[2011] UKPC 7

Privy Council Appeal No 0064 of 2009
Privy Council Appeal No 0065 of 2009
Privy Council Appeal No 0066 of 2009
Privy Council Appeal No 0067 of 2009

JUDGMENT

AK Investment CJSC (Appellant) *v* Kyrgyz Mobil Tel Limited and Others (Respondents)

Altimo Holdings and Investment Limited and Others (Appellants) *v* Kyrgyz Mobil Tel Limited and Others (Respondents)

CP-Crédit Privé SA (Appellants) *v* Kyrgyz Mobil Tel Limited and Others (Respondents)

Fellowes International Holdings Limited (Appellant) *v* Kyrgyz Mobil Tel Limited and Others (Respondents)

From the High Court of Justice of the Isle of Man (Staff of Government Division)

before

Lord Phillips
Lord Mance
Lord Collins
Lord Kerr
Lord Clarke

JUDGMENT DELIVERED BY
Lord Collins
ON

10 March 2011

Heard 30 November 2010 – 7 December 2010

Appellant
James Ramsden
Jennifer Thelen
(Instructed by Steptoe & Johnson)

Respondent
Graham Dunning QC
Nicholas Harrison
(Instructed by Squire Sanders & Dempsey)

Appellant
Stephen Smith QC
Simon Adamyk
(Instructed by Lovells LLP)

Appellant
Bankim Thanki QC
Edward Levey
(Instructed by DLA Piper UK LLP)

Appellant
Guy Phillips QC
(Instructed by White & Case LLP)

LORD COLLINS:

I Introduction

1. At the heart of this unusual and complex case is a struggle between two Russian groups concerning a telecommunications business in Kyrgyzstan owned, or formerly owned, by BITEL LLC ("BITEL"), a Kyrgyz company. This appeal arises out of proceedings commenced in the Isle of Man by BITEL to enforce a Kyrgyz judgment at common law against the Respondents, Kyrgyz Mobil Tel Ltd, Flaxendale Ltd and George Resources Ltd ("the KFG Companies"), which are all incorporated in the Isle of Man, and are owned by Mobile TeleSystems OJSC ("MTS"), the largest mobile telecommunications operator in Russia, which is listed on the New York Stock Exchange.

2. The KFG Companies counterclaimed against BITEL and sought and obtained permission to join thirteen additional defendants to the Counterclaim and serve them out of the jurisdiction. The Appellants are six of those defendants to counterclaim, who applied, successfully, to Deemster Doyle for an order setting aside the order for service out of the jurisdiction. The Deemster's decision was reversed by the Staff of Government Division, and it is from that decision that the Appellants appeal.

3. The first three Appellants, Altimo Holdings and Investments Ltd, a BVI company ("Altimo BVI"), 000 Altimo, a Russian company ("Altimo Russia") and Sky Mobile LLC, a Kyrgyz company ("Sky Mobile"), are part of a very substantial Russian conglomerate known as the Alfa Group, and are collectively referred to here as the "Alfa Parties." The other Appellants are Fellowes International Holdings Ltd, a BVI company ("Fellowes"), CP-Crédit Privé SA, a Swiss fiduciary ("CP-Crédit") and AK Investment CJSC, a Kyrgyz company ("AK Investment"). Fellowes, CP-Crédit, and AK Investment are each separately represented, but generally in this advice the Appellants will be referred to collectively, except where the context requires otherwise.

4. In short this is an appeal about whether the Appellants are necessary or proper parties to the Counterclaim by the KFG Companies in the Isle of Man, or whether the appropriate forum is Kyrgyzstan, as the Appellants contend.

5. This, like many such cases, is not really a dispute about forum. The connection which this case has with the Isle of Man is that BITEL seeks to enforce a Kyrgyz judgment by proceedings in the Isle of Man against the KFG Companies, three

companies incorporated in the Isle of Man, who seek to counterclaim against the Appellants in relation to matters which occurred wholly outside the Isle of Man, and primarily in Kyrgyzstan. The KFG Companies accept that Kyrgyzstan is the natural forum for the pursuit of their claims, in the sense of being the jurisdiction with which their claims have their most real and substantial connection: *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, at 478, per Lord Goff of Chieveley.

6. But the practical reality of the matter is that if the KFG Companies are confined to their remedies against the Appellants in Kyrgyzstan they will not in fact be able to pursue any of their claims there. Consequently, although this is in form a case about the appropriate forum, in reality it is a case in which, if the Isle of Man is not the appropriate forum, the KFG Companies will have no practical remedy at all.

7. Experience has shown that Lord Templeman was being over-optimistic when he said, in *Spiliada* (at 465), that in disputes about the appropriate forum the court would not be referred to other decisions on other facts, and that submissions would be measured in hours and not days. But this case has been excessively complicated by any standards. The hearings before the Deemster and the Staff of Government Division each lasted for 4 days or more. The hearing before the Board lasted 4 days. The written cases of the parties exceeded 200 pages, and more than 30 volumes of documents were placed before the Board, containing almost 14,000 pages, as well as 170 authorities in 12 volumes. The core bundle alone consisted of six volumes. The list of "essential" pre-reading for the Board listed documents totalling some 700 pages. All of this was wholly disproportionate to the issues of law and fact raised by the parties.

II The facts

8. The factual background is complex. Many of the facts are disputed and nothing in this advice is intended to prejudge any question of fact which may arise in subsequent hearings.

9. By early 2005 BITEL was the leading supplier of mobile telephone services in Kyrgyzstan. It was owned by the KFG Companies, whose ultimate beneficial owners were then the son of the President of Kyrgyzstan and the Deputy Minister for Transport and Communications. By the end of 2005 the ultimate owners of the KFG Companies had become MTS.

The Transfer Agreement between the KFG Companies and IPOC/KMIC

10. By an agreement dated May 30, 2003 (the "Transfer Agreement"), the KFG Companies agreed to sell their interest in BITEL to IPOC International Growth Fund Ltd ("IPOC"), a Bermudian mutual investment fund, for approximately US$22.4 million. Under the Transfer Agreement, IPOC had the right to transfer its interest in BITEL to Kyrgyzstan Mobitel Investment Company Ltd ("KMIC"), which was to be incorporated as a subsidiary of IPOC. If completion of the sale to IPOC did not occur prior to December 1, 2003, the Transfer Agreement was to terminate automatically.

11. The Transfer Agreement was governed by English law and included an arbitration clause, which provided that any dispute arising out of the agreement was to be referred to arbitration under the rules of the London Court of International Arbitration ("LCIA").

12. KMIC was subsequently incorporated and on October 6, 2003 IPOC notified the KFG Companies of its intention to assign its rights and obligations under the Transfer Agreement to KMIC. Unknown to the KFG Companies, by a written agreement dated October 1, 2003 between IPOC and Fellowes, Fellowes agreed to purchase from IPOC 100% of its shares in KMIC conditionally upon the completion of the Transfer Agreement. That agreement was also governed by English law, with provision for arbitration in London under UNCITRAL Rules. IPOC then assigned its interest in BITEL under the Transfer Agreement to KMIC on October 8, 2003.

13. In late 2003 a dispute arose between the KFG Companies, IPOC and KMIC. The KFG Companies refused to complete the sale by December 1, 2003. Consequently, KMIC initiated arbitration proceedings on March 31, 2004 seeking specific performance of the Transfer Agreement or, alternatively, damages for breach of contract.

April 2005 Judgment

14. In December 2004 the Alfa group, through Altimo BVI, purchased a controlling interest in Fellowes. In March 2005, a revolution in Kyrgyzstan led to the resignation of President Akaev, who left the country. The then beneficial owners of the KFG Companies, who (as indicated above) were associated with the former regime, also left the country.

15. On March 29, 2005 Fellowes (which was not a party to the Transfer Agreement, but had agreed to purchase KMIC from IPOC) initiated proceedings in the Bishkek Interdistrict Economic Court in Kyrgyzstan against the KFG Companies alleging a breach of the Transfer Agreement and seeking specific performance directly in its own favour.

16. On April 15, 2005, the Bishkek Interdistrict Court ordered specific performance of the Transfer Agreement in favour of Fellowes in the absence of any representatives of the KFG Companies. The Court held that Fellowes and the KFG Companies had entered into the Transfer Agreement, which was duly signed by them, and in the dispositive part of the Judgment held that Fellowes had the right to own the shares in BITEL upon payment by Fellowes (which was later made) of US$20.5 million to the deposit account of the Kyrgyz Ministry of Justice, such sum being the balance of the purchase price (the "April 2005 Judgment"). The Court ordered that Fellowes be registered as the owner of BITEL.

17. The KFG Companies claim that the April 2005 Judgment was obtained by fraud, in proceedings which were opposed to natural justice, and in a manner which would in the Isle of Man be regarded as contrary to public policy. The KFG Companies say that there was no arguable basis at all for Fellowes' claim, as the party entitled to enforce the Transfer Agreement was KMIC not Fellowes, and even if Fellowes had been a party it would have been bound by the arbitration clause in the agreement, to which the Bishkek Interdistrict Court would have been obliged to give effect as Kyrgyzstan is a party to the New York Convention on the recognition and enforcement of foreign arbitral awards.

Injunctions in England and BVI

18. On May 10, 2005, Andrew Smith J, sitting in the Commercial Court in England (the seat of the arbitration), on application by the KFG Companies, granted an injunction restraining Fellowes from (inter alia): (a) bringing or pursuing any proceedings to enforce rights under the Transfer Agreement except by way of LCIA arbitration in London; (b) enforcing or seeking to enforce any judgment or order obtained from any court on the basis that it had become entitled to enforce the Transfer Agreement, in particular the April 2005 Judgment; (c) registering itself or taking any steps to have itself registered as the owner of BITEL. The High Court in the BVI (where Fellowes is incorporated) made an order against Fellowes on May 13, 2005 in terms identical to those of the Commercial Court in England.

Altimo BVI lodges $20.5 million and is registered as owner of BITEL

19. Notwithstanding the injunctions Altimo BVI, which had acquired a controlling interest in Fellowes in December 2004, transferred US$20.5 million to the deposit account of the Kyrgyz Ministry of Justice as required by the April 2005 Judgment and stated that it wished to have itself registered as the owner of BITEL pursuant to that judgment. The letter further asked for the co-operation of the Kyrgyz authorities in execution of the judgment to ensure the registration of itself as owner of BITEL.

BVI court appoints receiver over Fellowes and grants injunction and declaration/Commercial Court final injunction and declaration

20. In the light of these events, The KFG Companies applied in the BVI for the appointment of a Receiver over Fellowes to ensure that no further steps were taken to register the shares of BITEL in the name of Fellowes or Altimo BVI or any associated person. On June 10, 2005 the BVI court appointed a Receiver for this purpose, and restrained Fellowes from disposing of the legal or beneficial ownership of the BITEL shares or exercising any rights attached to the BITEL shares.

21. This order was subsequently stayed following a letter from Altimo Russia and Fellowes on June 22, 2005 to the Kyrgyz authorities referring to the court proceedings in England and the BVI and to the London arbitration, stating that no re-registration of the BITEL shares would be undertaken pending the outcome of the arbitration, and requesting that the assistance previously requested in that regard should be "suspended for the moment".

22. On June 16, 2005 Cooke J, sitting in the Commercial Court, continued the injunction made by Andrew Smith J against Fellowes: [2005] EWHC 1329 (Comm). This was a final injunction because there was no prospect of Fellowes being able to say that the injunction was wrongly granted at any stage in the future. Cooke J also made a declaration that, under English law, no contract existed between the KFG Companies and Fellowes since Fellowes was not a party to the Transfer Agreement. Fellowes was not therefore entitled to enforce any rights under that agreement and in particular was not entitled to exercise any right that IPOC as original party might have had to seek specific performance of the Transfer Agreement. The declaration also stated that the proceedings brought by Fellowes in Kyrgyzstan were vexatious and oppressive. Cooke J said:

> "The starting point in considering all these issues is….. the circumstance that the defendants have obtained judgment in Kyrgyzstan when they should not have done. The basis upon which they did that was to claim to be party to the transfer agreement and to claim specific performance of it whilst ignoring the arbitration provisions within that agreement. The fact that it is accepted on all sides that they are not party to the transfer agreement as a matter of English law, and not party to the arbitration agreement as such, merely emphasises the vexatious and oppressive nature of their action".

