Neutral Citation Number: [2016] EWHC 2908 (Comm)

Case No: CL-2013-000411
(Formerly 2013 Folio 1697)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building
7 Rolls Building
Fetter Lane
London EC4A 1NL

Date: 16/11/2016

Before:

THE HONOURABLE MR JUSTICE FLAUX

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Between:

(1) STANDARD CHARTERED BANK (HONG KONG) LIMITED (a company incorporated in Hong Kong) **(2) STANDARD CHARTERED BANK MALAYSIA BERHAD (a company incorporated in Malaysia)**	**Claimants**
- and -	
(1) INDEPENDENT POWER TANZANIA LIMITED (a company incorporated in Tanzania) **(2) VIP ENGINEERING AND MARKETING LIMITED (a company incorporated in Tanzania)** **(3) PAN AFRICAN POWER SOLUTIONS (T) LIMITED (a company incorporated in Tanzania)**	**Defendants**

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Mr Jonathan Davies-Jones QC and Mr William Edwards (instructed by **DLA Piper UK LLP**) for the **Claimants**
The Defendants did not appear and were not represented

Hearing dates: 6 September 2016

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Judgment Approved

The Hon Mr Justice Flaux:

Introduction

1. This is the claimants' application pursuant to an Application Notice dated 10 June 2016 for summary judgment under CPR 24 against all the defendants. The first claimant (to which I will refer as "SCBHK") and the second claimant (to which I will refer as "SCBMB") which are both wholly owned subsidiaries of Standard Chartered

Bank claim against the first defendant (to which I will refer as "IPTL") sums due under a Facility Agreement dated 28 June 1997 which was novated to SCBHK by Danaharta Managers (which had itself taken over the loan by a process of novation from the original lending banks under that Agreement). SCBMB had become the Facility Agent under that Agreement. SCBHK as Security Agent also claims against IPTL under an independent covenant to pay in the Security Deed entered on the same day and forming part of the same suite of finance documents as the Facility Agreement.

2. SCBHK also claims declaratory relief against IPTL and against the second and third defendants (to which I will refer as "VIP" and "PAP" respectively). VIP was a 30% shareholder of IPTL and had entered a Shareholder Support Deed and a Charge of Shares also dated 28 June 1997 and forming part of the same suite of Financing Agreements, under which VIP and its fellow 70% shareholder Mechmar Corporation (Malaysia) Berhad ("Mechmar") undertook, inter alia, to use their best endeavours to procure that IPTL complied with its obligations under the Financing Agreements and independently covenanted not to dispose of their shares. SCBHK's case is that IPTL is in breach of its obligations under the Financing Agreements, putting VIP in breach of the Shareholder Support Deed and that, in breach of the covenant in the Charge of Shares, VIP has purported to transfer its shareholding to PAP.

3. All three defendants made challenges to the jurisdiction of the English Courts, on the basis that Tanzania not England was the most appropriate forum for the determination of the dispute between the parties, alternatively, in the case of VIP, on the basis that the English proceedings were an abuse of process. IPTL and VIP had been served with the proceedings as of right pursuant to service of process provisions in the relevant contracts and PAP was served outside the jurisdiction in Tanzania pursuant to permission granted by Popplewell J under CPR 6.37 and PD6B paragraph 3.1(3), on the basis that PAP is a necessary or proper party to the claim against IPTL. At the hearing of the jurisdiction challenges, it was accepted by PAP that, if the claim against IPTL proceeded in England and was not stayed, then that service out was valid and the claim against PAP should also proceed in England.

4. Following a four day hearing in April 2015, the jurisdiction challenges were all dismissed by this court: [2015] EWHC 1640 (Comm); [2016] 1 All E.R. (Comm.) 233. The defendants' appeal against my judgment was dismissed by the Court of Appeal on 28 June 2016: [2016] EWCA Civ 411. The Supreme Court refused permission to appeal on 19 July 2016. At a case management hearing on 13 June 2016, I set a timetable for the determination of the present summary judgment application, with the hearing to take place in the week of 5 September 2016. Each of the defendants was duly served with this application and the claimants' evidence in support. However, since the jurisdiction challenge was finally dismissed, none of the defendants has taken an active part in the proceedings, notwithstanding that VIP unconditionally acknowledged service in May 2016, after the Court of Appeal judgment.

5. The background to the present proceedings was set out by me at [7] to [81] of my jurisdiction judgment. So far as presently material, none of that recitation of the facts was challenged by the defendants in the Court of Appeal. I do not propose to repeat it all here, but simply summarise in the next section of the judgment the factual background insofar as it is relevant to this application.

