added that restructuring talks were taking place with Alliance at the highest level and that the claimants were "optimistic that these will be fruitful". These general assertions were of little value in the absence of detailed justification. None of the matters listed at subparagraphs (1) to (8) above was contested by the claimants. Their skeleton argument for the 11 July hearing instead adopted a focus upon developments described in the claimants' evidence filed from 8 July 2014 onwards.

124. This was a sensible focus to adopt. It was only on 8 July 2014 – i.e. at the start of stage 2 of my analysis - that talks with Alliance reached a stage where Mr Zaiwalla could say in Zaiwalla 3 that an agreement in principle had been made to settle "the defaulted loans made to KK Group by Alliance". Thus so far as stage 1 is concerned, as regards Alliance, there was no evidence going beyond optimism that talks "will be fruitful" in reliance to Alliance's claims. In concrete terms, making full allowance for what was in evidence about the settlement with DFK, the evidential position prior to 8 July 2014 gave ample reason to believe that if Mr Zhunus successfully defended the

claim against him the claimants would not be able to pay costs, whether under an interim payment order or after detailed assessment.

125. However as noted above further evidence was filed both before and after the 11 July hearing. Accordingly I turn to evidence as it stood at the time of the 14 November hearing in so far as relevant to the inability to pay pre-condition, and relevant aspects of the argument on 14 November 2014.

D3.2 Stage 2: financial material dealt with in Zaiwalla 7

126. The claimants' new evidence was set out in Zaiwalla 7. It included information about a detailed agreement with Alliance and information about KK Plc's unaudited financial results up to 30 September 2014.

127. It exhibited:

(1) KK Plc's unaudited financial results for the first half of 2014;

(2) a decision of the Specialized Inter-District Economic Court of the Almatinsky Region dated 28 August 2014;

(3) a London Stock Exchange regulatory news announcement in respect of KK Plc issued on 24 September 2014;

(4) a London Stock Exchange regulatory news announcement in respect of KK Plc issued on 1 October 2014;

(5) a London Stock Exchange regulatory news announcement in respect of KK Plc issued on 2 October 2014;

(6) an announcement of the Kazakhstan Stock Exchange dated 10 October 2014;

(7) a letter from Centras Securities (representing KK Jsc's bondholders) dated 22 October 2014;

(8) KK Plc's unaudited financial results for the third quarter of 2014.

128. As regards Alliance, a formal announcement of settlement was made on 24 September 2014. Details were given in an announcement by both KK Plc and Alliance on 2 October 2014:

> Kazakhstan Kagazy PLC (KK) and Alliance Bank JSC (Alliance) are pleased to announce that they have agreed terms upon which KK Group's outstanding loan indebtedness to Alliance Bank (totalling about KZT15.3bn, including interest and penalties) will be fully and finally settled. Under the terms of the signed settlement agreements, KK will transfer its selected non-core assets, including land plots and Class B warehouses to Alliance. As a result, KK will exit the logistics business. The settlement will allow KK to reduce significantly its overall debt level and free financial and management

> resources to focus on the company's core growing and profitable recycling and paper manufacturing obligations.
>
> In addition, KK will pay between 2.7bn and 5.4 bn KZT to Alliance, depending on the outcome of KK's proceedings in London against the company's former shareholders.....

129. Overall, the claimants noted that as a result of the settlement KK Group's indebtedness to Alliance in a total sum of KZT 15.3 billion (approximately US $85.4 million at the then current rate) had been cleared. In its place Alliance had received or would receive assets regarded by KK Group as non-core, and would be entitled to receive from KK Group between 2.7bn and 5.4 bn KZT, depending on the outcome of the present litigation.

130. Paragraphs 54 and 55 of Zaiwalla 7 commented in this regard:

> 54. Although settling with Alliance Bank has an impairment effect on the KK Group (in that it loses its logistics business and investment), it should be remembered that the logistics segment of the KK Group only generated between 4 and 5% of total Group revenue. Such cash as the logistics business generated was used to pay the debt and in litigation costs relating to the debt, so the loss of that revenue stream has no net impact. Likewise, the assets transferred to Alliance Bank were in any event pledged.
>
> 55. On the other hand, the benefits to the KK Group in settling with IFK and now Alliance Bank are significant, having eliminated substantial finance costs and litigation costs. In addition there will be some savings in administration costs as a result of the loss of the logistics business which (as a result ultimately of the frauds perpetrated by the Defendants and the continuing liabilities that had brought about) had become something of a millstone round the neck of the KK Group.

131. As regards information about KK Plc's unaudited financial results up to 30 September 2014, two documents were exhibited to Zaiwalla 7. The first comprised unaudited financial results for the first half of 2014, announced on 10 July 2014. In summary, Mr Zaiwalla explained that while, compared with the first half of 2013, there was a reduction in revenue of $5.5m, the apparent decline was largely explained by a drop in value of the KZT against the USD. Thus there was only a 2% drop in KZT revenue. Mr Zaiwalla added that some of the reduction was caused by an investigation by the Financial Police which the claimants believed to have been instigated by the defendants.

132. The second document comprised unaudited financial results for Q3 2014. Mr Zaiwalla explained, in summary, that these showed an increase in revenue in local currency for the first 9 months of 2014 of 0.4% compared to the same period in 2013. While revenue for the first 9 months of 2014 in USD had dropped in comparison to the same period in 2013, Mr Zaiwalla said that this was attributable entirely to the conversion effect caused by a drop in value of the KZT against the USD. Similarly, Mr Zaiwalla

said that a drop in EBITDA was due in large part to the conversion effect, with the balance being attributable largely to increased purchase costs in hard currency. In fact, said Mr Zaiwalla, revenue in the third quarter of 2014 was higher year on year compared with the third quarter of 2013.

D3.3 Tickner 7, Beber 2 and the Zhunus supplemental skeleton

133. Tickner 7 noted publication of:

(1) KK Plc's audited financial statements for the period to 31 December 2013 ("the 2013 Annual Report"), dated 29 October 2014 and signed on 31 October 2014;

(2) an announcement dated 10 July 2014 providing certain unaudited information as to the KK Group's results for the 6 months to 30 June 2014 ("the Q2 2014 Results"); and

(3) an announcement dated 23 October 2014 providing certain unaudited information as to the KK Group's results for the 9 months to 30 September 2014 ("the Q3 2014 Results").

134. Exhibited to Tickner 7 was a supplemental report of HW Fisher & Co dated 7 November 2014. It too was produced by Mr Beber. I shall refer to it as "Beber 2".

135. A supplemental skeleton argument on behalf of Mr Zhunus ("the Zhunus supplemental skeleton") was lodged on 6 November 2014. In relation to Alliance Bank it submitted, among other things:

(1) Neither the term sheet nor the agreement apparently concluded between the KK Group and Alliance Bank during September 2014 had been put in evidence by the claimants. Zaiwalla 7 merely referred to brief public announcements dated 24 September 2014 and 2 October 2014 that provided very limited insight into the terms of that settlement. It was said that since the material could have but has not been exhibited the court should draw all proper inferences against the claimants as to the contents of such documents.

(2) The 2013 Annual Report at note 3 confirms that the settlement provides for very substantial payments to be made to Alliance Bank following the conclusion of the present litigation, being a minimum of $15m and a maximum of $30m depending on the outcome of the litigation. Thus if the claimants lose the case and become liable for Mr Zhunus' costs, that costs liability would arise at approximately the same time as a $15m liability to Alliance.

(3) The settlement also provides for the transfer of logistics assets to Alliance Bank, including land plots and class B warehouses. The precise effect of that is presently unknown. However, Beber 2 had noted that the effect of a transfer of class A warehouses and terminals to IFK in January 2014 had been to cause losses of approximately $36.1m.

136. As to the overall financial position of the KK Group, Beber 2 made points ("the Beber overall points") that:

(1) Total KK Group losses as audited for the period to 31 December 2013 were $112.6m, compared to losses of $35.6m for the period to 31 December 2012.

(2) Those losses included exceptional losses of $99.5m, with finance costs and income taxes expense of $60.3m. EBIT, which had been estimated at $18.1m in the Q4 2013 Results, was revised down to $12.2m due to the seizure of assets by IFK in January 2014.

(3) The KK Group's audited balance sheet as of 31 December 2013, which was the most recent balance sheet available, audited or otherwise, showed a net deficiency of $72.6m. This was significantly worse than Mr Beber had estimated in the Beber 1.