23. As Lord Mance pointed out during the course of argument, the acceptance by counsel for Fellowes, and the finding by the judge, that Fellowes was not a party to

the Transfer Agreement would make it difficult for Fellowes to suggest that it genuinely thought that it was entitled to the April 2005 Judgment.

24. On July 5, 2005, the BVI court granted the KFG Companies a declaration similar to that made by the Commercial Court in England on June 16, 2005.

KFG Companies seek to quash Bishkek order/Fellowes opposes/Receiver re-appointed in BVI/Receiver revokes any authority of Fellowes to oppose/appointment discharged in BVI but continued pending appeal

25. On July 15, 2005, the KFG Companies filed an application in the Bishkek City Court seeking to nullify the April 2005 Judgment. Fellowes opposed the application, and on September 29, 2005 the KFG Companies applied to the BVI court for the re-appointment of a Receiver over Fellowes on the basis that Fellowes' conduct constituted an indirect attempt to enforce the April 2005 Judgment in breach of the injunction granted on May 13, 2005. The KFG Companies' application was granted and Mr Glenn Harrigan was appointed as Receiver over Fellowes to ensure its compliance with the previous orders given by the BVI court. On September 30, 2005, Mr Harrigan made a statement to the Bishkek City Court revoking all powers of attorney granted by Fellowes authorising its attorneys to represent it on the application to nullify the April 2005 Judgment and withdrawing Fellowes' objection to the nullification of the April 2005 Judgment.

26. Subsequently, Fellowes sought an order in the BVI that the Receiver's appointment be discharged. The order was granted, but was immediately stayed pending an appeal by the KFG Companies, with the consequence that the receivership remained in place. The KFG Companies' appeal was successful in April 2006 and confirmed the appointment of the Receiver for the purposes of ensuring Fellowes' compliance with the injunction for an indefinite period of time. The Receiver continues in place.

Alleged sale of the shares in BITEL to Reservespetsmet (allegedly in May 2005 without knowledge of Fellowes)

27. In mid-October 2005 the KFG Companies became concerned that an attempt might be made to have the BITEL equity interest re-registered in the name of a third party, and on October 19, 2005, they applied to the BVI court which granted an injunction by consent restraining Fellowes, its servants or agents from transferring, assigning or otherwise disposing of the legal or beneficial ownership in the BITEL shares and from exercising any rights attached to the BITEL shares in the event that Fellowes obtained re-registration of the shares in its own name or in the name of any assignee, associated entity or person.

28. On the same day, unknown to the KFG Companies, CJSC Reservespetsmet ("Reservespetsmet"), a Russian company, was granted an order by the Ministry of Justice in Bishkek for the re-registration of the BITEL shares in its name (Order 1570). This order was obtained on the basis that Reservespetsmet had purchased the BITEL shares from Fellowes on May 20, 2005.

29. The sale of Fellowes' interest in BITEL to Reservespetsmet had not been referred to during the proceedings in England or the BVI. Fellowes subsequently claimed that this omission was due to the sale to Reservespetsmet having occurred without Fellowes' knowledge and pursuant to an agency arrangement. According to Fellowes, this agency agreement between Fellowes and Lovianco Trading Company Ltd ("Lovianco") was reached in early May 2005, and enabled Lovianco to act as Fellowes' agent in any sale of the BITEL shares. According to Fellowes, Lovianco then entered into a sub-agency agreement with Yuridicheskoe Bureau Pravo ("Pravo"). Fellowes stated that the agency arrangement was terminated on May 20, 2005 but, meanwhile, the sale of BITEL to Reservespetsmet had occurred without Fellowes' knowledge, and the sale had never subsequently been brought to its attention, either by its agents (Lovianco and Pravo) or by the purchaser (Reservespetsmet).

30. The KFG Companies say that the "sale" was a fraudulent invention intended to evade the consequences of the English and BVI injunctions and the BVI receivership order, and that the documents were later forgeries. Their case is that the Altimo Companies were directly involved in the production of the documents purportedly evidencing the supposed sale of BITEL by Fellowes to Reservespetsmet in May 2005. They say that there is compelling evidence that in reality Reservespetsmet was a front for the Altimo Companies, because the identity of the beneficial owner of Reservespetsmet has never been revealed. It was initially claimed that the beneficial owner was an unidentified leading Russian company. It was then claimed that Sophia Ignatova, a young Russian actress and popular music singer, was the beneficial owner, but that claim was subsequently withdrawn, and instead it was claimed that the person behind the company was a wealthy Russian businessman, who has never been identified.

31. The KFG Companies say that analysis of the metadata (computer information about how data was collated) extracted from Reservespetsmet's electronic press releases in the period from October to December 2005 demonstrates that Altimo executives were involved in producing those press releases (in conjunction with the lawyer then ostensibly representing Reservespetsmet, Mr Sadyrov) and that they were distributed via the Altimo computer gateway. No evidence has been filed in answer to this, beyond a bare assertion that the relevant electronic evidence must somehow have been forged or planted.

32. The Alfa Parties claim that they sold their interest in Fellowes to an independent third party on September 30, 2005, the day after Mr Harrigan was appointed as Fellowes' Receiver. The KFG Companies say that no documentary evidence has even been produced to support that contention, the supposed purchaser has never been identified, and the claim is not credible.

Registration of shares in name of Reservespetsmet/proceedings by Reservespetsmet

33. The re-registration of BITEL in the name of Reservespetsmet by Order 1570 led to further proceedings in Kyrgyzstan. BITEL itself (at the direction of its then management) commenced an action seeking to have Order 1570 set aside. Order 1570 was cancelled by a further Order from the Ministry of Justice (Order 1604) but Order 1604 was then itself set aside on November 21, 2005 on application by Reservespetsmet.

34. Reservespetsmet also commenced a further action against the acting director general of BITEL, seeking an order that he vacate BITEL's offices.

April 2005 judgment nullified/orders against BITEL's officers and December 2005 Judgment

35. Meanwhile, on October 31, 2005, the KFG Companies' application to nullify the April 2005 Judgment was heard by the Bishkek City Court, which granted it (the "Cassation Judgment"). On November 23, 2005, the Bishkek City Court rejected Fellowes' request for a review of the Cassation Judgment.

36. On December 8, 2005, Fellowes and Reservespetsmet filed an appeal against the Cassation Judgment to the Supreme Court of Kyrgyzstan. At the time the appeal was filed, the Receiver of Fellowes remained in office and had not granted authority to Fellowes' lawyers to file the appeal. The appeal was then scheduled for December 15, 2005, but the KFG Companies say that they were not notified of this fact. Fellowes' actions were in breach of the injunctions and without the authority of the Receiver.

37. On December 14 and 15, 2005, prior to the hearing of the appeal to the Supreme Court, Reservespetsmet obtained ex parte orders from the Sverdlovsk District Court in Bishkek to suspend BITEL's General Director and Audit Committee Chairman from office with immediate effect, to seize BITEL's assets at locations in Bishkek and to freeze BITEL's bank accounts. The KFG Companies contend that there could have been no proper basis for the making of these orders at a time when the April 2005 Judgment had been nullified, that the proper plaintiff should have been

BITEL, that the orders were wholly disproportionate, and that they can only have been procured by improper influence. This is denied by the Appellants, who contend that the applications were properly made in anticipation of the appeal to the Supreme Court of Kyrgyzstan.

38. By its judgment of December 15, 2005 (the "December 2005 Judgment") the Supreme Court upheld the appeal of Fellowes and Reservespetsmet. The Supreme Court confirmed the April 2005 Judgment on the basis that Fellowes was a party to the Transfer Agreement, but also decided that because Fellowes had not signed the Transfer Agreement it was not bound by the arbitration clause. The Court also held that because the arbitration clause did not provide for the name of the arbitration forum to which the parties had agreed to refer disputes, the arbitration agreement was invalid. No reference was made to the declarations made by the English and BVI courts that Fellowes was not a party to the Transfer Agreement.

39. The KFG Companies claim that: their lawyer was first notified at about 10 am on December 15, 2005 that the appeal would take place at 2pm; the Supreme Court rejected his applications for an adjournment on the grounds that inadequate notice had been given and that time was required to legalise a statement from Mr Harrigan, Fellowes' Receiver, to confirm that the lawyers purporting to act on Fellowes' behalf had no authority to do so; the Supreme Court accepted the representation made to it by Fellowes' lawyers to the effect that Mr Harrigan had been discharged from office, when in fact the order of November 29, 2005 discharging him had been stayed on the following day pending appeal (which was allowed on April 24, 2006). At 3.30pm the Supreme Court delivered its judgment.

40. The decision can only be regarded as bizarre, and even Mr Smith QC for the Alfa Parties accepted that "several of these conclusions may look strange through English eyes." In particular, the Court re-iterated that Fellowes was a party to the Transfer Agreement, although this was obviously not so. Despite its statement that Fellowes was a party to the Agreement it held that it was not bound by the arbitration agreement because it did not sign the Agreement and that the arbitration agreement was not enforceable because it did not name the arbitral tribunal. It is impossible to understand how it could have decided that Fellowes did not sign the arbitration agreement in clause 17 at the same time as holding that Fellowes was a party to the Agreement, and impossible to understand how it could have decided that the arbitration agreement did not identify the arbitral tribunal when the clause plainly provided for appointment by the LCIA and when arbitral proceedings were already on foot, with Fellowes controlling them on behalf of KMIC.

Offices seized

41. Shortly after the Supreme Court delivered the December 2005 Judgment, BITEL's offices were seized by the Bishkek police and various other personnel who it is claimed were judicial executors. The KFG Companies contend that these men stormed BITEL's offices without having served any order or writ of execution. The Appellants deny that these actions were in any way improper or unjustified. During the course of the seizure, there was significant damage to BITEL's property and BITEL's mobile services across Kyrgyzstan were interrupted. BITEL alleges that this damage was caused by the improper resistance of the KFG Companies' representatives. This is denied. The KFG Companies allege that representatives of the Alfa Parties were present at the seizure. They have produced evidence that Mr Andrei Zemnitsky, an Altimo executive (who was also apparently involved in the preparation of the Reservespetsmet press releases) was also present.

Changes in the ownership of BITEL since December 2005

42. On December 15, 2005, Energia Light LLC ("Energia Light") was registered as a co-shareholder in BITEL together with Reservespetsmet. Subsequently, 93% of the BITEL shares were sold to CP-Crédit by Energia Light rather than by Reservespetsmet.

43. On February 20, 2006, CP-Crédit became the sole shareholder of BITEL and was registered as such on March 9, 2006. CP-Crédit is an established Swiss fiduciary and it claims to have bought the shares as a nominee for a client beneficially owned by a Mr Lebowitz, and says that it is an innocent third party ignorant of any prior fraud.

The April 2006 Judgment

44. Through its appointed representative, Mr Sadyrov, CP-Crédit caused BITEL to bring the proceedings on March 22, 2006 in the Bishkek Interdistrict Court against the KFG Companies, claiming that: (a) by virtue of the April 2005 Judgment, the shares in BITEL were owned by Fellowes and were subsequently transferred to Reservespetsmet on May 20, 2005; (b) on September 14, 2005, although the KFG Companies no longer owned the shares in BITEL, they had purported to appoint Mr Omurzakov as Chairman of BITEL's Audit Committee and give him the powers of general director of BITEL; (c) notwithstanding Order 1570, the KFG Companies refused to recognise Reservespetsmet as BITEL's legal owner and, as a consequence of this, Reservespetsmet had been compelled to obtain orders from the Sverdlovsk District Court; (d) when bailiffs sought to execute the orders from the Sverdlovsk District Court, the KFG Companies had unreasonably refused access to BITEL's offices; (e) on the direct orders of the KFG Companies, documents belonging to BITEL were removed, BITEL property was destroyed and the operation of BITEL's switchboard was interrupted, causing a total loss to BITEL of approximately US$18

million; (f) on the direct orders of the KFG Companies, on December 14 and 15, 2005 BITEL employees caused BITEL to make illegitimate payments of approximately US$10 million.

