Neutral Citation Number: [2023] EWHC 1113 (Comm)

Case No: CL-2021-000630

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMMERCIAL COURT (KBD)

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12/05/2023

Before :

DAVID EDWARDS, KC
SITTING AS A JUDGE OF THE HIGH COURT

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Between :

EMIRATES NBD BANK PJSC **(a company incorporated in the Emirate of Dubai)**	**Claimant**
- and -	
(1) RASHED ABDULAZIZ ALMAKHAWI **(2) ABDULAZIZ RASHED ABDULAZIZ MOHAMMED ALMAKHAWI**	**Defendants**

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- -

WILLIAM EDWARDS (instructed by **DWF Law LLP**) for the **Claimant**
DANIEL LEWIS (instructed by **Spector Constant & Williams**) for the **Defendants**

Hearing dates: 27 February – 2 March 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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DAVID EDWARDS, KC

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 12 May 2023 at 10:30am.

David Edwards, KC:

A. The Parties

1. The Claimant ("the Bank") is a bank incorporated in the Emirate of Dubai, United Arab Emirates ("UAE").

2. The First Defendant ("Mr Almakhawi Sr") is a UAE national. He was born on 1 October 1947 and so by the time of the trial he was 75 years old. He was at one time UAE Ambassador to Germany and subsequently Ambassador to a number of other countries. He is a well-educated man, holding doctorates from three universities. The Second Defendant ("Mr Almakhawi Jr") is his son.

B. Background

3. Mr Almakhawi Sr was originally the sole beneficial owner of System Construct Dubai, LLC ("System Construct Dubai"), a construction company incorporated in Dubai, although at some point his shareholding was reduced to 51%. He was one of the company's three directors. The company went into insolvent liquidation on 28 September 2014 having suffered substantial losses.

4. On 25 January 2010, some years before its liquidation, System Construct Dubai entered into a Facility Agreement with the Bank (subsequently extended and amended) under which the Bank provided letter of credit, overdraft and other financial facilities ("the Facility"). Mr Almakhawi Sr, along with the other directors, provided guarantees to support the company's borrowings.

5. On 19 October 2015, following its entry into liquidation, the Bank commenced proceedings in Dubai Court of First Instance seeking repayment of the outstanding amount under the Facility from System Construct Dubai and payment of the equivalent amount from Mr Almakhawi Sr and the other guarantors under their personal guarantees ("the Dubai Proceedings").

6. On 16 January 2017 the Dubai Court of First Instance entered judgment in favour of the Bank for AED 142,303,347.42 plus interest. System Construct Dubai and the guarantors appealed to the Dubai Court of Appeal, but the appeal was unsuccessful, and on 27 February 2019 the Court of Appeal entered judgment for the revised sum of AED 218,299,040.31 plus interest.

7. There was then a further appeal to the Dubai Court of Cassation, Dubai's highest court, but this too was unsuccessful. On 7 July 2019 the Court of Cassation entered judgment ordering System Construct Dubai, Mr Almakhawi Sr and the other guarantors to pay the Bank AED 211,299,040.31 (approximately £47.5 million at current exchange rates) plus interest ("the Dubai Judgment").

8. The Bank has sought to enforce the Dubai Judgment, but the evidence before me was that no, or at least only very limited, recoveries have been made by the Bank so far.

C. The English Proceedings

9. In these English proceedings, the Bank seeks the following relief against Mr Almakhawi Sr and against his son, Mr Almakhawi Jr.

10. First, as against Mr Almakhawi Sr, the Bank seeks to enforce the Dubai Judgment in this jurisdiction. There is no treaty providing for the recognition and enforcement of judgments between the United Kingdom and the UAE, and so the Bank seeks to enforce the judgment by way of a common law action on the judgment.

11. Secondly, the Bank seeks relief against both Defendants in respect of transfers of property and money made by Mr Almakhawi Sr to Mr Almakhawi Jr in 2019, specifically in respect of:

    i) A property at 193 Warren House, Beckford Close, London W14 8TR ("the Warren House Property") transferred to Mr Almakhawi Jr on 8 July 2019; and

    ii) Sums of £200,000 and £2,336,873.28 transferred to Mr Almakhawi Jr on, respectively, 16 August 2019 and 18 October 2019 ("the Money Transfers"), still held intact by him in a UK bank account.

12. In relation to these transfers, the Bank seeks either declarations that Mr Almakhawi Sr retained beneficial title to the relevant assets and that they are held by Mr Almakhawi Jr on resulting trust, or alternatively relief under section 423 of the Insolvency Act 1986 ("the 1986 Act") on the ground that the transfers were transactions defrauding creditors within the meaning of the section.

13. As set out in more detail below, in relation to the issue of enforcement of the Dubai Judgment, Mr Almakhawi Sr contends that the judgment was obtained as a result of a breach of natural justice concerning the terms of the two reports submitted by the court-appointed expert in Dubai and, as such, the judgment falls within a recognised English law exception to enforcement.

14. As for the transfers, the Defendants contend that:

    i) The property and money transfers represented gifts made by Mr Almakhawi Sr to his son, made principally for the purposes of succession or inheritance planning;

    ii) The Bank cannot rebut the presumption of advancement applicable to transfers between father and son; the beneficial interest in the assets was transferred to Mr Almakhawi Jr and the assets are not held on resulting trust; and

    iii) Although it is accepted that the transfers were gratuitous, they were not made by Mr Almakhawi Sr for one of the prohibited purposes set out in section 423(3) of the 1986 Act and so relief cannot be granted under that section.

D. The Trial

15. The trial before me took place over four days, with the morning of the first day used for pre-reading, followed by short oral openings.

16. Thereafter, the remainder of Day 1, the whole of Day 2 and part of Day 3 were taken up with cross-examination of Mr Almakhawi Sr, who gave evidence remotely with the assistance of an interpreter. The remainder of Day 3 was used for the evidence of Mr Almakhawi Jr, who gave evidence in person, and for the evidence of the Dubai law

experts, who gave their evidence remotely. Day 4 was used for oral closing submissions.

17. In addition to the evidence of the two Defendants, I also received witness statements, served on behalf of the Bank, from:

    i) Oasha Obaid Khalifa Abdulla Almehairi, a Senior Vice President of the Bank; and

    ii) Amir Alkhaja of Habib Al Mulla, lawyers who represented the Bank in the Dubai Proceedings.

    These statements dealt with various formal matters - the amount of the judgment and the absence of any recoveries. Neither of them was required by the Defendants to attend for cross-examination, and I accept the evidence contained in their statements.

18. I set out my findings in relation to the evidence I received in the sections below where I deal with the substantive issues. Of the two factual witnesses from whom I heard oral evidence, the evidence of Mr Almakhawi Sr was the most significant, and I had an opportunity to assess his demeanour and candour over a cross-examination approaching two days.

19. Many of the events occurred some years ago, and for this reason, and as is often the case in commercial disputes, I consider that the surest guide to the facts are the contemporaneous documents, the inferences that can properly be drawn from those documents (or, in some cases, from the absence of documents) and the probabilities. There are, however, areas of the case where the documentation is scant.

E. Enforceability of the Dubai Judgment

20. The first issue I have to decide concerns the enforceability of the Dubai Judgment.

1. English law principles of enforceability

21. There was no dispute between the parties as to the English law principles relating to the enforceability of foreign judgments.

22. The basic principle is set out in *Dicey, Morris & Collins on the Conflict of Laws* (16th ed.), Rule 46 at paragraph 14R-024. As there stated, subject to certain exceptions:

> "… a foreign judgment in personam given by the court of a foreign country with jurisdiction to give that judgment in accordance with the principles set out in Rules 47 and 48, and which is not impeachable under any of Rules 52 to 55, may be enforced by a claim or counterclaim for the amount due under it if the judgment is
>
> (a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty); and
>
> (b) final and conclusive,
>
> but not otherwise."

23. There was no dispute that the Dubai courts had jurisdiction to give the judgments they did or that the requirements set out in sub-paragraphs (a) and (b) of Rule 55 are satisfied. The issue between the parties concerned the exceptions to enforcement, specifically the exception recognised in *Dicey, Morris & Collins* (*op. cit.*), Rule 55 at paragraph 14R-158 that:

> "A foreign judgment may be impeached if the proceedings in which the judgment was obtained were opposed to natural justice."

24. I was referred to a number of authorities that have considered the circumstances in which the natural justice exception applies. These authorities demonstrate that:

i) Natural justice is concerned with procedural fairness, not whether the judgment of the foreign court is wrong (or even manifestly wrong) as a matter of fact or law: *Adams v Cape Industries Plc* [1990] Ch. 433, 569E–F (Slade LJ);

ii) Proof of a mere procedural irregularity in the foreign court is not enough. What is required for the exception to bite is a defect which would constitute a breach of the English court's view of substantial justice; *Adams* at 559F–G and 566F–568A (Slade LJ); and

iii) It is not enough that the foreign court takes a different procedural approach to that which an English court might take, unless that difference deprives the judicial process of the quality of substantial justice: *Yukos Capital v OJSC Rosneft Oil Company* [2011] EWHC 1461 (Comm), [2012] 1 All ER (Comm) 478 at [67] (Hamblen J).

25. As explained by Slade LJ in *Adams* at 570C-E, in considering whether substantial injustice has been established, the availability of a remedy in the foreign court for any error in procedure or unfairness is a relevant factor; however, the significance of an available remedy depends upon the circumstances of the particular case:

> "Since the ultimate question is whether there has been proof of substantial injustice caused by the proceedings, it would, in our opinion, be unrealistic in fact and incorrect in principle to ignore entirely the possibility of the correction of error within the procedure of a foreign court which itself provides fair procedural rules and a fair opportunity for remedy. The court must, in our judgment, have regard to the availability of a remedy in deciding whether in the circumstances of any particular case substantial injustice has been proved. However, the relevance of the existence of the remedy and the weight to be attached to it must depend upon factors which include the nature of the procedural defect itself, the point in the proceedings at which it occurred and the knowledge and means of knowledge of the defendants of the defect and the reasonableness in the circumstances of requiring or expecting that they made use of the remedy in all the particular circumstances."

2. Mr Almakhawi Sr's case

26. Mr Almakhawi Sr advanced a variety of points in paragraph 13 of his Amended Defence as to why, he said, the Dubai Judgment had been obtained in breach of natural justice (or, insofar as different, as to why the judgment had been obtained in breach of

Article 6 of the European Convention on Human Rights or its enforcement would be contrary to English public policy).

27. By the time Mr Lewis, who appeared for both Defendants at trial, lodged his skeleton argument, however, these various points had been reduced to three; and, as reflected in a speaking note Mr Lewis handed up for use in his oral closing submissions, by the conclusion of the trial these three points had been reduced to one. As explained in Mr Lewis' speaking note:

> "The only issue relied upon by the Defendants is the reliance placed by the Dubai Courts on the two expert reports dated 18 September 2016 (the 'First Report') and 20 November 2016 (the 'Second Report') which each referred to the superseded Law No. 8 of 1974 when they should have be[en] prepared in accordance with the Law No. 7 of 2012."

28. The essence of the point advanced was this:

i) The banking expert appointed by the Dubai Court of First Instance had (as was common ground) referred in his two reports to an outdated and superseded Dubai law regulating the use of expert evidence;

ii) This mis-reference - regardless, as Mr Lewis made clear, of whether there was anything wrong with the substance of the expert's reports, and regardless of whether the expert had, as a matter of fact, complied with his duties under the current regulatory law - meant that the two reports were "null and void" as a matter of Dubai law; and

iii) For the Dubai courts to rely, and to base their judgments, upon expert reports (as they obviously had) which were null and void, meant that the judicial process in Dubai was substantially unjust.

3. The Dubai Proceedings and the Expert

29. In order to address this point, it is necessary for me to explain the course that the Dubai Proceedings took and the role played by the court-appointed expert, and the laws and procedural rules in Dubai governing expert evidence.

30. As explained in paragraph 5 above, the Dubai Proceedings were commenced on 19 October 2015. Somewhat oddly, the trial bundles did not appear to contain the initiating document. The first document in time I was shown was a document entitled "Rejoinder", which was filed on behalf of Mr Almakhawi Sr's by his then Dubai lawyers, Dar Al Adalah ("DAA") on 17 February 2016.

31. On 28 March 2016 Mr Almakhawi Sr filed a Statement of Counterclaim. This document asserted various defences, including that the Bank had improperly cashed certain letters of guarantee after System Construct Dubai had been placed into liquidation and that it had allowed the Facility to be used by System Construct Abu Dhabi, which Mr Almakhawi Sr said was a different legal entity.

32. The relief sought by Mr Almakhawi Sr in his Statement of Counterclaim included the appointment of an expert:[1]

> Therefore, the Counter Claimant [Mr Almakhawi Sr] submitted this lawsuit to request the appointment of an expert according to Article 69 and the following articles of the law of evidence. The expert shall be assigned to investigate the elements of calculation in both the Principal and counter-claims according to this statement of claim and as a result, a judgment will be passed granting the Counter Claimant the amounts resulting from such calculation according to the technical and accounting standards.

33. In a Rejoinder filed on 16 May 2016, the Bank indicated that it had no objection to Mr Almakhawi Sr's request that the court appoint an expert, and at a hearing on 18 July 2016 the Dubai Court of First Instance accordingly did so. The court's 18 July 2016 judgment explained the expert's mandate very fully:

> "Whereas the Court decides to delegate an Expert in the Lawsuit pursuant to Article No. (69) of the Evidence Law. …
>
> The Court ruled, before adjudicating on the subject matter, to delegate the competent banking expert, who has the next turn on the roster and whose mission is to review the file of the Lawsuit and the documents submitted therein and what may be provided by the litigants of non-denied assets or non-denied photocopies of contracts, correspondence or any other documents as well as regular paper, electronic commercial records, books (in accordance with Article No. (5) of 2006 regarding transactions and E-commerce) paper and electronic correspondence, all within the limits of the Defendant's accounts with the Plaintiff Bank, subject matter of the Lawsuit, provided that they are executed in Arabic or provided with a certified translation to indicate whether there is a banking relationship between the parties to the Lawsuit or not, and in the first case, it shall indicate the following:
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> - The nature of that relationship and its date and evidence.
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> - The type, date, amount, guarantee, applicant, its capacity, beneficiary and method of benefit of the facilities granted from the Plaintiff Bank to the Defendant.
>
> - Interest calculated by the Plaintiff Bank on these facilities and their evidence.
>
> - Indicating on whether the Defendant used those facilities, subject matter of the Lawsuit, or not, and the total amounts owed and the accrued interest on them, whether the Defendant paid such amounts or part of them or not.
>
> In the first case, indicating the total amount paid by the Defendant or obtained by the bank from the guarantees provided by the Defendant and indicating the total entitlements owed by the defendant added to the contractual interests. The same to whether or not the specified interest on the part of the plaintiff was included in the agreement to obtain such facilities. Indicating whether the interest specified by the

[1] The original documents in relation to the Dubai Proceedings were in Arabic. The certified translations were generally good, but the English was, predictably, not perfect. I have not sought to correct it.

plaintiff was included in the agreement to obtain such facilities or not, and indicating on whether the subject matter of Lawsuit amounts is in compliance with the facts of the Lawsuit. Indicating whether the current account in which these facilities were deposited and whether they were deposited in one current account or not. In the first case, the indicating of the total entitlements owed by the Defendant, if any, until the date of closing that account, which the cut-off date for the last transaction is made by the Defendant with the Plaintiff bank in any of those facilities. Provided that the compound contractual interests in all those facilities up to that date are calculated in his account added the delayed interest after closing the account until the date of the dispute's register on 19.10.2015 furthermore interest shall be calculated at 9% annually, and in the event that each facility is included in separate current accounts, these accounts shall be determined and the account closure rule applied to each account separately in accordance with the previous rules, as well as achieving the Cross Plaintiff's defense.

In general, the account shall be settled between the two parties in order to reach the extent of the eligibility of the Plaintiff bank in its requests and the fulfilment of the requests and defense of the parties to the litigation.

It authorized the Expert, in order to perform his task entrusted thereto, to move to any destination it deem to move to, including the state Plaintiff's headquarters, to review the documents it deems useful in performing the task, and to hear the statements of the litigants and their witnesses without an oath. … and the expert shall taken into account the procedures and deadlines prescribed in the Article No. 81 of the Evidence Law in addition to indicate how to perform this, the parties shall deliver the Expert what they have of exhibits in the hearing of the first meeting and the expert shall fill its report at the specified hearing."

34. In Dubai an expert is appointed by the court from a roster of registered experts; the appointed expert is simply the individual whose turn it is next. In the present case, the court appointed Mohamed Kamel Airan of Knowledge House Auditing ("the Expert"). As apparent from the passage in the judgment set out above, the expert was appointed to perform a fact-finding and/or investigatory role.

35. The Expert delivered his first report on 18 September 2016 ("the First Expert Report"). After reciting the terms of the court's 18 July 2016 judgment setting out the scope of his assignment, the report explained the procedures the Expert had followed, including his correspondence and meetings with, and the documents that had been submitted to him by, the parties.

36. This statement of procedure was introduced in the First Expert Report in the following way:

"**Second: Procedures taken by the Expert to Perform the Task and Prepare the Report.**

Within the limits of the task assigned to us by the honorable Court and in implementation for the provisions of Law No. (8) of 1974 Regulating The Experts before the Courts, Law of Evidence in Civil and Commercial Transactions promulgated by Law No. (10) of 1992 AD, the professional norms and practices, we took the following procedures."

I draw attention to the reference to Law No. 8 of 1974 "Regulating the Experts before the Courts" ("the 1974 Law"), which is at the heart of Mr Almakhawi Sr's complaint.

37. On 29 September 2016 Mr Almakhawi Sr's lawyers filed a document entitled "Memorandum of Defence and Comment on the Bank Expert's Report in the Case". This made a number of criticisms about the substance of the First Expert Report, but it made no complaint about the fact that the report had referred to the 1974 Law, nor did it suggest that the report was null and void for that reason.

38. The Memorandum concluded with a statement of the relief sought, which included the following:

> "4. **To return the case to the same expert again in light of the objections** raised in the papers, especially, the lack of investigation of the defence of the Counter Defendant or to delegate another expert to perform the same missions."

Mr Almakhawi Sr thus invited the court to remit the matter back to the same expert that had issued the First Expert Report for further consideration.

39. At a hearing on 31 October 2016 this request was granted, and this led to the production by the Expert on 20 November 2016 of a Complementary Banking Expert Report ("the Second Expert Report"). In its format, the Second Expert Report was similar to the First Expert Report, in particular including the passage set out in paragraph 36 above referring to the 1974 Law.