(4) During the year to 31 December 2013 there was a net decrease in cash flow in the sum of $6m, with cash held at the end of the year of only $3.1m. This too was significantly worse that estimated by Mr Beber in Beber 1. It indicated that only $1.5m cash had been generated in the fourth quarter of 2013.

(5) The totality of material available since the 11 July hearing casts serious doubt on the status of the KK Group as a going concern, particularly since there is a short term (i.e. current) deficiency of $141.4m. Even stripping out debts and debt penalties, the current asset position remains negative.

(6) In the 2013 Annual Report dated 29 October 2014 the KK Group's auditors, PwC, issued an "Emphasis of Matter – Going concern" warning ("the PwC October 2014 warning"). The warning, which was described by Mr Beber as a cause for serious concern, referred to matters in Note 3 of the 2013 Annual Report. Those matters included what had been classified as current liabilities to the European Bank for Reconstruction and Development ("EBRD") following breach of covenants in a loan agreement. They also included factors concerned with debt to Alliance and IFK. The matters in note 3 were recorded in the PwC October 2014 warning as indicating:

> … the existence of a material uncertainty which may cast significant doubt about the ability of the group to continue as a going concern.

(7) The Q2 2014 Results and the Q3 2014 Results did not include any balance sheet. This contrasted with the Q2 2013 Results and Q3 2013 Statement, both of which included balance sheets. Moreover the claimants must have had a balance sheet available to them internally in order to prepare the figures that were released.

137. As to the absence of Q2 2014 and Q3 2014 balance sheets, the Zhunus supplemental skeleton urged the court to infer that the claimants chose to omit such figures from their interim results because they considered them likely to be damaging in the context of this application, among others. The Zhunus supplemental skeleton submitted that in any event a number of points could be gleaned from the interim

reports, which showed that the KK Group's finances had continued to decline steeply during 2014. These points, which I shall refer to as "the gleaning points", were:

(a) The Q3 2014 Results showed revenue of $44.6m in the 9 months to September 2014, reduced from $62.9m in the same period in 2013. They also showed gross margin of 39% (reduced from 46.6% in the same period in 2013).

(b) The Q3 2014 Results showed EBIT of $7m before exceptional operating items, reduced from $11.1m for the same period in the previous year, but (again in contrast to the same period in 2013) decline to provide any information figures below the EBIT line, e.g. relating to exceptional operating items, finance income and/or finance costs.

(c) The Q3 2014 Results showed operating cash flow of $5.5m, down from $13.7m over the same period in the previous year.

(d) While some of the decline in performance was due to the devaluation of the KZT in February 2014, the fall in performance was proportionately greater than the devaluation, meaning that underlying performance had worsened.

(e) Moreover, as Beber 2 pointed out, contrary to Mr Zaiwalla's unsupported assertion that the devaluation was a one-off issue, the need to pay for imports with a devalued currency would have a continuing adverse effect on margins and ability to earn profit. Moreover foreign-denominated debt obligations, e.g. to Alliance Bank and EBRD, would be more expensive to service by reason of such devaluation.

(f) Indeed, the Q3 2014 Results specifically confirmed that the KK Group's EBITDA dropped by $5.4m, out of which only $2.4m was attributable to the conversion effect, with the remainder due mainly to increased purchase costs in hard currency.

(g) Moreover since any order for costs made against the claimants would be in Sterling, the devaluation in the KZT would increase the cost of meeting that liability by 19%, assuming that exchange rates were stable in the interim.

138. Beber 2 was also relied on as showing that, despite the settlement with Alliance, substantial liabilities remained to other parties. In particular:

(1) The KK Group's current liabilities to the EBRD, totalling $16.2m, arose from failure to make payments of principal for Q2 and Q3 of 2014. The group was relying on the forbearance of EBRD. The 2013 Annual Report stated that in negotiations EBRD had given "preliminary indications that it is willing to restructure the loan" but there was obviously considerable uncertainty in relation to that. Given the state of the evidence the court should proceed on the basis that these loan obligations are and will continue to be payable.

(2) The Astana-Contract Group had continuing liabilities to IFK, which purchased DBK's debt. It appeared from the 2013 Annual Report (note 3) that even following the further transfer of properties to IFK in part-satisfaction of this debt, liabilities of $33m would remain unpaid.

(3) The KK Group had outstanding liabilities to bondholders in the principal sum of around $108m. Representatives of bondholders had, statement dated 10 October 2014, expressed further concerns in relation to the group's ability to meet these obligations, in particular due to the KK Group's exit from the logistics business following the settlement with Alliance Bank. Zaiwalla 7 suggested that this was "unduly pessimistic", but Beber 2 considered these concerns to be entirely justified. Mr Zaiwalla confirmed that $10m was payable in respect of bonds over 2015 and 2016, but had not explained how these sums were calculated. It would be wrong, therefore, for the court to understand that the obligations under these bonds were far in the future, as appeared to be the Claimants' case in July.

139. Accordingly it was submitted that the restructuring of certain of the KK Group's debts did not mean that the underlying performance problems and other significant liabilities were resolved. The Zhunus supplemental skeleton further relied on an analysis in Beber 2 of projected cash-flow going forward ("the Beber cash resources analysis"). This analysis took the position up to December 2016, which was said to be the approximate time at which any judgment in the present action is likely to be given. The analysis took into account current performance and the debt commitments of the KK Group (including its restructured debts to Alliance Bank). It concluded that by December 2016 there was likely to be a cash deficiency of at least $4.8m. That figure did not take into account the claimants' very substantial costs incurred in the present legal proceedings.

140. The Zhunus supplemental skeleton criticised Zaiwalla 7 as containing "further assertion and superficial commentary". Particular matters complained of included:

(1) failure to exhibit the primary documents to which the claimants referred at the 11 July hearing, in particular the term sheet or the agreement apparently concluded between the KK Group and Alliance Bank during September 2014. Instead Mr Zaiwalla merely referred to brief public announcements dated 24 September 2014 and 2 October 2014 that provided very limited insight into the terms of that settlement. It was said that the claimants' lack of candour in this regard, together with the very limited recent financial information made publicly available by the claimants, entitled the court to draw inferences against the claimants as to the contents of documents not produced.

(2) In relation to the PwC October 2014 warning, Mr Zaiwalla had suggested that this was merely "standard form wording" and that the statement arose from debts to IFK and Alliance Bank that had now been settled. However this did not accurately reflect note 3 to the 2013 Annual Report, where the management of KK Group expressed the view that, among others, factors concerning the position as regards Alliance, the EBRD, and IFK, indicated "a material uncertainty which may cast doubt as to the group's ability to continue as a going concern".

D3.4 McGregor 4 and Crestohl 6

141. On 11 November 2014, following service of the Zhunus supplemental skeleton, McGregor 4 stated in summary that:

(1) on behalf of bondholders, Centras had confirmed that they had received a full response to their queries, and considered the issuer to be compliant with the bond covenants;

(2) the Financial Police investigations against KK Group had all been suspended, without any charges being brought against management;

(3) as regards current steps to achieve completion of the settlement with Alliance, the only relevant impediment at the time of finalising the 2013 audited financial statements was the fact that certain land plots could not yet be transferred to Allicance because of an arrest placed on those lands by the Financial Police; however the arrest of those lands had now been overturned by the authorities in Kazakhstan;

(4) the payment to be made to Alliance in the event that the claimants do not succeed in this litigation is:

(a) an amount of KZT 2.7bn (approximately $15m at current exchange rates);

(b) to be paid in equal quarterly instalments over a 3-year period, with the first such quarterly payment being made within 7 business days of the date of adverse judgment;

(c) interest free; and

(d) expected by KK Group management to be met out of revenues and cash flow;

(5) the payment of the remaining balance of approximately $33m to IFK:

(a) is to be made only if sufficient funds are recovered in relation to the Astana fraud claim in the present litigation;

(b) involves no legal recourse against non-debtor members of the KK Group or against their assets;

(c) is therefore entirely irrelevant to the KK Group's ability in 2016 to meet any adverse costs order in Mr Zhunus's favour;

(6) as to EBRD, it:

(a) is a shareholder in KK Plc;

(b) is not controlled by the Kazakh government;

(c) did not lend money to the KK Group which the claimants presently allege to have been misappropriated by the defendants;

(d) has differed from Alliance and DBK in its relationship with the claimants, in that the relationship with both Alliance and DBK former had been acrimonious until recently, whereas the relationship with EBRD had not;

(e) has confirmed that it has no intention to accelerate repayment of KK Group's loan, having discussed the default on that loan with KK Group in advance of its occurrence;

(f) has been waiting to see whether the KK Group could successfully settle with Alliance;

(g) now that Alliance has settled, has given KK Group management no reason to think that it would not come to new loan terms with the KK Group.