45. As a result, BITEL claimed US$28,174,037 restitution for loss and damage on the grounds that the KFG Companies had unjustifiably asserted rights of ownership over BITEL and were responsible for damage caused to its property when the offices were seized by Reservespetsmet.

46. On March 23, 2006, the Bishkek Interdistrict Court directed that a full hearing on the merits was to take place on April 4, 2006 subsequently adjourned to April 7, and then April 10, 2006. On April 10, 2006, Mr Asylov (the KFG Companies' lawyer) filed a statement of objection to the claim. Neither party called any witnesses. It is in dispute between the parties whether or not Mr Asylov attempted to make oral applications to challenge the jurisdiction of the Court and to ask the Court to appoint an independent expert or, alternatively, for further time to consider and prepare a response to an expert's report, which he claimed not to have seen until that day.

47. By its judgment given on April 10, 2006 (the "April 2006 Judgment"), the Court held that the KFG Companies were liable to BITEL in the sum of US$24,159,452. The April 2006 Judgment was founded upon the fact that BITEL was owned by Reservespetsmet (by reason of the April and December 2005 Judgments and the sale to Reservespetsmet) and not by the KFG Companies. The Court directed that the judgment could be enforced against the sum of US$20.5 million held for the KFG Companies in the deposit account of the Kyrgyz Ministry of Justice pursuant to the April 2005 Judgment.

48. It is the KFG Companies' case that the April 2006 Judgment was obtained by fraud, in proceedings which were opposed to natural justice, and/or in such a manner that to enforce it in the Isle of Man would be contrary to public policy. The primary ground on which the KFG Companies rely is that since the April 2006 Judgment was procured on the basis of the April and December 2005 Judgments (both of which they say are impeachable on grounds of fraud, public policy and want of natural justice) and the purported sale to Reservespetsmet (which they say was also fraudulent), the April 2006 Judgment is itself unenforceable. The KFG Companies' case on all these matters is denied by the Appellants.

49. On May 4, 2006, the Bishkek Interdistrict Court made an order for the enforcement of the April 2006 judgment and such judgment was enforced against the US$20.5 million which Fellowes had deposited at the Kyrgyz Ministry of Justice after the April 2005 judgment. This left a balance of approximately US$3.6 million due to BITEL from the KFG Companies.

Transfer to AK Investment

50. On June 28, 2006, AK Investment, which had been incorporated on June 13, 2006, became the sole shareholder of BITEL and was registered as such on July 5, 2006. AK Investment claims that its beneficial owner is a Mr Sherbakov.

51. The KFG Companies say that from the evidence as a whole it is to be inferred that AK Investment, like CP-Crédit, was not an innocent third party as claimed, but rather acted as a stooge of Altimo in relation to Altimo's fraudulent scheme to launder BITEL's shares and assets which it knew had been wrongfully obtained.

The transfer of BITEL's assets to Sky Mobile

52. Between May and July 2006, (a) the assets of BITEL were transferred to Sky Mobile, a company incorporated in April 2006 and newly acquired by the Alfa group; and (b) the shares in BITEL were transferred by CP-Crédit to AK Investment.

The KFG Companies' claims of collusive behaviour

53. CP-Crédit, AK Investment and the Alfa Parties have adduced evidence which they say shows that the transactions were all bona fide arm's length transactions, and that the sale of the BITEL shares to AK Investment was unrelated to the sale of BITEL's assets to Sky Mobile.

54. The KFG Companies, on the other hand, say that there is strong evidence that none of the purported transfers of the shares in BITEL to Energia Light LLC, CP Crédit or AK Investment or the transfer of BITEL's assets to Sky Mobile were arm's length transactions, and that they were collusive transfers, for these reasons.

i) CP-Crédit was involved in the production of the documents purportedly evidencing the supposed sale of BITEL by Fellowes to Reservespetsmet in May 2005.

ii) The person purportedly appointed by Fellowes' shareholders (including Altimo BVI) to act on behalf of Fellowes in relation to appointment of Lovianco as Fellowes' agent in relation to the supposed May sale, and who subsequently signed both the supposed agency agreement and the notice of termination of that agreement, was Mr Valery Tutykhin. The KFG Companies say that Mr Tutykhin is CP-Crédit's manager for Russian projects, and that he

has extensive experience of corrupt practices in the context of corporate raiding.

iii) The Alfa group exercised de facto control over BITEL at all material times after Reservespetsmet had seized control of the company in December 2005.

iv) The same key personnel who were appointed by Reservespetsmet continued to exercise control over BITEL after December 2005 despite the later ostensible changes of ownership. In particular, Mr Sadyrov, who conducted the litigation on behalf of Reservespetsmet whilst collaborating with Altimo executives in the production of Reservespetsmet's electronic press releases, was subsequently appointed by each of CP-Crédit and AK Investment in turn as their representative in relation to their shareholdings in BITEL.

v) No explanation has been given by any party as to who is behind Energia Light, why it became a shareholder in December 2005, how it acquired its interest, what it paid for that interest, or how it came to sell that interest to CP-Crédit at what appears to have been a substantial undervalue.

vi) There are strong grounds for concluding that the transaction under which CP-Crédit acquired its interest in BITEL in February 2006 was not a genuine arm's length transaction on commercial terms as claimed, but was a collusive transaction which did not result in any change to the underlying ownership of BITEL.

vii) The effect of the evidence of Denis Shershnev, the general director of BITEL appointed by Reservespetsmet in December 2005, is that he understood Reservespetsmet to have remained the owner of BITEL until the transfer of the shares to AK Investment. In particular, Mr Shershnev states that he consulted with Miss Ignatova (not CP-Crédit) in relation to the sale of the shares in BITEL to AK Investment and that the terms of the sale to AK Investment were subsequently handled between lawyers for AK Investment and lawyers for Reservespetsmet.

viii) The price of $21.7m at which CP-Crédit claims to have acquired its interest was a fraction of the market value of the shares in BITEL in early 2006. MTS had paid $150m for a 51% indirect interest in BITEL two months earlier and a valuation report prepared four months later valued the company as a whole at approximately $150m. No evidence has been filed on behalf of any party to explain how or why the price of $21.7m was agreed. Nor has any

explanation been given as to why the purchase price was not paid until several weeks after the shares had been transferred to CP-Crédit.

ix) AK Investment was registered as the new owner of the shares on July 5, 2006 before the price of $45m was agreed on July 10, 2006. The price was a fraction of the true value of the shares in July 2006.

x) The terms of the almost simultaneous sale of BITEL's assets to Sky Mobile, which is admittedly owned by the Altimo Companies, were such that AK Investment on its own evidence made a vast windfall profit within a matter of weeks, since the price paid by Sky Mobile for BITEL's "property complex" alone was $45m and Mr Sherbakov states that AK Investment also received a further $40m for its brand name and intellectual property rights. No sensible explanation has been given for the fact that CP-Crédit (or its client Mr Lebowitz) was willing to sell the shares in BITEL to AK Investment for $45m, rather than reaping the windfall profit itself.

The crucial points

55. In this detailed narrative, the crucial points for present purposes are these:

(1) The Transfer Agreement was between the KFG Companies and IPOC, and IPOC had a right to transfer its interest to KMIC.

(2) The Transfer Agreement was governed by English law and included an arbitration agreement, providing for LCIA arbitration.

(3) Fellowes was not a party to the Transfer Agreement.

(4) From March 2004 there were arbitral proceedings between KMIC and the KFG Companies under the Transfer Agreement.

(5) In the proceedings which led to the April 2005 Judgment Fellowes falsely claimed to be a party to the Transfer Agreement.

(6) The April 2005 Judgment decided that Fellowes had signed the Transfer Agreement, and ignored the arbitration agreement.

(7) The English and BVI courts granted injunctions restraining Fellowes from bringing any proceedings to enforce rights under the Transfer Agreement except by way of LCIA arbitration in London, or enforcing the April 2005 Judgment.

(8) The English court (and the BVI court) made a declaration that no contract existed between the KFG Companies and Fellowes since Fellowes was not a party to the Transfer Agreement, and that the proceedings brought by Fellowes in Kyrgyzstan were vexatious and oppressive.

(9) The Receiver informed the Kyrgyz court that he had revoked all authority granted by Fellowes to its lawyers to represent it in the Kyrgyz proceedings.

(10) Fellowes sought and obtained an order from the BVI court discharging the appointment of the Receiver, but the order was stayed pending appeal.

(11) In October 2005 the BVI court granted an injunction restraining Fellowes from transferring the BITEL shares.

(12) Reservespetsmet obtained an order for registration of the BITEL shares in its name on the basis that it had purchased the BITEL shares from Fellowes in May 2005. Fellowes claimed that the sale of its interest in BITEL had been effected by an agent on its behalf but with its knowledge.

(13) There is strong evidence that Reservespetsmet's press releases about its acquisition of the shares came from the Altimo computer gateway.

(14) In breach of the injunction and the receivership order Fellowes sought re-instatement of the April 2005 Judgment. Its lawyers falsely told the Supreme Court of Kyrgyzstan that the Receiver had been discharged.

(15) The December 2005 Judgment confirmed the April 2005 Judgment on the basis that Fellowes was a party to the Transfer Agreement but held that because Fellowes had not signed the Transfer Agreement it was not bound by the arbitration clause. The Court also held that because the arbitration clause did not provide for the name of the arbitration forum

to which the parties had agreed to refer disputes, the arbitration agreement was invalid.

(16) Shortly thereafter BITEL's offices were seized.

(17) The April 2006 Judgment was founded on the fact that BITEL was owned by Reservespetsmet (by reason of the April and December 2005 Judgments and the alleged sale to Reservespetsmet on behalf of Fellowes in May 2005), not by the KFG Companies. The Court directed that the judgment could be enforced against the sum of US$20.5 million held for the KFG Companies in the deposit account of the Kyrgyz Ministry of Justice pursuant to the April 2005 Judgment.

(18) The consequence of all of this was that (i) the KFG Companies were deprived of their shares in BITEL; (ii) the deposit of $20.5 million placed by Fellowes and intended for the KFG Companies was taken by BITEL; and (iii) the business of BITEL was transferred to Sky Mobile, an Alfa group company.

III The Isle of Man proceedings

56. BITEL commenced the present proceedings in the Isle of Man on July 25, 2006 to seek to enforce the balance of the April 2006 Judgment, $3.6 million. The pleading could have been limited to identifying the judgment debt and the jurisdiction of the foreign court in the international sense, and claiming the balance of the judgment debt as a debt. Instead it contains an elaborate account of the background to the judgment including allegations that the KFG Companies were involved in frauds on BITEL.

57. On August 16, 2006, BITEL commenced separate proceedings in the Isle of Man against the KFG Companies relating to the alleged authorisation by the KFG Companies and their directors of an illegal dividend of US$25,206,694 paid from BITEL to, or at the direction of, the KFG Companies in January 2005. This claim has no direct relevance to the current proceedings.

58. On January 26, 2007 the KFG Companies filed their Defence and Counterclaim. The Counterclaim against BITEL seeks the following relief: (1) a declaration that the April 2006 judgment was obtained by fraud; (2) damages to be assessed in respect of the wrongful obtaining of the April 2006 judgment; (3) damages to be assessed in respect of the wrongful transfer of its assets to Sky Mobile.

59. As well as making a Counterclaim against BITEL, the KFG Companies sought (among other things) to join 13 additional parties as defendants to counterclaim, and applied on January 30, 2007 for permission to serve their Counterclaim out of the jurisdiction on the proposed new defendants to counterclaim as all of those parties were overseas.