40. On 16 January 2017 the Dubai Court of First Instance produced its judgment. The judgment set out the procedural history of the matter, including the issuance of the First and Second Expert Reports. The court's conclusions were set out in the following passage, which made clear that the evidence upon which the court had relied included that contained in the two Expert Reports:

> "Whereas, it is held that the Trial Court has the power to understand and comprehend the facts of the lawsuit, assess the evidence and exhibits submitted to it, and reason the facts of the lawsuit insofar as its decision is based on plausible grounds [Contestation No. 398 of 2011, hearing dated 3.10.12].
>
> Whereas, based on the foregoing judicial and legal precedents, the facts of the Case – as adequately deduced by the Court based on the entire papers of the Case and exhibits, including the original and supplementary reports of the deputized expert – are represented in that the Claimant Bank granted the Second Respondent Company, at the letter's request, various banking facilities which included overdraft, trust receipts, and documentary credits, and that the Second Respondent Company continued to pay the outstanding dues to Claimant Bank up to 28.09.2014 (account closure date), on which date the activity of the Respondent Company's current accounts ceased after the latter became indebted in favor of the Claimant Bank at the time with the amount of AED 142,303,347.42 (UAE Dirhams One Hundred Forty Two Million Three Hundred Three Thousand, Three Hundred Forty Seven and Forty Two Fils).
>
> …

> Whereas, in view of the foregoing, it is established that each of the Third to Fifth Respondents had submitted a continuing personal written guarantee to guarantee the indebtedness payable by the Second Respondent Company in exchange for using the banking facilities in favor of Claimant Bank on 08.12.2010, noting that the said obligation was renewed by them upon re-signing the banking facilities letter dated 14.04.2013; hence, it is admissible for the Claimant Bank to request the Third, Fourth and Fifth Respondents to jointly pay with the Second Respondent Company the amount specified in the operative part of the judgment. Accordingly, the Court impliedly rejects all the substantive pleas previously addressed by it."

41. The Dubai Court of First Instance rejected part of the Bank's claim which was concerned with certain letters of guarantee issued by System Construct Dubai in favour of third parties, but it held that Mr Almakhawi Sr and the other two guarantors were liable for the amount of AED 142,303,347.42 due from System Construct Dubai under their personal guarantees.

42. On 11 February 2017 Mr Almakhawi Sr lodged an appeal with the Dubai Court of Appeal, which was subsequently consolidated for hearing with appeals lodged by other parties. The short Statement of Appeal filed on behalf of Mr Almakhawi Sr was supported by an Explanatory Memorandum which criticized the substance of the Expert's work, saying that the Expert:

> "… did not investigate where and to whom such amounts and banking facilities were issued … did not review the accounts of System Dubai, the account holder, and the projects for which the banking facilities were signed, whether they were letters of guarantee or personal guarantees, and it did not review as well the accounts of System Abu Dhabi … [and] … did not comply with the principles of the accounting profession and did not review or examine at the accounts of System Dubai or System Abu Dhabi and did not examine to whom such facilities were issued and for which projects, knowing that the Director of System Dubai is the Second Appellee and the same Director of System Abu Dhabi."

43. There was, thus, a complaint about the substance of the Expert's work and about the substantive content of his two reports, and inevitably about the Dubai Court of First Instance's reliance upon them. No criticism was, however, made about the Expert's reference to the 1974 Law, and again no suggestion was made on behalf of Mr Almakhawi Sr that the reports were null and void for that reason.

44. The relief sought by Mr Almakhawi Sr included a request that the Dubai Court of Appeal appoint "a tripartite Committee" – a panel of three experts - to review the Bank's accounts regarding the Facilities and to investigate certain matters: essentially to carry out the work that it was alleged the Expert should have, but had not, carried out already.

45. On 27 February 2019, in a lengthy judgment, the Dubai Court of Appeal dismissed Mr Almakhawi Sr's appeal and the appeals filed by System Construct Dubai and by the other guarantors. The Court of Appeal explained its refusal to appoint a three-person expert panel in the following way:

> "Whereas, regarding the Appellant's request to deputize a tripartite expertise committee from the Ruler's Court to perform the assignment set forth in the

Explanatory Memorandum and to look into the Appellant's claims and objections, it is held that the Trial Court has full powers to understand and comprehend the facts of the lawsuit, assess the evidence and exhibits submitted to it, weigh between them and adopt whatever it is satisfied with and disregard otherwise, and has absolute power to assess the activities of the expertise as an element of evidence, and adopt whatever matters it is satisfied with on the basis of the veracity of the grounds upon which they are based in conformity with the facts established in the lawsuit, insofar as its judgment is based on plausible grounds, substantiated by the papers, and reasoned, without being bound thereafter by individually addressing each and every objection raised by the litigant against the expert's report, since the Court's adoption of the reasoned report signifies that the Court did not find in the litigants' pleading anything that would impair the veracity of the conclusion reached in the report and that such pleading is not worthy of addressing beyond what is contained in the report, with the Court's right to disregard the request of appointing a tripartite expertise committee (Contestation No. 284/2011 Civil – Hearing dated 09.05.2012).

Whereas, the Court has found the Case papers and exhibits, including the expert's reports, sufficient to establish its conviction, and that the expert has discharged of his assignment in a manner that has satisfied the purpose of his appointment within the scope of his assignment indicated in the interlocutory judgment, noting that specific matters which the Appellant requested to be investigated are not related to the subject matter of the Case, namely how the amounts and banking facilities were used, whether there was fraud committed by the Company's managers and whether the managers' personal accounts were illegally accessed etc., and other request which are not the subject matter of the Case relating to the banking facilities acquired by the Company and guaranteed by the Appellant."

46. In May 2019 Mr Almakhawi Sr made a further appeal to the Dubai Court of Cassation, Dubai's highest court. At this stage, he appointed new lawyers, Mohamed Abdulla ("MA"), in place of DAA.[2] As set out in his Statement of Appeal, there were three grounds of appeal:

"1. The Applicant challenges the challenged judgment for its error in applying the law and its interpretation, which invalidates its conclusion.

2. Deficiency in presentation and examination in its grounds which led to another deficiently in reasoning and flaws in inference.

3. The failure to respond to the pleas submitted by the Applicant contained in the papers of the challenged judgment and the appealed judgment with justifiable reasons sufficient to dismiss them and dismiss their significance, which led to a prejudice to the right of defense."

[2] Mr Almakhawi Sr complained about the conduct of DAA, and on 12 August 2020 the Professional Conduct Committee of the Government of Dubai Legal Affairs Department issued a decision giving the firm a written warning about its conduct. On the basis of the documents I was shown paragraph 22 of Mr Almakhawi Sr's witness statement, where he suggested that DAA had been suspended from practice, was incorrect.

47. As part of the third ground, Mr Almakhawi Sr made substantive criticisms of the work carried out by the Expert, alleging that it was "vitiated by the lack of evidence, deficiency and contradiction". No mention was, however, made of the fact that the Expert had referred in his two reports to the 1974 Law, and there was again no suggestion that the reports were null and void for that reason.

48. On 7 July 2019 the Dubai Court of Cassation dismissed the appeal. Commenting on Mr Almakhawi Sr's challenge to the Court of First Instance's reliance on the expert's conclusions, the Court of Cassation said the following:

> "The Claimant argued that the said judgment relied on the report produced by the deputized expert, to the effect that the Respondent Company received miscellaneous banking facilities from the Fourth Respondent Bank, whereupon the Respondent Company became indebted in favor of the Respondent Bank with the adjudged amount, and that the Claimant and Second and Third Respondents guaranteed the First Respondent by way of a continuing personal guarantee with the Fourth Respondent Bank against the use of the said facilities.
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> …
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> The Claimant also invoked inveracity of the expert's conclusion in the report and that the Fourth Respondent Bank allowed that the credit facilities granted to the Company be used in favor of another company, namely System Construct Abu Dhabi, which is not a party to the Agreement and is not guaranteed by the Claimant.
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> …
>
> The Claimant argued that the Bank contravened the conditions of disbursement and the decision of the execution judge by liquidating the letters of guarantee. Therefore, the Claimant requested to appoint a banking expert or a tripartite expertise committee to consider his pleading and to determine entitlement of the Respondent Bank to grant and renew the banking facilities for the benefit of the First Respondent Company in respect of other projects relating to another company, namely (System Construct L.L.C. Abu Dhabi). The Claimant added that the Challenged Judgment declined his substantial pleas and his request to deputize an expert or a tripartite expertise committee on the grounds that the papers of the Case and the report produced by the expert are adequate for the Court to hand down a judgment on the substance of the Case, which renders the judgment defective and necessitates that it be vacated.
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> …
>
> The Trial Court has the power to understand and comprehend the facts of the lawsuit, assess the evidence submitted to it, and adopt whatever it is satisfied with and disregard otherwise, and has the power to construe contracts, agreements, and all exhibits in such a manner as it deems best satisfies the intent of the contracting parties, designate the guaranteed debt, and deduce the guarantor's approval to the continuation of the guarantee. Moreover, the Trial Court has the right to assess the activities of the expert and to adopt his conclusion insofar as it is satisfied with the veracity of his research and considers that the expert has investigated all the points of the dispute in the action. Thereafter, the Trial Court is not bound by individually

addressing the exhibits submitted by the litigants or discussing every illegal argument raised or addressing their different arguments and claims and individually replying thereto, insofar as the fact it is satisfied with and evidenced impliedly refutes such arguments and claims.

…

Whereas the First Instance judgment, upheld by the Challenged Judgment in this respect, compelled the Claimant and the First, Second and Third Respondents to jointly pay to the Fourth Respondent Bank the adjudged amount and the interest based on the grounds mentioned in its recitals to the following effect:

…

It is evident from the original and supplementary reports produced by the expert, with which the Court is satisfied due to being based on plausible grounds substantiated by the papers, that the facilities, subject matter of the Case, were granted to the First Respondent Company 'System Construct L.L.C.', which benefited from the bank guarantees by entering into tenders and having contracting projects awarded thereto; …

Hence, the Fourth Respondent Bank has the right to claim the amount paid with regard to the aforesaid letters of guarantee from the value of guarantees and documentary credits, totalling AED 149,132,233.92. On conducting a simple calculation, the Court finds that the amount payable to the Bank on the account closure date, namely 28.09.2014, is as follows:

…

Whereas, the conclusion reached by the Challenged Judgment, whereby it is established that the Claimant guaranteed the First Respondent and that the Claimant is compelled to jointly repay with the First Respondent the outstanding indebtedness, is valid and plausible; hence, the contention raised against the Challenged Judgment in this respect is unfounded.

Whereas, based on the foregoing, the Contestation is bound to be dismissed."

4. Dubai law regulating expert evidence

49. The Bank and the Defendants both served expert evidence in relation to Dubai law, including in relation to the role of an expert, and the legislation regulating the use of expert evidence, in Dubai proceedings.

50. The Claimant's expert was Mr Ali Al Aidarous. He has been in legal practice in the UAE for approximately 30 years, initially as an in-house lawyer at various banks but since 1993 in private practice. He is licensed to practice before both the Dubai and DIFC courts. He is the founding partner of Al Aidarous Advocates and Legal Consultants, Dubai, UAE.

51. The Defendants' expert was Mr Ali Ismael Al Zarouni. Mr Al Zarouni has more than 20 years experience in Dubai specialising in litigation and arbitration matters and is licensed to practice before both local and federal UAE courts. He was the founder, and

he remains the managing partner, of Horizons & Co Law Firm, a leading independent law firm in the UAE.

52. I am satisfied that both experts were qualified to give the evidence that they gave and that they gave their evidence impartially and with a view to assisting the court. As I explain below, on the one critical point concerning the status of what I refer to as "the Ministry Circular" I preferred the evidence of Mr Al Aidarous, but I am grateful to both experts for their assistance.

53. In relation to the role of an expert before the Dubai courts, there was, in fact, no substantive dispute between the two experts.

54. As Mr Al Aidarous explained in paragraph 24 of his report, and as he confirmed in cross-examination, the appointment of an expert may be appropriate in Dubai proceedings where the factual issues are complicated or technical. The expert is permitted to collect evidence and to perform investigations. Expert evidence in Dubai proceedings is treated as evidence of fact.

55. As to whether expert evidence should trespass on matters of law, Mr Al Aidarous accepted in cross-examination that it should not, because the law was the province of the judge; but, he explained, whilst an expert should not seek to *determine* legal issues, it might be impossible for an expert to render a report without some understanding of, or comment on, issues that were in truth legal.

56. On this topic, Mr Al Aidarous said the following in paragraph 27 of his report, which was not challenged in cross-examination:

> "In practice, it may happen sometimes that a court appointed expert may exceed the mandate and make certain legal determinations. However, this will not of itself invalidate the Court's judgment unless the Court relies upon such legal determinations made by the expert without independently satisfying itself that the facts and evidence support the expert's findings by giving appropriate weight to the evidence submitted by the parties and applying the appropriate legal principles to the issues at hand."

57. Mr Al Aidarous said that a court may choose to rely upon findings made by an expert and, if the court does so, then those findings will become the reasoning of the court. That the court has a discretion, and that it does not have to accept all the expert's findings, as one would expect, is confirmed by the passages in the Dubai Court of Appeal and Court of Cassation judgments set out in paragraphs 45 and 48 above.

58. Mr Lewis's submission was that, given the potential significance of expert evidence to the final decision of a Dubai court, it was important that experts were subject to professional duties with which they were obliged to comply and which could be enforced. That, as a general proposition, is unsurprising, and it was not disputed by Mr Al Aidarous in cross-examination.

59. So far as the legislation regulating expert evidence in Dubai proceedings is concerned, the first law in time was Federal Law No. 8 of 1974 "On the Regulation of Expertise before the Courts", *i.e.*, the 1974 Law. A copy of that law was not in the trial bundles, but in paragraph 43 of his report Mr Al Aidarous summarised the 1974 Law as follows:

> "The first law regulating experts before the Courts was Federal Law No. 8 of 1974 ('Law of 1974') that regulated the procedure for their appointment by the Court, their fees, the manner in which experts are to carry out their assignment (such as meeting the parties, preparing minutes of meetings geld with the parties, preparing the final report, etc.), cross examination of experts by the Court, the Court's power to adopt or disregard the findings of experts, the creation of a register for experts held by the UAE Ministry of Justice, the criteria to be met for registration of experts, the disciplinary measures that may be taken against experts, etc."

60. In 2012 the 1974 Law was replaced by Federal Law No. 8 of 2012 "On the Regulation of Expertise Before the Judicial Authorities" ("the 2012 Law"). A copy of the 2012 Law was in the trial bundles, and on its first page it explained that it abrogated a number of existing UAE laws, including the 1974 Law, a point confirmed by Article 36.

61. The 2012 Law comprises some 37 Articles. Without seeking to address them all:

i) Article 3 specifies a number of requirements for an expert to be included on the register: he or she must be of good conduct, must hold a university degree, must have a prescribed number of years of post-graduate experience, must have the approval of his or her employer, and must pass procedures and tests prescribed by the Ministry;

ii) Articles 4 to 9 are concerned with the establishment of the expert register, the making of applications for inclusion, the period for which an expert is entitled to remain on the register, the taking of an expert's oath, and the circumstances in which an expert's registration might be suspended in the event of impediment and then renewed;

iii) Article 11 contains a statement of expert duties. Some 12 duties are listed, and I will not recite them all, but they include the following:

> "The expert shall abide by the following:
>
> 1 – Practice his profession with accuracy, honesty and sincerity, in a manner that preserves its dignity and consideration, while taking into account the principles and traditions in accordance with the Charter.
>
> 2 – Handle personally the task entrusted to him.
>
> 3 – Not to disclose information which he may have accessed by virtue of his work of expertise.
>
> 4 – He, nor anyone of his relatives up to the fourth degree of kinship, shall [not] have a personal interest directly or indirectly in any business related to the subject of the case subject to his expertise.
>
> …
>
> 6 – Not to accept the work of expertise in a dispute in which he has been already asked for consultancy or briefed on the documents related thereto, by any party to the conflict."

iv) Articles 12 to 15 provide for the establishment and composition of an Expert Affairs Committee, responsible for registering, rejecting or striking off an expert from the approved list and for dealing on a preliminary basis with any complaints or court proceedings against an expert;

v) Articles 16 to 24 deal with disciplinary proceedings before a Disciplinary Board with powers to issue a warning, to suspend the registration of an expert for up to one year and to strike an expert off the approved list permanently, from whose decisions an appeal can be made to the Competent Court of Appeal; and

vi) Articles 27 and 28 provide for fines and/or for a term of imprisonment for any expert who practises without being registered on the list or who violates certain articles of the 2012 Law including Article 11.

62. The requirements of the 2012 Law were amplified and developed in Cabinet and Ministerial Resolutions issued in 2014 and 2015, both of which refer to the 2012 Law and appear to have been issued under or by reference to it.

63. The first of these was UAE Cabinet Resolution No. 6 of 2014 "On the Implementing Regulations to Federal Law No. 7/2012 Concerning the Regulation of the Profession of Expertise Before the Judicial Authorities" ("the 2014 Resolution").

64. Facially, there appears to be considerable overlap between the Articles of the 2014 Resolution and the 2012 Law (Article 14 of the 2014 Resolution, for example, substantially mirrors Article 11 of the 2012 Law), but the 2014 Resolution imposes a number of additional requirements, for example in relation to professional indemnity insurance.

65. Subsequently, in Ministerial Resolution No. 116 of 2015 "On the Technical Experts Charter" ("the 2015 Resolution") the UAE authorities established what the Dubai law experts referred to as a Code of Conduct. The 2015 Resolution comprises only 10 articles, of which Articles 4, 5 and 6 are the most relevant for present purposes:

"**Article 4 – Expert commitments**

The expert shall commit to the following:

1 – Federal Law no. 8 of 2012 on the regulation of expertise before the judicial authorities.

2 – Federal Law no. 10 of 1992 on the evidence in civil and commercial transactions and its amendments.

3 – Cabinet Decision no. 6 of 2014 on the regulation of Federal Law no. 7 of 2012 on the regulation of expertise before the judicial authorities.

Article 5 – Main professional values

Experts shall commit to the following professional values while performing their job and duties:

1 – Honesty, trust and impartiality.

2 – Integrity and transparency.

3 – Respect of others' rights.

4 – Cooperation with experts and teamwork in relation to the tripartite committees' matters.

5 – Commitment to job performance and completion on the set dates.

6 – The expert shall keep a true copy of the original of the reports they elaborate until a final judgment is rendered in the case.

7 – The expert shall preserve the confidentiality of the information that comes to their knowledge during or due to their performance of the tasks entrusted thereto.

8 – The expert shall commit to submitting the expertise reports on the set date to the competent court.

Article 6 – Code of professional conduct

1 – To commit to receiving the mission they are entrusted with from the competent court and appear before it on the set dates.

2 – To accomplish the mission entrusted thereto in person and within the scope of this mission.

3 - To perform their duties while adopting the highest standards of quality and competence.

4 – To observe the principles, ethics and practices of the profession.

5 – To exercise due diligence in improving their knowledge, developing their professional skills through education and participation in scientific and training sessions.

6 – To inform the department within one month of any amendment to or change of their address or licensing data."

66. Mr Al Aidarous was asked in cross-examination about the impact of the 2012 Law and the 2014 and 2015 Resolutions. He accepted that they contained more detail than was in, and thus that there was more regulation than under, the 1974 Law, but he resisted the suggestion that there had been any major change or that the basic duties of an expert were any different to what they had been before:

"Q. You accept, I think, that the 2012 law has expanded on the duties and requirements imposed upon experts, yes?

A. No. It doesn't expand on the duty, it is rather regulating their work in terms of the regulation for registration was a requirement, it is more detail, but there is no major change in the law about the duties of experts and the old law and the new law are the same.

…

Q. Yes. The code of conduct was a feature than only came about after the 2012 law, correct?

A. Yes, if you want to say codified code of conduct, but always there is a code of conduct, the major principle, duties of the expert contained in the old law and the new law and the conduct maybe just improve – it is nothing new.