6. On 21 July 2016, the same day as the parties were notified that the Supreme Court had dismissed VIP's application for permission to appeal, the court received a lengthy letter direct from VIP (notwithstanding that solicitors were still on the record for VIP at that time) signed by the company secretary Mr Didace saying that they had instructed their English lawyers to cease acting and inviting the court to "delay" the summary judgment hearing for an unspecified period of time. He asserted that: "*there are cogent reasons, discernible from the trial evidence in the Tanzanian Action of which your Lordship may take judicial notice, why summary judgment cannot be regarded.*"

7. In essence, the basis for the assertion that VIP could not deal with the summary judgment application at a hearing at the beginning of September was threefold: (i) that Mr Rugemalira, a director of IPTL who was said to be critical to their defence had given evidence in the Tanzanian proceedings in February 2016, but his evidence was part heard and VIP could not discuss his evidence with him and so could not produce a witness statement from him in opposition to the present application; (ii) VIP would need time to put its expert evidence before the court and (iii) VIP had lost confidence in the impartiality of the English courts.

8. The claimants' solicitors DLA Piper UK LLP provided a response to that letter dated 26 July 2016. By that stage Charles Russell Speechlys LLP had come off the record for VIP. The claimants opposed VIP's application for an adjournment pointing out: (i) that, as had been discussed at the hearing on 13 June 2016, the obvious solution to any impediment in speaking to Mr Rugemalira was for VIP to make an application to the Tanzanian court (which the claimants had indicated they would support) for him to be released; (ii) that, at that hearing on 13 June 2016, the experts' reports which VIP had chosen to deploy in Tanzania were exhibited to a witness statement of Mr Novak of Charles Russell Speechlys LLP and there was no suggestion that the expert evidence served in England would be substantially different, so that VIP had ample time to serve any expert evidence for the purposes of the present hearing; and (iii) that the court should reject the suggestion that it had not acted impartially or that there had been any impropriety on the part of the claimants.

9. I was and remain satisfied that there was nothing in any of these impediments. I have little doubt that, if VIP had made an unopposed application to the Tanzanian court to have Mr Rugemalira released, the court would have acceded to that application. VIP simply chose not to make such an application. Furthermore, the period of nearly three months from the directions hearing on 13 June 2016 to the hearing of the summary judgment application on 8 September 2016 was ample time within which VIP could have recast its experts' reports, so as to be compliant with CPR Part 35 (an issue to which I return below). Again, it has simply chosen not to do so. There is no question of this court not being impartial or of the claimants having acted with impropriety.

10. In the circumstances, the application for an adjournment was refused and the hearing proceeded. The reality is that, as Mr Davies-Jones QC submitted on behalf of the claimants, the VIP letter is a piece of window dressing for what was a voluntary decision by VIP not to participate in the present proceedings further, putting it in the same position as the other two defendants who had taken that voluntary decision in May 2016 following the dismissal of their appeal by the Court of Appeal.

11. In the circumstances, in relation to claims which are English law claims, the defendants have chosen not to put in Defences to those claims. In accordance with well-established principles, at the hearing of the summary judgment application, Mr Davies-Jones QC drew my attention to the points, both factual and legal, which the defendants might have made had they continued to participate and filed Defences: see *Habib Bank Ltd v Central Bank of Sudan* [2006] EWHC 1767 (Comm), [2007] 1 WLR 470, at [9] and *Concept Oil Services Ltd v EIN-GIN Group LLP* [2013] EWHC 1897 (Comm), at [9]. He did this primarily by reference to the Plaints filed by the defendants before the Tanzanian courts and, in the case of VIP, the expert evidence it has served in the Tanzanian proceedings, even though (for reasons elaborated below) that expert evidence is inadmissible in the present proceedings.

12. So far as the relief sought on this application is concerned, the claimants are not seeking all the declaratory relief sought in their Particulars of Claim (in particular the negative declaratory relief sought at [94], that the claimants are not liable to VIP in the Tanzanian proceedings) or the injunctive relief sought at [95] to [97]. However, both claimants seek declarations that each of the Facility Agreement, Security Deed, Shareholder Support Deed and Charge of Shares was valid, effective and binding when entered into and remains valid, effective and binding. They also seek declarations that the rights, title and interest of the original lending Banks became vested in SCBHK with effect from 17 August 2005 as assignee of Danaharta and with effect from 25 October 2005 pursuant to the Novation Notice, that SCBMB is and has been the Facility Agent since 21 October 2005, and that SCBHK is and has been the Security Agent since 4 December 2009. Various other declarations are sought.

13. The claimants also seek a money judgment against IPTL for the total amount outstanding under the Facility Agreement as varied by the First and Second Variations (including contractual interest). On 24 August 2016, the sum due as at 31 July 2016 was certified by SCBMB as Facility Agent as U.S. $166,841,800.39. That figure has been updated thereafter for subsequent interest and costs.