60. The parties agree that the law applicable to the claims in the Counterclaim is the law of Kyrgyzstan. The three Kyrgyz law causes of action that are said by the KFG Companies to arise against the Appellants are these: (1) *Causing harm (tort/delict)*: The KFG Companies claim that, pursuant to Articles 993, 997, 1008, 1010 and 14 of the Civil Code of Kyrgyzstan, a person who has been harmed is entitled to full compensation for any harm suffered by the person who has caused the harm. (2) *Unjust enrichment*: The KFG Companies claim that, pursuant to Articles 1029, 1031, 1032 and 1034 of the Civil Code, any person who, without legal justification, has acquired or taken the benefit of property at the expense of another person shall have a duty to return the property. (3) *Abuse of right*: The KFG Companies claim that, pursuant to Article 9 of the Civil Code of Kyrgyzstan, abuse of a legal right is prohibited under Kyrgyz law and it includes, but is not limited to, obtaining and enforcing a right through fraud or by abuse of the judicial process. A person who has abused a right is obliged to reinstate the position of the person who has suffered and compensate him in full for any harm done.

61. The KFG Companies claim:

> (1) Fellowes, Reservespetsmet, Energia Light, CP-Crédit and AK Investment have been unjustly enriched at the KFG Companies' expense as a result of the wrongful misappropriation of the shares in BITEL and are liable to return the shares to the KFG Companies (together with compensation for any diminution in the value of the shares since they were misappropriated) and/or to account for the benefit they have derived from them.
>
> (2) Fellowes, Mr Varenko, Mr Orynbaev, Altimo BVI, Altimo Russia, Reservespetsmet, Miss Ignatova, Lovianco and Pravo have jointly caused the wrongful misappropriation of the shares in BITEL from the KFG Companies and are jointly and severally liable to compensate the KFG Companies for the loss which they have suffered as a result.
>
> (3) Fellowes and Reservespetsmet have abused their rights to bring proceedings before the Kyrgyz Courts and/or to enforce in Kyrgyzstan the judgments which they obtained there, and are liable to compensate the KFG Companies for the loss which they have suffered as a result.

(4) BITEL has wrongfully obtained the April 2006 Judgment and is liable to compensate the KFG Companies for the loss which they have suffered as a result.

(5) BITEL, Sky Mobile and Altimo Russia have jointly caused the wrongful transfer of BITEL's assets to Sky Mobile and are jointly and severally liable to compensate the KFG Companies for the loss which they have suffered as a result.

62. So far as the parties to the present appeal are concerned, the prayers in the Counterclaim are as follows: (1) against AK Investment, an order that it take such steps as may be necessary to return the shares in BITEL to the KFG Companies; (2) against Fellowes, CP-Crédit, and AK Investment (a) a declaration that any interest which any of them might have held in the shares in BITEL as a matter of Kyrgyz law has been held on trust for the KFG Companies; and (b) equitable compensation; (c) an order for an account of benefits; and (3) against Fellowes and the Alfa Parties, damages for the wrongful misappropriation of the shares in BITEL.

IV The basis of jurisdiction and the decisions of the Deemster and the Staff of Government Division

Necessary and proper parties and the Manx High Court Rules

63. The KFG Companies sought permission to join the Appellants (among others) on the basis of the Manx High Court Rules ("MHCR"), Ord. 6, r. 1(g) and (h). Permission was granted by the court (Deemster Doyle) on February 1, 2007 without a hearing. BITEL's Reply and Defence to Counterclaim was served on May 9, 2007.

64. MHCR Ord. 6, r.1(g) provides that service out of the jurisdiction may be allowed whenever

> "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

65. This corresponds to the former RSC Ord. 11, r.1(c) in England. There were three changes to that rule in England which came into effect in 1987, which were not made in the Isle of Man. First, Ord. 11, r.1(c) was extended so that it applied where the original claim was brought against a person "duly served within or out of the jurisdiction" and not only as regards a person "duly served within the jurisdiction" as

the Manx rules continue to provide. Second, the word "properly" in the phrase "properly brought" against that person was omitted. This made no substantive difference, particularly in the light of the third change, which was that a new RSC Ord. 11, r.4(1)(d) provided that where an application was made under RSC Ord. 11, r.1(1)(c), the applicant for leave had to show grounds for belief that there was between the plaintiff and the person on whom a writ had been served "a real issue which the plaintiff may reasonably ask the Court to try." No such change was made in the Isle of Man, but it was declaratory of the principle established in *Ellinger v Guinness, Mahon & Co* [1939] 4 All ER 16, 22, where Morton J said:

> "I do not think it is part of the function of the court, in considering whether an action is 'properly brought' against a party within the jurisdiction, to arrive at a conclusion as to whether the plaintiff will or will not succeed against that party. It is enough if the court is satisfied that there is a real issue between the plaintiff and that party which the plaintiff may reasonably ask the court to try."

66. What was RSC Ord. 11 has now been relegated to Practice Direction Part B of Part 6 of the Civil Procedure Rules, and para 3.1(3) of the Practice Direction has the same effect as the former RSC Ord. 11, r.1(1)(c) as amended, by providing that a claim form may be served on a defendant abroad with the permission of the court, where

> "A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

67. None of these changes affects the questions of law which arise on this appeal, each of which applies equally to the amended RSC and to the current CPR.

68. The second provision of the MHCR on which the KFG Companies relied is Ord. 6, r.1(h), which provides that service out of the jurisdiction might also be allowed "in any other case where upon cause shown the Court shall be of opinion that there are sufficient special grounds to warrant service of a summons or notice out of the jurisdiction." There was no equivalent to this provision, which dates from 1884, in the former Rules of the Supreme Court in England. It is possible, but by no means certain, that it has its origin in a provision in the English Court of Chancery Consolidated Orders, Ord. X, r.7, giving a general power to serve out of the jurisdiction, which provided: "Where a Defendant in any suit is out of the jurisdiction

of the Court, the Court, upon application, supported by such evidence as shall satisfy the Court in what place or country such Defendant is or may probably be found, may order that a copy of the bill … may be served on such Defendant, in such place or country or within such limits as the Court shall think fit to direct." See *Cookney v Anderson* (1863) 1 DJ&S 365; *Drummond v Drummond* (1866) LR 2 Ch App 32.

69. In *Arquebus Ltd. (In Liquidation) v Rafter*, September 27, 2004, Deemster Doyle considered that Ord. 6, r. (1)(h) may have originally been inserted to cover cases of tort not covered by other parts of the Rule, citing Moore, *The Isle of Man and International Law* (1926), 29, but he took the view that it was not limited to tort cases, and concluded (at [39]):

> "The width of [Ord. 6, r. 1(h)] is such that the courts should be careful to see that it is not abused but it can be used legitimately in a proper case to ensure that justice is not defeated and that there are no holes in which wrongdoers can attempt to hide from judgment day. In each case there must be a substantial connection with this jurisdiction to justify granting leave for service out of the jurisdiction."

The decisions of the Deemster and the Staff of Government Division

70. The present Appellants sought to set aside the orders for service out of the jurisdiction. The Deemster set aside the orders because the KFG Companies had failed to establish that the Isle of Man was clearly the appropriate forum for trial of the issues in the counterclaim. He did not therefore find it necessary to deal with the arguments that the counterclaims were not properly brought against BITEL and that the Appellants were not proper parties, nor with the applicability of MHCR, Ord. 6, r.1(h). The Staff of Government Division allowed the appeal. It found that the claims against the present Appellants came within MHCR, Ord. 6, r.1(g), and it held that it was entitled to interfere with the exercise of discretion by the Deemster for reasons developed in section VI of this advice.

V Legal principles

General considerations

71. On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements: *Seaconsar Far East Ltd. v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, 453-457. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be

tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e.g. *Carvill America Inc v Camperdown UK Ltd* [2005] EWCA Civ 645, [2005] 2 Lloyd's Rep 457, at [24]. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other: see *Canada Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547, 555-7 per Waller LJ, affd [2002] 1 AC 1; *Bols Distilleries BV v Superior Yacht Services* [2006] UKPC 45, [2007] 1 WLR 12, [26]-[28]. Third, the claimant must satisfy the court that in all the circumstances the Isle of Man is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

Counterclaims

72. This is by no means the first case in which a submission by claimants to the jurisdiction by bringing a claim has resulted in an unexpected counterclaim: see e.g. *Settlement Corp v Hochschild (No 1)* [1966] Ch 10 and *Buttes Gas & Oil Co v Hammer (No 1)* [1971] 3 All ER 1025, followed by the proceedings reported at [1982] AC 888. In *Derby & Co Ltd v Larsson* [1976] 1 WLR 202 (HL) it was held that permission to serve additional defendants to the counterclaim could be obtained in such a case under what became RSC Ord. 11, r (1)(c) and what is now CPR PD6B, para 3.1(3), because the original plaintiffs had submitted to the jurisdiction and thereby submitted themselves to the risk of a counterclaim. Consequently the counterclaim was "properly brought against a person duly served within the jurisdiction" and the additional defendants to the counterclaim could be necessary or proper parties to the original counterclaim.

The necessary or proper party head of jurisdiction

73. The necessary or proper party head of jurisdiction is anomalous, in that, by contrast with the other heads, it is not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts: *The Brabo* [1949] AC 326, 338, per Lord Porter. Piggott, *Foreign Judgments and Jurisdiction* (3rd ed, 1910), pt III, p 238, said: "This is perhaps the most important of the sub-rules, for it throws the net of jurisdiction over a wider area; and the principle of considering the nature of the cause of action which pervades the whole subject, appears here to be ignored." Consequently as Lloyd LJ said in *The Goldean Mariner* [1990] 2 Lloyd's Rep 215 at 222:

> "I agree … that caution must always be exercised in bringing foreign defendants within our jurisdiction under O.11 r.1(1)(c). It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction."

"Properly brought" and "proper party"

74. Among the questions which arise on this appeal are these: When is an action "properly brought" against the defendant served within the jurisdiction (and outside the jurisdiction under the English rules), referred to here as D1, or "the anchor defendant"? When will the foreign additional defendant, or D2, be a "proper party"? In particular, what is the merits threshold for each of those claims? Is the claim not "properly brought" against D1 if the motive of the claimant in suing D1 is to add D2? Does it matter that in practice the claimant will not recover against D1?

75. The leading decisions are the decisions of the House of Lords in *Improvement Commissioners v Armement Anversois SA (The Brabo)* [1949] AC 32 and *Derby & Co Ltd v Larsson* [1976] 1 WLR 202, and of the Court of Appeal in *Massey v Heynes & Co* (1888) 21 QBD 330 and *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258. The members of those tribunals do not all speak with one voice, but the following propositions may be derived from them.

The motive in suing the anchor defendant

76. First, the mere fact that D1 is sued only for the purpose of bringing in D2 is not fatal to the application for permission to serve D2 out of the jurisdiction: *The Brabo* [1949] AC 326, 338-9, per Lord Porter; *Derby & Co Ltd v Larsson* [1976] 1 WLR 202, 203, per Viscount Dilhorne.

77. The question was discussed extensively (and somewhat discursively) in *Multinational Gas and Petrochemical Co. v Multinational Gas and Petrochemical Services Ltd* [1983] Ch 258, but without reference to the relevant passages in *The Brabo* and without any citation to the court of *Derby & Co Ltd v Larsson.*

78. The point arose in *Multinational Gas* because D1 was in liquidation and therefore the plaintiff had no real prospect of recovery against D1. Lawton LJ did not treat as fatal to the application the fact that the sole, or predominant, reason for beginning the action against a party duly served within the jurisdiction was to enable

an application to be made to serve the parties outside the jurisdiction. It was instead a relevant factor in the exercise of the discretion: at 268. Dillon LJ said (at 285) that an action was not to be regarded as properly brought against D1 if the true inference from all the facts was that the sole reason for suing D1 was to found an application to join foreign defendants in the action. But although he held that the predominant reason for the action against D1 was to enable foreign defendants to be joined, he regarded the action as bona fide and properly brought: at 286-287. May LJ considered that if there was a good arguable case against D1 in an action in which any judgment obtained against that defendant might or would not be met owing to lack of funds, the fact that the main or predominant purpose of keeping D1 in the proceedings was to enable the plaintiff to bring in D2 was not a ground for saying that the proceedings were not properly brought against D1: see at 273-279. See also *Goldenglow Nut Food Co Ltd v Commodin (Produce) Ltd* [1987] 2 Lloyd's Rep 569, 578 (CA).