Q. Is this a fair way of putting it, Mr Al Aidarous: after 2012 the provisions became more detailed as to what was expected of experts? Yes?

A. No. No. No. It was simply it is more regulation side, because don't forget the old law 1974, the country used this law for almost 40 years, it is a natural things, the system will be improved, there is more regulation providing for how to register the expert, about the measures of discipline measure, but it doesn't change the basic duties of the expert in the old law and the new law are the same."

67. The thrust of Mr Al Zarouni's evidence was that the 2012 Law was more modern and more detailed than the 1974 Law, but he did suggest that there was also a substantive difference:

"Q. It is correct, isn't it, that the basic duties an expert owes to the court were the same under the 1974 and 2012 laws?

A. 2012 is more advanced and more details. This is what I can say.

Q. Yes, more detail –

A. - in general

Q. - but the basic principles were the same?

A. No, there is some principle it is there, but it is more with detail, more with, you know, it is a big difference from 1974 up to the year of 2012, if I am not mistaken, okay? So that is that that big difference. Of course, the new law will be more modern, more details, and that is what I can say about it."

68. Ultimately the issue between the experts on this topic was a fairly narrow one, essentially whether the 2012 Law did anything more than spell out expressly duties that were already implicit and that any appointed expert already owed.

69. In response to a number of questions about aspects of the 2012 Law and the 2014 and 2015 Resolutions that had not featured in the previous 1974 Law, Mr Al Aidarous said that the relevant matter "goes without saying". This led to the following exchange about Article 11 of the 2012 Law:

"Q. … What article 11 does is it sets out, if you like, a code, what is expected of an expert in terms of standards of conduct, yes?

A. Yes.

Q. Do you see that? My question to you is very simple. This is the first time in the law of 2012 that those standards were expressly put, were expressly written down. Do you agree with that?

A. Yes, yes. If you said expressly, yes, agreed, but those duties exist all the time."

5. The Ministry Circular

70. In circumstances where the breach of natural justice relied upon by Mr Almakhawi Sr to resist enforcement is not a substantive failure by the Expert to comply with his duties or with any code of conduct, whether under the 2012 Law or any other law, it might be thought that all this is of limited relevance.

71. It was, however, the basis for Mr Lewis' submission that the reference in the Expert's two reports to the 1974 Law rather than to the 2012 Law, accepted by both Dubai law experts to be a mistake, was significant. Mr Lewis argued that the 2012 Law contained additional safeguards, and that one could infer from the Expert's reference to the 1974 Law that he had not had regard to them.

72. There are two obvious difficulties with this submission, which I explored with Mr Lewis in his oral closing submissions.

73. The first is that, as Mr Lewis accepted, there is no explicit requirement in the 2012 Law or the 2014 or 2015 Resolutions that an expert report contain a reference to the 2012 Law or to *any* regulatory law concerning expert evidence:

"Mr Lewis: … And your Lordship said to my learned friend, you said there is no requirement to actually refer to a specific law in the report.

The Judge: I don't know, I hadn't been shown one.

Mr Lewis: I have looked through the legislation that we have post 2012 and I accept that there is no such obligation."

74. The second difficulty is that Mr Lewis's complaint was simply about the mistaken reference to the 1974 Law in the First and Second Expert Reports. Mr Lewis made clear that he did not (and could not) advance a case that the Expert had *actually* failed to comply with any provision of the 2012 Law or that he had *actually* failed to have regard to his duties under it or under the code of conduct:

"The Judge: Just so that I am clear, you say it is a serious defect whether or not, as a matter of fact, the expert acted in a way which was consistent with the new law?

Mr Lewis: Yes – well, we simply don't know.

The Judge: I think, as I understand your proposition, you are saying that regardless of whether the expert in fact acted in accordance with the new law, the fact that he referred to the old law in his report is itself a serious defect?

Mr Lewis: We say that, yes, my Lord. Yes."

75. If the matter had rested there, I would have had no difficulty in rejecting the argument that the fact of the mis-reference in the First and Second Expert Reports to the 1974 Law, even assuming it could be regarded as a procedural irregularity, was an irregularity of such significance that it constituted a breach of the English court's view of substantial justice.

76. Mr Lewis, however, relied upon a circular issued by the Experts Division of the UAE Ministry of Justice on 1 March 2022 ("the Ministry Circular"). I should set out the content of this document in full:

> "Dear honourable Experts,
>
> Peace be upon you.
>
> At first, we would like to extend you our best regards, wishing you continuous success and we would like to inform you that the Judicial Authorities stated the following:
>
> - Some Experts' reports still include the phrase: (This report was prepared in accordance with Federal Law No. (8) of 1974 Regulating Expert Profession) and since Law No. 8 of 1974 was repealed by the issuance of Law No. 7 of 2012, any report that includes this phrase shall be considered null and void.
>
> - It was noted that some of the initial reports that are sent to the parties for comment are not signed by the delegated expert, which violates the Evidence Law and its amendments, and therefore please adhere to the correct law.
>
> Yours Sincerely,
>
> Expert/M.S. Aisha Suleiman Al Ali
>
> Director of Technical Experts and Translators Affairs Department."

77. Mr Al Aidarous and Mr Al Zarouni disagreed about the impact of the Ministry Circular, but before dealing with that disagreement I should identify two points that were undisputed.

78. First, the Ministry Circular was dated 1 March 2022. It was, therefore, issued almost three years after the judgment of the Court of Cassation in the Dubai Proceedings. If the Ministry Circular had only prospective effect, then it could have no impact upon the First and Second Expert Reports or upon the reliance that had been placed upon them by the Dubai courts.

79. Secondly, whilst Mr Al Zarouni said that the Ministry Circular had retrospective effect, or at least that what it recorded reflected the law prior to 1 March 2022, he was unable to point to any authority - any decision of a Dubai trial or appellate court or any textbook - between 2012 and 2022 – which had said or decided that an expert report that referred to the 1974 Law was null and void.

80. As for the Ministry Circular itself, Mr Al Zarouni accepted that it was not itself a law or a byelaw. He relied, however, on the opening part of the circular in which the Ministry said that it wished to inform the expert community "that the Judicial

Authorities [had] stated" that any expert report that included reference to the 1974 Law "shall be considered null and void".

81. However:

i) There was no evidence of what the judicial authorities – assuming that this can be taken to mean the judiciary as a whole or perhaps the senior judiciary – had actually said, or that there had been a court decision in which it had been held that an expert report which mistakenly referred to the 1974 Law was automatically null and void; and

ii) Even if the Ministry Circular, by its reference to the judicial authorities, can be treated as having some sort of binding legal effect, which I doubt, there was no evidence that it was intended to operate retrospectively so as to invalidate decisions in prior cases that had been reached in reliance upon expert reports which mistakenly referred to the 1974 Law.

82. In my judgment, reading the Ministry Circular as a whole, noting its author (the Ministry, not a law-making or judicial body), its addressees (the expert community), its content and its tone, Mr Al Aidarous was correct when in his oral evidence he described the circular as essentially a notification or warning to the expert community of the importance of referring to the (new) 2012 Law:

"A. … This is a regulatory body of experts and they receive a complaint from the courts that is a separate stating that there are some experts who are still referring to the old law. I think the expert, the Ministry of Justice, the regulatory body, they try to notify to the expert, please abide by the new law, don't refer to the old law.

What the statement is said by the ministry, if you refer to the old law, maybe this is the intention it was it might be or it will be nullified by the court, but the Ministry of Justice have no powers to nullify any expert report. The expert report will be nullified by the court.

Q. What you have then is a direction from the Ministry of Justice to the courts as to how they should treat experts' reports which refer to the 1974 law, isn't that correct?

A. No. This is addressed to the expert, notifying them, 'Please be careful, use the new law to make a reference', it is not addressed to the court, it is not the duty of the Ministry of Justice to say to the court what is annulled and the experts is null and void or not, this is the court, this is a court judiciary decision to be made by the court itself.

…

A. … This is basically a direction to the expert to the intention was to tell them you might be nullified by the court, it is not for the Ministry of Justice to nullify the expert report in the first place."

Mr Al Zarouni disagreed with the suggestion that the Ministry Circular was simply a notification or a warning, but on this point I preferred the evidence of Mr Al Aidarous.

83. Ultimately, in fact, Mr Al Zarouni made clear that his opinion did not depend upon the Ministry Circular changing the law, either prospectively or retrospectively. Rather, he said, the circular was confirmatory of what the law already was, *i.e.*, that, since 2012, any expert report that referred to the 1974 Law rather than to the (new) 2012 Law was automatically null and void:

> "Q. … Suppose, prior to this circular being issued, a judgment relies upon a report referring to the 1974 law, once the time for appealing has passed, such that the judgment is final and binding this law doesn't retrospectively invalidate the judgment – sorry, this circular does not retrospectively invalidate the judgment?
>
> A. The circular is nothing to do to only invalidate. The law by itself is by operation of the law it is invalidated, because the decision based on the expert which is null and void. That is exactly what it – the grounds of that judgment was based on the expert, so if the ground is not there, then it should be like this. Now the way how they can approach the court and how they can do it, that is not part of my legal expert to be very frank, to talk about it.
>
> Q. Can we just unpack that? I think your point there was that the 2012 law means that a report that refers to the 1974 law is invalid and that is simply a consequence of the 2012 law. Is that what you are saying?
>
> A. Again.
>
> Q. Is your evidence that the effect of the 2012 law is that an expert report produced after the 2012 law came into force [that] refers to the 1974 law, it is invalid by virtue of the 2012 law?
>
> A. Yes, because that is which is the circular is confirming."

84. The difficulty with this, however, is that, although Mr Al Zarouni said that any expert report filed after the 2012 Law came into force that referred to the preceding 1974 Law was automatically null and void, there was nothing in the 2012 Law itself which said that this should be the case; nor was Mr Al Zarouni able to point to a case after 2012 where a court had said that.

85. In circumstances where there is no requirement in Dubai law for an expert report to refer to *any* regulatory law, it would be odd if an unnecessary, but mistaken, reference to the 1974 Law meant that the expert report was automatically null and void, rather than simply a factor that could be taken into account by a court in deciding whether or not to admit, or the weight to be attached to, the report. The absence of any authority to that effect is, therefore, unsurprising.

86. On the basis of the evidence that I heard, I reject the argument made on Mr Almakhawi Sr's behalf that the mistaken reference in the First and Second Expert Reports to the 1974 Law had the automatic consequence that the reports were null and void with the result that the Dubai courts were not entitled to rely upon those reports.

87. I would, for the same reason, reject any suggestion that the mistaken reference in the First and Second Expert Reports to the 1974 Law was anything more than a defect in form or a mere procedural irregularity; I would thus reject the argument that the Dubai court's reliance upon those reports meant that the judicial process in the Dubai Proceedings was substantially unjust.

6. A local remedy?

88. There is, in any event, this further difficulty in the way of Mr Almakhawi Sr's natural justice complaint.

89. I explained in paragraph 25 above that, in determining whether there had been substantial injustice, a relevant factor was the availability of a remedy in the foreign court for any error in procedure or unfairness that had occurred.

90. Let it be assumed, contrary to my view, that Mr Al Zarouni is right, that the Ministry Circular was declaratory or confirmatory of existing Dubai Law, and that since 2012, when the 2012 Law came into force, an expert report that referred to the 1974 Law was automatically null and void and could not properly be relied upon by a Dubai court.

91. If that is correct, then the invalidity of the First and Second Expert Reports, referring as they did on their face to the 1974 Law, was plain to see. Whether or not the point was actually taken on behalf of Mr Almakhawi Sr, it was *available* to be taken by him at trial, and it could also have formed the basis of an appeal to the Court of Appeal or the Court of Cassation by either of his two sets of Dubai lawyers.

92. Mr Al Zarouni accepted this in cross-examination:

> "Q. I am asking you a purely legal question. Suppose you are right, that a reference to the 1974 law means – as a result of the 2012 law – a trial judge shouldn't refer to it, shouldn't rely on it?
>
> A. Ah ha.
>
> Q. That, as a matter of law, is an argument you can make to the trial judge and if the trial judge accedes to it, you can appeal to the Court of Appeal on that ground and you can appeal to the Court of Cassation on that ground?
>
> A. Yes, if their counsel they look at it, they can use that, of course. It is a matter of – there is a – they have some good reasoning, in my opinion."

93. As explained in *Adams*, the significance of an available local remedy depends upon the particular facts. I was referred by Mr Lewis in that context to the decision of the Court of Appeal in *Masters v Leaver* [2000] IL Pr. 387, a case concerning a dispute between shareholders of a US company, Cable Advertising Networks, Inc. The facts of that case were as follows.

94. In 1992 the claimants brought proceedings in Texas against a variety of parties including Mr Leaver and Hopkins & Sutter, his attorneys, claiming damages for oppressive conduct and fraud. Mr Leaver failed to comply with a number of court orders, and an order was made striking out his defence and giving judgment against him with damages to be assessed, at the claimants' option, by a judge or jury.

95. A trial subsequently took place for two purposes: to consider the liability of Hopkins & Sutter, and to assess the damages recoverable from Mr Leaver, which the claimants had chosen to be assessed by a jury. The claim against Hopkins & Sutter settled. The judge then directed the jury to return an award against Mr Leaver in the amount of damages claimed by the claimants.

96. The order drawn up by the Texas court in February 1995 stated that the jury had found that both oppressive conduct and fraud had been proved against Mr Leaver and that it had awarded damages of $9.125 million for each of them, *i.e.*, $18.250 million in total, to each claimant. Mr Leaver issued a motion for a new trial and subsequently an appeal, but both were dismissed.

97. In March 1998 proceedings were commenced by the claimants in England to enforce the Texas judgment against Mr Leaver who, by that stage, was an undischarged bankrupt. In support of an application for leave to continue the proceedings, an affidavit was sworn by the claimants' attorney asserting that the Texas jury had found fraud and that it, *i.e.*, the jury, had assessed damages in the amounts claimed.

98. A default judgment was subsequently obtained against Mr Leaver. He applied to set it aside on the basis that, contrary to the affidavit sworn by the claimants' attorney, there had been no assessment of damages by the Texas jury; rather, the sums had been awarded on the direction of the judge at the suggestion of the claimants' own attorney.

99. Morritt LJ, who gave the only substantive judgment in the Court of Appeal, referred at [31]–[33] to *Adams* and to the principles set out in paragraphs 24 and 25 above. At [33] he said the following in relation to the availability of a local remedy:

> "Thirdly, where the procedural defect is apparent to the defendant he should use the local remedy of appeal before resorting to the contention in this country that the assessment of his liability was not in accordance with the principles of substantial justice."

100. On the application of the principles to the facts of the case, at [39]–[41] Morritt LJ said this:

> "39. … On the basis of the evidence before us it appears to me that, contrary to the statement of Mr Myers in the later affidavit, it was the duty of the judge to leave the assessment of the damages for the decision of the jury in light of the wide variation in the expert evidence before them. The judge did not do so, with the result that, arguably, the assessment of damages required by the order did not take place.
>
> 40. So the question arises whether Mr Leaver should have pursued any remedy in Texas by way of appeal in respect of the failure to observe the requirements of the 1994 order. The judge considered that he should. She said:
>
> > It is sufficiently obvious, therefore, that if that was a breach of procedure, it was a matter that could be pursued in an appeal in Texas. The procedures that were provided in Texas were in themselves reasonable and the fact that a bond may or may not have been required in order for the defendant to pursue an appeal from a default judgment in Texas does not so far offend the concept

> of natural justice as to provide any basis for a challenge to the Texas judgement as regards the amount of the actual award of damages. I do not find therefore but any breach of procedure, even assuming there were one, or the availability of means to redress it, had gone so far as to offend the English concept of proper justice and proper procedure. This case is therefore well on the inside of the line as drawn in the Adams v. Cape Industries case as to whether the court will enforce a judgement. Therefore I reject that as a matter supposedly giving rise to a reasonable defence such that leave to defend ought to be given on that score.
>
> 41. On the basis of the evidence before us, I would answer the question in the negative. The evidence of Mr Myers was to the effect that the quantum of liability had been assessed by the jury in the normal way. I share the judge's astonishment at Mr Myers' evidence as to the course the proceedings took. The true position did not come to light until September 1998. By that time Mr Leaver's appeal in Texas had long since been dismissed for failure to provide security for costs. I am by no means satisfied that he could at that late stage had re-opened the appeal on the new ground he might then have realised was available."

101. I do not consider that the decision in *Masters* assists Mr Almakhawi Sr.

102. As the passages set out above show, the Court of Appeal asked itself whether the defect in Texas had been "apparent" to Mr Leaver so that he could have availed himself of a local remedy. The court determined that the defect had *not* been apparent, and that the true position had not come to light until years later after Mr Leaver's appeal (on other grounds) had been dismissed.

103. In the present case, as I have explained, the reference in the First and Second Expert Reports to the 1974 Law was plain to see; and if, contrary to my view, the consequence was that the First and Second Expert Reports were null and void, the point could have been taken, either at first instance or on appeal in Dubai, by Mr Almakhawi Sr through either of his two sets of lawyers.

7. Conclusion

104. The natural justice exception in *Dicey, Morris & Collins* (*op. cit.*), Rule 55 is not made out. I will, therefore, declare that the Dubai Judgement is enforceable in England and Wales and enter a monetary judgment against Mr Almakhawi Sr accordingly.

F. The Transfers

105. The second issue I have to decide concerns the transfer of the Warren House Property and the Money Transfers.

106. As I explained in paragraph 12 above, the Bank puts its claim in relation to the transfers in two ways: it says that either:

i) The assets transferred are still beneficially owned by Mr Almakhawi Sr and are the subject of a resulting trust in his favour; or

ii) The transfers amounted to transactions in defraud of creditors within the meaning of section 423 of the Insolvency Act 1986.

I summarised the Defendants' response in paragraph 14.

107. The evidence in relation to the two ways in which the claim is put overlaps, and I propose to address it as a whole. It is convenient to deal first with the applicable principles.

1. Resulting Trust

108. Mr Almakhawi Sr purchased the remaining term of a long lease of the Warren House Property in January 2007 for a purchase price of just under £1.7 million.

109. There was at one stage a mortgage on the property, but by July 2019 the property was unencumbered. By a TR1 form dated 8 July 2019, legal title to the property was transferred from Mr Almakhawi Sr to Mr Almakhawi Jr. It is common ground that the transfer of the Warren House Property was gratuitous. The same is true of the Money Transfers made in August and October 2019.

110. The general rule in English law is that a gratuitous transfer is rebuttably presumed not to be a gift: see *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 2 AC 669 at 708A-B (Lord Browne-Wilkinson). Thus, where *A* makes a voluntary transfer to *B* and the presumption applies, the asset will be held by *B* on resulting trust for *A*.

111. However:

i) The presumption is just that – a presumption;

ii) It may be rebutted by evidence, and in *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291 at 312F Lord Upjohn said that it was "easily rebutted"; and

iii) The presumption may also be rebutted by the counter-presumption of advancement - itself, of course, only a presumption - which applies to transfers between parent and child, even where the child is not a minor: *Wood v Watkin* [2019 EWHC 1311 (Ch), [2019] BPIR at [82]-[93] (ICC Judge Barber).[3]

112. So far as the evidence admissible to rebut the presumption is concerned, the authors of *Lewin on Trusts* (20th ed.) explain in paragraph 10-037 that:

> "In general, any evidence of the real purchaser's actual intention at the time of purchase which is admissible under the general law of evidence may be adduced to support or rebut a presumption of resulting trust or advancement. Thus, acts and declarations antecedent to or contemporaneous with the purchase, or so immediately after it as to constitute part of the same transaction may be relied on in evidence for the purpose of rebutting or supporting the presumptions.