14. Before considering the various points which the defendants have raised in Tanzania and therefore which they might have raised here, had they chosen to continue to participate in these proceedings, I propose to summarise the factual background and the various agreements in so far as necessary for the purposes of this application. Before doing so, however, it is to be noted at the outset that none of the defendants has ever disputed the validity of SCBMB's appointment as Facility Agent, nor has any of them sought to raise any defence in Tanzania (and therefore by definition here) which would or does impugn the entitlement of SCBMB to the declarations and money judgment it seeks. It follows that, without more, SCBMB is entitled to the summary judgment it seeks.

Factual background

15. In 1994, the Government of Tanzania invited Mechmar, a Malaysian corporation, to submit a proposal for the construction of a power plant in Tanzania and Mechmar entered a memorandum of understanding with the Tanzanian Ministry of Water, Energy and Minerals for the construction of a power plant. In September 1994, VIP and Mechmar entered into a Shareholders Agreement to establish a company to build and operate the plant, on the basis that Mechmar would provide the finance and technical know-how and VIP would obtain all necessary government approvals.

Under that agreement, although Mechmar was to hold 70% of the shares and VIP 30%, Mechmar contributed all the funds to pay up the share capital of U.S. $1 million. The advance by Mechmar was to be waived upon the fulfilment of various conditions, including the obtaining of all grants and licences for the construction and operation of the plant for 20 years and, until those conditions were fulfilled, VIP undertook not to sell or charge its shares. By clause 6 of the Shareholders Agreement, VIP agreed that Mechmar would have the sole right to *"manage and operate [IPTL] for the duration of the project"*. Under clause 18 all disputes were to be submitted to LCIA arbitration in London. IPTL was incorporated as contemplated by the Shareholders Agreement in December 1994.

16. In May 1995, IPTL entered into a Power Purchase Agreement ("PPA") with Tanzania Electrical Supply Co Ltd ("Tanesco"). By an Implementation Agreement, the Government of Tanzania guaranteed Tanesco's payment obligations. By Article 5 of the PPA, Tanesco was to pay periodic Capacity Payments and Energy Payments. The Capacity Payment was to be calculated by a reference to a *"Reference Tariff"* addressed in Appendix B. By Article 16.1(e), the appointment of a receiver or liquidator to IPTL was an Event of Default which could lead to the termination of the PPA. Article 18.3 provided for arbitration.

17. The terms on which the power station was to be constructed by Stork-Wartsila Diesel BV of the Netherlands ("Wartsila") were set out in an EPC Contract dated 4 February 2007 by which Wartsila undertook to design and build the power station for U.S. $114.188 million. There were contractual provisions for default interest (Clause 32.13) and post-contractual variations (Clause 33).

18. The lending was set out in a suite of Financing Agreements dated 28 June 1997. Under the Facility Agreement, the original lenders, a syndicate of Malaysian banks, agreed to lend IPTL up to U.S. $105 million and IPTL agreed to ensure that the banks had various security, including a legal mortgage over the land it owned and a charge over its shares. As is quite usual in syndicated banking, the participation of the lending banks was freely transferable. Clause 26(C) of the Facility Agreement provided for two methods of transfer: (i) novation, which required delivery of a novation notice to the Facility Agent (originally Bank Bumiputra) or (ii) assignment of outstandings which required no formalities.

19. Clause 26(C) provided so far as material as follows:

> *"Any Bank may, at any time, novate all or part of its Outstandings and Commitment to any bank or financial institution. Any such novation shall be made by delivering to the Facility Agent a duly completed and executed Novation Notice. On receipt of such notice the Facility Agent shall countersign it for and on behalf of itself and the other parties to the Agreement and subject to the terms of that Novation Notice:*
>
> *(1) to the extent that in that Novation Notice the relevant Bank seeks to novate its Outstandings and/or its Commitment, the Borrower and that Bank shall each be released from further obligations to each other and their respective rights against*

each other shall be cancelled (such rights and obligations being referred to as "discharged rights and obligations");

(2) the Borrower and the relevant New Bank shall each assume new obligations towards each other and/or acquire new rights against each other which differ from the discharged rights and obligations only insofar as the Borrower and that New Bank have assumed and acquired the same in place of the Borrower and that Bank; and

(3) the New Bank and the other parties to this Agreement (other than the Borrower) shall acquire the same rights and assume the same obligations between themselves as they would have acquired and assumed had that New Bank been an original party to this Agreement as a Bank with the rights and/or obligations acquired or assumed by it as a result of that novation (and, to that extent, the original Bank and those other parties shall each be released from further obligations to each other).

Any Bank may at any time assign all or part of its Outstandings to any bank or financial institution."