79. The better view, therefore, is that the fact that D1 is sued only for the purpose of bringing in the foreign defendants is a factor in the exercise of the discretion and not an element in the question whether the action is "properly brought" against D1, provided that there is a viable claim against D1.

"Bound to fail"

80. Second, the action is not properly brought against D1 if it is bound to fail: *The Brabo* [1949] AC 326, 338-9, per Lord Porter. He also put the point (echoing *Witted v Galbraith* [1893] 1 QB 577) on the basis that leave will not be granted if the lack of a plausible cause of action against D1 shows that the presence of D1 in the jurisdiction is being used as a device to bring in D2. See also *Multinational Gas and Petrochemical Co. v Multinational Gas and Petrochemical Services Ltd.* [1983] Ch 258, 268, 273-274.

"Bound to fail"/"Serious issue to be tried" and questions of law

81. A question of law can arise on an application in connection with service out of the jurisdiction, and, if the question of law goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case: *Hutton (EF) & Co (London) Ltd. v Mofarrij* [1989] 1 WLR 488, 495 (CA); *Chellaram v Chellaram (No 2)* [2002] EWHC 632 (Ch), [2002] 3 All ER 17, [136].

82. Because this appeal is concerned with the "necessary or proper party" provision, the question of the merits of the claims is relevant to the question of whether the claim against D1 is "bound to fail" and to the question whether there is a "serious issue to be tried" in relation to the claim against D2. There is no practical

difference between the two tests, and they in turn are the same as the test for summary judgment.

83. What is the position if the viability of the claims depends on a substantial issue of law? Is the court bound to decide it at the stage of the application to set aside service out of the jurisdiction?

84. The general rule is that it is not normally appropriate in a summary procedure (such as an application to strike out or for summary judgment) to decide a controversial question of law in a developing area, particularly because it is desirable that the facts should be found so that any further development of the law should be on the basis of actual and not hypothetical facts: e.g. *Lonrho Plc. v. Fayed* [1992] 1 A.C. 448 , 469 (approving *Dyson v Att-Gen* [1911] 1 KB 410, 414: summary procedure "ought not to be applied to an action involving serious investigation of ancient law and questions of general importance ..."); *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 741 ("Where the law is not settled but is in a state of development … it is normally inappropriate to decide novel questions on hypothetical facts"); *Barrett v Enfield London BC* [2001] 2 AC 550, 557 (strike out cases); *Home and Overseas Insurance Co. Ltd. v Mentor Insurance Co. (U.K.) Ltd.* [1990] 1 WLR 153 (summary judgment). In the context of interlocutory injunctions, in the famous case of *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 407 it was held that the court must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It was no part of the court's function "to decide difficult questions of law which call for detailed argument and mature consideration."

85. In *Seaconsar Far East Ltd. v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, 452, Lord Goff said that if, at the end of the day, there remained a substantial question of fact or law or both, arising on the facts disclosed by the affidavits, which the plaintiff bona fide desired to try, the court should, as a rule, allow the service of the writ. The standard of proof in respect of the cause of action could broadly be stated to be whether, on the affidavit evidence before the court, there was a serious question to be tried.

86. There is no reason why the same principle should not apply to the question whether, in a service out of the jurisdiction case on the "necessary or proper party" head, a claim is "bound to fail" as well as to the question whether there is a "serious issue to be tried" in the claim against D2. Prior to the modern authorities on striking out, summary judgment, and interlocutory injunctions, the point was considered in the context of "necessary or proper party" in *The Brabo* [1949] AC 326. In that case it was held that the claim against D1 was bound to fail because the claim against it was made as agent of the Crown and it was therefore entitled to Crown immunity (as it then was). That was not a case where the point of law was a difficult one. Lord Porter said (at 341) that "when the various Acts and provisions are collated the answer is

clear." Consequently the observations of the members of the Appellate Committee are obiter, but although they do not all put it in the same way, the overall effect of the decision is that if the question is whether the claim against D1 is bound to fail on a question of law it should be decided on the application for permission to serve D2 (or on the application to discharge the order granting permission), but not where there is an exceptionally difficult and doubtful point of law: Lord Porter at 341, and cf at 338, per Lord Porter; Lord du Parcq at 351. Contrast Lord Simonds at 348: "…the court should not easily be deterred by any apparent difficulty or complexity of subject matter from considering and, if it can do so at that stage, forming an opinion on the question whether the action is bound to fail against the defendants within the jurisdiction."

"One investigation"/ "closely bound up"

87. Third, the question whether D2 is a proper party is answered by asking: "Supposing both parties had been within the jurisdiction would they both have been proper parties to the action?": *Massey v Heynes & Co* (1888) 21 QBD 330 at 338, per Lord Esher MR. D2 will be a proper party if the claims against D1 and D2 involve one investigation: *Massey v Heynes & Co* at 338, per Lindley LJ; applied in *Petroleo Brasiliero SA v Mellitus Shipping Inc (The Baltic Flame)* [2001] EWCA Civ 418, [2001] 1 Lloyd's Rep 203, at [33] and in *Carvill America Inc v Camperdown UK Ltd* [2005] EWCA Civ 645, [2005] 2 Lloyd's Rep 457, at [48], where Clarke LJ also used, or approved, in this connection the expressions "closely bound up" and "a common thread": at [46], [49] .

The exercise of discretion

88. The principles governing the exercise of discretion set out by Lord Goff of Chieveley in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, at 475-484, are familiar, and it is only necessary to re-state these points: first, in both stay cases and in service out of the jurisdiction cases, the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice; second, in service out of the jurisdiction cases the burden is on the claimant to persuade the court that England (in this case, of course, the Isle of Man) is clearly the appropriate forum; third, where the claim is time-barred in the foreign jurisdiction and the claimant's claim would undoubtedly be defeated if it were brought there, practical justice should be done, so that if the claimant acted reasonably in commencing proceedings in England, and did not act unreasonably in not commencing proceedings in the foreign country, it may not be just to deprive the claimant of the benefit of the English proceedings.

Justice in the foreign jurisdiction

89. Lord Goff in *Connelly v RTZ Corp plc (No 2)* [1998] AC 854, 866, quoted with approval from the judgment of Sir Thomas Bingham MR in the Court of Appeal ([1997] ILPr 643, 651):

> "But faced with a stark choice between one jurisdiction, albeit not the most appropriate in which there could in fact be a trial, and another jurisdiction, the most appropriate in which there never could, in my judgment, the interests of justice would tend to weigh, and weigh strongly in favour of that forum in which the plaintiff could assert his rights".

90. Two questions on this aspect of the present case have been canvassed on this appeal. The first is the standard of proof to be satisfied by the party which asserts that justice will not be done in the foreign jurisdiction: does that party have to show that justice will not be done, or simply that there is a risk that it will not be done? The second is whether the court may rule that as a result, for example, of endemic corruption, justice is not to be obtained in the foreign legal system in general.

91. The earliest cases arose in proceedings by German Jewish refugees in England against German companies. In *Oppenheimer v Louis Rosenthal & Co. AG* [1937] 1 All ER 23 the Court of Appeal held that a German Jew was entitled to sue his German employer in England under a contract governed by German law, because in Germany the plaintiff would have to appear in person since he would not be allowed to be legally represented and he would be under a real risk of being arrested and put in a concentration camp. In *Ellinger v Guinness, Mahon & Co* [1939] 4 All ER 16, 24, Morton J accepted the evidence of the plaintiff, and of Dr F A Mann, "a fully qualified German lawyer and a Doctor of Laws of the Universities of Berlin and London, and who practises as a consultant on German law in London", that, if the plaintiff were compelled to bring proceedings in Germany against the German defendant whom he sought to add, he would be unable to obtain justice there.

92. In *The Abidin Daver* [1984] AC 398, at 411, Lord Diplock said that the "possibility cannot be excluded that there are still some countries in whose courts there is a risk that justice will not be obtained" and gave some examples, none of which is close to this case. He went on to say that a plaintiff in an English action seeking to resist a stay (that being a stay case) upon the ground that "even-handed justice may not be done to him in that particular foreign jurisdiction, must assert this candidly and support his allegations with positive and cogent evidence." That was not a case in which this question arose for decision, but it is clear that Lord Diplock was speaking of evidence of *risk*, and that he was not requiring a higher standard, that justice would not be done.

93. In other decisions of the House of Lords, again obiter, Lord Diplock's dictum was treated as requiring evidence that the claimant "will not" obtain justice in the foreign jurisdiction. In *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, 478, Lord Goff of Chieveley, summarised the relevant part of Lord Diplock's speech by referring to "the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction" and in *Connelly v RTZ Corp (No 2)* [1998] AC 854, 873, Lord Goff said: "Only if the plaintiff can establish that substantial justice cannot be done in the appropriate forum, will the court refuse to grant a stay …" Lord Bingham in *Lubbe v Cape plc* [2000] 1 WLR 1545, 1554 said (citing Lord Goff in *Spiliada* and *Connelly*): "It is only if the plaintiff can establish that substantial justice will not be done in the appropriate forum that a stay will be refused …"

94. In two decisions of the Court of Appeal it has been held that the relevant question to which the cogent evidence will go is to the *risk* that justice will not be done in the foreign jurisdiction, and that it is not necessary to establish that on the balance of probabilities that the risk will eventuate: *Cherney v Deripaska* [2009] EWCA Civ 849, [2009] 2 CLC 408, at [28]-[29], per Waller LJ; *Pacific International Sports Clubs Ltd. v Surkis* [2010] EWCA Civ 753, [34]-[35], per Mummery LJ. See also *OJSC Oil Company Yugraneft v Abramovich* [2008] EWHC 2613 (Comm), at [496], where Christopher Clarke J said that the risk of judicial impropriety could be inferred from such matters as departure from normal judicial practice, or irrational conclusions.

95. The better view is that, depending on the circumstances as a whole, the burden can be satisfied by showing that there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption. Of course, if it can be shown that justice "will not" be obtained that will weigh more heavily in the exercise of the discretion in the light of all other circumstances.

96. Is the court able to find that justice will not, or may not, be done because of endemic corruption in the foreign system? The Appellants say that the court is precluded from undertaking this task by the act of state doctrine or the related principle of judicial restraint enunciated in *Buttes Gas & Oil Co. v Hammer* [1982] AC 888.

97. Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required. But, contrary to the Appellants' submission, even in what they describe as endemic corruption cases (i.e. where the court system itself is criticised) there is no principle that the court may not rule. It is true that there is some authority for the application of a principle akin to the act of state doctrine in this area. First, in the High Court of Australia, in *Voth v Manildra Flour Mills Pty.*

Ltd. (1990) 171 CLR 538 (a service out of the jurisdiction case), Mason CJ, Deane J, Dawson J and Gaudron J said in their joint judgment at [39]:

> "Moreover, there are powerful policy considerations which militate against Australian courts sitting in judgment upon the ability or willingness of the courts of another country to accord justice to the plaintiff in the particular case. Those policy considerations are not dissimilar to those which lie behind the principle of 'judicial restraint or abstention', which ordinarily precludes the courts of this country from passing upon 'the provisions for the public order of another State': see generally *Attorney-General (United.Kingdom) v Heinemann Publishers Australia Pty Ltd* [(1988) 165 CLR 30, 40-44]…."