[3] The presumption of advancement is set to be abolished by section 199 of the Equality Act 2010, but that section has not yet been brought into force.

The focus is on the intention of the transferor; it is not necessary that the transferee's intention should be the same: see *Lewin* (*op. cit.*), paragraph 10-010.

113. As a resulting trust is imposed in order to reflect the presumed intentions of the parties, if a gratuitous lifetime instrument of transfer contains express or inferred provisions determining the beneficial ownership of the property transferred, effect will be given to those express or inferred provisions: *Lewin* (*op. cit.*), paragraph 10-002.

2. Section 423 of the 1986 Act

114. Section 423 of the 1986 Act, provides, insofar as relevant, as follows:

> "**423 Transactions defrauding creditors.**
>
> (1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if –
>
> (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;
>
> …
>
> (2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such an order as it thinks fit for –
>
> (a) restoring the position to what it would have been if the transaction had not been entered into, and
>
> (b) protecting the interests of persons who are victims of the transaction.
>
> (3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose –
>
> (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
>
> (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.
>
> …
>
> (5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as "the debtor".

115. Section 424 of the 1986 Act identifies a number of persons who may apply for an order under section 423, which include a "victim of the transaction" as defined in section

423(5). If the Bank is right in what it says about the purpose for which the transfers were made, there was no dispute that the Bank would qualify as a victim.

116. Section 425 provides a non-exhaustive list of orders that the court may make in circumstances where it has found that a transaction has been entered into which satisfies the requirements of section 423. They include an order for the asset transferred to be returned to and vested in the transferor, where it will then, of course, potentially be available for enforcement by the transferor's creditors.

117. There was no dispute that the Warren House Property and the Money Transfers involved transfers from Mr Almakhawi Sr to his son for no consideration within the meaning of section 423(1)(a). The critical issue was whether the transfers were made for one of the purposes identified in section 423(3) ("a Prohibited Purpose").

118. I summarised the law, as I understood it, in relation to the Prohibited Purpose requirement in a judgment I gave earlier this year in *Integral Petroleum S.A. v Petrogat FZW* [2023] EWHC 44 (Comm). Referring to a passage in Gee, *Commercial Injunctions* (7th ed.), paragraph 13-031, and to recent Court of Appeal authority, at [63] I said this:

> "This, as Stephen Gee, KC says in *Commercial Injunctions* (7th ed.) at 13-031 requires proof of a subjective, positive intention on the part of the company entering into the transaction (the debtor) to achieve a Prohibited Purpose, which is a question of fact. However:
>
> (i) Whilst it is important to distinguish between the *purpose* of a transaction and what is simply a collateral *effect*, it is not necessary to show that a Prohibited Purpose was the only, or the dominant, or the predominant purpose. No adjective should be read in to the statutory language: see *JSC BTA Bank v Ablyazov* at [14] *per* Leggatt LJ;
>
> (ii) Nor is it necessarily fatal that, even absent a Prohibited Purpose, the debtor (here Petrogat) might have entered into the impugned transaction anyway: see *JSC BTA Bank v Ablyazov* at [11] – [12] *per* Leggatt LJ, citing the judgments of Laws and Simon Brown LJJ in *Inland Revenue Commissioners v Hashmi* at [33] and [38];
>
> (iii) Proof that the consequence of the transaction was to put assets beyond the reach of creditors is not, in itself, enough; however, evidence that this was the foreseeable and foreseen result may, nonetheless, support an inference that the transaction was, in fact, entered into for a Prohibited Purpose, as may also evidence that this was something the actor desired.

119. It was common ground that section 423 does not require dishonesty on the part of the transferor: see, *e.g.*, *National Westminster Bank plc v Jones* [2001] 1 BCLC 98 at [107] (Neuberger J). That said, many cases do involve dishonesty or at least disreputable conduct, and it has been held that a *prima facie* case under section 423 is sufficient to engage the iniquity exception to legal professional privilege.

120. Mr Edwards, who appeared before me on behalf of the Bank, challenged the proposition that it was necessary in all cases to show that the transferor had a subjective, positive

intention to achieve a Prohibited Purpose. Whilst acknowledging that the operation of section 423 did not depend upon proof of insolvency, Mr Edwards submitted that:

> "… a transfer at less than full value by an insolvent person is presumptively made for a prohibit[ed] purpose."

121. Mr Edwards argued that, where the transferor is insolvent and where the consequence of the transferor's conduct is to put assets beyond the reach, or otherwise to prejudice the interests of creditors, then the existence of a Prohibited Purpose is to be imputed or presumed on the basis that:

> "… a man must be presumed to intend the natural consequences of his own act."

Mr Edwards submitted in closing that, where the transferor was insolvent, there was "a completely objective" standard.

122. Mr Edwards' argument proceeded in three steps.

123. First, he submitted, under the Fraudulent Conveyances Act 1571 and under section 172 of the Law of Property Act 1925, the predecessors of section 423 of the 1986 Act, the relevant statutory purpose could and would be imputed from the consequences of the actor's conduct: see, in particular, the decision of the Court of Appeal in Chancery in *Freeman v Pope* (1870) LR 5 Ch. App. 538.

124. Secondly, Mr Edwards said, there was no reason to think that the amendments made in 1925 and then again in 1985/86, following the Report of the Review Committee into Insolvency Law and Practice chaired by Sir Kenneth Cork ("the Cork Report") were intended to change the position and to make the mental element less favourable to creditors, requiring proof of actual, subjective intent.

125. Thirdly, Mr Edwards argued, his proposition, that, in cases of where the transferor was insolvent at the time the transfer was made, a Prohibited Purpose was to be presumed from conduct, was consistent with the duties owed by insolvent persons to their creditors: see *BTI 2014 LLC v Sequana SA* [2022] UKSC 25, [2022] 3 WLR 709 at [129] (Lord Briggs JSC).

126. I asked Mr Edwards whether the presumption he suggested was a presumption of fact or law; and, if it was a presumption of law, whether it was a rebuttable or an irrebuttable presumption. Mr Edwards answered, candidly, that the authorities were not clear, and that, whilst the language used in *Freeman* was suggestive of a rule of law, that might be too high a way of putting it.

127. This argument was ably developed, but I am unable to accept it. I say this for the following reasons.

128. So far as the history is concerned, prior to 1926 fraudulent conveyances were subject to the Fraudulent Conveyances Act 1571 ("the 1571 Act", sometimes referred to as the Statute of Elizabeth). The 1571 Act referred to conveyances "to the end, purpose and intent, to delay, hinder or defraud creditors", deeming such conveyances to be void.

129. In relation to this language, in *Freeman* Lord Hatherley LC said the following at 540-541 (the underlined emphasis is mine):

> "The difficulty the Vice-Chancellor seems to have felt in this case was, that if he, as a special juryman, had been asked whether there was actually any intention on the part of the settlor in this case to defeat, hinder, or delay his creditors, he should have come to the conclusion that he had no such intention. With great deference to the view of the Vice-Chancellor, and with all the respect which I most unfeignedly entertain for his judgment, it appears that this does not put the question exactly on the right ground; for it would never be left to a special jury to find, *simpliciter*, whether the settlor intended to defeat, hinder, or delay his creditors, without a direction from the judge that if the necessary effect of the instrument was to defeat, hinder or delay the creditors, that necessary effect was to be considered as evidencing an intention to do so. A just would undoubtedly be so directed, lest they should fall into the effort or speculating as to what was actually passing in the mind of the settlor, which can hardly ever be satisfactorily ascertained, instead of judging of his intention by the necessary consequences of his act, which consequences can always be estimated from the facts of the case.
>
> …
>
> But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the Judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute.

130. Sir G. M. Giffard LJ spoke similarly at 544-545 (again, the emphasis is mine):

> "Of course the irresistible conclusion from that was, that the voluntary settlement was intended to defeat the subsequent creditors. That being so, I do not thing that the Vice-Chancellor need have felt any difficulty about the case of *Spirett v. Willows*, but he seems to have considered, that in order to defeat a voluntary settlement there must be proof of an actual and express intent to defeat creditors. That, however, is not so. There is one class of cases, no doubt, in which an actual and express intent is necessary to be proved – that is, in such cases as *Holmes v. Penney*, and *Lloyd v. Attwood*, where the instruments sought to be set aside were founded on valuable consideration; but where the settlement is voluntary, then the intent may be inferred in a variety of ways. For instance, if after deducting the property which is the subject of the voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, then the law infers intent, and it would be the duty of a Judge, in leaving the case to the jury, to tell the jury that they must presume that that was the intent. Again, if at the date of the settlement the person making the settlement was not in a position actually to pay his creditors, the law would infer that he intended, by making the voluntary settlement, to defeat and delay them.

131. I agree with Mr Edwards that the trenchant language used in these passages is consistent with the view that, under the 1571 Act, in the context of gratuitous conveyances at least, the law was prepared to deem or presume an intent to delay, hinder or defraud creditors simply on the basis that this was the necessary consequence of the relevant conduct.

132. This certainly seems to have been the view of the authors of May, *The Law of Fraudulent and Voluntary Conveyances* (3rd ed. 1908) who spoke, at pages 4-5, of a form of constructive fraud:

> "The statute of 13 Eliz. C. 5, is not only directed against transfers of property as are made with the express intention of defrauding creditors; but, as has been justly remarked, it extends as well to such as virtually and indirectly operate the same mischief, by abusing their confidence, misleading their judgment, or secretly undermining their interests. To obviate this, it has gradually grown into a practice to regard certain acts or circumstances as indicative of a so-called fraudulent intention in the construction of the Statute, although, perhaps, there was in fact, no actual fraud or moral turpitude. It is difficult, in many cases of this sort, to separate the ingredients which belong to positive and intentional fraud from those of a mere constructive nature, which the law thus pronounces fraudulent upon principles of public policy.
>
> To draw any definite invariable line of distinction between moral and technical fraud, on the one hand, or between actual and constructive on the other, would be next to impossible and could rarely serve any useful purpose. But there are certain circumstances, the presence of which has been taken as conclusive evidence of fraud, and as invariably avoiding the conveyance.
>
> The ordinary form of this constructive fraud under 13 Eliz. C. 5, is a voluntary conveyance made by a man deeply indebted, which accordingly is void, under the Statute, as against the grantor's creditors."

133. The successor to the 1571 Act (albeit indirectly) was section 172 of the Law of Property Act 1925 ("the 1925 Act"). Section 172(1) provided, in rather simpler and more modern language than the 1571 Act, that:

> "Save as provided in this section, every conveyance of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instances of any person thereby prejudiced."

134. I agree with Mr Edwards that there are authorities that can be said to support the view that under section 172 of the 1925 Act the same approach to intent applied as under the 1571 Act, although the cases are somewhat more equivocal as to whether intent is automatically to be presumed. See:

i) *In re Eichholz* [1959] Ch. 708 at 722-724 (Harman J):

> "There is no doubt that the Statute of Elizabeth was available after a man's death to his creditors to recover from a volunteer property of whatever kind … It was not necessary to prove a fraudulent intent. The mere fact of insolvency was enough: see Lord Hatherley's judgment in *Freeman v Pope*. … In my judgment, all this continues to be good law under section 172 of the Law of Property Act";

ii) *Lloyds Bank Ltd v Marcan* [1973] 1 WLR 339 at 344H (Sir John Pennycuick V.C.):

> "The word "intent" denotes a state of mind. A man's intention is a question of fact. Actual intent may unquestionably be proved by direct evidence or may be inferred from surrounding circumstances. Intent may also be imputed on the basis that a man must be presumed to intend the natural consequences of his own act: see the judgment of Lord Hatherley LC and Giffard LJ in *Freeman v Pope* (1870) 5 Ch. App. 538. I would mention that today this imputation might well be considered applicable where there has been a valuable consideration short of full consideration. I do not, however, propose to pursue that point for this reason. In the present case there is evidence of actual intention. That, of course, is by no means always so in cases under this section. Where there is evidence of actual intention, in the nature of things there is very little room for imputing intention. I do not, therefore, propose to pursue the difficult questions which arise as to the circumstances in which intention may be imputed.

See also, dismissing an appeal in the same case, reported at [1973] 1 WLR 1387, the judgment of Cairns LJ at 1392D-E:

> "Other cases make it clear that if the conveyance is voluntary it is easier to infer a dishonest intention than when it is made for consideration or even that no dishonest intention need then be established: see *Freeman v Pope* (1870) 5 Ch. App. 538, *Ideal Bedding Co. Ltd v Holland* [1907] 2 Ch. 157, *In re Eichholz, decd.* [1959] 1 Ch. 708."

135. That the law in relation to the meaning of the phrase "with intent to defraud" in section 172 of the 1925 Act was, however, not entirely clear is reflected in the Cork Report issued in 1982. In paragraph 1212, commenting on section 172, the report said this:

> "The section does not render a transaction voidable unless there is an intent to defraud creditors. Unfortunately, it is not entirely clear what is the meaning of 'to defraud' in this context; though it seems that, in practice, the requisite inference of fraud will be drawn whenever the necessary consequences of the transaction is to defeat, hinder, delay or defraud the creditors or to put assets belonging to the debtor beyond their reach. Where the requisite intention is proved, or inferred, any person prejudiced may have the transaction set aside, whether or not there was any intention of defrauding that person."

136. The Cork Report went on in paragraph 1215 to recommend that section 172 be repealed and re-enacted in a different form, with the recommended re-enactment including an express provision that:

> "… the necessary intent is an intent on the part of the debtor to defeat, hinder, delay or defraud creditors, or to put assets belonging to the debtor beyond their reach, and that such intent may be inferred whenever this is the natural and probable consequence of the debtor's actions, in light of the financial circumstances of the debtor at the time, as known, or taken to have been known, to him."

The recommendation, I note, was for the inclusion of language that intent "may" be inferred, not, as the judgments in *Freeman* might be thought to suggest, that intent *must* be inferred in certain circumstances.

137. In the event, a new provision replacing section 172 of the 1925 Act was included as section 212 of the Insolvency Act 1985, which was then consolidated into the Insolvency Act 1986 as section 423. The language of sections 212 and 423 is materially similar, but it is materially different to the language in the 1571 Act and in section 172 of the 1925 Act that had gone before.

138. Focussing on section 423 of the 1986 Act, the relevant terms of which are set out in paragraph 114 above, it is notable that:

i) The section imposes separate, clearly cumulative requirements for relief, namely that the relevant transaction should both:

a) be entered into at an undervalue, *e.g.*, a gift or a transfer of property made for no consideration (section 423(1)); and

b) be entered into for a Prohibited Purpose (section 423(3));

ii) The section uses different language to the 1571 and 1925 statutes, referring not to a conveyance "with intent to defraud" but in section 423(3) to a transaction entered into "for the purpose" of putting assets beyond the reach, or of prejudicing the interests, of those who have or who might have claims.

The additional language suggested in the Cork Report, referred to in paragraph 136 above, was notably not included in the 1986 Act.

139. It seems to me that, whatever the position may have been under the earlier 1571 and 1925 Acts, it is section 423 of the 1986 Act that I have to interpret; and that, given its different structure and terms, it does not necessarily follow that section 423 should be interpreted to mean exactly the same, or to operate in precisely the same way, as its predecessor statutes.

140. In any event, since the coming into force of the 1986 Act, there have been at least four decisions of the Court of Appeal that have considered the meaning of the phrase "for the purpose of" within section 423(3), which I consider bind me.

141. The first, chronologically, is *Royscot Spa Leasing Ltd v Lovett* [1995] BCC 502.[4] The case was concerned with a claim to set aside a transfer of property under section 423, and an issue as to whether the iniquity exception applied so as to defeat a claim to withhold documents from disclosure on the ground of legal professional privilege.

142. In the course of his judgment at 507-509, Sir Christopher Slade said this:

> "For the purposes of this appeal, though without deciding the point, I am content to assume in favour of the plaintiffs that the relevant purpose which has to be established in the application of s. 423 is substantial purpose, rather than the stricter test of dominant purpose.
>
> In the present case it is not open to the plaintiffs to argue that the very fact that the transfer was made for no consideration by itself establishes the requisite purpose

[4] I was not taken to this case, but it was referred to in *Hashmi* with which I deal next.

> of defrauding creditors. The requirements for the operation of the section imposed by s. 423(3) are additional to those imposed by s. 423(1) so that the actual purpose of the transferor has to be investigated. The test is not a solely objective one.
>
> …
>
> No doubt the result of the transfer was to put assets beyond the reach of the plaintiffs and otherwise to prejudice their interests, but in applying the section, result cannot be equated with purpose; and as yet, in my judgment, no prima facie case showing the relevant purpose has been established."

143. The point made in the second quoted paragraph reflects the structure of section 423, making the point that the requirement for a Prohibited Purpose is an additional requirement and that it cannot be presumed simply from the fact that the transfer was made at an undervalue. The third paragraph states in unequivocal terms that result cannot be equated with purpose.

144. The second case is *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981, [2002] 2 BCLC 489 which, like the present case, involved a transfer between father and son. The principal issue was whether the Prohibited Purpose had to be the sole or the dominant purpose, or whether it was enough that it was one of the purposes, for which the relevant transaction was undertaken.

145. The main judgment was given by Arden LJ, whose knowledge and experience of insolvency law is well-known. At [21] she referred to the history of section 423, noting that its immediate predecessor, section 172 of the 1925 Act, had not always received a consistent judicial interpretation, and also noting the recommendations in the Cork Report.

146. At [23]-[25] Arden LJ said this:

> 23. The question arising on this appeal is whether on the true construction of s. 423 the purpose shown must be a dominant purpose. In my judgment the answer to that question must be arrived at taking into account the role, as explained above, of s. 423 in insolvency legislation. Accordingly it is not necessarily helpful to apply the construction placed on similar words in different provisions and none was suggested. In my judgment there is no warrant for excluding the situation where purposes of equal potency are concerned. … Accordingly, in my judgment, the section does not require the inquiry to be made whether the purpose was a dominant purpose. It is sufficient if the statutory purpose can properly be described as a purpose and not merely as a consequence, rather than something which was indeed positively intended. Moreover, I agree with the observation of the judge that it will often be the case that the motive to defeat creditors and the motive to secure family protection will co-exist in such a way that even the transferor himself may be unable to say what was uppermost in his mind.
>
> …
>
> 25. I cite these examples to emphasise that for something to be a purpose it must be a real substantial purpose; it is not sufficient to quote something which is a by-product of the transaction under consideration, or to show that it was simply a result

> of it, as in *Royscot Spa Leasing Ltd v Lovett* [1995] BCC 502 itself, or an element which made no contribution of importance to the debtor's purpose of carrying out the transaction under consideration. I agree with the point made by Laws LJ in argument that trivial purposes must be excluded.

147. The distinction Arden LJ drew between the "purpose" of a transaction and the "consequence", "by product" or "result" of a transaction is important, as is also her remark that the purpose must be "something which was indeed positively intended". These remarks cannot sit with the notion of constructive purpose, a purpose presumed to exist simply because it was the result of the relevant conduct.