142. Turning to the PwC October 2014 warning, Mr McGregor noted that:

(1) a warning of this kind had been present in the audited financial statements of the KK Group since 2009, but despite that warning the KK Group had continued to trade; indeed, KK management believed that the core paper business had grown over that period and would continue to grow;

(2) it was a warning as to various conditions and assumptions by management which, as set out in the 2013 annual statements were objectively less taxing than they had been in the past. In the main, these are the (i) the rescheduling of the EBRD loan, (ii) the necessity to complete the transfer of assets to Alliance Bank/IFK and (iii) the Financial Police investigations not having adverse results for the claimants or management;

(3) in the main, it reflected concerns as to the rescheduling of the EBRD loan, the necessity to complete the transfer of assets to Alliance Bank and IFK, and the danger that the Financial Police investigations might have adverse results for the group or its management; and

(4) it followed from the above that the assumptions and judgements of management underlying the "material concern", which the auditors had accepted, could readily and realistically be achieved.

143. Also served on 11 November 2014 was Crestohl 6. This statement:

(1) emphasised that Mr Beber has necessarily been standing on the outside looking in, with an absence of full information;

(2) asserted that Mr Beber had had to make assumptions and projections which did not necessarily reflect either commercial reality or the realistic prospects of the KK Group's future financial performance;

(3) asserted that Mr Beber had prepared Beber 2 in something of a hurry and had lost the degree of objectivity of an independent expert;

(4) claimed that in calculating the time needed for the group to pay the principal debt it owed, Mr Beber had fallen into error because:

(a) in the audited 2013 accounts the full year's EBIT figure was $12.169m before exceptional items; and

(b) although Mr Beber had that figure available to him in the audited 2013 Financial Statements, he had chosen to use a 9 month EBIT figure of $7m;

(5) said that as regards the loss of the logistics business:

(a) Mr Beber acknowledged that this would have a negligible impact on either revenue or profit;

(b) Mr Beber had however placed emphasis on what he considered to be the impact on the net asset position;

(c) this emphasis overlooked the fact that those assets were, in any event, overvalued as a result of the misconduct of the defendants in perpetrating the frauds;

(d) this emphasis also overlooked the fact that absent a compromise with IFK and Alliance Bank, those assets (having been pledged) would in any event not have been available at the time when the postulated costs liability would arise;

(6) as to Mr Beber's projection that KK Group would, by the end of 2016, have a cash deficiency of close to $5m:

(a) Mr Crestohl had discussed this with Mr Werner, and considered comments of the KK Group's finance director;

(b) the projection was not accepted; indeed KK Group management's projections were entirely to the contrary effect, namely that the KK Group would have more than adequate cash in 2016 to meet any adverse costs order;

(c) the group expected to increase year on year its cash on hand and cash flow until the end of 2016;

(d) this expectation resulted from a number of factors, including a decrease in litigation costs (both in Kazakhstan and in London); a decrease in the cost of waste paper; a reduction in costs of supplies (at least in 2015 given a surplus from the previous year); reductions in general and administrative costs; and a slight growth in sales;

(e) the management's cash flow projection took into account obligations to EBRD and bondholders, and capital expenditure over the period, but

was still expected to leave a cash closing balance at the end of 2016 in the region of $15 million; and

(f) even allowing for unforeseen one-off expenditures, there would be more than sufficient cash to meet an adverse costs order.

D3.5 14 November: Mr Lowenstein's opening submissions

144. At the hearing on 14 November 2014 Mr Lowenstein dismissed relevant passages in Zaiwalla 2 and McGregor 4 for failure to provide any proper analysis or particulars. The same applied to Crestohl 6 which was described by Mr Lowenstein as scrappy, speculative and almost all hearsay. Surprisingly, it had dealt with points that Mr McGregor, who was closer to his own client, had not dealt with.

145. As to what Crestohl 6 said about the KK Group having $15m in cash at the end of December 2016, Mr Lowenstein summarised what I have called the Beber overall points. He stressed the points made in the Zhunus supplemental skeleton about the decline in the KK Group finances. In particular under the headline "decreasing cash flow" he noted that the year to 31 December 2013 had seen a net decrease in cashflow of some $6m, with cash held of only $3.1m.

146. Mr Lowenstein relied also on Mr Beber's serious doubt as to the status of the group as a going concern. In that regard Mr Lowenstein stressed particularly that there was a current deficiency of $141.4m, and even stripping out debts and debt penalties the current negative asset position would remain negative.

147. Turning to what Mr McGregor said about the PwC October 2014 warning, in addition to his general criticisms identified earlier, Mr Lowenstein submitted that Mr McGregor had not addressed two critical matters of concern which would underpin any "emphasis of matter going forward". These were (1) the deficit and shortage of net current assets, and (2) the question of cash.

148. Mr Lowenstein added that there were still structural matters which were of concern. The fact that the warnings had been in the accounts for some years was, he submitted, a point which assisted Mr Zhunus. This was a very rickety group, living off the support of its bankers and the forbearance of its creditors. He then repeated the point made in the Zhunus supplemental skeleton that the inference to be drawn from failure to provide balance sheets was that it would be very unhelpful for the claimants in the context of this litigation to show their worsening asset position.

149. Turning to what I have called the gleaning points, Mr Lowenstein noted among other things gleaning point (f). This was that only $2.4m of the $5.4m drop in EBITDA was attributable to the conversion effect, and it was founded on KK Group's own disclosure to the market on 23 October 2014. The remaining $3m drop in EBITDA was due to higher costs mainly related to the increased purchase costs in hard currency. This was the structural point: there was a trading problem. It was additional to other gleaning points concerning continuing and future obligations in hard currency and concerning the costs of this litigation.

150. In relation to the settlement with Alliance, Mr Lowenstein noted that the claimants had chosen not to disclose the terms of that settlement, something which could have

been done on a confidential basis. He submitted that, as the claimants' choice was to deploy selected highlights as suited their case, the court should draw all inferences against them. As to management's expectation that the minimum payment of $15m, due to Alliance on conclusion of the present litigation, could be made out of revenue, the revenues were crashing. The business was smaller, and the cash position was abject. The group would have to find hard cash in a foreign currency, with a devaluing local currency, just at a time when they would, on the postulated scenario, have lost the action against Mr Zhunus, at a time when other supporters such as the EBRD may then also lose interest and stop supporting them, and, in the ordinary course of things, when they would have to pay their own legal costs as well.

151. In relation to EBRD Mr Lowenstein dismissed Mr McGregor's categorisation of the default as "technical". On the contrary, there had been defaults over two quarters, and what they showed was that the group was in intensive care. If EBRD were to accelerate repayment then Mr Lowenstein noted from the 2013 accounts that EBRD held just short of $54 million worth of security over core trading assets of the group. Mr McGregor seemed to think that this would ameliorate the position, but in reality recourse to those assets would make matters significantly worse.

152. In relation to bondholders Mr Lowenstein noted that Zaiwalla 7 had disclosed that in 2015 and 2016 a total of $10 million will be payable in coupon payments to bondholders. Their representative, Centras, had expressed concern in a statement dated 10 October 2014 about the group's exit from its logistics operations, which was likely to reduce operational profitability and liquidity. Mr McGregor had relied on a later statement as showing that this concern had been allayed, but the later statement said no such thing. It did no more than set out KK Group's response.

153. Turning to the Beber cash resources analysis, Mr Lowenstein noted that in order to present a best case analysis it ignored the claimants' own legal costs, it ignored capital expenditure and it assumed that only a minimum payment to EBRD would be made. He added that Beber 1 had made conservative estimates, in relation to which the position had been significantly worse when actual accounts came. As to Mr Crestohl's answers, the notion that legal costs would decrease was incompatible with heavy litigation of the present kind. It was no more than speculation to say that there would be a reduction in costs of the business, and it ignored the effect of the devaluation. On the criticism about extrapolating from a 9 month period, Mr Lowenstein had asked Mr Beber for an explanation.