98. That statement was obiter since there was no suggestion that justice could not be obtained in the foreign jurisdiction (Missouri). In *Mokbel v Attorney-General for the Commonwealth of Australia* [2007] FCA 1536 (Federal Court of Australia), an Australian national appealed against his extradition on drug trafficking charges from Athens to Australia and, in doing so, alleged that two e-mail communications from the Australian embassy in Athens were sent with the intention of and did in fact influence the Athens Court of Appeal. Gordon J suggested (at [58]-[59]) that for an Australian Court to comment on, or intervene in, the manner in which the Athens Court of Appeal conducted the Request hearing, would run directly counter to the principle of public international law that the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

99. Second, in *Jeyaretnam v Mahmood, The Times*, May 21, 1992, the plaintiff claimed that England was the appropriate forum because he could not expect to receive a fair trial in Singapore (a more obvious forum). Brooke J held that he was precluded by the principles of judicial restraint from embarking on an inquiry into the plaintiff's allegations that he would not receive justice in Singapore, and that he was prevented "from expressing my views on the rightness or wrongness, wisdom or unwisdom, or justice or injustice of the treatment the Plaintiff has received from the courts of Singapore, or on the reasonableness or unreasonableness of his views on the quality of that justice." He went on: "The quality of a country's system of justice for its citizens, like the fairness of its laws, are qualities which may attract or repel outside observers in the family of states of which that country is a member, but they are not matters on which judges of another country may express any opinion." See also *Skrine & Co v Euromoney Publications plc* [2000] All ER (D) 1683, QBD, where Morland J struck out from a pleading allegations which criticised the behaviour and impugned the integrity of the judiciary in Malaysia.

100. The decision in *Jeyaretnam v Mahmood* was criticised in *Al-Koronky v Time-Life Entertainment Group Ltd.* [2006] EWCA Civ 1123, [2006] CP Rep 47, where the

question was whether the court could take into account, for the purposes of ordering security for costs, evidence that any costs order in favour of the defendants would not be enforced in the Sudan because of the lack of independence of the judiciary in that country. The Court of Appeal held that the court was entitled to take the evidence into account. Sedley LJ, giving the judgment of the court, said that it accepted that "any court is always reluctant to pass judgment on the judiciary of a foreign country in the context of jurisdictional disputes" but doubted if there was any general principle that the English court would never do so, and gave the example of asylum cases, where the court would consider whether the foreign courts would afford any remedy against persecution, and those jurisdiction cases involving repressive regimes such as Nazi Germany. That was no doubt a reference to *Oppenheimer v Louis Rosenthal & Co. AG* [1937] 1 All ER 23, CA and *Ellinger v Guinness, Mahon & Co* [1939] 4 All ER 16, in each of which, as has been seen, it was held that the foreign legal system would not afford justice.

101. The true position is that there is no rule that the English court (or Manx court) will not examine the question whether the foreign court or the foreign court system is corrupt or lacking in independence. The rule is that considerations of international comity will militate against any such finding in the absence of cogent evidence. That, and not the act of state doctrine or the principle of judicial restraint in *Buttes Gas & Oil Co v Hammer*, is the basis of Lord Diplock's dictum in *The Abidin Daver* and the decisions which follow it. Otherwise the paradoxical result would follow that, the worse the system of justice in the foreign country, the less it would be permissible to make adverse findings on it.

102. That conclusion is also supported by the many cases in the United States courts in which the standard of justice in the foreign court has been examined in the context of *forum non conveniens* questions. It was said in *Blanco v Banco Industrial de Venezuela*, 997 F 2d 974, at [50] (2d Cir 1993), quoting earlier decisions, that it "is not the business of our courts to assume the responsibility for supervising the integrity of the judicial system of another sovereign nation." That is not the enunciation of the act of state doctrine (well known in the United States) or the doctrine of judicial restraint in foreign relations cases (which has its origin in the United States), but simply a reflection of the fact that comity considerations require the court not to pass judgment on the foreign court system without adequate evidence. Evidence of corruption in the foreign court system is admissible (as, e.g., in *Cariajano v Occidental Petroleum Corp*, 626 F 3d 1137 (9th Cir 2010)), but it must go beyond generalised, anecdotal material: *Tuazon v RJ Reynolds Tobacco Co*, 433 F 3d 1163, 1179 (9th Cir 2006); *Stroitelstvo Bulgaria Ltd v Bulgarian-American Enterprise Fund*, 589 F 3d 417 (7th Cir 2009). Cases in which justice in the foreign legal system has been found wanting have been rare but they are by no means unknown: *Rasoulzadeh v Associated Press*, 574 F Supp 854 (SDNY 1983), affd 767 F 2d 908 (2d Cir 1985) and *Osorio v Dole Food Co*, 665 F Supp 2d 1307 (SD Fla 2009) are examples in the contexts of *forum non conveniens* and enforcement of foreign judgments respectively.

VI Application of the principles to the appeal

A Bound to fail/no serious issue to be tried

103. The Appellants say that the claims against BITEL for a declaration and damages arising out of the obtaining of the April 2006 Judgment are bound to fail, and there is no serious issue to be tried in relation to the claims against the Appellants. "Bound to fail" and "no serious issue to be tried" tests are different ways of putting the same point, which is that the claims against the Appellants and BITEL in relation to the 2005 and 2006 Judgments are hopeless, and in this section the tests will be used interchangeably. It should be noted that, although the Appellants argue (as they are entitled to do) that the claims against BITEL are bound to fail, BITEL has put in a Reply and Defence to Counterclaim, and has not sought to strike out any part of the Defence or Counterclaim

(1) *Substance/procedure*

104. First, the Appellants say that there is an essential pre-condition which has to be met before the Kyrgyz law causes of action arise, which is that the April and December 2005 Judgments must first be set aside: unless and until they are set aside in Kyrgyzstan, then, under Kyrgyz law, no cause of action can arise in favour of the KFG Companies in relation to any of their Kyrgyz law claims. The KFG Companies accept that statement of Kyrgyz law, but say that the rule is one of procedural law and therefore not applicable in the forum, the Isle of Man.

105. There was no dispute about the applicable legal principles. In deciding whether a foreign rule is procedural, the court examines the foreign law in order to determine whether the rule is of such a nature as to be procedural in the English sense: Dicey, Morris & Collins, *Conflict of Laws*, 14th ed 2006, para. 7-002.

106. The evidence of Kyrgyz law on this point developed in the following way. The evidence of Mr Kenenbaev, for the Alfa Parties, was that the claims could not succeed unless and until criminal proceedings led to a finding that the court had been misled into giving the April 2005 Judgment, because otherwise the actions of the parties against whom the claims were made would have none of the attributes of unlawful behaviour in the case of the tort claims; acquisition of title on the basis of a court judgment could not be considered unjust enrichment while the judgment stood; and a claim of abuse of right was impossible until the judgment was reversed, and there was no judgment which established that the April 2005 judgment was an abuse. A petition by the KFG Companies to overturn the April 2005 Judgment (as confirmed by the Kyrgyzstan Supreme Court) could be filed only on the basis of newly discovered facts, and the petition had to be brought within three months of the discovery of new

facts. The only avenue open to the KFG Companies was to prove that a crime had been committed under Kyrgyz criminal law.

107. Mr Maggs, for the KFG Companies, supported by Mr Newton, proceeded on the basis that questions of procedure were governed by Manx law, and therefore the effect of the Kyrgyz judgments in a Kyrgyz court was irrelevant. He accepted that judgments could be set aside where it was established in criminal proceedings that there had been deliberately false evidence or other criminal acts of the parties or of the judge. Mr Maggs said there would be considerable difficulties in obtaining such a conviction. Mr Kenenbaev replied that the requirement that the KFG Companies had to apply to set aside the April 2005 Judgment on the basis of a criminal conviction under Article 361 was a matter of substantive law, although the provision was in the Civil Procedure Code. That was because it set out the basis on which a property right could be altered. It was not unusual for some substantive provisions to be contained in the Civil Procedure Code.

108. The question for the Manx court is whether, from the viewpoint of Manx law, the Kyrgyz rule relates to a matter of substance or of procedure. That the rule is contained in the Civil Procedure Code is relevant but not conclusive. It will have to be looked at in the light of its function and role in the Kyrgyz legal system. There is not only a conflict of expert evidence on whether the requirement in Kyrgyz law is procedural, which is not of course decisive, but in addition the experts have not gone into sufficient detail for the Manx court to take a view as to whether in their context the Kyrgyz rules are to be regarded as procedural from the Manx viewpoint. Given the difference of view, and the difference of approach, a proper consideration of this question cannot be given without more evidence and, if necessary, cross-examination. There is a serious issue to be tried on this aspect of the case.

(2) *Fraud and foreign judgments: the principle in Abouloff v Oppenheimer & Co*

109. The principle in *Abouloff v Oppenheimer & Co* (1882) 10 QBD 295 (CA) is that, in the context of recognition and enforcement of foreign judgments at common law, a foreign judgment may be impeached for fraud even though no newly discovered evidence is produced and even though the fraud might have been produced, or even was produced and rejected, in the foreign court. This is in contrast to the rule for impeachment of English judgments, which requires that the person seeking to impeach the judgment produces newly discovered evidence which could not have been produced at the trial with reasonable diligence: see e.g. *Kuwait Airways Corp v Iraqi Airways Co (No 11)* [2003] EWHC 31 (Comm), [2003] 1 Lloyd's Rep 448; *Owens Bank Ltd. v Etoile Commerciale SA* [1995] 1 WLR 44, 48 (PC).

110. The Appellants say, first, that the decision in *Abouloff* is no longer good law and/or should not be adopted in the Isle of Man, and on that basis the KFG Companies cannot claim that the 2005 and 2006 Judgments were procured by fraud, because they cannot adduce newly found evidence to prove it. Second, the Appellants argue that, even if *Abouloff* is good law, the KFG Companies are using it, impermissibly, as a positive basis of a claim: the KFG Companies cannot make a claim for the fraudulent procurement of a foreign judgment, when that judgment is valid in the place where it was rendered and no fresh evidence shows that it was obtained by fraud. Third, the Appellants argue that the *Abouloff* rule does not apply where the judgment is *in rem*, which is the case here, because the effect of the decisions of the Kyrgyz courts was that the shares in BITEL belonged to Fellowes and then to Reservespetsmet, and subsequently to CP-Crédit and AK Investment, and those decisions cannot be impugned for fraud because they have a proprietary effect. In particular, CP-Crédit says that it bought the shares in BITEL after taking legal advice on the effect of the December 2005 Judgment, and that the KFG Companies' case on unjust enrichment would lead to the illogical conclusion that Fellowes and Reservespetsmet had not been the true owners of the shares at the relevant time, despite the fact that the effect of the April and December 2005 Judgments was that they were the true owners and the share register in Kyrgyzstan reflected that fact.

111. The existence and scope of the rule in *Abouloff* would be directly engaged by BITEL's claim at common law on the April 2006 Judgment. The appeal has proceeded on the basis (which may be debateable) that the allegations that the 2005 and 2006 Judgments were obtained by fraud can only succeed if the Manx court applies the rule in *Abouloff*, and this advice will proceed on the basis, which appears to be common ground between the parties, that the claim (or a substantial part of it) would fail if the rule in *Abouloff* no longer represented the law in the Isle of Man.