148. The third case is *Hill v Spread Trust Co. Ltd* [2006] EWCA Civ 542, [2006] BIPR 789. In that case, a number of issues arose in the Court of Appeal, including an issue of limitation, but the relevant issue for present purposes was whether the judge had been entitled to find that one of the transferor's purposes was a Prohibited Purpose within section 423(3).

149. Arden LJ again gave the principal judgment (she dissented on an issue concerning limitation, but Waller LJ and Sir Martin Nourse explicitly agreed with her conclusions on the other issues). At [130], at the commencement of a section addressing the legal aspects of the purpose issue, she said the following, which is consistent with her previous judgment in *Hashmi*:

> "There can be no doubt but that s. 423(3) requires the person entering into the transaction to have a particular purpose. It is not enough that the transaction has a particular result".

150. The fourth and final case is *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176, [2019] BCC 96. The case was concerned with a claim under section 423 of the 1986 Act in respect of a sum of money transferred by Mr Ablyazov to his son at a time when Mr Ablyazov, the former chairman of the claimant bank, must have appreciated that he had been involved in serious wrongdoing, albeit that claims against him had not yet actually been brought.

151. Laurence Rabinowitz, QC (sitting as a Deputy High Court Judge) had held at first instance that putting the asset out of the bank's reach was not a substantial purpose of the transfer because Mr Ablyazov would have made the transfer anyway, and he said he was unwilling too readily to infer that the money was transferred for that purpose.

152. In the Court of Appeal Leggatt LJ addressed the statutory purpose test at [8]-[16]. Commenting on the Court of Appeal's previous decision in *Hashmi* as to whether the Prohibited Purpose had to be the sole or dominant purpose, he said this at [15]-[16]:

> 15. Arden LJ made this very point in the *Hashmi* case when she said (at [23]) that 'there is no epithet in the section and thus no warrant for reading one in'. When later in her judgement she referred (at [25]) to a 'real substantial' purpose, it is apparent from the context that the reason for using those adjectives at that point was to underline the distinction between a purpose and a consequence of the relevant transaction. As Arden LJ emphasised, it is not enough to bring a transaction at an undervalue within s. 423 that the transaction had the consequence of putting assets of the debtor beyond the reach of creditors. That is so even if the

consequence was foreseeable or was actually foreseen by the debtor at the time of entering into the transaction. Evidence that the debtor believed that the transaction would result in putting assets beyond the reach of creditors may support an inference that the transaction was entered into for the purpose of doing so, but the two things are not the same. To illustrate the distinction using a less homely example than that given by Arden LJ, a commander may order a missile strike on a military target knowing that it will almost certainly cause some civilian casualties. But this does not mean that the missile strike is being carried out for the purpose of causing such casualties.

16. When judging a person's intentions, we are generally more inclined to accept that an action was not done for the purpose of bringing about a particular consequence, even if the consequence was foreseen, if there is reason to believe that the consequence was something which the actor wished to avoid or at least had no wish to bring about. Hence, in the example just given, where the missile strike had a clear strategic purpose, we may readily accept that it was not ordered for the purpose of causing civilian casualties - particularly if, for example, there is evidence that the commander gave anxious consideration to how many civilians were likely to be in the target area and planned the strike for a time when the number was expected to below. By contrast, a consequence is more likely to be perceived as positively intended if there is reason to think that it is something which the actor desired. Thus, evidence that a person who entered into a transaction at an undervalue foresaw that the result would be to put assets out of reach of creditors and desired that result might lead the court to infer that the transaction was entered into for that purpose. But such a conclusion is not a logical or legal necessity. It is a judgement which has to be based on an evaluation of all the relevant facts of the particular case.

153. There were, in addition to these four appellate decisions, three further cases on which I was addressed and with which I should deal. (Other cases were mentioned, but they did not seem to me to take matters any further.)

154. The first is *Barclays Bank Plc v Eustice* [1995] 1 WLR 1238. This case, like *Royscot*, involved a section 423 claim where there was a challenge to the withholding of documents on the ground of legal professional privilege. The question arose in that context as to whether the evidence disclosed a strong *prima facie* case for making an order under section 423.

155. Schiemann LJ considered whether the transaction had been entered into for a Prohibited Purpose. There is nothing in his judgment that supports the proposition that a Prohibited Purpose can automatically be imputed from the consequences of the relevant conduct, but Mr Edwards relied upon a passage at 1248A-B as showing how readily an inference may be drawn:

"Once one accepts that there is a strong prima facie case that the bank's security has been transferred to members of the family at a time when action by the creditor was clearly anticipated by the debtor and that these transfers were at an undervalue and that what remains in the hands of the debtor barely if at all covers the debt, there is in my judgment a strong prima facie case that the purpose of the transactions was to prejudice the interests of the creditor."

156. The second case is the decision of the Court of Appeal decision in *Giles v Rhind* [2008] EWCA Civ 118, [2009] Ch 191, which, in chronological terms, sits after *Hill* but before *Ablyazov*. This case, Mr Edwards submitted in his skeleton argument, was the exception amongst the recent authorities, the other cases, he said, having "rather lost sight of the earlier authorities", which I understood to be a reference to *Freeman*.

157. Mr Edwards relied upon [15], but that paragraph needs to be read in the context of [14], and [17] which follows is also important:

> "14. The principle that creditors should be protected from the consequences of transactions which are designed to prejudice their interests has long been embedded in English law. Section 423 of the 1986 Act is derived from a Statute of Elizabeth (13 Eliz 1, c 5) which provided that all dispositions of property made with the intention of delaying, hindering or defrauding creditors should be void against creditors. This did not extend to any estate or interest created bona fide and for good consideration in favour of any person not having at the time notice of such fraud. It has even been said that the Statute of Elizabeth was merely declaratory of the common law. It was replaced by section 172 of the Law of Property Act 1925, which in turn was replaced by section 423 and following.
>
> 15. There is considerable case law on the predecessors of section 423. Lord Mansfield CJ held that the Statute of Elizabeth (13 Eliz 1, c 5) should be liberally interpreted: *Cadogan v Kennett* (1776) 2 Cowp 434. Intent to defraud could be inferred from the making of a conveyance that would leave creditors unpaid: *Freeman v Pope* (1870) LR 5 Ch App 538. As Lord Hatherley LC so pithily put it in that case, at p 540, 'persons must be just before they are generous".
>
> …
>
> 17. Section 423 does not impose a sanction on a debtor whose actions prejudice his creditors unless the debtor's purpose satisfies section 423(3). None the less, as I see it, section 423 has to be seen in the context of a debtor's responsibilities to his creditors generally. It actualises those responsibilities in particular circumstances. Any argument that section 423 does not involve a breach of duty has therefore a somewhat counter-intuitive ring to it. Section 423 can be contrasted with for example section 238 of the 1986 Act which invalidates transactions at any undervalue within a given period of the insolvency. The object of this sanction is at least in part to enlarge the pool of assets available for creditors generally."

158. In light of the first sentence of [17], the reference in [15] to *Freeman* can hardly be seen as a statement that the existence of a Prohibited Purpose can be found simply on the basis of the consequence of the relevant conduct.

159. The judgment was, furthermore, a judgment of Arden LJ, and there is nothing to indicate that she was recanting the views she had previously expressed in *Hashmi* and *Hill*. Nor, in my judgment, does the finding, that a transaction caught by section 423 involves a breach of duty for the purposes of section 32(2) of the Limitation Act 1980, demand such a conclusion.

160. The third and final case is the decision of the Court of Appeal in *BTI 2014 LLC v Sequana SA* [2019] EWCA Civ 113, [2019] BCC 631 (the section 423 issue did not

arise in the subsequent appeal to the Supreme Court). In the judgment of David Richards LJ at [66] he said the following in relation to the purpose requirement:

> "This is essentially a question of fact. The purpose of a person in entering into a transaction is a matter of the subjective intention of that person: what did he aim to achieve? Section 423(3) does not require the specified purpose to be the sole or dominant purpose. It is sufficient if it 'can properly be described as a purpose and not merely as a consequence, rather than something which was indeed positively intended': *Inland Revenue Commissioners v Hashmi* [2002] EWCA Civ 981; [2002] B.C.C. 943 at [23] per Arden LJ."

As can be seen, he said that purpose was a matter of subjective intention, and the explanation in *Hashmi* that there was a distinction between consequence and purpose was specifically endorsed.

161. In my judgment, therefore, although there may be cases that indicate that, for the purposes of the 1571 and 1925 Acts, an intent to defraud could and would be inferred or presumed simply because of the consequences of the relevant conduct, there is no support for the proposition that the same is true under section 423 of the 1986 Act.

162. There is, as it seems to me, this further difficulty.

163. The question is ultimately one of statutory construction: what is meant by the statutory requirement of "purpose" in section 423(3) of the 1986 Act, read in its context, and what does it require?

164. Mr Edwards' submission was that, where the transferor is insolvent at the time of the transfer, the fact that the consequence of a transfer made at an undervalue is to prejudice the interests of creditors results, in and of itself, in an inference or presumption that the statutory requirement for a Prohibited Purpose is made out.

165. If true, however, this means that, although (as Mr Edwards accepts) insolvency is not a prerequisite for the operation of section 423, in practical terms, section 423 cases will fall to be divided into two categories:

i) Cases where insolvency is established where, as Mr Edwards submitted in closing, a completely objective test should be applied; and

ii) Cases where insolvency is not established where proof of a subjective, positive intention on the part of the transferor to achieve a Prohibited Purpose is required.

166. That the same statutory language might, depending upon the circumstances, have two meanings is an inherently difficult proposition to accept. Although Mr Edwards is right that the financial condition of the transferor is always likely to be a relevant factor, if his argument were right the question of whether the transferor was formally insolvent at the time of the transfer would become a critical enquiry because it would change the nature of the test.

167. In deference to the detail of Mr Edwards' submissions, and in light of the fact that the point was not argued before me in the *Integral* case, I have dealt with his argument as to the proper approach to the Prohibited Purpose requirement at some length. Having

done so, however, I see no need to add to or amend the statement of principles set out in paragraph 118 above.

168. To be clear:

i) Section 423(3) requires proof of a subjective, positive intention on the part of the transferor to achieve a Prohibited Purpose;

ii) That intention may be, and very often is, inferred from the circumstances, and the Prohibited Purpose need not be the only, or even the dominant or predominant, purpose of the relevant transaction; but proof that the consequence of the transaction is to put assets beyond the reach of creditors is not, in itself, enough.

3. The parties' cases

169. The Bank set out its case in relation to the transfer of the Warren House Property in paragraphs 23 to 25 of its Amended Particulars of Claim.

170. The Bank said that it was to be inferred that Mr Almakhawi Sr did not intend to make a gift of the Warren House Property to his son, but that he intended to retain the beneficial ownership, displacing the presumption of advancement. It pleaded that this inference was to be drawn in view of:

i) The timing of the transfer of the property on 8 July 2019, the day after the decision of the Court of Cassation (see paragraph 48 above);

ii) The fact that the transfer of the property was made by (what it termed) a "bare" form TR1, not by deed of gift;

iii) The fact that Mr Almakhawi Sr had continued to pay (up to at least November 2021) the council tax and utilities due in respect of the property, notwithstanding its transfer to Mr Almakhawi Jr more than two years earlier; and

iv) A pattern of other divestments: these included the Money Transfers made in August and October 2019, but also:

a) Gifts purportedly made by Mr Almakhawi Sr to Mr Almakhawi Jr and his two other children on or about 20 November 2018 of four different properties (three residential and one commercial) in Dubai with a combined recorded value of AED 195 million;

b) A gift purportedly made by Mr Almakhawi Sr to Mr Almakhawi Jr and his two other children on or about 28 February 2019 of a further property in Dubai with a recorded value of AED 10 million;

c) The transfer by Mr Almakhawi Sr to Mr Almakhawi Jr on or about 7 March 2019 of a 95% shareholding in a Dubai-registered company, United Makgroup Technologies LLC ("Makgroup"); and

d) The transfer by Mr Almakhawi Sr on or after 19 September 2019 of a residential apartment building at 39 East 29th Street, New York, NY 10016 ("the New York Property") into the Redington Trust (see below).

171. The Bank pleaded that the result of these transfers, according to the position taken by Mr Almakhawi Sr in enforcement proceedings in Dubai, was that his only remaining assets were a car of modest value, a bank account the only sums standing to the credit of which were derived from his pension which could not be attached, and one property which had since been sold.

172. In support of its alternative case under section 423 of the 1986 Act, that the transfer of the Warren House Property had been made for a Prohibited Purpose, the Bank relied upon:

i) The timing of the transfer: see paragraph 170 i) above;

ii) The fact that a deed of gift was executed only on 23 July 2019, after the transfer had taken place, and so the transfer was made by a "bare" form TR1: see paragraph 170 ii) above; and

iii) The pattern of other divestments and the result: see paragraphs 170 iv) and 171 above.

173. Similar matters were relied upon by the Bank in support of its case that the Money Transfers were not intended by Mr Almakhawi Sr to be gifts, and that the credit balance in Mr Almakhawi Jr's account was held on resulting trust for Mr Almakhawi Sr; alternatively, that the Money Transfers were transactions in defraud of creditors within the meaning of section 423 of the 1986 Act.

174. The Defendants' pleaded case in relation to both the transfer of the Warren House Property and the Money Transfers was, in essence, that they involved succession or inheritance planning, taking place against the background of a dispute within Mr Almakhawi Sr's family about an inheritance and a desire to avoid the same problem arising again: see paragraph 18 of the Amended Defence:

> "In around 2010, in view of his advancing years and also financial disputes which had arisen between him and his siblings, [Mr Almakhawi Sr] formed an intention to transfer assets to his children as an 'inheritance' while he was still alive. His wish was to minimise the risk of disputes between them after his death and to avoid the complications of a Sharia-compliant (post-mortem) inheritance. After the death of his brother Mohamed Almakhawi in November 2014, which precipitated a bitter inheritance dispute which continues to this day, that intention on the part of [Mr Almakhawi] developed into a plan. In pursuance of that plan, and for the purposes described above in this paragraph, he first transferred to his children properties in Dubai (see paragraph 24 below) and then his flat in London, 193 Warren House, which he wished to gift to his son, [Mr Almakhawi Jr]. In respect of 193 Warren House, [Mr Almakhawi Sr] had the additional motivation that [Mr Almakhawi Jr] had paid substantial amounts of money to or on behalf of his father over the preceding few years."

175. As is apparent from the final sentence of this paragraph, whilst the principal motivating factor for the transfers was said to be inheritance planning, reliance was also placed in relation to the transfer of the Warren House Property on payments that had allegedly been made previously by Mr Almakhawi Jr either to on behalf of Mr Almakhawi Sr: a schedule exhibited to Mr Almakhawi Sr's witness statement listed some eight payments totalling AED 16,699,339.89.

176. I should note that the matters relied upon by the Defendants in their witness statements in support of their case that the purpose of the transfers was succession or inheritance planning and not a Prohibited Purpose covered a broader range than the matters pleaded by the Bank; they included, for example, the transfer made by Mr Almakhawi Sr in 2017 of some $21 million into a Jersey trust known as the Violet Trust.

177. As these additional matters were part of the Defendants' case, I have necessarily had to consider whether they are made out and whether the facts relating to them are consistent or inconsistent with the Defendants' case that the transfer of the Warren House Property and the Money Transfers were not made for a Prohibited Purpose. I make clear, however, that it is no part of my task to make findings as to the propriety of any other transfers or as to the ownership of any other transferred assets.[5]

4. The witnesses

178. In the next section of this judgment I address the facts relating to and surrounding the transfers in detail.

179. I should say something first, however, about the evidence of Mr Almakhawi Sr, the principal witness in relation to these matters, and also about the evidence given by his son, Mr Almakhawi Jr.

180. As I stated in paragraph 2 above, Mr Almakhawi Sr is a well-educated man, who has held a number of positions of prominence on behalf of the UAE. Patently, he is – or at least he was at one time – a wealthy man with substantial business interests. By the time of the trial before me, however, he was a man of advanced years.

181. On the morning of the first day of the trial (a Monday) during Mr Edwards' oral opening submissions, I was handed a medical report, which had been sent by the Defendants to the Bank over the preceding weekend, relating to Mr Almakhawi Sr's health. The report was prepared by Dr Kenneth Mackinnon Mitchell, a consultant psychiatrist in Dubai.

182. Although I was not shown it, I was told that a medical report had previously been submitted to the court in support of an application, heard at the Pre-Trial Review earlier this year, for Mr Almakhawi Sr to give evidence by video link. That report had apparently indicated that Mr Almakhawi Sr suffered from ostitis, a bone condition, and

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5 I was told by Mr Edwards that proceedings had been commenced in Jersey in which the Bank was seeking to unwind the Violet Trust, but I know little about those proceedings, and the status of the Violet Trust is not for me. The same is true in relation to the Redington Trust, which I describe below. Both trusts are expressly governed by Jersey law and subject to Jersey jurisdiction. Mr Lewis suggested in his closing note that these divestments are themselves subject to the presumption of advancement, but I make no findings about that.

so was advised not to travel, but it had disclosed no other difficulty he might have in giving evidence.

183. So far as Dr Mitchell's report is concerned, this explained that Dr Mitchell had examined Mr Almakhawi Sr on 24 February 2023, *i.e.*, on the Friday preceding the hearing, and that he had done so remotely by video link, speaking at the same time with Mr Almakhawi Sr's daughter, who was able to give him a history of her father's mental health and memory problems.

184. Dr Mitchell was candid in his report that:

> "As is typical in such cases, his daughter is far better able to recount and describe these symptoms because the nature of the condition adversely affects the sufferer's insight, making it difficult for the patient to remember and describe their symptoms in any detail or in any logical or chronological order."

His report set out the description he had been given by Mr Almakhawi Sr's daughter (who did not give evidence before me) of the difficulties Mr Almakhawi Sr had apparently experienced previously in responding to persistent, detailed questioning in court.

185. Dr Mitchell did, of course, examine Mr Almakhawi Sr (remotely) himself. He described how he responded promptly and well to simple, non-specific questions, but he said that when Mr Almakhawi Sr was asked more searching questions he exhibited doubt, confusion and delay. Dr Mitchell's expressed opinion was that:

> "[Mr Almakhawi Sr] appears to be suffering from the following conditions and symptoms, which are likely to have been largely caused, and/or exacerbated by, the prolonged high stress and distress from many years of protracted intense legal action and court appearances:
>
> 1. Major Depressive Disorder
> 2. Anxiety Disorder
> 3. Panic Attacks / Panic Disorder
> 4. Insomnia and sleep deprivation
> 5. Chronic Confusional State."

186. Dr Mitchell did not say, and Mr Lewis did not submit, that Mr Almakhawi Sr was not fit to appear in court; but he qualified his statement that Mr Almakhawi Sr was fit to appear in the following way:

> "[Mr Almakhawi Sr] is currently fit to appear in Court but I qualify this statement as follows: I respectfully advise the Court(s) that all the above mental health conditions and symptoms suffered by [Mr Almakhawi Sr], will be significantly exacerbated by the very high stress of court appearances and persistent detailed questioning. As a result of the aforementioned mental health conditions and stressful Court appearances and questioning, [Mr Almakhawi Sr] will inevitably exhibit: significantly impaired recall; difficulty and delays in comprehending and

responding to questions; confusion, vagueness, inaccuracies, factual errors and inconsistencies in answers; great difficulty organising his thoughts and answers; severe difficulty with organising and recounting answers in terms of chronology, dates, names of persons, lawyers and firms; confusion, uncertainty, hesitation, vagueness, factual errors, chronological errors and inconsistencies in answers to questions, particularly regarding which person, lawyer or legal firm made which particular comments or statements, whether written or verbal."