"Novation Notice" is a defined term under the Facility Agreement: *"Novation Notice means a notice substantially in the form set out in Schedule 3."* Schedule 3 to the Facility Agreement then sets out a model form of Novation Notice.

20. As Mr Davies-Jones QC submitted, in the light of the illegality arguments which VIP has raised in Tanzania, it is worth focusing on some of the other provisions of the Facility Agreement:

(1) The purpose of the bank lending was to cover part of the costs of construction and initial operation of the power station (Clause 2(B)(a)).

(2) The *"Projected Aggregate Construction Expenditure"* for the Project was U.S. $149.3 million. That total included the U.S. $114.188 million cost of the EPC Contract and, therefore, additional projected expenditure of approximately U.S. $36 million was predicted.

(3) This total expenditure was to be funded in a ratio of bank lending to *"Shareholders' Funds"* no greater than 70:30 (Clause 4(A)(2) and the definitions of *"Shareholders' Funds" and* "*Debt: Equity Ratio*"). In other words assuming that the full U.S. $105 million was drawn down under the Facility Agreement, *"Shareholders' Funds"* would have had to have been made available to IPTL of at least U.S. $45 million.

(4) The definitions of *"Shareholders' Funds" and "Debt: Equity Ratio*" make clear that the *"Shareholders' Funds"* could take the form of debt from the shareholders, not simply equity subscription. It means that the Financing Agreements expressly contemplated and permitted a situation where very substantial sums were provided to IPTL by way of shareholder loans. As Mr Davies-Jones QC submits, this is a point of fundamental importance, ignored by VIP's experts.

(5) The *"Debt: Equity Ratio"* was enforced by Clauses 4(A)(2) and Clause 18(A)(19). In particular, by Clause 4(A)(2), there could be no drawdown under the Facility Agreement unless the Facility Agent was satisfied that *"Shareholders' Funds"* of the requisite amount had been, or would be, paid to IPTL's Project Bank Account prior to the relevant Advance being made.

(6) *"Shareholders' Funds"* which took the form of shareholder loans were a form of subordinated indebtedness (as is clear from the definition of *"Debt: Equity Ratio"* and Clause 4.5 of the Shareholder Support Deed). That did not, however, mean that there could be no payment to the relevant shareholder in respect of the debt until after all the bank lending under the Facility Agreement had been repaid. On the contrary, it simply meant that payment of interest or capital in respect of the shareholder debt fell within the definition of *"Restricted Payment"* and was therefore subject to certain restrictions as set out in Clause 18(B)(21) and (22) and Schedule 1 para 3 of the Shareholder Support Deed). As Mr Davies-Jones QC said, this point, which is obvious on the face of those agreements, is also ignored by VIP's experts in Tanzania.

21. In addition to the Facility Agreement, the suite of Financing Agreements, all also dated 28 June 1997, included: (i) the Security Deed by which IPTL granted various security to the Security Agent (as agent for the Banks), including an assignment of sums receivable from Tanesco under the PPA. The Security Deed also empowered the Security Agent to appoint an Administrative Receiver of IPTL in the event of a default; (ii) a legal mortgage over the Tanzanian land owned by IPTL (in addition to the equitable mortgage resulting from the Security Deed) in the form of a Mortgage of a Right of Occupancy; (iii) a Charge of Shares by which VIP and Mechmar (a) charged their shares in IPTL and (b) (by a combination of Clause 4 and Schedule 1 para 2) independently covenanted not to dispose of those shares; and (iv) a Shareholder Support Deed by which VIP and Mechmar undertook, inter alia, to use best endeavours to procure that IPTL complied with its obligations under the Financing Agreements.

22. All the agreements in the suite of Financing Agreements contained non-exclusive English jurisdiction clauses with forum non conveniens ("FNC") waivers and an express acceptance of the possibility of concurrent proceedings in different jurisdictions, together with provisions for service in England. The effect of those FNC waivers was considered by this court in the jurisdiction judgment and by the Court of Appeal. The Facility Agreement, Security Deed and Shareholder Support Deed were also expressly governed by English law. The Charge of Shares and Mortgage of land owned by IPTL were governed by Tanzanian law, no doubt because they are concerned with Tanzanian property, but otherwise contained materially identical jurisdiction clauses to the Facility Agreement.

23. Clause 4.3 of the Shareholder Support Deed contained an undertaking by VIP and Mechmar as shareholders to ensure that on or prior to each drawdown under the Facility agreement, Shareholders' Funds of not less than the equivalent of 30% of the aggregate Project Expenditure were paid in cash into the Project Bank Account or otherwise applied to meet Project Expenditure. Since Shareholders Funds as defined included the provision of subordinated loans by the shareholders, it was again expressly contemplated by this Agreement that substantial shareholders' loans could be provided to IPTL.