D3.6 14 November: Mr Brindle's response submissions & Beber 3

154. Mr Brindle's oral submissions began by contrasting the stance taken on behalf of Mr Zhunus in July with the stance taken now. The primary point in July had been the debt to Alliance, and, submitted Mr Brindle, that had now been dealt with satisfactorily in Zaiwalla 7. The terms of settlement had not been provided to Mr Zhunus because there were genuine reasons to distrust him totally, and the claimants would not tell him anything more than they absolutely had to. It was clear, Mr Brindle added, that neither IFK nor Alliance would allow the group to fail. Mr McGregor's account of the Alliance settlement was said to be a perfectly straightforward statement of the position.

155. Turning to EBRD, Mr Brindle submitted that Mr McGregor's description of their stance warranted the conclusion that they thought the default to be technical, as they did not intend to do anything about it. This was said to deal "completely satisfactorily" with any problem about EBRD.

156. Mr Brindle submitted that the effect of the settlement with Alliance was enormous on the strength, health and future prospects of the group. It was true that the loss for 2013 was $112.6m. The evidence showed, however, that this loss had largely come about as a result of impairments to the assets, necessary write-downs as a result of the various things that have happened, which should not carry forward into future periods. The chairman had explained that the management had started to reposition the company, completing the exit from the non-performing logistics business to develop new areas such as recycling in line with Kazakhstan's aim to become a green economy. This was borne out by the CEO's report. The auditors had certified that the accounts gave a true and fair view. The operating and financial review dealt with economic profit and with revaluation of assets, including impairment charges of $28.2m.

157. In relation to the PwC October 2014 warning, Mr Brindle described it as "not at all unusual". He accepted that it was, as stated in note 3, management's view that conditions identified in that note indicated material uncertainty. This was a view reached in conjunction with the auditors. Mr Brindle then said on instructions that the conditions which management considered to indicate uncertainty were four specific conditions rather than the whole of the matters dealt with in the note. He accepted, however, that the auditors made it clear that their concern related to both those conditions and the other matters described in the note.

158. Mr Brindle noted that Zaiwalla 7 had indicated that the 2013 financial statements would show steady growth in revenue and production. It had rightly stated that the impairments had no impact on revenue. As to cash, it had warned that the financial statements would show a significantly reduced figure, largely as the result of a payment of 7.9 million under a share buy-back arrangement.

159. Zaiwalla 7 had asserted that the logistics segment of the KK Group only generated a small amount of revenue, and that the loss of that business was advantageous to the group as it had become something of a millstone. It had acknowledged the concern expressed by Centras, and had said that this concern was unduly negative. In that regard Mr Brindle relied upon, and sought to justify, Mr McGregor's assertion that the concern had been allayed. However he accepted that all that the later announcement said was, in effect, "We are publishing the reply that we have received." Thus the notion that Centras had said that their concern was allayed was, admitted Mr Brindle, no more than Mr McGregor's interpretation. Mr Brindle then submitted that there did not seem to have been any more generalised continuing expression of concern. At first he claimed that Mr McGregor had said this. When it was pointed out that Mr McGregor had said no such thing, Mr Brindle submitted it was a reasonable point to make in the light of what Mr McGregor had said.

160. Turning to Crestohl 6, Mr Brindle accepted that the likely cash position was obviously a matter of great importance. Reserving for the time being the issue about extrapolating from a 9 month period, Mr Brindle identified in Mr Beber's cash resource analysis that in reaching the overall result of a $4.867m deficiency at 31

December 2014, Mr Beber had estimated operating cash flows for the 2.25 years to then as generating $12.375m. The preferable calculation, submitted Mr Brindle, was:

(1) to take EBITDA for Q3 2014 of $8.4m, and annualise this to a full year figure of $11.2m (a little less than the 2013 audited figure of $12.2m);

(2) then to extrapolate the figure of $11.2m over 2.25 years, thus giving an operating cash flow to 31 December 2016 of $25.2 million, instead of 12.375 million;

(3) finally to carry that through the rest of the calculation, resulting not in a deficit of $4.867 million, but a surplus of $8.408 million.

161. Thus the end result was massively different. In Mr Brindle's words:

> My clients have said in their evidence, in Mr Crestohl's evidence, and I have now put some flesh on it in terms of figures, that this is all much too pessimistic, …

162. Accordingly, submitted Mr Brindle, the court could not safely proceed on the basis that the KK Group was going to suffer the degree of cash deficiency over the period which Mr Beber had postulated.

163. Turning to what was said in Zaiwalla 7 about profits, Mr Brindle said that Mr Zaiwalla had acknowledged that costs were increased by the effect of the devaluation. Zaiwalla 7 had added that the first half of 2014 presented other unforeseen and actual challenges, including problems with the financial police. He had explained why the results showed the effect of one-off relatively short-term problems. Mr Zaiwalla had commented:

> The shock of a devaluation of the tenge has been absorbed. Costs of production remain high but further increases have ceased and stabilised and revenue is already high year on year compared with the third quarter of 2013.

164. All this, submitted Mr Brindle, warranted Mr Zaiwalla's conclusion:

> Therefore the KK Group remains, as I have stated, a growing company with a bright future.

165. As to the devaluation and its effect on Q3 2014, Mr Brindle pointed out that the group had stated on 23 October 2014 that the revenue drop was entirely attributable to the conversion effect and the EBITDA drop partially so.

166. During the short adjournment Mr Beber prepared a note ("Beber 3") on the calculation he had made in paragraph 13.4 of Beber 2 in order to say that the group would need to trade for nearly 100 years to be able to pay just the principal debt that it owed. That paragraph had identified a debt burden of $140m. The trading profit had been derived by taking an EBIT of $7.0m reduced down by coupon/interest charges of at least $5.5m to just $1.5m. In Beber 3 Mr Beber explained that a reference in paragraph 13.4 of Beber 2 to the EBIT of $7.0 as being the EBIT for the third quarter

of 2013 needed correction. That EBIT figure was Mr Beber's estimate of the 2014 full year EBIT. As to this, in Beber 3 Mr Beber said:

> I reached this estimate after stripping out my estimate of the logistics contribution (which has not been separately disclosed) and taking into account the hard currency costs incurred in 2014 by reason of the devaluation of the Tenge, and pro rating to 12 months.

167. In his submissions following the short adjournment Mr Brindle commented that this had not been stated in Beber 2, and would seem to be inconsistent with paragraph 11.1 of Beber 2 (referring to the Q3 2013 EBIT as $7m) and with what was said in paragraph 13.4 of Beber 2. Secondly, Mr Brindle noted that Mr Beber had not been clear about the amounts he attributed to the items stripped out. Thirdly, Mr Brindle queried why the items should be stripped out.

168. Mr Brindle noted that paragraph 5.3 of Beber 2 acknowledged that EBITDA reported for Q3 2014 had been $8.4m, and repeated his submission at element (1) of his preferable calculation of cash resources, that the better approach was to take EBITDA for Q3 2014 of $8.4m, and annualise this to a full year figure of $11.2m. In relation to that, submitted Mr Brindle, EBITDA was the best way of equating to cashflows, as taking account of depreciation and amortisation would equate most accurately to the actual cash value of earnings.

169. Turning to Mr Beber's figures for coupon payments to bondholders, Mr Brindle acknowledged that, despite what he said were doubts on the part of Mr Werner, he could not dispute the figures of $4.5m and $5.5m given by Mr Beber for 2015 and 2016 respectively. Mr Brindle then queried why Mr Beber should have assumed that payments in 2014 would amount to $4.5m, and announced that over the short adjournment the Finance Director had stated that the amount was $1m.

170. It was at this stage that Mr Lowenstein made the objection, and I made the ruling, described in section C5.3 above. Mr Brindle then concluded his submissions on the inability to pay pre-condition by commenting that, while Beber 1 had been a fair and moderate report, Beber 2 seemed to be straining at every point to find problems and difficulties.

D3.7 14 November: Mr Lowenstein's reply submissions

171. In reply Mr Lowenstein observed that there was no evidence that Alliance would not allow the group to fail. As to the auditors saying that the accounts gave a true and fair view, that was only on the basis that the accounts included note 3, the note which led to the PwC October 2014 warning.