187. Dr Mitchell was not called to give evidence; but notwithstanding that, and although his report was only based on an initial, remote examination of Mr Almakhawi Sr, combined with the history given to him by Mr Almakhawi Sr's daughter, I bore his report in mind when listening to Mr Almakhawi Sr's evidence, as well, of course, as Mr Almakhawi Sr's age.

188. The indication given to me before he commenced his evidence was that Mr Almakhawi Sr would try to give his evidence in English, but that he was likely to need an interpreter for more difficult questions. It became apparent very quickly, however, that an interpreter was generally required, and so with few exceptions Mr Almakhawi Sr gave his evidence through an interpreter.

189. Mr Almakhawi Sr's cross-examination was robust – given the nature of the case and the challenges made to Mr Almakhawi Sr's account, that was always likely to be so – but it was not, in my judgment, at any stage unfair. There was a point towards the end of his cross-examination when it was necessary to stop because Mr Almakhawi Sr said he was feeling unwell, but after a short adjournment he expressed himself content to continue.

190. In general, and notwithstanding Dr Mitchell's diagnosis and predictions, I found Mr Almakhawi to be a generally articulate witness who had little difficulty responding to questions; indeed, his answers were often very full, which caused some problems for the interpreter. His answers were, however, at times diffuse, argumentative, or sometimes both, not responding directly to the question that had been asked.

191. As the written notes of Mr Almakhawi Sr's exchanges with HSBC Private Bank record (see below), Mr Almakhawi Sr is a private person who does not like others to be aware of his affairs. This attitude carried through into his evidence, where he was generally defensive. He is obviously aware that the Bank's aim is to be able to enforce the Dubai Judgment against assets that he has either placed into trust or given away to family members.

192. There were a number of occasions where Mr Almakhawi Sr protested his age and his lack of memory as a reason for not being able to answer a question. In some cases, quite apart from the points made by Dr Mitchell, this objection was perfectly understandable as the question concerned matters of historic detail. These protestations did, however, become more frequent as his evidence went on, and there were times when the complaint was far less easy to comprehend.

193. There were two specific occasions where Mr Almakhawi Sr's evidence was thoroughly unimpressive.

194. The first was when he was asked about what I describe below as the December 2015 Letter, where I am quite sure that Mr Almakhawi Sr understood both the questions that were being asked and their importance given his defence in these proceedings, but where he professed not to understand, or protested the relevance of, what was being asked.

195. The second occasion concerned Mr Almakhawi Sr's disposal of his interest in Makgroup, where the evidence given in his witness statement, which he largely stuck to in his oral evidence, was flatly contrary to the documents that I was shown. The disparity was such that it is difficult to regard his evidence on this matter as anything but a straightforward untruth.

196. Generally, I consider that Mr Almakhawi Sr's evidence needs to be approached with real caution. Quite apart from the points made above, many of the things he said in his witness statement, if true, were matters that one would have expected to be the subject of correspondence or documented, or supported by other witness evidence; but the material produced was either non-existent or scant.

197. Mr Almakhawi Jr was a more straightforward witness, although he was plainly irritated by some of the questioning. He made clear that he had no or limited involvement in, or knowledge of, his father's businesses beyond what his father had told him. He said that did not know of the Dubai Proceedings in the beginning but only later after the judgment.

5. The facts

(a) The Dubai Proceedings; a reminder

198. I set out the chronology of events in relation to the Dubai Proceedings earlier in my judgment. As the temporal context of the transfers is an important part of the Bank's case, by way of reminder:

i) On 28 December 2014 System Construct Dubai was placed into liquidation;

ii) On 19 October 2015 the Bank commenced the Dubai Proceedings against Mr Almakhawi Sr and others;

iii) On 16 January 2017, the Dubai Court of First Instance entered judgment against Mr Almakhawi Sr for AED 142,303,347.42 plus interest;

iv) On 27 February 2019, the Dubai Court of Appeal dismissed Mr Almakhawi Sr's appeal ordering him to pay the revised sum of AED 218,299,040.31 plus interest; and

v) On 7 July 2019, the Dubai Court of Cassation dismissed Mr Almakhawi Sr's further appeal, giving judgment for the revised amount of AED 211,299,040.31 plus interest.

199. As explained below, the transfer of the Warren House Property was put in motion after the (adverse) decision of the Dubai Court of First Instance and shortly before the judgment of the Court of Appeal, although it was formally executed after the judgment

of the Court of Cassation. The Money Transfers were also made after the decision of the Court of Cassation.

(b) The death of Mr Almakhawi Sr's brother

200. On 21 November 2014 Mr Almakhawi Sr's brother, Muhammad Abdulazeez Muhammad Al-Makhawy Al -Swaidy ("Mr Al-Swaidy"), died.

201. Mr Al-Swaidy had no wife or children, but he had three siblings: two brothers, including Mr Almakhawi Sr, and a sister. His estate was divided between them in accordance with Sharia law. On 21 December 2014 the Dubai Court of Personal Status named Mr Almakhawi Sr and his siblings as the legal heirs of his brother's estate.

202. Mr Almakhawi Sr said in his witness statement that the death of his brother in November 2014:

> "… led to a bitter inheritance dispute between my siblings, which still remains unresolved to date."

203. If there had been such a "bitter inheritance dispute", now lasting over eight years, I would have expected to be shown court filings or other documents evidencing that dispute, but with one exception (to which I attach little weight) there were none.[6] It was obviously open to Mr Almakhawi Sr to adduce evidence from his Dubai lawyers in relation to the dispute, but no such evidence was produced.

204. A letter from the Dubai Court of Personal Status, Head of Department, Estates Department dated 10 January 2022 does, however, confirm that, although there is no issue about the shares in which Mr Al-Swaidy's siblings are to inherit Mr Al-Swaidy's estate, the distribution of the estate is not yet complete:

> "Court of Personal Status hereby certifies that the file of the inheritance, belonging to the above-mentioned deceased/Muhammad Al-Makhawy Al -Swaidy, has been registered dated 24-08-2015 AD. His inheritance was limited to his two brothers/Rashid and Salim and to his Turkish sister. The legal division was determined by five shares, each brother is entitled to two (2) shares, while the sister is entitled to one (1) share. So far, the distribution of the inheritance elements and the proportion of each heir have not been finalized. The property located in Umm Al Quwain has been transferred in the name of the heirs. In addition, the inventory has been transferred to the heir/Rashid Abdulazeez Al-Makhawy, deducting from his proportion in an amount of (AED 19453645)."

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6 The exception is a document that appeared at the back of one of the chronological bundles entitled "Detailed summary of the estate of the Deceased/Muhammad Abdul-Aziz Al-Mokhawi brother of Rashid Abdul-Aziz Al-Mokhawi". This appeared to describe events going back to Mr Al-Swaidy's death in 2014, but I was told that the metadata indicated that the document was not contemporaneous but had been prepared in January 2022. The Bank had served a Notice to Prove under CPR 32.19 in relation to the document; but, notwithstanding that notice, no evidence was adduced as to its authenticity or content. It was not clear who had prepared the document, for what purpose, and on the basis of what primary sources.

205. As the last sentence of this passage indicates, however, there has been a partial distribution. On 30 October 2015, as his bank statements showed, and as he confirmed in his witness statement and in cross-examination, Mr Almakhawi Sr received $20,917,358.42 from his deceased brother's trust (the Atlantic Star Trust), which he deposited in an account with HSBC Luxembourg.

(c) The December 2015 Letter

206. Mr Almakhawi Sr's pleaded case (see paragraph 174 above) was that in around 2010, in view of his age and disputes with his siblings, he formed an intention to transfer assets to his children as an inheritance; and that, after the death of his brother in November 2014, and in the context of the supposed bitter inheritance dispute, that intention had developed into a plan.

207. There was, however, no evidence whatsoever, either in his witness statement or elsewhere, to support Mr Almakhawi Sr's pleaded case that he formed the intention to transfer assets to his children in 2010. Mr Almakhawi Sr himself effectively disavowed this part of his pleaded case during the course of his cross-examination:

> "Q. You say in your statement at paragraphs 37 and 54 that you started succession planning in 2015. That is your evidence, is it not?
>
> A. Yes, this is true.
>
> Q. You do not in your witness statement talk about succession planning in 2010, do you.
>
> …
>
> A. This subject happened in 2015 and not 2010."

208. Indeed, notwithstanding his reference to 2015, there is, in fact, little evidence of any steps being taken by Mr Almakhawi Sr to transfer assets until the middle of 2017, after the case in the Dubai Court of First Instance had been fought and lost; and even then, as explained below, the transfers made in 2017 were not made directly to his children.

209. The sole exception is a manuscript Arabic document, referred to in (but not exhibited to) Mr Almakhawi Sr's witness statement and produced by the Defendants on 20 December 2022, very shortly after his witness statement was served, long after the date set by the court for Extended Disclosure in these proceedings.

210. The document is in the form of a manuscript letter from Mr Almakhawi Sr to his (then) lawyers, DAA. It reads (in translation) as follows:

> "In view of the problems that happened in the estate of my brother Mohamed Al-Makhawi, which you are aware thereof, in your capacity as the lawyers who defend me in the estate mentioned above, I decided to transfer all my property, inside and outside, in the name of my children avoiding any disputes that may arise in the future among them, noting that you have all papers and documents related to my property. I trust that you will complete such actions and you have the right to duly enlist any of the bodies and persons that have competence and experience."

211. The document bears a note at its foot, which reads (again, in translation):"We, Dar Al Adalah, received on 29/12/2015".

I refer to the document for this reason as "the December 2015 Letter"; but that label is applied simply for convenience and should not be understood as indicating that I accept that the document represents a letter that was created or sent by Mr Almakhawi Sr to DAA in that month.

212. The December 2015 Letter is not an original document but a PDF. Its date of creation, I was told, can be seen from the metadata to have been 19 December 2022, the day before it was provided to the Bank. The Arabic document bears a stamp of Al-Ahram Translation Services ("AATS") by whom an English translation of the document has been prepared which bears the same stamp.

213. As is obvious, AATS must have been given an unstamped December 2015 Letter, either the original or a copy; they then stamped it with their own stamp, one assumes to show their receipt of the document, and then produced an English translation, which they again stamped. Neither the unstamped document presented to AATS nor the original stamped document they generated has, however, been disclosed.

214. On 23 December 2022 the Bank served a Notice to Prove under CPR 32.19 in relation to this and other documents. A table attached to Mr Edwards' skeleton argument explained the Bank's position in relation to this document, and also what had emerged when the Bank's Dubai lawyers had sought to inspect the original of the document disclosed to them:

> "This PDF document was not included in the Defendants' original batch of Extended Disclosure. It was provided late on 20 December 2022. The First Defendant appears to make reference to this document in his witness statement for trial stating (at paragraph 39) that he has 'a letter formally instructing DAA to start transferring my assets as a part of succession planning in 2015 and I will provide a copy of this letter as soon as I am able'. DWF asked to inspect the original letter which SCW said was being held with the Defendants' lawyers in Dubai. However, upon visiting their offices, DWF were informed that the Defendants' lawyers are only holding a copy of this document and not the original."

215. Mr Almakhawi Sr was unable to explain the location of the original document in his oral evidence. If the December 2015 letter was genuine and if it had been sent, then the original ought to have been in the possession of DAA, whose file Mr Almakhawi Sr said had been handed to MA, and thus within his control, but it was not disclosed. He had no explanation as to why the original had not produced, or who had taken the copy to the translator to be translated.

216. Mr Almakhawi Sr was then asked when and where the document had been between September, the date for Extended Disclosure, and December 2022, when it was disclosed. He said that he did not know, and he complained about the unreasonableness of the question. As I indicated earlier, this was unimpressive; as the only document suggesting that Mr Almakhawi Sr had started inheritance planning in 2015, before judgment had been given against him in Dubai, I am quite sure that he appreciated its significance.

217. The informality of the December 2015 Letter is notable; it was written in manuscript. But there are further curiosities:

i) Mr Almakhawi Sr relies upon the letter as an instruction to his lawyers, but its content is remarkably vague;

ii) The letter refers to transferring "all my property, inside and outside, in the name of my children", but it contains no explanation of what the property actually is, or as to which of Mr Almakhawi Sr's children is to get what item(s) of property. It seems unlikely to be a set of instructions upon which a lawyer could properly act, at least without asking further questions;

iii) But insofar as DAA, to whom the letter was supposedly sent, might have asked for more specific instructions, there was no documentary evidence that Mr Almakhawi Sr was asked for or gave any such instructions, or that he met with DAA in 2015 to discuss the transfer of his property to his children, or that DAA made any attempt to effect such a transfer.

218. Given, in particular, the Notice to Prove, one would have expected Mr Almakhawi Sr to adduce evidence – nothing more than a short witness statement would have been required – from DAA to confirm that they did indeed receive the December 2015 Letter on the date noted on the document. But no such evidence was produced.

219. The contrast between what is said to have happened in December 2015 and what happened in 2017 and 2019, when Mr Almakhawi Sr undoubtedly did take steps to transfer his assets, is, furthermore, striking. In 2017 and 2019 matters were organized by Mr Almakhawi Sr through his wealth managers, HSBC Private Bank (Suisse) SA ("HSBC Private Bank"), and it was through HSBC Private Bank that lawyers were engaged and trusts were set up for the transfer of assets to his children and more generally. None of this occurred in 2015.

220. So far as this last point is concerned, Mr Lewis said in his oral closing submissions that Mr Almakhawi Sr "is obviously someone who is surrounded by advisers". Given his one-time wealth, I accept that this is highly likely to be the case; but if it is, and if a decision was taken by Mr Almakhawi Sr in 2015 to engage in succession planning, then one would have expected to see a documentary trail which involved those advisors, but there was none.

221. The position is, in fact, worse than that. Mr Almakhawi Sr *was* in contact with HSBC Private Bank in late 2015, but it was not in connection with inheritance planning or a proposal to transfer assets to his children but in connection with a possible investment for his own benefit. An HSBC Call Report of a meeting that took place with Mr Almakhawi Sr on 5 November 2015 gives the following details:

> "Met client who recently credited $21m from HSBC Jersey trustees. Courtesy meeting as was outside DIFC. Client indicated that he is a very conservative investor and is not comfortable with fluctuations of the market. Client indicated that he will invest $5m and see what performance will be and might invest further going forward. Agreed that we would provide an investment proposal to Mohamed Hadi, his PAO in DIFC which will be discussed in compliance with DFSA rules and potentially invested accordingly. Client is shortly travelling to London and

> Germany where he has homes (extended invitation to Luxembourg). Discuss with David and prepare proposal for M Hadi to present to client."

222. On the balance of probabilities, bearing in mind the form and content of the document, the circumstances in which it was disclosed and the other matters described in the paragraphs above, I am not satisfied that the December 2015 Letter is genuine, *i.e.*, that the PDF document produced represents a letter that was actually written and sent by Mr Almakhawi Sr and actually received by DAA on the date that it bears in December 2015.

223. Far more likely, in my judgment, is that the December 2015 Letter is a construct: it is a document created recently (precisely when and by whom is unclear) with a view to demonstrating that Mr Almakhawi Sr was engaged in estate planning and took steps to transfer his assets to his children in late 2015, before he was found liable in the Dubai Proceedings, far earlier than he in fact did.

(d) The Violet Trust

224. Whether the December 2015 Letter is genuine or not, I was shown nothing to indicate that any concrete steps were taken by Mr Almakhawi Sr to dispose of or to transfer assets to his children at any time prior to 16 January 2017, when judgment was given against him by the Dubai Court of First Instance.

225. On 11 June 2017, some five months after the decision of the Dubai Court of First Instance, Mr Almakhawi Sr met with HSBC Private Bank. A HSBC Individual Meeting Report dated 11 June 2017 (partially redacted) records the content of the meeting. Mr Almakhawi Sr is referred to in it as "RAM":

> "The meeting was being held as [redacted] and wished to set up the same for the money that had been distributed to him from this Trust.
>
> RAM is a very private person and does not like others to be aware of his affairs. Most of his assets are held in cash and he wants to protect this for his family whilst ensuring that Sharia applies in terms of distribution.
>
> [Redacted] went through the MENA Deed Questionnaire and explained to him a Trust, the parties to a Trust, the pros and cons and provided live examples. RAM made it clear he wanted his Trust to reflect that of [redacted] with his children as beneficiaries. Following his death the Trust Fund is to be distributed. [Redacted] confirmed that this could be arranged.
>
> RAM expressed the importance to having the documents be ready for him to execute for him to execute before Eid and a meeting for 19 June 2017 was agreed."

226. Mr Edwards put to Mr Almakhawi Sr that, consistent with the second paragraph of this report, he had told HSBC Private Bank that the purpose of the proposed trust was to protect his assets for the benefit of his family, obviously to avoid them being taken by his creditors. Mr Almakhawi Sr said that he did not remember, but he denied that there was any relationship between the Dubai Proceedings and the instructions to HSBC Private Bank:

"A. There is no relation between the judgment and when I instruct my bank.

…

Q. You had $21 million in a bank account in Luxembourg which you knew your creditors would be able to attach, to execute against, if they found out about it. That is why you settled the Jersey trust, to protect that money for your family, to put it beyond the reach of creditors. That is true, is it not?

A. Okay, so the bank suggests – this is not true, because the bank comes to me with the idea of investments and I let them get on with it. The court – the judgment against me was unjust and in reference to several experts."

227. Mr Almakhawi Sr's reference in this last answer to "… the bank com[ing] to me with the idea of investments" gives the impression that it was HSBC Private Bank that came up with the idea of putting his assets into a trust, but that is not consistent with the HSBC Meeting Report. It is noteworthy that, although Mr Almakhawi Sr received a $21 million distribution from his brother's estate in October 2015, action to put the amount into trust was taken only in June 2017, after the Dubai Court of First Instance judgment.

228. As reflected in the Meeting Report, HSBC Private Bank prepared a MENA Deed Questionnaire for Mr Almakhawi Sr in relation to the proposed trust. The questionnaire noted that Mr Almakhawi Sr was not to be sent emails and was only to be contacted by mobile telephone because he was "concerned [about] safety/confidentiality". Based on what Mr Almakhawi Sr had told them, HSBC Private Bank put his total net worth at $200 million, including cash and a number of properties including the New York Property and the Warren House Property. The questionnaire indicated that Mr Almakhawi Sr's intention was to transfer $20 million into the trust initially, possibly increasing to $40 million.

229. At some point during this period HSBC Private Bank drew up a more formal Source of Wealth document in relation to Mr Almakhawi Sr. As reflected in an Individual Meeting Report, a further meeting took place between Mr Almakhawi Sr and HSBC Private Bank on 8 October 2017 specifically for the purpose of Mr Almakhawi Sr providing additional source of wealth information.

230. The completed document referred to:

i) Mr Almakhawi Sr's ownership of 95% of the Rashed Al Makhawi Enterprises Group, which was said to have diversified interests in a number of industries; and

ii) The audited financial statements of the group for the year ended 31 March 2016, which were said to show the AED equivalent of $9,260,008 in revenue and $8,936,449 in assets.