24. Between August 1997 and December 1999, there were nine Advances under the Facility Agreement totalling U.S. $85,862,022. Although IPTL's Plaint in the Tanzanian Proceedings refers to only U.S. $84 million having been advanced to it, IPTL and PAP have overlooked the ninth advance of U.S. $1.86 million. Furthermore, that the total amount advanced was U.S. 85.862 million is clear from the fact that this is the amount which Mr Rugemalira set out as the Bank Loan in his email for the IPTL Board of 23 April 2001. Inevitably of course, contractual interest has accrued on the principal sums since those sums were advanced.

25. The plant was ready for commercial operation by September 1998, but did not commence operating because, in April of that year, Tanesco had sought to terminate the PPA with IPTL on the basis that costs had been exaggerated and the wrong generators installed. In November 1998, Tanesco commenced an ICSID Arbitration ("the Tariff Arbitration") against IPTL. The ICSID Award was published in July 2001. The Tribunal determined that the PPA was and remained valid, but the Financial Model used to calculate the capacity and energy tariffs was adjusted, which resulted in a reduction of the tariff payable under the PPA. However, it is important to note that the lenders under the Facility Agreement were not parties to the Tariff Arbitration, nor did any of the Tribunal's findings go to the question of the debt due to them. Commercial operation of the plant began in January 2002.

26. In July 2001, by a process of novation, Danaharta Managers became the sole lender under the Facility Agreement. Danaharta Managers was a wholly-owned subsidiary of Danaharta, an entity established by the Malaysian state in June 1998 (as a result of the Asian financial crisis) as an Asset Management Company. Its role was to tackle the rising level of non-performing loans ("NPLs") in the Malaysian banking system by, inter alia, acquiring and then restructuring the NPLs. The nature of Danaharta's role is described, inter alia, in its Final Report 1998-2005 where it is said that the purpose of the loan restructuring in which it engaged was *"rehabilitating an NPL to become a performing loan. This could involve an extension of the loan repayment period or rescheduling of loan repayments"*. In the case of foreign loans such as in the present case, the strategy was to then sell them off by the end of 2005.

27. In its Tanzanian proceedings, VIP alleges that Danaharta Managers conspired with Mechmar and Wartsila to defraud IPTL by facilitating unlawful payments by IPTL to Mechmar and Wartsila. This is a matter to which I return later in the judgment, but for now I simply record the implausibility of the suggestion that a Malaysian state-owned company, whose purpose was to maximise recoveries on its NPLs for the state, would conspire to assist third parties to defraud IPTL of its assets, thereby damaging its own chances of maximising recovery.

28. By October 2001, substantial sums were overdue under the Facility Agreement because Tanesco had made no payments to IPTL during the period of the Tariff Arbitration from 1998 to 2001 and, as a result, IPTL had made no payments under the Facility Agreement. Accordingly, IPTL requested a restructuring of the loan facility and, on 29 October 2001, Danaharta wrote offering terms for a restructuring of what was overdue under the original loan facility. This involved a restructured loan amount of U.S. $120,215,086.35, U.S. $112,215,086.35 of which was repayable with a grace period of 18 months (Term Loan 1) and U.S. $8 million (Term Loan 2) which would be waived if there was full compliance and performance of Term Loan 1, but which Danaharta could reinstate if there was an event of default under Term Loan 1. That offer of restructuring on those terms was accepted by IPTL and by Mechmar as guarantor.

29. Contrary to the assertion of VIP's experts in Tanzania, that 2001 variation did not involve the replacement of the original loan agreement by a new loan agreement. It was clearly not a new loan but a restructuring of the existing one: it capitalised the overdue accrued interest, provided a short grace period before payments commenced, rescheduled the payments thereafter, and offered an element of debt forgiveness (U.S. $8 million) if all other terms were complied with. Furthermore, the terms of the 29 October 2001 letter make it quite clear that it is a variation of the Facility Agreement not a new loan agreement. Thus it states:

> *"Security: All existing security arrangement pursuant to the Facility remains intact, binding upon and enforceable against the respective security providers.*
>
> …
>
> *All existing terms and conditions as per the executed Facility Agreement dated 28 June 1997 between the Borrower and syndicated lenders will remain in full force and effect, save as varied by this Letter."*

30. The suggestion by VIP's experts in Tanzania that the 2001 Variation was entered for an illegal purpose or was detrimental to IPTL is preposterous. It was clearly advantageous to IPTL since it involved less stringent terms, with a grace period, the potential for an element of forgiveness of the debt and a reduction in the rate of Default Interest. Furthermore, it was IPTL which had requested a restructuring and it accepted this restructuring. This Variation was in the best interests of both IPTL and Danaharta Managers, since it turned an NPL into a performing debt.