172. As to the cash position, Mr Lowenstein submitted that:

(1) as all other assets were charged cash would have to be found to pay the costs;

(2) during the course of the hearing Mr Zhunus's team had found in the 2013 audited accounts that litigation costs for the present proceedings to the end of

that year amounted to $2.517m, while costs of the litigation with the bank for the same period amounted to $478,000;

(3) Mr Brindle's submissions on Crestohl 6 were "creative accountancy" in that they were unsupported by evidence;

(4) the fact that Mr Brindle had come up with a figure of $8.4m discredited Mr Crestohl's own figure of $15m;

(5) Mr Brindle's assertion that EBITDA equated to cash was not based on evidence, and was wrong because earnings comprised what was charged, not what was received;

(6) as to what would be received, a distressed business was pinched both ways: creditors would insist on credit being restricted and debtors tended to "chance it a bit, because they may never have to pay";

(7) the best figures were in the table in Beber 2, which used actual cash figures.

D3.8 The note of objection

173. As noted at sections C5.3 above, on 14 November 2014 I indicated that complaints about reference to impermissible material should be dealt with by written objection. That course which was duly taken by Mr Zhunus on 17 December 2014, as recorded in section C6 above. Sections C6 and C7 also record subsequent correspondence in this regard.

D4. Conclusion on the inability to pay pre-condition

174. For the reasons given in section D3.1 the evidential position prior to 8 July 2014 gave ample reason to believe that if Mr Zhunus successfully defended the claim against him the claimants would not be able to pay costs. In Mr Beber's words, the group appeared to be surviving solely due to the forbearances of its bankers, and the available information did not enable him to see how the situation could improve in the next two to three years.

175. The evidence up to and including 14 November 2014 is that Alliance has shown support for the group during this period. In broad terms it has settled its claims against the group in exchange for a promise of a minimum sum on conclusion of the present proceedings, and more if these proceedings are successful. In these circumstances EBRD has continued to forbear to enforce its claims against the group.

176. A detailed analysis of what the position is likely to be is hampered by the failure of the group to publish balance sheets in support of recent statements of financial information. No good reason has been identified for that failure. I would, if necessary, have been prepared to draw inferences against the claimants in that regard. However it is unnecessary for me to do so. On the evidence up to and including 14 November 2014 I am satisfied by the analysis in Beber 2 that the group appears to be surviving due to the indulgence and forbearance of EBRD. I am also satisfied by that analysis that, unless the claimants' claim succeeds, at the conclusion of the trial there is reason

to believe that the group's survival will be dependent upon forbearance by both Alliance and EBRD.

177. To my mind none of the claimants' answers to Beber 2 cast significant doubt on this conclusion. Thus while Mr Zaiwalla described the devaluation of the KZT as "one-off", it is not suggested that a revaluation can be expected. In the meantime the impact on profitability on core operations will be substantial. Mr Zaiwalla's downplaying of the PwC October 2014 warning was in my view an unsubstantiated gloss on important concerns which management set out in note 3 to the 2013 accounts.

178. I am satisfied on the relevant evidence that the liabilities to Alliance and EBRD on conclusion of this litigation will be substantial. As to Alliance, the court was told that the minimum sum was $15m. It was then said that the minimum sum was the KZT equivalent of $15m. No documentation has been provided to justify this assertion, or indeed the assertion that the only liability will be the minimum sum. As to EBRD, the notion that the group's liabilities to it could be discharged in the short term is unsupported by any detail as to how this could be achieved and cannot be sustained.

179. Criticism was made of what was said in paragraph 13.4 of Beber 2 concerning a trading profit that could be used to repay the group's principal debt of $140m. His computation of the trading profit was such, he said, that "the group would need to trade for nearly 100 years to be able to pay just the principal debt it owes". The trading profit he referred to would give rise to an ability to pay $1.5m, after deduction of coupon/interest charges of at least $5.5m. It is in my view plain that he was talking about annual figures in this regard. I am satisfied that, as explained in Beber 3, his reference in paragraph 13.4 to "EBIT of $7.0m in Q3 2013" was a slip, and what he had intended to refer to was his own estimate of EBIT for 2014 – this being $7.0m. Mr Brindle said that this was inconsistent with the statement in paragraph 11.2 of Beber 3 that there was indeed an EBIT of $7.0m in Q3 2013. I detect no inconsistency – indeed the fact that both figures were $7.0m may well explain the slip.

180. Mr Brindle recognised the importance of Mr Beber's computation of the likely cash position. However, as pointed out in the notice of objection filed by Mr Zhunus in December 2014, Mr Brindle's criticisms of that computation were reliant upon unsupported assertions as to appropriate accounting practice and as to the amount of coupon/interest payments falling due. The claimants' answer began with an assertion that Mr Zhunus unjustifiably sought to censor Mr Brindle's submissions. This misunderstood both my order and the objection. My order entitled Mr Zhunus to complain about submissions based on material not in evidence. Mr Brindle's submissions relied on EBITDA as the appropriate proxy, but no evidence had been filed to support this. On the interest/coupon payments, Mr Brindle effectively sought to give evidence as to their amount: if the claimants were going to rely on any such evidence it ought to have been filed much earlier. Having failed to do so, the claimants' criticisms of Mr Beber's estimates are unimpressive.

181. A further aspect is the loss of income previously derived from the group's involvement in the logistics sector. This plainly gave rise to concerns on the part of bondholders. Mr Brindle's submission that those concerns had been allayed proved, on analysis, to be unjustified by what had been said on behalf of bondholders. At its highest the submission could only be that Mr McGregor interpreted what had been said in that way, but it is not what was said on behalf of bondholders and Mr

McGregor has given no other basis for thinking that bondholders' concerns had been allayed. I acknowledge that Mr Beber did not consider the likely revenue effect to be more than "small". However the way in which officers of the claimant put their own gloss on what has been said in an unambiguous document leads me to be sceptical about other statements made by the claimants for which no underlying documents have been provided.

182. Moreover Mr Beber's computations excluded the claimants' costs of these proceedings. It is not denied that they are and will be substantial. No basis has been identified for the assertion that there will be "a decrease in litigation costs": ordinarily, so far as these proceedings are concerned, the contrary would be the case in the period during the run up to trial.

183. As to the position at the conclusion of the trial, of course if the claimants are successful then their financial position will be greatly improved. It is not disputed, however, that for the purposes of the inability to pay pre-condition, I must assume that Mr Zhunus has been successful in his defence. For the reasons given earlier, the group will at that point have substantial liabilities to Alliance and EBRD. Mr Brindle valiantly asserted that the group's bankers would not let the group fail. There was, however, no evidence of any assurance of that kind in relation to the group's current financial position, let alone in relation to what the group's position would be if its claims in the present litigation were to fail.

184. Overall I remind myself that I must consider whether Mr Zhunus has shown, on the evidence filed up to and including 14 November 2014, that there is reason to believe that the claimants will be unable to pay Mr Zhunus's costs if ordered to do so. It is a question about the claimants' future financial position (at the point when an order for costs of the proceedings would be made against it, if made at all) rather than their current one. In the ordinary course such an order will have been made because the claimants' claim has failed.

185. Sometimes it will be inappropriate to speculate as to why the claimants' claim has failed. In the present case, however, the major difficulty with the claimants' case has been prominent from the time that Mr Arip contested the freezing order. One of the few matters that both sides agree upon is that Kazakh law applies so as to impose a time bar on the claims for fraud, and that this time bar will take effect three years from the date on which the claimants should have been aware that their rights were violated. While His Honour Judge Mackie QC thought that the claimants had much the better of the argument on the limitation point, none of the judges in the Court of Appeal took that view. All three agreed on the test for maintenance of the freezing order: what had to be shown was a good arguable case, in the sense of a case which is more than barely capable of serious argument. This is a low hurdle. Longmore LJ thought it was surmounted because the claimants' case on limitation was "well arguable". Jackson and Elias LJJ, however, considered that this low hurdle had been surmounted "only by a narrow margin".

186. As recorded in section C3 above, neither side opposed my proposal to work on the basis that, as with Mr Arip, it was only "by a narrow margin" that the claimants' case against Mr Zhunus was strong enough to be described as "more than barely capable of serious argument". Nothing that I have seen leads me to doubt that this is the right approach. In these circumstances, if an order is made after trial that the claimants

must pay Mr Zhunus's costs, the strong likelihood is that this will be because the time bar defence of all three defendants has succeeded. In those circumstances the claimants' hopes to recover large sums of money will have been dashed, and lesser but still large sums of money spent by the claimants on costs will have been wasted, because a claim which was entirely concerned with Kazakhstan was not brought within the Kazakh limitation period. Beber 2 gives good reason to believe that the claimants' own resources will by this time have been exhausted. In the circumstances described earlier in this paragraph, and taking account of all the evidence about sources of finance, there is also good reason to believe that the claimants would at that stage not be able to obtain the financial assistance that would be needed in order to pay Mr Zhunus's costs.