112. The rule in *Abouloff* has received considerable criticism: see the literature cited in Dicey, Morris & Collins, *Conflict of Laws*, 14th ed. 2006, para 14-129. It has been repudiated by the Supreme Court of Canada: *Beals v Saldanha* (2003) 234 DLR (4th) 1 as regards fraud going to the merits, as distinct from fraud going to jurisdiction. In *Owens Bank Ltd. v Bracco* [1992] 2 AC 443 the House of Lords was invited to overrule *Abouloff* in the context of a St Vincent judgment being enforced in England under the Administration of Justice Act 1920. It was held that the fraud defence in section 9(2)(d) of the 1920 Act had to be construed in the light of the common law as understood when the 1920 Act was passed following the Sumner Report (1919, Cmd 251), and therefore it embodied the principle in *Abouloff*. Lord Bridge of Harwich said (at 487) that he saw the force of the submission that *Abouloff* should be over-ruled, and recognised (at 489) that "as a matter of policy, there may be a very strong case to be made … in favour of according to overseas judgments the same finality as the courts accord to English judgments." But to alter the common law rule would produce the absurd result that the judgment creditor, denied statutory enforcement on the ground that he had obtained his judgment by fraud, could succeed in an action to enforce the judgment at common law because the evidence relied on by the judgment

debtor did not satisfy the English rule. As a result the whole field was governed by statute and it was for the legislature, and not for the judiciary, to effect it.

113. The Appellants' case is that the position in the Isle of Man is different since the Judgments (Reciprocal Enforcement) (Isle of Man) Act 1968 (equivalent to the Foreign Judgments (Reciprocal Enforcement) Act 1933) contains in section 6 (as does the 1933 Act) an express prohibition on enforcement at common law of a judgment which could in principle be registered under the Act. The Appellants say therefore that the absurdity which influenced Lord Bridge's judgment under English law in *Bracco* finds no counterpart in the Isle of Man. In fact, Lord Bridge's remarks were directed to the 1933 Act as well as the 1920 Act, although it is possible that he did not appreciate that the position was different as between the two pieces of legislation.

114. In *Owens Bank Ltd. v Etoile Commerciale SA* [1995] 1 WLR 44 (PC) Lord Templeman said (at 50) that the result in *Owens Bank Ltd v Bracco* "may be regretted" and that the Board did not regard the decision in *Abouloff* "with enthusiasm, especially in its application to countries whose judgments the United Kingdom has agreed to register and enforce". He said that "in those cases the salutary rule which favours finality in litigation seems more appropriate" (ibid). He regarded the arguments put forward in favour of the view that the rule in *Abouloff* should be reconsidered where there was no statutory procedure "interesting and important" but it was not necessary to deal with them because the fraud defence was an abuse of process: at 51.

115. The Appellants submit that the rule in *Abouloff* should not be applied in the Isle of Man because: (a) the courts should apply the same rules in relation to foreign judgments as they apply at common law to the setting aside of a domestic judgment; (b) the rule allows the party seeking to challenge the judgment several bites at the cherry, which is unjustifiable, especially in relation to evidence and submissions which could have been put forward with reasonable diligence at the trial; (c) the rule ignores the doctrines of cause of action and issue estoppel and the nature of the doctrine of obligation, and is wrong in principle; (d) the policy underlying *Abouloff* is objectionable and wrong, and is inconsistent with judicial comity. A policy which requires a Manx court to appropriate for itself the responsibility of deciding whether a foreign court was deceived, especially where the foreign court has its own procedure for setting aside judgments obtained in such circumstances, is anomalous and unjustifiable.

116. These are powerful arguments, but the present case shows that, even if the rule in *Abouloff* were no longer to represent the law, simply to apply the English rules to foreign judgments might lead to real injustice. To decide, on an application to set aside service, an issue which requires "detailed argument and mature consideration" (*American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 407) would be an

inappropriate application of the "bound to fail"/"serious issue to be tried" tests. Extremely important issues of policy would be involved in deciding whether to change a rule which has stood for almost 120 years. In particular the facts of this case shows that a nuanced approach might be required, depending on the reliability of the foreign legal system, the scope for challenge in the foreign court and the type of fraud alleged.

117. In any event, the rule in *Abouloff* may not necessarily affect the outcome of the proceedings. Thus if the April and December 2005 Judgments were corruptly obtained by the exercise of improper influence on the relevant Kyrgyz courts, or if their recognition is contrary to public policy, those judgments would not be recognised or enforced in the Isle of Man, whether or not the rule in *Abouloff* applies.

118. The latter point also applies to the further argument of the Appellants, namely that, even if the rule in *Abouloff* applies in the Isle of Man, the KFG Companies seek to extend the rule in a manner which is without precedent and lacking in principle. The Appellants say that the KFG Companies are impermissibly using the rule positively to assert a foreign cause of action whose very existence depends (under the *lex causae*) upon the foreign judgment not existing or having been set aside, and by arguing that the local court can (on the ground that it was allegedly obtained by fraud) treat the foreign judgment as not existing or having been set aside, even though that judgment does actually still exist and has not actually been set aside under the relevant foreign law.

119. The Board's view is that the KFG Companies are right to say that this argument mis-characterises their claim. The real issue would not be whether the KFG Companies can use the rule in *Abouloff* in aid of a positive claim, but rather whether, where a foreign judgment is relied on by way of defence, that defence may be defeated by the claimant establishing that the judgment in question is impeachable on any of the grounds available at common law. There is no reason in principle why it should not be possible to adduce fraud in opposition to a defendant's reliance on a foreign judgment: see Dicey, Morris & Collins, para. 14-138.

120. The next point taken by the Appellants is that in any event the rule in *Abouloff* does not apply to judgments *in rem*, and that the claims must fail (a) because the Manx court cannot ignore the April and December 2005 Judgments on the grounds of fraud or related matters, as they are judgments *in rem*, relating to shares situate in Kyrgyzstan, which are relied upon *qua* assignments: *Pattni v Ali* [2006] UKPC 51, [2007] 2 AC 85; and (b) foreign judgments are not impeachable for fraud where the foreign judgment in question is a foreign judgment *in rem* relied upon *qua* an assignment of title: Dicey, Morris & Collins, paras 14-102, 14-140; *Castrique v Behrens* (1861) 30 LJQB 163.

121. The answer to this point is that it is arguable that the exception to the *Abouloff* rule for *in rem* judgments does not apply where the claim is for wrongful misappropriation, and where the defence is, not that there was an assignment, but that the elements of a claim for unjust enrichment are lacking. It is also arguable that, even if the April and December 2005 Judgments were relied on as assignments, they should not be recognised on public policy grounds, in the light of the way in which Fellowes obtained the Judgments in breach of a English arbitration agreement and of orders of the English and BVI courts, and in the light of the way in which the Kyrgyz courts dealt with the case.

(3) *Damages claim against BITEL, Sky Mobile and Altimo Russia for wrongful transfer of BITEL's assets*

122. As regards the claim for damages against BITEL in relation to the transfer of its assets to Sky Mobile, the Appellants say that BITEL was the victim and not the perpetrator, and should have been the claimant and the defendant (and CP-Crédit adds that the KFG Companies have never explained what loss or damage they claim to have suffered by reason of the allegedly wrongful obtaining of the April 2006 Judgment).

123. The expert evidence for the KFG Companies by Mr Maggs was that BITEL, Sky Mobile, and Altimo Russia would be liable to the KFG Companies for the wrongful transfer of the BITEL assets to Sky Mobile. In reply, Mr Kenenbaev, for the Appellants, deposed that BITEL was the victim and any such claim had to be in the name of BITEL and not a claim against BITEL. Mr Maggs then accepted that normally a shareholder had no direct right of action, but said that the case of the KFG Companies was that there was a scheme to which Sky Mobile was a party under which BITEL was seized and then stripped of its assets, and as a joint tortfeasor, Sky Mobile would be liable for all harm caused to the KFG Companies under the scheme, or alternatively would be liable to claim for unjust enrichment.

124. It would appear, therefore, that Mr Maggs agreed that there was no claim against BITEL under this head. That would not prevent Sky Mobile and Altimo Russia from being proper parties to the action if the claims against BITEL for damages and a declaration arising out of the obtaining of the April 2006 Judgment are not bound to fail. The fact that the claim against BITEL for wrongful transfer of its assets would be bound to fail is not fatal to the joinder of Sky Mobile and Altimo Russia, because what is required under MHCR, Ord 6, r.1(g) is that they be proper parties to the "action" and not to any particular claim: see below at [129].

(4) *Declaratory relief*

125. The Appellants argue that the claim against BITEL for a declaration that the April 2006 Judgment was obtained by fraud, in proceedings which were contrary to natural justice, and/or in a manner which to enforce it would be contrary to public policy, is bound to fail, because (a) the court will not grant a declaration unless it would serve a useful purpose (*Messier-Dowty Ltd v Sabena SA* [2000] 1 WLR 2040, at [41]) and no useful purpose would be served in this case: *Clarke v Fennoscandia Ltd*. [2007] UKHL 56, 2008 SLT 33, at [24] per Lord Rodger of Earlsferry ("the declarators would not – indeed could not – have any conceivable legal effect except in the Scottish proceedings"); and (b) the court will be especially reluctant to grant a negative declaration, and the declaration is in effect a negative declaration that the April 2006 Judgment is not enforceable; and where a court finds that a negative declaration would be ignored in foreign legal proceedings, or there is no sensible point in making the declaration, the claim would be an abuse of the process of the court: *Boss Group Ltd v Boss France SA* [1997] 1 WLR 351, at 358.

126. The answer to this point is that declaratory relief is discretionary, and depends on the circumstances at the date of trial, and there is no material which would indicate that there is no prospect of obtaining it.

B Was the Counterclaim "properly brought" against BITEL for the purposes of MHCR Order 6, r. 1(g)?

127. The primary question under this head is whether the claims against BITEL were "bound to fail," which has already been considered.

128. The Appellants also take under this heading the point that the Counterclaim was not properly brought against BITEL because it was brought for the sole or predominant purpose of establishing jurisdiction against the other defendants to Counterclaim including the Appellants. Although there is some authority for the view that this is an aspect of the question of whether the claim is "properly brought," for the reasons given above (para [78]) the better view is that the fact that D1 is sued only for the purpose of bringing in the foreign defendants is a factor in the exercise of the discretion and not an element in the question whether the action is "properly brought" against D1.

C Are the Appellants "proper parties" to the counterclaim against BITEL? The "single investigation"/ "closely bound up" point

129. A litigant relying on the "proper party" ground must show a good arguable case that the proposed defendant (here the Appellants as defendants to counterclaim) is a proper party to the action against the anchor defendant (here a proper party to the

Counterclaim against BITEL). The Appellants must be necessary or proper parties to the Counterclaim and not to any particular claim.

130. The Appellants claim that no "single investigation" is required in relation to the claims against BITEL relating to the April 2006 Judgment and the claims against the Appellants for these reasons: (1) even if the April and/or December 2005 Judgments had been procured by fraud, BITEL was not a party to those proceedings and was entitled to rely upon those judgments in the proceedings which led to the April 2006 Judgment; (2) consequently, BITEL did not perpetrate any fraud in obtaining the April 2006 Judgment, but merely correctly reported to the court the existence and effect of the December 2005 Judgment; (3) any allegation that fraud has been practised on a court must relate to fraud practised on *that particular* court (that is to say, the April 2006 court): *Jet Holdings Inc. v Patel* [1990] 1 QB 335, 346-347; (4) as a result, the Manx court would not be required to investigate the circumstances of the April 2005 and December 2005 Judgments in order to determine the KFG Companies' claims against BITEL.

131. The argument based on *Jet Holdings v Patel* [1990] 1 QB 335 is that: (1) BITEL did not deceive the Kyrgyz court in 2006 by informing it that by virtue of the April 2005 Judgment the KFG Companies had ceased to be owners of BITEL prior to September 14, 2005, because this was a correct statement of the effect of the judgment as a matter of Kyrgyz law, which had been upheld by the Kyrgyz Supreme Court; (2) it is irrelevant that the purported sale to Reservespetsmet may have been a later fraudulent invention, because that was not an issue in the proceedings which led to the April 2006 Judgment and the finding that Reservespetsmet was the true owner from May 2005 onwards therefore did not affect the Court's decision; (3) there is therefore no good arguable case that, by reason of the earlier events which are the basis of the KFG Companies' claims against the Appellants, the April 2006 Judgment was impeachable for fraud, and accordingly those events are irrelevant to any issues between BITEL and the KFG Companies concerning the enforceability of the April 2006 Judgment.