31. In June 2003, there was a second variation to the Facility Agreement ("the 2003 Variation"), again by letter between Danaharta and IPTL, which (i) altered the terms as to interest, and (ii) permitted various payments to be made out of moneys paid by Tanesco. Again VIP's experts in Tanzania have alleged that this variation was also entered into for an illegal purpose because it provided for payments in respect of IPTL's debts to Mechmar and Wartsila before the bank lending had been repaid. This allegation is also misconceived. By June 2003, the debt under the Facility Agreement was no longer a NPL: it was performing in accordance with its re-structured terms. In those circumstances, the terms of the Facility Agreement expressly permitted payments to shareholders such as Mechmar, as noted in [20(6)] above. There was

nothing improper about payments to Wartsila either. They were either payments in respect of the EPC Contract price (which should have been paid a long time ago but which remained outstanding), or fees for maintenance of the power station, which constituted IPTL operating expenses and had priority in the payment waterfalls under the Financing Agreements in any event. I return to the detail of this later in the judgment.

32. On 13 July 2005, Danaharta Managers invited SCBHK and others to bid for its rights under the suite of Financing Agreements. The bids were to be *"unconditional"* and on an *"as is where is"* basis. This form of disposal of the loan, which relieved Danaharta Managers from on-going responsibility, was consistent with its role as a temporary manager of the debt and with Danaharta's internal mission to complete its work by the end of 2005 as referred to in its Final Report.

33. Accordingly, Danaharta Managers and SCBHK entered into a Sale and Purchase Agreement ("SPA") dated 4 August 2005. It is clear from the face of the SPA that it was a standard form document used by Danaharta for a wide range of transactions. A Deed of Assignment was entered on 17 August 2005 and, also on that date, a Novation Notice was signed by Danaharta and SCBHK and (on 25 October 2005) by SCBMB.

34. The effectiveness of this transfer is disputed by the defendants on various grounds to which I return in detail later but for the present simply note that, at the time of the transfer, the loan was performing on its re-structured terms and was expressly characterised as such by a Danaharta Managers memorandum dated 1 April 2005. SCBHK bid and paid U.S. $76.1 million for it (in fact U.S. $76.3 million, including an element of interest) by two funds transfers. VIP's banking expert in Tanzania erroneously assumes that it was an NPL, on the basis of which he makes the extraordinary suggestion that SCBHK could not in fact have paid U.S. $76.1 million for the loan. However, the evidence of payment is clear and compelling and the fact that a so-called expert feels able to make such an extraordinary suggestion calls into serious question his objectivity and independence.

35. The evidence is that SCBHK's exit strategy was two-fold, either to re-finance the debt within 2 years or longer, alternatively to allow the debt to be re-paid over 6 years through IPTL's operational cashflows. I accept the claimants' case that the purchase of this performing loan, at a discount of about 25% from the amount outstanding at the time, was an entirely normal commercial transaction.

36. SCBMB became the Facility Agent on or about 21 October 2005. The appointment was effected by a letter dated 22 September 2005 from the outgoing Facility Agent (BCBB), signed by SCBMB on 21 October 2005 and counter-signed by BCBB on 23 October 2005. That procedure accorded with Clause 22(H) of the Facility Agreement. On 9 November 2005, SCBMB wrote to IPTL informing it of the Novation Notice. I have already noted the defendants do not seek to challenge the status of SCBMB in the Tanzanian proceedings; indeed, they are not even mentioned. Accordingly, they have an unanswerable claim in the present proceedings.

37. In April 2006, IPTL began defaulting on its payments under the Facility Agreement. The default was an Event of Default under Clause 19 of the Facility Agreement, so that the security under the Security Agreements became enforceable at that stage. So

far as events after April 2006 are concerned, they are dealt with in detail at [14] to [81] of my jurisdiction judgment, to which reference can be made. I simply note, so far as relevant to the present application, that SCBHK became the Security Agent in December 2009. Although the defendants challenge the validity of this in Tanzania, they do not do so on grounds independent of their challenge to the 2005 loan transfer.