231. There was some debate during Mr Almakhawi Sr's cross-examination about the status of his ownership of Rashed Almakhawi Enterprises LLC, which was subsequently renamed United Makgroup Technologies LLC, *i.e.*, Makgroup.

232. Mr Almakhawi Sr had said in paragraph 46 of his witness statement that he originally held a 95% shareholding in Makgroup, [7] but that he sold 45% of his shareholding in 2010. Mr Almakhawi Sr went on to say that, as a result of a dispute with the other shareholders, he was "pushed out" and was forced to sell his remaining 45% shareholding for no consideration.

233. The timing of Mr Almakhawi Sr's suggested disposal of 45% of his shares does not, however, fit with what he told HSBC Private Bank: see paragraph 230 above. Nor does it fit with a Government of Dubai printout showing the commercial license status of the company as at 12 April 2017, which showed that Mr Almakhawi Sr still held a 95% shareholding in the company as at that date.

234. Furthermore:

i) Data obtained by the Bank from the Dubai Department of Economic Development suggested that Mr Almakhawi Sr may have only ceased to be a shareholder, if he had, on 7 March 2019;

ii) The identity of the person or entity to whom Mr Almakhawi Sr's shareholding in Makgroup had been transferred, if it had been, was not disclosed nor were any documents showing the terms of the disposal;[8]

iii) Mr Almakhawi Sr patently had an ongoing connection with Makgroup as late as October 2019 when an email was sent by Makgroup's Chief Accountant on his behalf to HSBC Private Bank; and

iv) As late as 11 December 2021, as apparent from a letter he sent to HSBC in London, seeking copies of bank statements for the purposes of disclosure in this litigation, Mr Almakhawi Sr still operated a Makgroup email address rashed@makgroup.ae.

235. Mr Almakhawi Sr protested that his witness statement was accurate; that he had disposed of 45% of his shares in the company in 2010; that he "… gave it up almost for free to my friend because he [the friend] had the ability to run it" - notably, not that Mr Almakhawi Sr had been pushed out (which seems improbable if he was a 95% shareholder) - and that he was not lying.

236. The disparity between Mr Almakhawi Sr's evidence and what the documents showed was, however, marked. I do not accept his evidence on this topic. I note that, if what he said in his evidence to the court was true, then he would have lied to HSBC Private Bank when he told the bank in 2017, in the context of the Source of Wealth document, that he remained a 95% shareholder in Makgroup at that time.

237. So far as the trust is concerned, draft documents were provided to Mr Almakhawi Sr at a meeting with HSBC Private Bank on 19 June 2017. The bank's Meeting Report notes that Mr Almakhawi Sr reviewed them then but that he did not want his own trust deed

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7 Mr Almakhawi Jr confirmed in his oral evidence that he owned the other 5%.

8 The Bank pleaded that Mr Almakhawi Sr's shareholding in Makgroup was transferred to Mr Almakhawi Jr, but there is insufficient evidence for me to find that this was the case.

to be the same as that for his deceased brother. The documents were then amended and brought into line with his letter of wishes.

238. On 23 October 2017 a Settlement Deed was executed between Mr Almakhawi Sr (as Settlor) and HSBC Trustee (C.I.) Limited, Jersey ("HSBC TCI") (as Original Trustee) creating a Jersey trust named the Violet Trust. Far from giving his assets away absolutely, the deed stipulated in clauses 3 and 4 that, subject to the consent of the trustees, the trust was revocable at Mr Almakhawi Sr's option and was also capable of variation or amendment by him.

239. A Letter of Wishes executed by Mr Almakhawi Sr on 25 October 2017 stated that:

> "My reasons for settling the Trust include:
>
> - to benefit the beneficiaries and provide for their education advancement, maintenance and support;
> - a desire to avoid the delay, and hardship which can be brought about by lengthy probate procedures;
> - succession planning; and
> - to protect the assets in the Trust as much of possible from disruptive events such as the bankruptcy of a beneficiary."

240. The only discretionary lifetime beneficiary of the Violet Trust was Mr Almakhawi Sr, and he was entitled under clause 8 to direct the trustees to pay over to him the whole of the income of the Trust Fund. The trustees were also permitted to pay over the whole or part of the Trust Fund itself to Mr Almakhawi Sr during his lifetime. After his death, the Trust Fund was to be distributed to his children.

241. On 21 December 2017 Mr Almakhawi Sr gave instructions for $20,911,312.82 (identified in an HSBC Private Bank Call report as the "full balance and investments") to be transferred from his account at HSBC Luxembourg to Voijin Investments Limited, the nominated Investment Company under the Violet Trust to be added to the trust's nominal initial assets of AED 100.

(e) The transfer of the US property

242. On or about 20 November 2018, while his appeal in Dubai was pending, Mr Almakhawi Sr transferred four properties in the Al Garhoud and Oud Metha areas of Dubai with a combined recorded value of AED 195 million to his children. A further Dubai property with a recorded value of AED 10 million was transferred to his children in February 2019.

243. On 12 February 2019, after the final hearing in the Dubai Court of Appeal and shortly before the court's judgment was issued, Mr Almakhawi Sr met with HSBC Private Bank again. The summary contained within the HSBC Private Bank Meeting Report records some initial discussion about the Violet Trust and the Letter of Wishes, but it then moved on to other matters:

> "RAAM then made reference to his UK Premiere account explaining that he had received a letter from them requesting additional due diligence. RAAM provided CB with a copy of this letter and she confirmed that she would deal with this matter. CB asked what currency the funds in this account were held in. RAAM informed CB that the monies were held in sterling. CB suggested that RAAM consider converting this to USD as IHT would be payable if held in GBP on RAAM's passing. RAAM confirmed that he would do this and also informed MH that he wanted an account open with Premiere in the UK for his son in respect of the UK property to be gifted to his children (see below).
>
> RAAM then made reference to two properties that he owns. One in the UK located at 193 Warren House, 185 Beckford Close, W14 8TR, which he purchased in 2008/2009 for circa GBP1.6m. The second in New York in the US which was purchased two years ago for circa USD1.65m.
>
> RAAM wants to understand what he needs to do for succession planning in respect of these properties. CB recommended that RAAM first obtain a valuation for the property in the UK (he wants to gift this property to his three children who are all resident in the UAE) and obtain tax advice for the property in the US (which he is considering gifting to his daughter). RAAM requested that CB arrange this on his behalf."

244. Mr Almakhawi Sr confirmed in cross examination that this 12 February 2019 meeting was the first occasion on which he had mentioned to HSBC Private Bank a desire to transfer the Warren House Property.

245. Mr Almakhawi Jr suggested that he and his father had previously agreed that his father would hold the Warren House Property on trust for him as a way of paying him back for the monies that Mr Almakhawi Jr had allegedly paid on his behalf (see below); however, if there was such an agreement:

i) There is no evidence of any steps taken by either of the Defendants in that regard prior to 2019 to document any such trust; and

ii) There is nothing to suggest that Mr Almakhawi Sr informed HSBC Private Bank when he met them that there was an agreement to that effect and that he was already holding the Warren House Property (which, according to the Meeting Report, he said he wanted to gift not to Mr Almakhawi Jr but "to his three children") on trust for Mr Almakhawi Jr.

246. This meeting took place some time after the decision of the Dubai Court of First Instance, but there is also no indication that Mr Almakhawi Sr told HSBC Private Bank in this meeting, or indeed back in June 2017 when HSBC Private Bank was preparing a Source of Wealth document, that judgment in the Dubai Court of First Instance had gone against him or that he faced a very sizeable claim from the Bank running into many $ millions.

247. Initially, when asked about this, Mr Almakhawi Sr was indignant and defensive:

> "Q. You didn't tell HSBC about it, did you?

A. So why would I – every time there is a problem I have to run to HSBC and inform them.

Q. You were going to HSBC saying you were going to gift a property to your children and you didn't tell them about the judgment against you, did you? That is the question.

A. What has the bank got to do with the judgment – that is a bank, why …"

In response to a question from me, Mr Almakhawi Sr simply said that he did not remember informing HSBC that there had been a judgment against him in Dubai.

248. It is almost inevitable that, if the fact of the judgment had been communicated to HSBC Private Bank, some reference to it would have appeared in the HSBC Meeting Reports. Quite apart from any concern the bank might have had about the propriety of his proposed asset transfers, the judgment would have had a material impact upon Mr Almakhawi Sr's net wealth as reflected in the Questionnaire and the Source of Wealth document. It is plain that it was not disclosed.

249. In relation to the property in New York – the US Property – the documents showed that a decision was taken by Mr Almakhawi Sr in around June or July 2019 that the property would be transferred to a non-US corporation the shares in which would be held by a non-US trust. The non-US corporation was ultimately called Redington Holdings Limited; the non-US trust was called the Redington Trust.

250. On 9 October 2019 a Settlement Deed was executed between Mr Almakhawi Sr (as Settlor) and HSBC TCI (as Original Trustee) creating the Redington Trust. As with the Violet Trust, the settlement was revocable by Mr Almakhawi Sr, and he was the sole discretionary lifetime beneficiary. Redington Holdings Limited was the identified Investment Company.

251. On 24 October 2019 HSBC TCI and HSBC Private Banking Nominee 3 (Jersey) Limited signed Declarations of Trust acknowledging that they held the shares in Redington Holdings Limited as nominee and on trust for Mr Almakhawi Sr. The New York Property was subsequently transferred by Mr Al Makhawi Sr to Redington Holdings Limited; the precise date of the transfer is unclear.

252. An Instrument of Gift records that on 1 July 2021 Mr Almakhawi transferred his shares in Redington Holdings Limited to the trustees of the Redington Trust. Declarations of Trust were subsequently executed by HSBC TCI and HSBC Private Banking Nominee 3 (Jersey) Limited acknowledging that they held the shares as nominee and on trust for HSBC TCI as trustee of the Redington Trust.

(f) The transfer of the Warren House Property

253. The long lease of the Warren House Property had been purchased by Mr Almakhawi Sr in January 2007. There was at one time a mortgage on the property, but this was discharged in February 2017.

254. On 11 March 2019, following and pursuant to the discussion at the 12 February 2019 meeting with Mr Almakhawi Sr (see paragraph 243 above), and having in the meantime

received a valuation report for the Warren House Property, HSBC Private Bank contacted English solicitors, Charles Russell Speechlys LLP ("Charles Russell") to deal with the transfer.

255. HSBC Private Bank's introductory email said this:

> "Kindly note that I have a UAE resident client who has a property in London which is debt free.
>
> Our client wishes to gift the property to his son and as such a valuation has been carried out, which confirms that on 5 April 2015 the property value was GBP1,750,000 and today the value is GBP1,595,000 meaning that it has declined.
>
> On this basis, I understand that no CGT is payable on the gift from father to son and all that is required is for a TR1 form to be completed and filed with Land Registry.
>
> I would be grateful if you could let me know if this is the case (or if I am missing anything) and also if you would be able to assist us in arranging the gift for which we would require an indication of your costs."

256. There were some intervening exchanges, but on 18 April 2019 Charles Russell sent HSBC Private Bank a draft letter of engagement along with its standard terms and conditions. The letter of engagement identified the scope of Charles Russell's proposed work as follows:

> "**SCOPE OF OUR WORK**
>
> The scope of our work will comprise transferring the ownership of your UK property to your son, including:
>
> 1. Preparing the deed of gift to transfer the property;
> 2. Carrying out the property transfer work;
> 3. Dealing with a licence to assign and any other landlord's requirements in respect of the transfer; and
> 4. Filing the non-resident capital gains tax return in respect of the transfer of ownership."

The reference to Charles Russell's anticipated instruction to prepare a deed of gift is of significance given the argument as to whether Mr Almakhawi Sr intended to transfer beneficial ownership of the Warren House Property to his son.

257. On 26 June 2019, having been formally engaged, Charles Russell sent an email to HSBC Private Bank saying that they were now ready to proceed with the transfer of title of the Warren House Property to Mr Almakhawi Jr, attaching a TR1 Transfer Deed for signature by Mr Almakhawi Sr (stating that it should be left undated).

258. The TR1 form, as completed, contained a section headed "Consideration". Within that section, Charles Russell placed a cross in the box confirming that:

> "The transfer is not for money or anything that has a monetary value."

The form was signed by Mr Almakhawi Sr and a scanned copy of the form was returned to Charles Russell by email on 2 July 2019 with the original subsequently sent by courier.

259. The TR1 form was ultimately completed and filed by Charles Russell with HM Land Registry, along with an AP1 form applying to change the register, on 8 July 2019. An official copy of the Register of Title for the Warren House Property dated 16 July 2019 shows that Mr Almakhawi Jr was registered as the owner of the Warren House Property on 8 July 2019.

260. On 18 July 2019 Charles Russell sent HSBC Private Bank by email:

> "… the deed of gift for the client and his son to sign in acknowledgment of the transfer".

261. The Deed of Gift between Mr Almakhawi Sr (the Donor) and Mr Almakhawi Jr (the Donee), which appears to have been signed on or around 23 July 2019, but which was ultimately dated 20 August 2019, recorded in its recitals that:

> "(B) The Donor has transferred the leasehold property known as 192 Warren House Beckford Close Warwick Road London W14 8TR and registered at the land registry with title number BGL42461 (the **Property**) to the Donee with full title guarantee.
>
> (C) The Donor wishes to confirm that the Property has been irrevocably gifted to the Donee.
>
> (D) The Donee wishes to accept the gift of the Property."

262. The operative provisions of the deed included in clauses 1 and 2 that:

> "1. The Donor hereby confirms that beneficial title to the Property has been irrevocably transferred from the Donor to the Donee by way of gift and legal ownership of the Property has transferred so that the Property is now under the Donee's control.
>
> 2. The Donee hereby acknowledges and accepts the gift of the Property and confirms receipt thereof."

263. On 5 August 2019, following the transfer of the Warren House Property to Mr Almakhawi Jr, Charles Russell sent an email to Premier Estates, the managing agent of the block in which the Warren House Property was located, in response to an email from Premier Estates advising of an outstanding debit for the service charge and credits for various utilities.

264. Charles Russell's email explained that:

> "The property was not sold rather transferred between family members. The payment arrangements/direct debit will be remaining as they were an no apportionment or refunds will be necessary."

Mr Almakhawi Sr did not dispute that he continued to pay the service charges, council tax and utility bills for the Warren House Property, but he said that the amounts were very modest, and Mr Almakhawi Jr was his son.

265. By the time Charles Russell were instructed, Mr Almakhawi Sr had lost in Dubai, both in the Court of First Instance and the Court of Appeal. By the time the TR1 form was filed, and by the time the Deed of Gift was sent and executed, Mr Almakhawi Sr had also lost in the Court of Cassation. There is no evidence that he told Charles Russell of any of these matters, and I find that he did not.

266. It was put to Mr Almakhawi Sr that he transferred the Warren House Property to his son to protect it from his creditors, but he denied that:

> "Q. Okay, what I am going to suggest to you is this. You transferred this property to your son to protect it from your creditors for the benefit of your family.
>
> A. No, this is not true.
>
> Q. There are two possibilities: either your son was holding it for you – which is consistent with the fact that you continued to meet the outgoings – or it was an out-and-out gift to protect it from your creditors.
>
> A. Okay, so I did not lose all the cases. To answer your question, it is not true in terms of the gift and the transfer. Some of these cases were lost because of Dar-Al-Adalah, and by that I mean the ex solicitors, who did not submit the paperwork on time and did not attend court, and I was outside – I was out of the country at the time."

267. He made the same denial in response to a similar question concerning his transfer of the US Property into the Redington Trust:

> "Q. One question, you gave the instruction to transfer the New York flat for the same reason as you gave to transfer the London flat. Namely to protect it from your creditors. That's correct, is it not?
>
> …
>
> A. This is part of the distribution of my assets to my children and it is my right to do so."

(g) The cheques

268. I mentioned in paragraph 175 above that, whilst the Defendants' case was that the principal motivating factor for the transfer of the Warren House Property was inheritance planning, they also relied as an additional motivating factor upon a number of payments that had allegedly been made by Mr Almakhawi Jr either to on behalf of Mr Almakhawi Sr.

269. A schedule exhibited to Mr Almakhawi Sr's witness statement referred to eight payments allegedly made by Mr Almakhawi Jr on dates between 11 October 2014 and 1 March 2021, all by cheque, in amounts ranging from AED 300,000.00 to AED 7,000,000.00. Five were said to have been made to settle debts of System Construct

Dubai for labour costs and utilities and the other three to settle Mr Almakhawi Sr's legal fees.

270. Mr Almakhawi Sr did not accept it, but as a matter of logic it is plain that the two payments allegedly made in 2021, both for labour costs, cannot have been a motivating factor when Mr Almakhawi Sr transferred the Warren House Property to Mr Almakhawi Jr on 8 July 2019, some two years earlier, or when he made the Money Transfers in August and October 2019.

271. In relation to the preceding six payments, although copy cheques relating to the payments had been disclosed the evidence was unsatisfactory for a number of reasons:

i) Bank statements for the accounts from which the payments were allegedly made, and which would show whether the cheques had been collected or cashed, had not been disclosed. Mr Almakhawi Jr said that there had been a bank merger and so it would be difficult to obtain statements, but it seems unlikely that records did not exist;

ii) The cheques, or at least PDFs of them, had been disclosed (some completed in Arabic and some completed in English; there were also in some cases translations of notations that appeared alongside the copy of the cheque), but the cheques did not appear to bear any notation or marking indicating that they had passed through clearing;

iii) There were multiple copies of at least one of the cheques, the cheque for AED 5.7 million (a cheque made out to cash), but the notations that were on the PDF appeared in at least one case to be different. It was, furthermore, not clear when and by whom the copies of the cheques had been made:

a) If the cheques had been presented and cleared, they would likely have been in the hands of Mr Almakhawi Jr's bank. Mr Almakhawi Jr confirmed, however, that he did not have cheques returned to him by his bank after they had been collected;

b) On that basis, the copies provided must have been taken before the cheques were cashed or sent to their intended recipients, if they had been. But it was not obvious, why this would have been done, or indeed who had done it;

iv) There were generally no supporting documents; in the case of the labour and utility costs, for example, there were no documents showing the make up of the costs paid, or any correspondence with the liquidator of System Construct Dubai, sums having been paid on the company's behalf which would ordinarily fall within the insolvent estate;

v) In the case of the cheques allegedly issued for the purpose of paying Mr Almakhawi Sr's legal fees, DAA did issue receipts, because such three receipts were included in the bundle; but these receipts did not correspond with the

payments identified on the schedule, and they were seemingly issued for payments made by Mr Almakhawi Sr himself;[9]

vi) The second and third of the three payments allegedly made to DAA involved cheques dated 25 February 2016; but in circumstances where Mr Almakhawi Sr had received $20,917,358.42 on 30 October 2015 (see paragraph 205 above) it was not clear on what basis it was said he was in financial difficulties and unable to make the payments himself.

272. The schedule exhibited to Mr Almakhawi Sr's witness statement was not, to be clear, a contemporaneous document, recording payments made by Mr Almakhawi Jr on his father's behalf at or around the time they were made. It was a document prepared by Mr Almakhawi Sr's lawyers recently for the purposes of these proceedings, and as such it has no evidential value of its own.