187. On the evidence filed up to and including 14 November 2014, I am satisfied that there is reason to believe that the claimants will be unable to pay Mr Zhunus's costs if ordered to do so.

E. The residence pre-condition

E1. Residence pre-condition: general

188. It is common ground that Mr Zhunus is able to satisfy the residence pre-condition as regards all the claimants. All claimants are, as required by CPR 25.12(2)(a)(i), resident out of the jurisdiction. It is also the case that all claimants are not resident in a state forming part of what has been called the "Zone" or "European legal market", as more precisely defined in CPR 25.12(2)(a)(ii). A contention was advanced in Zaiwalla 2 that, by returning to live in Kazakhstan, Mr Zhunus had debarred himself from complaining about obstacles to enforcement under Kazakh law. This contention was rightly not pursued by Mr Brindle.

189. However, both sides agree that if the court is to grant security, then it must not do so in a manner which is discriminatory when Articles 6 and 14 of the European Convention on Human Rights are taken together. This does not pose a problem where the power to grant security is based upon satisfaction of the inability to pay pre-condition, for that pre-condition applies to companies and other bodies whether they are based within the jurisdiction or abroad. The residence pre-condition, however, on its face discriminates against claimants who reside outside the European legal market. In order to comply with the non-discrimination provisions in Article 14 as regards access to justice under Article 6, the grant of security when the residence pre-condition has been satisfied should not be either automatic or inflexible. Instead the court should consider whether residence out of the jurisdiction gives a basis for concluding that enforcement would face any substantial obstacle or extra burden meriting the protection of an order for security for costs and thus justifying the difference in treatment. Moreover, the court should consider tailoring the order to the particular circumstances: if there is likely to be no difficulty about enforcement, but simply an extra burden in the form of costs or moderate delay, the appropriate course could well be to limit the amount of the security ordered by reference to that potential burden.

190. These principles are derived from the judgment of Mance LJ, with whom Simon Brown LJ agreed, in *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556, [2002]

1 WLR 1868. In the present case the application of those principles in relation to the Kazakh claimants is relatively straightforward. They are resident in Kazakhstan and, to the extent that they have assets, those assets are in Kazakhstan. I consider the application of these principles to the Kazakh claimants in section E2 below.

191. As regards KK Plc the application of these principles may not be straightforward. It is resident in the Isle of Man, but its assets consist of holdings in foreign companies which are the indirect owners of businesses and real and personal property in Kazakhstan. I consider the position as regards KK Plc in section E3 below.

E2. Residence pre-condition: the Kazakh claimants

192. As noted in section C2.1 above, Tickner 3 exhibited the MGAP Report. This stated that there was no relevant bilateral or multilateral treaty in relation to the enforcement of English judgments in Kazakhstan, that there was no known example of an English judgment being recognised and enforced in Kazakhstan, and that such recognition and enforcement was "highly unlikely".

193. The claimants observe, however, that in paragraphs 63 to 65 of his judgment in *Nasser* Mance LJ said this:

> [63] It also follows, I consider, that there can be no inflexible assumption that there will in every case be substantial obstacles to enforcement against a foreign resident claimant in his or her (or in the case of a company its) country of foreign residence or wherever his, her or its assets may be. If the discretion under rule 25.13(2)(a) or (b) or 25.15(1) is to be exercised, there must be a proper basis for considering that such obstacles may exist or that enforcement may be encumbered by some extra burden (such as costs or the burden of an irrecoverable contingency fee or simply delay).
>
> [64] The courts may and should, however, take notice of obvious realities without formal evidence. There are some parts of the world where the natural assumption would be without more that there would not just be substantial obstacles but complete impossibility of enforcement; and there are many cases where the natural assumption would be that enforcement would be cumbersome and involve a substantial extra burden of costs or delay. But in other cases—particularly other common law countries which introduced in relation to English judgments legislation equivalent to Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 (or Part II of the Administration of Justice Act 1920)—it may be incumbent on an applicant to show some basis for concluding that enforcement would face any substantial obstacle or extra burden meriting the protection of an order for security for costs. Even then it seems to me that the court should consider tailoring the order for security to the particular circumstances. If, for example, there is likely at the end of the day to be no

> obstacle to or difficulty about enforcement, but simply an extra burden in the form of costs (or an irrecoverable contingency fee) or moderate delay, the appropriate course could well be to limit the amount of the security ordered by reference to that potential burden.
>
> [65] I also consider that the mere absence of reciprocal arrangements or legislation providing for enforcement of foreign judgments cannot of itself justify an inference that enforcement will not be possible. The present case illustrates this. It is a remarkable fact that no country has ever entered into any treaty providing for recognition and enforcement of judgments with the United States of America. But the reason is concern about the breadth of American jurisdiction, the corollary of which has been a willingness on the United State's part to recognise and enforce foreign judgments by action on a similarly liberal and flexible basis: see, e g, Kevin M Clermont, "Jurisdictional Salvation and the Hague Treaty" (1999) 85 Cornell Law Review 89 , 97–98. I am not aware that anyone has ever suggested that access to justice or to the means of executing justice is an American problem. Certainly no evidence has been put before us to suggest that the defendants would, or even could, face any real obstacle or difficulty of legal principle in enforcing in the United States any English judgment for costs against this claimant.

194. Applying what was said by Mance LJ in paragraphs 63 to 65, it seems to me that I must not infer that enforcement will not be possible in Kazakhstan merely because there are no reciprocal arrangements or legislation providing for enforcement of an English judgment. However I am entitled to conclude that enforcement will not be possible or will face substantial obstacles if there is evidence to that effect, and moreover I should "take notice of obvious realities without formal evidence".

195. The claimants' evidence of Kazakh law began with Signum 1. The relevant question asked whether Mr Zhunus could start a claim in Kazakhstan against the Kazakh claimants "on the basis of the unpaid debt (i.e the amount outstanding under the English judgment)?" The answer said that Mr Zhunus might start a claim in Kazakhstan. It added:

> In this case, it would be a civil litigation, in which [Mr Zhunus] will have to prove the debt, i.e. the foreign judgment would not have any priority and would be regarded as one of the evidence.

196. This answer does not assist me. The reason is that the answer does not explain what principles of Kazakh law govern the question whether an English judgment against a Kazakh claimant would be held to constitute a debt upon which the judgment creditor could sue in Kazakhstan. There is a passing remark which suggests that a question of evidence might arise, but this does not take the matter any further. By contrast, Linkage & Mind 1 gave a detailed account of the requirements under Kazakh law and of the expectations of a Kazakh court where there is a claim for an unpaid debt. It identified an important statutory provision which Signum 1 did not mention: article

425 of the Code of Civil Procedure provides that foreign judgments are recognised and enforced if it is stipulated by law or an international treaty of the Republic of Kazakhstan on the basis of reciprocity.

197. Linkage & Mind 1 noted that a judgment creditor might try to rely on Article 71(2) of the Code of Civil Procedure. This stated that circumstances established earlier in civil proceedings court judgments in force shall be binding on the court and do not require to be proven again in other civil proceedings involving the same parties. In their view this provision was applicable only to Kazakh court judgments. The losing party's obligation to pay the winning party's legal costs pursuant to an English court judgment was not, in their opinion, a factual circumstance, but arose solely because of the order of the English court.

198. Linkage & Mind 1 agreed with MGAP's opinion that it is virtually impossible that an English court judgment would be recognised and enforced in Kazakhstan. They added that this applied, perhaps with even greater force, to any English judgment, consequential on a substantive judgment, awarding one party to pay the other party's costs.

199. Signum 2 explained that Signum 1 "did not mean to evaluate how successful might a claimant be in Kazakh courts with a civil claim." It was said to be at the court's sole discretion either to accept the judgment as evidence or not. There was no restriction in the civil procedure code on using a foreign judgment as evidence. Signum went on to assert that a foreign judgment complied with relevant requirements of the civil procedure code, but in this regard they made no response to paragraph 16 of Linkage & Mind 1 setting out what a Kazakh court would expect to see as proof of an "unpaid debt". They concluded by saying that grounds set out in the civil procedure code for rejection of a claim or "leaving the claim without consideration" did not include a limitation on subject or basis of the claim or evidences. However, this did not address the positive assertions made in Linkage & Mind 1. Signum 2 added:

> We believe that for a court the basis for a claim should not be the foreign judgment, but the outstanding debt.