132. Nor, say the Appellants, is a "single investigation" required in relation to the claims of asset-stripping against BITEL on the one hand and Altimo Russia and Sky Mobile on the other hand. Sky Mobile was not incorporated until May 2006, and the transfer of assets to it took place well after the relevant court proceedings in Kyrgyzstan, and after the obtaining of the April 2005 Judgment, the December 2005 Judgment and the April 2006 Judgment.

133. The argument based on *Jet Holdings v Patel* confuses the question of whether the claim against BITEL is bound to fail with the question whether there is a good arguable case that the Appellants are proper parties to the Counterclaim against BITEL. The KFG Companies say that the April 2006 Judgment is unenforceable in

that it was premised on the April and December 2005 Judgments which were themselves impeachable on grounds of fraud, natural justice and public policy. It was only because of the April and December 2005 Judgments that BITEL was able to claim in the proceedings which led to the April 2006 Judgment that Mr Omurzakov had been wrongfully appointed as director general by the KFG Companies and that representatives of the KFG Companies had caused damage to its business by destroying documents and making substantial payments.

134. The Board is satisfied that the claims against BITEL and the claims against the Appellants involve one investigation or are closely bound up together, and that the Staff of Government Division was right to hold (at [149]) that the factual issues were interwoven in such a manner that the case against each of the Appellants demands a single investigation. The issues in relation to the enforceability of the April 2006 Judgment and the issues between the KFG Companies and the Appellants in relation to the misappropriation of the shares in BITEL depend on the same inquiry into how the April and December 2005 Judgments were obtained. The other factual issues are intimately connected with these issues: the allegations about Altimo's control of Reservespetsmet, and the allegation that the sale of BITEL by Fellowes to Reservespetsmet was a sham to evade the orders of the English and BVI Courts and whether all the subsequent orders obtained by Reservespetsmet were therefore obtained by fraud; the seizure of BITEL in December 2005; the transfer of the shares to Fellowes, CP-Crédit and AK Investment; and the transfer of the business to Sky Mobile.

135. To take one example, in particular, both the claim by BITEL dated March 22, 2006 and the April 2006 Judgment relied on the alleged sale in May 2005 to Reservespetsmet. It is plainly arguable that the sale agreement was falsely back-dated, and that allegation is plainly related not only to the enforceability of the April 2006 Judgment, but also to the claims against the Appellants on all three of the Kyrgyz law causes of action.

136. On this aspect it only remains to mention the special argument on behalf of AK Investment and CP-Crédit, which is that their acquisition of the shares (especially by AK Investment, which was incorporated and acquired its interest in BITEL, after the April 2006 Judgment) was peripheral to the matters complained of by the KFG Companies and the claim against them are of limited ambit, and consequently they are not proper parties because their connection is an insufficient basis for concluding that a single investigation is necessary.

137. There is no basis for distinguishing AK Investment and CP-Crédit from the other Appellants for this purpose. They are alleged to have been involved in the overall conspiracy, albeit at a later date than other Appellants, and there is a serious issue to be tried on liability.

138. It follows that the Staff of Government Division was right to find that the KFG Companies had established that the Appellants were proper parties to the Counterclaim against BITEL for the purposes of MHCR, Ord 6, r. 1(g). It is therefore unnecessary to consider whether there is a sufficient "substantial connection" for the purposes of Ord. 6, r. 1(h).

D Forum conveniens and discretion

139. The fundamental question of the appropriate forum is a matter within the discretion of the judge. Consequently an appellate tribunal can only interfere with the exercise of discretion by the judge in accordance with well-settled principles: see, among many other decisions, *The Abidin Daver* [1984] AC 398, 420. In addition, an appellate tribunal should resist the temptation to subvert the principle that it should not substitute its own discretion for that of the judge by a narrow textual analysis which enables it to claim that he misdirected himself: *Piglowska v Piglowski* [1999] UKHL 27, [1999] 1 WLR 1360, at 1372, per Lord Hoffmann. The question for the Board, therefore, is whether the Staff of Government Division was entitled to interfere with the exercise of discretion by the Deemster, and, even if it was so entitled, whether it re-exercised the discretion on correct principles.

140. On this aspect of the case alone, each of the judgments of the Deemster and the Staff of Government Division covered 40 pages or so, and any summary is bound to do their careful judgments an injustice. It is only necessary to refer to those matters which are crucial.

141. The Deemster set aside the orders for service out of the jurisdiction because the KFG Companies had failed to establish that the Isle of Man was clearly the appropriate forum for trial of the issues in the counterclaim for these reasons in particular: (1) the issues had a much closer connection with Kyrgyzstan than they had with the Isle of Man; (2) Kyrgyzstan was an available forum since the KFG Companies had not established by positive and cogent evidence that they had not obtained and would not obtain substantial justice there; (3) the KFG Companies were sophisticated entities who had voluntarily chosen to make a sizeable investment in Kyrgyzstan.

142. The reasons of the Staff of Government Division for interfering with the exercise of discretion by the Deemster were these. Although the Deemster was justified in taking the view that Kyrgyzstan was the natural forum, the discretion should be exercised in favour of the KFG Companies because: (1) the Deemster had failed to take account of the extent to which there were overlapping issues (for the same reason as they required "a single investigation") in the counterclaims against BITEL and the counterclaims against the Appellants; (2) he had failed to take account of the point that on the basis of principles of comity the court should give effect to the

decisions of the English and BVI courts rather than those of the Kyrgyz courts; (3) he had applied the wrong test on the question of substantial justice by adopting the test of whether KFG Companies had shown that they would not obtain substantial justice, and the correct test was whether substantial injustice "will or may not be done" in the natural forum; (4) the litigation in Kyrgyzstan in which the KFG Companies had been engaged exhibited irrational conclusions and decisions which seemed, prima facie, contrary to natural justice, and there was a risk that they would not obtain substantial justice in Kyrgyzstan; (5) the combination of the existence of the obstacles to the Appellants mounting claims in Kyrgyzstan and the allegations of corruption was that in all probability there would be no trial in Kyrgyzstan of the issues raised by the claims against BITEL and the KFG Companies, and as result, there was no real risk of concurrent proceedings in two jurisdictions on the same issues; (6) the Deemster had wrongly taken into account the fact that the KFG Companies had made investments in Kyrgyzstan, when the parties had agreed to arbitration in London under English law for resolution of their disputes.

143. The Board is in no doubt that the Deemster erred in at least two significant respects. First, his finding that Kyrgyzstan was an available forum since the KFG Companies had not established by positive and cogent evidence that they had not obtained and would not obtain substantial justice there is open to two criticisms. The first, less important, is that focus should not have been on whether Kyrgyzstan was an available forum, but whether it was a forum in which the case could be suitably tried for the interests of all the parties and for the ends of justice. Second, but more important, was the focus on whether the KFG Companies "would" not obtain justice there, when the correct question was whether there was a risk that they would not obtain justice. In any event, there was substantial evidence of specific irregularities, breach of principles of natural justice, and irrational conclusions, sufficient to justify a conclusion that there was considerably more than a risk of injustice.

144. It is only necessary to recall at this stage that the April 2005 Judgment was given in the absence of the KFG Companies, and that it was given on the irrational basis that the Transfer Agreement had been executed by Fellowes, and in complete disregard of the fact that there was an arbitration clause and a choice of English law. As regards the December 2005 Judgment, the KFG Companies' lawyers were given notice of the hearing only on the morning that it was due to take place, the court refused to grant an adjournment, and refused time for the legalisation of the Receiver's statement that the authority of Fellowes' attorneys had been revoked, but accepted the false assertion on behalf of Fellowes that the Receiver had been discharged from office (when in fact the order for discharge had been stayed) and rejected the KFG Companies' application to dismiss the appeal on that basis. The Supreme Court held that the Transfer Agreement was an agreement made between Fellowes and the KFG Companies, and yet (although Kyrgyzstan is a party to the New York Convention) held that Fellowes was not bound by the arbitration clause contained in Article 17 as it "did not sign the Agreement", and that the arbitration clause was unenforceable as it did not denominate the arbitral tribunal, when in fact

the clause clearly provided that the tribunal was to be appointed by the LCIA. The April 2006 Judgment was given after the court refused the KFG Companies' application for time to prepare a response to expert evidence, and made an award of damages for which, arguably, there was no evidence and which the KFG Companies had no opportunity to challenge.

145. Secondly, while it is true that the KFG Companies were sophisticated entities who had voluntarily chosen to make a sizeable investment in Kyrgyzstan, that does not mean that they are bound to accept that all disputes arising out of that investment should be heard in Kyrgyzstan. In particular, they had agreed that disputes arising out of their sale of BITEL should be heard in a London arbitration under English law.

146. Those errors were sufficient to justify the Staff of Government Division in exercising the discretion itself. Are there grounds for this Board to interfere?

147. The Appellants make these criticisms in particular. First, there is no significant overlap between the Counterclaim against BITEL and the Counterclaim against the Appellants. In essence they rely on the same points as they do in relation to the "one investigation" point on proper parties, and that has already been dealt with: para [134] above. Second, the Staff of Government Division should not have held (at [345]) that it should "give effect to the orders and declarations of the English and BVI courts rather than those of the Kyrgyz courts in so far as they conflict", because the Staff of Government Division had not been asked to give effect to any orders of the English or BVI courts. Accordingly, there were no considerations of comity which weighed in the balance. The answer to this is that the Staff of Government Division was not giving effect to any orders of the English or BVI courts, but it was entitled to take into account the fact that not to hear the case would enable Fellowes (and those who were alleged to have conspired with it) to benefit from its conduct in breach of the English and BVI Courts' injunctions and in obtaining a judgment in proceedings which the English Court had held to be vexatious.

148. Third, the Appellants say that the KFG Companies ought to have shown that they would not have received justice in Kyrgyzstan *in the future*; allegations of specific corruption in the past could not be sufficient without evidence (to the appropriately high standard) of continuing corruption; and the Deemster and the Staff of Government Division should not have found that allegations of endemic corruption were justiciable.

149. The reasoning of the Staff of Government Division on this aspect is not easy to follow but there is no doubt that its starting point was correct, namely that the question is whether there is a risk that the KFG Companies would not obtain justice in

Kyrgyzstan. The court referred at length to the evidence which had been adduced and was fully entitled to conclude, as it did, that there was risk that the KFG Companies would not obtain substantial justice there.

150. As indicated above, not all of the reasoning of the Staff of Government Division is entirely clear. It referred throughout to a stay of proceedings on *forum non conveniens* grounds when, of course, this was a service out of the jurisdiction case. But it is accepted by the Appellants that this error did not of itself amount to an error sufficient to vitiate the exercise of discretion. In some respects the Board would have expressed itself differently, but it is mindful that in a case of this complexity it should not be astute to discern errors when it is apparent that the court below has in principle directed itself correctly.

151. There can be no doubt that Kyrgyzstan is the natural forum for claims under Kyrgyz law that the KFG Companies have been deprived of their shares in a Kyrgyz company through a conspiracy wholly or mainly carried out in Kyrgyzstan. But the fundamental point in this case is that, if there is no trial in the Isle of Man, there will be no trial anywhere. It is wholly unrealistic to suppose that the KFG Companies will ever be in a position to assert their civil claims. It is common ground that the claims cannot succeed in Kyrgyzstan unless the 2005 and 2006 Judgments are set aside after a criminal conviction. The expert evidence on behalf of the KFG Companies by Mr Maggs is that because the speed of criminal proceedings would be outside the control of the KFG Companies, there would be a significant possibility of criminal proceedings becoming time barred, and Mr Kenenbaev did not contradict this. The "practical justice" of the matter (see *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, at 483) is that substantial justice would not be achieved if the KFG Companies were left to a remedy in the Kyrgyz court which depended on their persuading a local prosecutor to bring criminal proceedings, or themselves bringing proceedings, and then securing a conviction within the limitation period for criminal acts.

152. Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed.

153. The parties have 14 days in which to put in submissions as to costs.