Proving the claims

38. The applicable test on an application for summary judgment is well-established. The claimants must show that the defendants have *"no real prospect of successfully defending the claim or issue [on which summary judgment is sought]"*: CPR, rule 24.2(a)(ii). To succeed, a respondent to such an application has to have a case which is better than merely arguable: see *ED&F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472 at [3]-[8]. In the present case, the defendants have not put forward any Defence in this jurisdiction the merits of which can be assessed by the court. Rather, the claimants have drawn my attention to the contentions being advanced by the defendants in their proceedings in Tanzania, which they might have sought to advance had they chosen to participate further in these proceedings. It is important to note however, as Mr Davies-Jones QC emphasised, that no English counsel has put his or her name to a pleading before this court containing these allegations. Indeed I was left with the distinct impression that, when VIP was represented, at the jurisdiction challenge hearing, by Mr Richard Coleman QC, he was at pains to indicate that he was not saying that the allegations in Tanzania could properly be pleaded in England. I suspect that was the furthest he could properly go in dissociating himself from those allegations. He was right to do so. As I find in more detail later in this judgment, many of the wilder and more extreme allegations made in Tanzania by VIP and its experts could never properly be made in this jurisdiction and could not conceivably give rise to a defence with any prospect of success.

39. As Mr Davies-Jones QC submits, the claimants prove their claims by a combination of their pleadings, verified by a statement of truth, the witness statements of Mr Curle of DLA Piper UK LLP, their solicitors and the exhibits to his statements. Since the claims relate to outstanding debt under the Facility Agreement, the starting point is that Agreement and the other Financing Agreements in the suite of agreements. The defendants have not sought to contend that these Agreements were not duly executed and binding and effective when entered into on 28 June 1997. From that it follows that the claimants are entitled to the first part of the declarations sought at paragraphs 3 to 6 of the draft Order. So far as the second part, that the various Agreements remain valid, effective and binding, the claimants will be entitled to those declarations unless the defendants have a better than merely arguable defence that for some reason the agreements are no longer valid, effective and binding. I consider the various contentions raised in Tanzania later in this judgment.

40. As I have already noted, the defendants have not sought to challenge the appointment of SCBMB as Facility Agent on 21 October 2005 and that appointment was clearly properly made pursuant to Clause 22(H) of the Facility Agreement. In those circumstances, the claimants are entitled to the declaration sought at paragraph 7 of the draft Order and SCBMB is entitled to the money judgment it seeks against IPTL.

41. So far as the other declarations sought and the money judgment sought by SCBHK are concerned, the entitlement of the claimants to that relief depends upon whether

there is anything in the defendants' allegations in Tanzania and it is to those allegations that I turn.

The position of IPTL and PAP in Tanzania

42. Of course IPTL is the debtor under the Facility Agreement and both it and PAP accept that substantial sums were drawn down and remain outstanding. As to the amount drawn down, I have already said that IPTL and PAP have ignored the ninth advance, so that their figure of U.S. $84 million should be U.S. $85.86 million. So far as the amount outstanding is concerned, IPTL and PAP contend that U.S. $58 million has been repaid, so that even on their case, some U.S. $26 million remains outstanding. Their contention completely ignores the entitlement of the lender to contractual interest on the sums outstanding now for many years. In so far as it is possible to discern what they are seeking to argue, they appear to be saying that the claimants cannot claim interest on a distressed debt from a company in liquidation. This contention is fundamentally misconceived: the debt was not distressed at the time of the assignment and novation and, as a matter of fact, IPTL was never in liquidation, but in any event the argument ignores the contractual entitlement to interest under the Facility Agreement. It follows that subject to the validity of other arguments they seek to run in Tanzania as to why IPTL is not liable to SCBHK (there being no argument that it is not liable to SCBMB), IPTL is liable to the claimants for the full amount of the outstanding debt plus interest.

43. What is immediately striking when a comparison is made between the claims of IPTL and PAP in Tanzania and the claims of VIP, is that IPTL and PAP are not running VIP's illegality argument (which in any event only seeks to impugn the 2001 and 2003 Variations, not the original Facility Agreement) at all, notwithstanding that it is IPTL and not VIP which is a party to those Variations.

44. The first point taken by IPTL and PAP by way of purported challenge to the validity of the assignment and novation in their Plaint is that the assignment and novation were *"transacted without the leave of the court"* and therefore void, because they involved a disposition of IPTL's property within Section 172 of the Tanzanian Companies Ordinance. As I have already held at [75] of my jurisdiction judgment, this point is simply unarguable. Section 172 of the Ordinance is based on the equivalent provision in the English Companies legislation (now Section 127 of the Insolvency Act 1986) and operates in relation to a company's assets, not its liabilities. The debt due from IPTL which was assigned or novated is not an asset, but a liability, so that Section 172 has no application.

45. Furthermore, as I also held at [75] of the jurisdiction judgment and as is confirmed by the claimants' Tanzanian law expert, Mr Zervos, Section 172 would only apply once there had been a winding up Order in Tanzania. There is no such extant Order by the Tanzanian Court, the Order made by Kaijage J having been held to be a nullity by the Court of Appeal of Tanzania ("the CAT"). In any event, even if this point were arguable as a matter of Tanzanian law (which it is not), that would be of no relevance, since the question of whether a contractual right or obligation is transferable depends on the governing law of the contract (see *Dicey, Morris & Collins: The Conflict of Laws* 15th edition para 24-062). In this case, the Facility Agreement, Security Deed and Shareholder Support Deed are all governed by English law. As a matter of English law, both the assignment and the novation are clearly valid.