200. This additional remark is difficult to follow. If Mr Zhunus were to be the beneficiary of a costs order, the only basis for his claim to payment would be the English court judgment in his favour in that regard. The English court's judgment in that regard would not be a recognition of an outstanding debt: it, and only it, would create the debt. To my mind, this additional remark gives strong reason to doubt the value of any of the opinions expressed by Signum.

201. Linkage & Mind 2 responded by reiterating what had been said in Linkage & Mind 1. It added that there was no need to have legal norms restricting the ability to sue on a foreign judgment, as Article 425 of the code limited the recognition and enforcement in Kazakhstan of a foreign judgment to cases where provision for this was made by law or by an international treaty on the basis of reciprocity. It described the additional remark of Signum 2 noted above as "a nonsense": it would mean that the costs judgment would stand as evidence of a debt before the Kazakh courts when the exercise of the judicial discretion that created the debt was itself not recognised.

202. In my view this evidence clearly establishes that an English costs order in favour of Mr Zhunus would not be enforceable in the courts of Kazakhstan. Even if that were not the case, however, in the English courts it is now an obvious reality that an English judgment will not be enforced in Kazakhstan. In the course of argument I observed that I had recently dealt with a case where, for that reason, a contract with Kazakh parties had included an arbitration clause so that an award could be enforced in Kazakhstan under the New York convention: see *Assaubeyev v Michael Wilson & Partners* [2014] EWHC 821 (QB). The claimants made no response to that observation.

E3. Residence pre-condition: KK Plc

203. Tickner 3 accepted that under statute law of the Isle of Man a judgment of the English High Court can be registered there and executed as a judgment of the Manx High Court. The cost of doing this would be in the region of £5000.

204. That being the case, the claimants submitted that, so far as the KK Plc was concerned, security of at most £5000 would be appropriate. They acknowledged that KK Plc's underlying assets were predominantly in Kazakhstan. Claiming to apply the reasoning of Mance LJ in *Nasser*, however, they submitted that in order to justify an order for security against a claimant resident outside the Zone which could not be obtained against a claimant resident within the Zone it has to be shown that it is residence outside the Zone which gives rise to costs of enforcement additional to those which would be incurred if the claimant was resident within the Zone. This was the reasoning adopted by Master Bowles in *Harrison v Laidlaw* [2014] EWHC 35 (Ch). In essence, the point is that security cannot be ordered against an English claimant merely because that claimant's assets are in Kazakhstan, and accordingly it would be unjustified discrimination to require security from a claimant in the Isle of Man because that claimant's assets are in Kazakhstan.

205. To my mind this takes too narrow a view. As noted by Mance LJ in paragraph 58 of his judgment, what is prohibited is discrimination on grounds unrelated to enforcement. It is to my mind a legitimate enforcement related distinction to say to those who are based outside the Zone that security may be required when it will not be possible to use against their assets the measures which can be used against assets within the Zone. This was the view taken both by Mr Gabriel Moss QC sitting as a High Court Judge in *AIMS Asset Management v Kazakhstan Investment Fund Ltd* Chancery Division, 22 May 2002 (unreported), and by Gross J in *Texuna International Ltd v Carin Energy Plc* [2004] EWHC 1102 (Comm), [2005] 1 BCLC 579. As pointed out by Gross J in paragraph 23(viii), this is consistent with Mance LJ's observation at paragraph [63] of *Nasser* that what the court is concerned with is whether there will be substantial obstacles to enforcement against a foreign resident claimant in the country of foreign residence or wherever the assets may be.

206. For these reasons, given that the vast majority of KK Plc's assets are effectively to be found in Kazakhstan, KK Plc's location outside the Zone entitles the court to order security if the justice test is met.

E4. Residence pre-condition: the proposed undertaking

207. The aim of the proposed undertaking was to bring about a position under which whatever entitlements Mr Zhunus may have to costs against the Kazakh defendants would be entitlements which he could enforce against KK Plc. At one stage it appeared to be suggested that this had already been achieved as regards Astana Jsc and Paragon Development, because their claims had been transferred to KK Plc. I am not sure that such a transfer would have the suggested result. I have seen no draft of any proposed amendment to the claim form or particulars of claim in this regard.

208. In any event, the proposed undertaking would not achieve its ultimate object. That is because, for the reasons given earlier, KK's location in the Isle of Man does not, in circumstances where its assets are in Kazakhstan, enable it to say that reliance upon the residence pre-condition would be discriminatory. In these circumstances I do not need to consider the precise terms of the proposed undertaking.

E5. Conclusion on the residence pre-condition

209. For the reasons earlier in this section I conclude that the claimants' location outside the Zone entitles the court to order security if the justice test is met.

F. The justice test

F1. Justice test: general

210. In section C2 above I have cited from paragraph 25.13.13 of *Civil Procedure 2014*. The justice test is described in that passage as:

> … a discretion under r.25.13 whether to order security for costs having regard to all the circumstances of the case. …

211. This terminology reflects observations in a number of the leading judgments. I do not understand it to be suggested that references to there being a "discretion" in any way detract from the specific requirement set out in CPR 25.13(1)(a). I can only order security for costs under rule 25.12 if I am satisfied, having regard to all the circumstances of the case, that it is just to make such an order.

212. The heading to the passage quoted in section C2 above refers to factors arising where the inability to pay pre-condition is relied upon. They may, as it seems to me, be relevant also in a case where the residence pre-condition is relied upon.

F2. Justice test: inability to pay and obstacles to enforcement

213. For the reasons given in sections D and E above, Mr Zhunus's first contention on the justice test is, in my view, amply justified. If an order for costs were to be made in his favour after trial there would be likely to be an order for interim payment of a large sum, followed by a process of detailed assessment leading to a requirement to pay another large sum. There is good reason to believe that the claimants would be unable to pay either of these sums, and even if they were there is no real prospect of being

able to enforce such orders against such assets of the claimants as have not been realised by other creditors.

214. Mr Zhunus thus has a strong case that both these matters call for an order to secure him against what would otherwise be a large and irrecoverable financial loss.

F3. Justice test: other factors

215. Returning to the citation in section C2 above, the claimants relied on two of the factors identified in that citation. They were those numbered in the citation as:

> (2) whether the claimant has a reasonably good prospect of success
>
> …
>
> (6) whether the claimant's want of means has been brought about by any conduct by the defendant, such as delay in payment or in doing their part of any work.

216. Additionally, it is suggested by the claimants that they can rely upon criticisms of the conduct of Mr Zhunus and upon the prejudice to shareholders and creditors if money which could otherwise be put to good use by the claimants is not available because it is held by the court as security or because costs have to be paid by the claimants in relation to the giving of some other means of security.

217. I can dispose of these suggested additional grounds in short order. Taking the last one first, shareholders' and creditors' interests must ordinarily stand or fall according to the court's conclusion as to the justice of the matter in relation to Mr Zhunus and the claimants. As Jackson LJ pointed out in the passage cited in section C1.7 above, the present case is one in which shareholders and creditors should take a close interest. Nothing in the evidence leads me to consider, however, that shareholders and creditors in the present case can expect any special treatment when I am giving consideration to the justice test.

218. As to the other additional factor upon which the claimants sought to place reliance, much of the evidence and some of the argument at the 11 July hearing was taken up with allegations against Mr Zhunus. Some of them form part of the 2013 fraud allegations. They may have relevance to an examination of factors (2) and (6). In so far as allegations are made about Mr Zhunus's conduct which do not arise for consideration as part of factors (2) and (6), I decline to examine them. None is so obviously meritorious as to justify taking account of it without engaging in what would inevitably be a "mini-trial".

219. Returning to factors (2) and (6), the structure of the submissions made on behalf of the claimants in this regard was confusing. They asserted that they could rely upon factor (2). That is plainly wrong: as was pointed out by the Court of Appeal, when forming a view upon the merits, the court must take account of possible defences, and in particular the defence of time bar. Far from having a strong case on the merits, the claimants' case on the merits can only "by a narrow margin" be described as more

than barely capable of serious argument. To my mind this factor counts in favour of Mr Zhunus rather than against him.