273. Mr Almakhawi Jr's response to questions about these matters was essentially that matters were dealt between himself and his father informally; that money flowed within the family both ways both to and from his father; that his role was simply to write the cheques and to hand them over to his father; and that he would do so whenever asked:

"A. As I told you, I keep repeating nearly 20 times this, for now my job was to write the cheque whenever my father asks for money. I would give him the cheque.

Q. Is that because what is mine is his, if I can put it that way, and what his is mine?

A. Exactly.

Q. Sort of family honour.

A. Exactly.

Q. If you have the money so you are morally obliged to hand it to your father and if it were the other way round he would give you the money.

A. Exactly."

274. Ultimately, given the limited reliance placed upon them by the Defendants, both in their Defence and in Mr Lewis' submissions, and although I have my doubts, I do not consider that I need to decide whether the cheques are genuine, in the sense that they were issued by Mr Almakhawi Jr, presented and collected on or about the dates they bear to settle sums owed by Mr Almakhawi Sr.

275. Mr Lewis made clear in an intervention he made during Mr Almakhawi Sr's cross-examination that the Defendants' pleaded case was not that the transfer of the Warren House Property was made in discharge of existing debts, and that the "moral" obligation

[9] A similar issue arose with other payments. There was a letter from the Chief Justice of the Labor Conciliation and Reconciliation Department in the Labor Court dated 18 January 2015, which appeared to record a payment of AED 8,126,461.00 made by Mr Almakhawi Sr to pay workers, but this did not match with any of the payments on the schedule.

on Mr Almakhawi Sr to repay Mr Almakhawi Jr was relied upon only as an ancillary, secondary reason for the transfer.

276. Ultimately, for the purposes of the section 423 claim, the question is whether a purpose (not necessarily the only, or the dominant or predominant, purpose) for which the transfers were made was a Prohibited Purpose. It seems to me that whether Mr Almakhawi Sr had only one other purpose (inheritance planning) or two other purposes (inheritance planning and repayment of sums paid on his behalf) in relation to the Warren House Property is unlikely to make a difference.

(h) The Money Transfers

277. This takes me finally to the Money Transfers.

278. It will be recalled that at the 12 February 2019 meeting with HSBC Private Bank (see paragraph 243 above) Mr Almakhawi Sr told the bank that he wanted to have an HSBC account opened for his son in the UK. Whether pursuant to this instruction or not, an account was subsequently opened for Mr Almakhawi Jr with HSBC, Sort Code 40-03-00, Account Number 93838307.

279. Mr Almakhawi Jr swore an affidavit in these proceedings on 15 December 2021 in which he explained that this was his only bank account in England and Wales. He also confirmed that the account was established for the purpose of having monies transferred from his father.

280. Duplicate bank statements for the account have been obtained and disclosed:

i) The first statement for the account starts with the 16 August 2019 transfer of £200,000. The relevant page is marked "Sheet Number 001", indicating that it is the very first statement for this account, and that the 16 August 2019 transfer was the very first transaction;

ii) The next transaction, which also appears on Sheet Number 001, is the transfer from Mr Almakhawi Sr on 18 October 2019 of £2,226,873.28, which brought the total credit balance on the account as at that date to £2,536,873.28.

281. The duplicate statement runs through 27 further pages to Sheet Number 028. These indicate that, apart from the two Money Transfers, there has been not a *single* movement in or out of the account since it was opened. In his 15 December 2021 affidavit Mr Almakhawi Jr explained that he had been told by HSBC that they regarded the account as dormant.

282. The current credit balance on the account remains at £2,536,873.28, which reflects that the account is a non-interest bearing account. On the face of things, therefore, Mr Almakhawi Jr has had over £2.5 million sitting in a UK bank account for well over two years which has been unused and has been earning no interest at all.

283. Mr Almakhawi Sr suggested in his witness statement he could not recall the reason for the first transfer, but he said that it would most likely have been for family expenses. The second transfer, he suggested, was made as part of succession planning as well as an attempt to repay Mr Almakhawi Jr for the sums allegedly paid on his behalf.

284. In his oral evidence, Mr Almakhawi Sr's explanation was much more general. Asked about the explanation in his witness statement for the first transfer, he said:

> "A. So would you like me to say no to my children? My son deals with shares and, you know, sometimes there are large amounts involved, and I do ask him occasionally, what is this amount for and this? But on the whole this is my family and when they want money, they get it."

He suggested that the reason the money had not been spent was because his son had not had the opportunity to travel to London.

285. In relation to the second, much larger transfer, he simply said:

> "My son asked me for it and I gave it to him."

286. Mr Almakhawi Jr's evidence was that the first transfer on 16 August 2019 was for family expenses sent, he said, because his family often spent the summer months in the UK. When it was put to him that the money was obviously not used in the summer of 2019, he said that the money was not necessarily for this trip, and that it could have been for future trips or for different reasons.

287. As for the second, much larger transfer on 18 October 2019, Mr Almakhawi Jr had said in his witness statement that he had had discussions with his father in which his father had agreed that he would hold these funds on trust for him as a way of paying back the cheques issued on his behalf; he accepted that there was no document supporting that, but he insisted that it occurred.

288. Asked why he had not moved the money into an interest bearing deposit account or do something with the money so that it generated a return, Mr Almakhawi Jr's answer was that:

> "A. I don't do this business. I never do deposits.
>
> …
>
> A. And I am free to do whatever I want with my money. Maybe for you it makes sense to make a deposit, for me it doesn't."

289. One of the features of the Money Transfers upon which Mr Edwards relied was that they had been paid into a newly opened account which had not been used previously and which was never used again; there was, thus no history of debits and credits in and out of the account which might appear in other records and which might make the existence of the account, and thus the money, easier to locate.

290. On that topic, there was this exchange between Mr Edwards and Mr Almakhawi Jr:

> "Q. What I am going to suggest to you is this. These monies were transferred into an account not used previously for any other purpose. That is correct, isn't it?
>
> A. It has not been used, no.

Q. They were not mixed with any other monies.

A. Okay, because that is the only money in the UK.

Q. And that is because the basis of these transfers was either that you would hold the cash for your father or because it was made to shield the asset from your father's creditors and you wanted an account that was not traceable back to you, because there were –

A. Well, it is traceable, it is not – it is traceable, you are saying we are trying to transfer to an account which cannot be traced. It is traced.

Q. What I am suggesting to you is the reason you wanted an account which had not been used before was so that somebody in Dubai who started looking into where your money had gone wouldn't be able to see that account on any document in Dubai?

A. That is not correct. That is not correct. He wanted to pay me back the loan that I have given him.

Q. Then why did you specially open an account to receive the monies?

A. Because I do not have any relation with any British bank. How was he going to give me the money?

Q. He could just organise a funds transfer to you anywhere. He could just tell his bank to make a transfer.

A. Well, we decided and discussed to have the money in the UK.

Q. Are you seriously suggesting that you don't know that you can tell your bank to make an international funds transfer?

A. I did not need the money in the Emirates. I do not need it. I want this money in the UK. I don't want to put all my eggs in one basket.

Q. But your father had a sterling account. He could have transferred it into dirhams or dollars or euros or any other currency anywhere, but what you did was open an account specially and move the money into that account.

A. Because we – I wanted the money to be in the UK.

Q. I am suggesting to you that you wanted it in the UK in an account which had no previous dealings in respect of it –

A. That is not correct.

Q. - so that somebody –

A. Because I did not need the money to use it, okay, and I wanted to diversify, that is why I wanted to open a bank – open an account in the UK, which I had never invested in before and I have never had a relation in the UK with

a bank. I dealt with different banks around the world, but I have never dealt with the UK."

291. This evidence was unconvincing, and in part contradictory – if, for example, Mr Almakhawi Jr was intent on "diversifying" and "investing" in the UK, it made no sense to leave a sum of over £2.5 million untouched in a non-interest bearing account for a period of over two years. The facts are, in my judgment, much more consistent with a desire that the money should remain hidden.

6. Discussion

(a) The Bank's primary case; beneficial ownership

292. In considering how the principles identified above apply to the facts, I start with the issue of whether the assets transferred by Mr Almakhawi Sr to Mr Almakhawi Jr were transferred absolutely or whether Mr Almakhawi Sr retained the beneficial interest in the assets and they were held on resulting trust.

293. So far as the Warren House Property is concerned, in my judgment the position is straightforward.

294. I accept Mr Edwards' submission that the Deed of Gift strictly post-dates the transfer of the property and it was, thus, not the instrument by which the transfer was made. However:

i) It is admissible evidence of Mr Almakhawi Sr's intention when transferring the Warren House Property, *i.e.*, that the property was intended to be a gift under which the beneficial interest would pass to Mr Almakhawi Jr: see *Lewin* (*op. cit.*), paragraph 10-037;

ii) Charles Russell's instructions from the outset were that a deed of gift should be prepared; indeed, they had been told by HSBC Private Bank that "our client wishes to gift the property to his son" (see paragraphs 255 and 256 above). The fact that the Deed of Gift was only drawn up only afterwards does not indicate that Mr Almakhawi Sr's intention at the time of the transfer was *not* to make a gift but to retain the beneficial interest in the property himself.

295. I attach little weight to the fact that Mr Almakhawi Sr continued to pay the council tax and utilities for the Warren House Property even after it had been transferred to Mr Almakhawi Jr given the very small amounts involved and the family relationship between Mr Almakhawi Sr and his son.

296. As for the other matters relied upon by Mr Edwards, *i.e.*, the timing of the transfer of the Warren House Property and the pattern of other divestments, although I accept that these are of significance in the context of the Bank's alternative section 423 claim, none of them, in my judgment, comes close to rebutting the presumption of advancement or outweighs the positive evidence described in paragraph 294 above that the Warren House Property was intended to be gifted to Mr Almakhawi Jr.

297. The position in relation to the Money Transfers is more difficult: there is less evidence about them, professionals were not involved, and there is no correspondence or other

documentation indicating one way or another that they were or were not being made by way of gift. The timing of the transfers and the manner in which they were made, furthermore, supports the proposition that the aim was to move Mr Almakhawi Sr's money out of the reach – or at least out of view – of his creditors.

298. Again, however, whilst these facts may (and, in my judgment, do) provide support for the alternative section 423 claim, they are insufficient to rebut the presumption of advancement and they are insufficient to satisfy me that Mr Almakhawi Sr's intention was that he should retain beneficial ownership of the money transferred such that it would be held on resulting trust for him.

299. One reason for this concerns the way in which Mr Almakhawi Sr's family apparently operated. A theme of the evidence of both Defendants was that, regardless of whether money was formally owned by Mr Almakhawi Sr or by his son, each would, as a matter of moral obligation or family honour, support the other: see the exchange in the cross-examination of Mr Almakhawi Jr set out in paragraph 273 above.

300. Assuming therefore - an issue with which I deal with next - that one of Mr Almakhawi Sr's purposes *was* to shield money from his creditors, it was not necessary for him to retain beneficial title to the money transferred to achieve that purpose. He could transfer it to Mr Almakhawi Jr, confident that, although the money was his, Mr Almakhawi Jr would be prepared to deploy the money for his or for the family's benefit if asked.

301. The Bank's primary case in relation to both the transfer of the Warren House Property and the Money Transfers accordingly fails.

(b) The Bank's alternative case; section 423

302. As I explained earlier, the only issue between the parties in relation to the Bank's alternative case under section 423 was whether the one of the purposes for which the transfers were made was a Prohibited Purpose.

303. In her judgment in *Hashmi* (see paragraph 146 above), Arden LJ noted her agreement with an observation made by the trial judge (Hart J) that it will often be the case that the motive to defeat creditors and the motive to secure family protection will co-exist. So, in my judgment, it is here.

304. I say that because, although it may be that *one* of Mr Almakhawi Sr's purposes in transferring the Warren House Property and in making the Money Transfers was to preserve assets for his children and in that sense to engage in succession or inheritance planning, I am quite satisfied that *another* purpose of the transfers, and not merely a consequence of them, was a Prohibited Purpose, *i.e.*, to put Mr Almakhawi Sr's assets beyond the reach of, and to prejudice the interests of, the Bank and his other creditors.

305. This is an inference I draw based on the evidence set out above as a whole, but the principal factors in my decision are the following.

306. The first is timing. By this, I mean the timing of the Warren House Property and the Money Transfers and the other divestments pleaded by the Bank. I also take into account the timing of the transfer of funds into the Violet Trust, not pleaded by the

Bank but part of the Defendants' own case that the transfer of the Warren House Property and the Money Transfers were not made for a Prohibited Purpose.

307. The chronology of events is set out in detail earlier in this judgment. The key points, to my mind, are these:

i) System Construct Dubai went into insolvent liquidation in September 2014. Given his personal guarantee, it would have been apparent to Mr Almakhawi Sr from that point on that he would likely face substantial claims;

ii) By October 2015, when the Dubai Proceedings were commenced that expectation had become a reality; and by 16 January 2017, when the Dubai Court of First Instance gave judgment against him, he knew that, subject to a successful appeal, in relation to the Bank alone he faced very substantial liabilities approaching $40 million;[10]

iii) It is against that background that all the various transfers took place. Notably:

a) There is no evidence to support the pleaded case that Mr Almakhawi Sr had formed an intention to transfer assets to Mr Almakhawi Jr or his other children in 2010;

b) Indeed, aside from the December 2015 Letter, which I have held was not genuine and which, in any event, would have been sent at a time when Mr Almakhawi Sr was already facing proceedings involving a sizeable claim, there is no evidence that he took any steps to transfer assets until June 2017;

c) All of the transfers were made after the Dubai Court of First Instance had given judgment against him; the transfer of the Warren House Property and the Money Transfers were made after his appeals against that judgment had failed;

iv) It is a powerful fact that, although Mr Almakhawi Sr had received a distribution of $21 million from his brother's estate in October 2015, he took no steps to place that money into trust until June 2017, after he had been found liable in the Dubai Proceedings.

308. The picture presented is, thus, of transfers of assets, including the transfer of the Warren House Property and the Money Transfers, that were responsive and reactive to, and that I infer were motivated by, defeats and reversals in the Dubai Proceedings; the transfers

[10] The Bank did not plead that Mr Almakhawi Sr was insolvent when he transferred the Warren House Property or when he made the Money Transfers, and there is no basis for me to make a finding of insolvency in those circumstances. Nor am I satisfied that it would be proper for me to do so; it appears that Mr Almakhawi Sr may still have owned property in Dubai (protected from enforcement as a gift from the Ruler of Dubai) or other assets. But, for the reasons I have explained, it is not necessary for the Bank's section 423 case that I make a finding of insolvency. On any view, at the time the Warren House Property transfer and the Money Transfers were made Mr Almakhawi Sr had very substantial liabilities and had already divested himself of significant assets.

were not, as Mr Almakhawi Sr sought to portray them, completely unrelated to what was happening in those proceedings.

309. The observation made by Schiemann LJ in *Barclays Bank* (see paragraph 155 above) is pertinent: where assets have been transferred to a family member at a time when action by a creditor was clearly anticipated and the transfer is at an undervalue, and what is left in the hands of the debtor barely if at all covers the debt, there is a strong *prima facie* case that the purpose of the transaction was to prejudice the interests of the creditor.

310. Secondly, and although, as I have made clear, the fact that the consequence of Mr Almakhawi Sr's conduct was to prejudice his creditors is not, in and of itself, enough to establish that he acted for a Prohibited Purpose, there is every reason to think that Mr Almakhawi Sr both foresaw and desired that the effect of the transfers of the Warren House Property and the Money Transfers would be to put assets out of the reach of his creditors, including the Bank.

311. That is a legitimate basis upon which to draw an inference that he did desire this result, and that it was at least one purpose for which the transfer of the Warren House Property and the Money Transfers were made: see the passage from the judgment of Leggatt LJ in *Ablyazov* set out in paragraph 152 above. It is an inference that I draw.

312. Thirdly, there are the circumstances of the transfers, in particular the Money Transfers.

313. I dealt with this in paragraphs 289 to 291 above. Although I accept that a reason for transferring modest sums of money to a UK bank account held by Mr Almakhawi Jr might be an expectation or anticipation that expenses would be incurred by him during trips to London, the facts of the present case were extraordinary and never properly explained:

i) The money was transferred into a newly opened account, never used before and never used again;

ii) An amount of over £2.5 million was allowed to sit in a non-interest bearing account for over two years, something that no rational person would do without good reason. I agree with Mr Edwards' submission that this was a price that was obviously felt to be worth paying to avoid creating a paper trail.

Mr Almakhawi Jr's evidence on this topic was contradictory and unsatisfactory.

314. Fourthly, Mr Almakhawi Sr's evidence was unsatisfactory in a number of respects, and I simply do not accept his evidence that the transfers had nothing to do with the Dubai Proceedings or with a desire to protect his assets from creditors; on the contrary, in my judgment the matters explored during the course of his evidence are consistent with the opposite being the case.

315. So far as that is concerned, Mr Almakhawi Sr used professional wealth managers, HSBC Private Bank, but it is apparent that he kept them in the dark about the sizeable claims that he faced, in particular when providing information for the purposes of HSBC Private Bank's Source of Wealth document which would have inevitably have taken into account liabilities as well as assets.

316. There are, I accept, and as Mr Lewis identified in his skeleton argument, references in some of the HSBC Private Bank documents to estate or succession planning. That may have been what Mr Almakhawi Sr told the bank; he would obviously want to provide an explanation to the Bank for what he was doing. But putting his assets into trust or passing them to his children for no consideration was consistent with his desire to keep them out of the hands of his creditors.

317. There is, furthermore, the information recorded in the HSBC Private Bank Meeting Report of the 11 June 2017 meeting that Mr Almakhawi Sr was a private person, that he did not like others to be aware of his affairs, and that he wanted to protect assets for his family, which is all consistent with a desire to shield assets from his creditors, as is the fact that he was only to be contacted by mobile telephone because he was "concerned [about] safety/confidentiality".

318. A central feature of Mr Almakhawi Sr's case was that he had been motivated to transfer assets to his children because of a bitter inheritance dispute following the death of Mr Al-Swaidy. But, as I have explained, there was no evidence of any such bitter inheritance dispute; and, whilst Mr Al-Swaidy died in November 2014, it is notable that Mr Almakhawi Sr did not take any (or certainly any concrete) steps to transfer assets until June 2017, after he had been found liable in Dubai.

319. Finally, there is also Mr Almakhawi Sr's evidence about the disposal of his 95% shareholding in Makgroup. So far as that is concerned, his suggestion that he had sold 45% of that shareholding in 2010 was flatly contradicted by the documents I was shown and in my judgment was a lie. Mr Almakhawi Sr was, I am sure, well aware that, if he had parted with his shareholding only in 2019 or later, that would be damaging to his case.

320. Fifthly and finally, although, even absent a Prohibited Purpose, Mr Almakhawi Sr might have (at some point) transferred assets to his children anyway, the authorities make clear that this fact is not fatal: see paragraph 118 above. On the evidence, I am satisfied that at least one of the purposes for which Mr Almakhawi Sr acted was to protect assets from his creditors.

321. The Bank's alternative case under section 423 of the 1986 Act in relation to the Warren House Property and the Money Transfers accordingly succeeds.

G. Conclusion

322. I will hear counsel in relation to the terms of the orders to be made to reflect my judgment, in particular the appropriate order to be made under section 423 of the 1986 Act, and in relation to any other consequential matters. I am grateful to both counsel, and to the teams behind them, for their assistance.