220. In the course of oral argument it emerged that points which were apparently presented as being made in relation to factor (2) by the claimants were points which in truth were directed to factor (6). While Mr Lowenstein vigorously maintained that Mr Zhunus had a strong defence that he was not party to any alleged frauds, it seems to me that the circumstances of the PEAK and Astana 2 frauds are such that a defence of this kind will require a great deal of explaining on the part of Mr Zhunus. I cannot and do not decide that Mr Zhunus is guilty of these frauds. Nevertheless there is a strong case that he was involved in, and benefited from, dishonest activities which led to the claimants' dire financial position at the start of these proceedings. This is a factor which weighs powerfully in favour of the claimants.

F1. Justice test: overall assessment

221. It seems to me important to bear in mind that, even if Mr Zhunus admitted the fraud he would be entitled to rely upon the time bar defence. That is because Parliament has legislated in the Foreign Limitation Periods Act so as to require that this court, in a case where it is agreed that Kazakh law applies and gives a time bar protection to those guilty of fraud, should respect the decision of the Kazakh legislature as to the stage at which a claimant must bring proceedings if the claim is not to be time barred. Jackson LJ in the Court of Appeal expressed concern that the present case may be an example of "the perfect fraud". If it were appropriate to describe the case in that way, then as it seems to me the reason for it being so described would be the choice by our legislature to proceed by reference to Kazakh law of limitation, and the choice by Kazakh law of limitation to bar a claim which is brought more than three years after the claimant ought to have been aware of the relevant violation of rights.

222. Thus the position on the material before me is that the claimants have spent large sums of money, and are continuing to propose to spend large sums of money, forcing Mr Zhunus to spend very substantial sums himself on a claim which is little more than barely capable of serious argument, and will likely result in failure. In these circumstances, while the strength of the fraud allegations is a powerful factor, I consider that it is significantly outweighed by the combination of the weakness of the claimants' case on the merits, the policy that the court must respect Kazakh law on limitation even in circumstances where English law would take a less generous approach to those accused of fraud, and the strong likelihood of substantial financial damage to Mr Zhunus if no order for security were made. Looking at the matter in the round, I am satisfied that it is just to make an order for security.

G: The February 2015 application

G1. February 2015 application: general

223. The February 2015 application asserts that a new state of affairs, unforeseeable in November 2014, has now arisen. It is said to have the consequence that the claimants will not be able to pay security for costs in the sum sought by Mr Zhunus. To do so, it is said, would mean mass redundancies and defaulting on bonds and obligations to

EBRD. Thus, it is now submitted, a bona fide claim would have effectively been stifled.

224. As noted in section C3 above, Mr Brindle expressly stated that it was not said that an order for security would stifle the claim. This new submission is an about turn from that express disavowal. It relies in part upon a collapse in the value of the RUB. The justification for making an about turn is said to be that the group "has … been dealt a surprising and unexpected double-blow by the currency crisis - demand from its core clients has sharply fallen, while competition from Russian producers has increased aggressively."

225. In these circumstances it is necessary to refer to key features of the way in which the court approaches a contention that the claim will be stifled.

G2. February 2015 application: principles as to stifling

226. In section D1 above I cited observations by Briggs J in *Chemistree.* In the light of what is now sought to be advanced in the February 2015 application, I set out further observations by Briggs J in paragraphs 4 to 6 of his judgment about the court's approach to an allegation that an order for security would stifle a claim:

> 4. A particular consideration much relied upon by claimants is whether an order for security would stifle the claim. In this respect the onus is on the claimants, see *Radu v Houston* [2006] EWCA Civ 1575 ....
>
> 5. The court must therefore guard against an uncritical acceptance of a mere assertion to that effect and deal with the issue objectively on the evidence as its stands. It is not enough, to make good an assertion of stifling, for the claimants' directors to say that, if faced with an order for security, they will decide on commercial grounds to discontinue the claim ...
>
> 6. The claimants do not have, in support of the stifling submission, to go so far as to prove that they could not in any circumstances raise the money. The claimants are expected to show that there is after due enquiry no available external source of funds to pay security, for example, from shareholders, stakeholders or associated companies."

227. In relation to the last sentence of the passage quoted above I refer also to what was said by Kitchen J in *Allen v Bloomsbury Publishing* [2011] EWHC 770. At paragraph 66 of his judgment Kitchen J explained that in this context the court must consider whether it has:

> … a full account of the resources available to [the claimant], whether he and those backing him have been full and candid in setting out what their means are, and whether he can raise the amount needed to meet an order for security from his backers and other interested persons.

G3. February 2015 application: the March 2015 material

228. As noted in sections A2 and C7.3 above my directions required full evidence and full written submissions on behalf of the claimants, and in response I was provided with what I shall call "the March 2015 material": namely, Werner 2 and the March 2015 submissions.

229. There are numerous difficulties with the contentions in the March 2015 material. Two examples immediately spring to mind. First, it would be surprising if it were indeed the case, as late as November 2014, that the difficulties now described could not have been foreseen. Second, it is difficult to reconcile the contention that the difficulties are as great as they are now said to be with the contention that they do not have the consequence that the inability to pay pre-condition is met. This inherent implausibility may cast doubt on the reliability of the assertions made in Werner 2. However I do not need to investigate these or other potential difficulties, as in my view there is a far more formidable difficulty which plainly is not surmounted by the March 2015 material.

230. The insurmountable difficulty is the failure to comply with the expectation, explained in section G2 above, that claimants relying upon a stifling contention will show that there is, after due enquiry, no available external source of funds to pay security. I shall refer to this expectation as "the due enquiry expectation".

231. The need to make such an enquiry is something that the claimants are and have been well aware of. In this regard Werner 2 says at paragraph 29:

> I anticipate that the First Defendant will say that if KK cannot meet an order of security for his costs, then its creditors (principally IFK and Alliance Bank) or shareholders such as EBRD or myself should provide the funds. This issue has already been addressed in the Second Witness of Sarosh Zaiwalla dated 23 June 2014 at para 59.

232. There is no need to look at Zaiwalla 2 in order to observe that this cannot possibly meet the due enquiry expectation. A witness statement made in June 2014 cannot possibly give an account of due enquiry made in February 2015.

233. I do not lengthen this judgment by setting out paragraph 59 of Zaiwalla 2. It is sufficient to note that what was said there was rightly described at paragraph 6.3 of Mr Zhunus's skeleton as:

> vague and unsupported assertions that those funding the Claimants' (very substantial) costs "cannot be expected" to fund [Mr Zhunus's] costs …

234. The March 2015 submissions make an observation at paragraph 22 that paragraph 59 of Zaiwalla 2 was not challenged in Mr Zhunus's reply evidence. This observation seems to confuse evidence and argument. Mr Zhunus can hardly be expected to investigate the position in relation to those funding the claimants and to set out in reply evidence the result of that investigation. The matter was properly dealt with by way of argument in paragraph 6.3 of Mr Zhunus's skeleton. That paragraph drew

attention to something which I am sure that the claimants were fully aware of: the court expects a detailed enquiry to have been made so that it can consider the matters identified by Kitchen J in his judgment in the *Allen* case.

G4. February 2015 application: conclusions

235. There is no evidence of any such enquiry as would meet the due enquiry expectation. I can identify nothing in the March 2015 material which explains or excuses the failure to carry out such an enquiry. In those circumstances the February application discloses no adequate evidence of stifling. Accordingly I dismiss that application without the need to call for evidence or argument in answer to it.

H. Quantum and conclusion

236. As to the amount of security, the claimants noted that a large proportion of the amount claimed was "historic". They commented that in relation to that historic amounts the request for security had not been made promptly. I do not consider, however, that there has been any such delay as would warrant criticism of Mr Zhunus. The question of security was flagged relatively early in the correspondence, there was reason to think that it might be agreed, and the application notice was issued promptly when it became apparent that no agreement would be reached.

237. I am nevertheless of the view that the amount claimed to take the matter through to the next stage is too high. Mr Zhunus has instructed a legal team who command a premium in the market. There is nothing wrong with this, but the premium must be for him to bear. As to the amount of work that has been billed, or is estimated for the future, I recognise that until now Mr Zhunus has had to deal with a considerable amount of irrelevant material which is time consuming to answer. Making full allowance for that, while also ensuring that the security does not include a premium, I consider that an amount of £1m is appropriate. I add that as regards future costs the court expects both sides to take heed of my observations at the outset of this judgment.

238. Accordingly I will grant Mr Zhunus's application in an amount of £1m.