46. In their Plaint, IPTL and PAP raise three further reasons why, so they contend, the assignment and novation were not effective. First, they contend that the assignment and novation were: *"transacted without [IPTL's] corporate authorization or knowledge, in contravention of the law and the Shareholders' Agreement"*. The short answer to this point is that no approval on the part of IPTL was required for an effective assignment of the debt due from it or for an effective novation of that debt. The provision for novation in Clause 26 (C) of the Facility Agreement, which is in a standard form, is one which does not require any participation on the part of IPTL, which appointed the Facility Agent as its agent for these purposes. The correct analysis is that such a clause operates as a standing offer to novate in accordance with its terms: see *The Argo Fund Ltd v Essar Steel Ltd* [2005] EWHC 600; [2006] 1 All ER (Comm) 56 and *Habibsons Bank Ltd v Standard Chartered Bank (Hong Kong) Ltd* [2010] EWCA Civ 1335, [2011] QB 943 at [22]-[23] of the judgment of Moore-Bick LJ considering a similar clause:

> "22. Although there has been some discussion in the authorities about the principles involved, there has hitherto been no real doubt that under English law a party to a contract may effectively give consent in the contract itself to a subsequent novation. The point was touched on in *The Argo Fund Ltd v Essar Steel Ltd* [2005] EWHC 600, also a case relating to a syndicated loan, in which it was common ground between the parties that terms similar to those of clause 26 in the present case were effective to achieve the parties' object. The analysis proposed in that case was that of unilateral contract (see paragraphs 51-52), which I find persuasive. I do not think that the judge in *Goodridge* entirely rejected that as a possibility, since he distinguished *Carlill v Carbolic Smoke Ball Co* on the grounds that the clause he had to consider was too nebulous, but if he did, I agree with Cooke J. that the decision does not represent English law. The provisions of clause 26 in this case cannot possibly be described as nebulous and there is no uncertainty about the terms of the contract to which a novation gives rise.
>
> 23. By entering into the Facility Agreement the lenders provided consideration for a standing offer on the part of Indover to contract by way of novation with any financial institution of a kind falling within clause 26.1(b) which might comply with the transfer provisions. As a result the offer was irrevocable without the consent of all those who were lenders from time to time. Habibsons does not plead that the effect of the administration order was to revoke the offer, but in any event it is difficult to see how that order could have done so, given that the contract is governed by English law. In my view, therefore, it matters not whether the administration order was made before or after the contract on 6th October; nor, for that matter, is it of any significance that the administration order was on any view made before the transfer certificate was signed by the agent, since it could not affect rights and obligations

> arising under the Facility Agreement as a result of the operation of the transfer mechanism in which Indover had no further part to play."

47. Furthermore, contrary to the assertion in the Plaint, there is no provision in the Shareholders Agreement which prevents an effective assignment and novation and, even if there were, that could not make the agreements IPTL entered ineffective and, since the shareholders, VIP and Mechmar, were parties to the overall financing package which included Clause 26(C), they must be taken to have waived any such provision.

48. Second, the Plaint contains an allegation that the assignment or novation is not in conformity with the Articles of Association of IPTL or the Facility Agreement and has not been: *"authenticated nor been registered as mandatorily required under Tanzanian law."* This is a bad point. There is no explanation as to how the assignment or novation was not in conformity with the Articles of Association, but in any event, the assignment and novation took place pursuant to Clause 26 of the Facility Agreement and there is no challenge by IPTL or PAP to IPTL having entered the Facility Agreement. Clause 26 itself therefore provides whatever authority is required. There is no basis for the suggestion that the assignment or novation required to be *"authenticated"* (whatever that might mean) under English law, the relevant governing law, or for that matter, under Tanzanian law. It would appear the point about registration is the same point as is made elsewhere in the Plaint, which is also a bad point for the reasons developed below.

49. Third, there is an unparticularised allegation in the Plaint that the assignment or novation altered the terms of the lending. The short answer is that, as Mr Davies-Jones QC submits, this ignores the nature of assignment and novation which do not alter rights or obligations. They are simply concerned with the identity of the party in whom the rights and obligations subsist. The transfer from Danaharta Managers to SCBHK of the rights which the former had under the Financing Agreements cannot sensibly be construed as altering the terms of the lending, not least because it was on an *"as is, where is"* basis, but even if it could, such transfer was expressly contemplated and permitted by Clause 26(C) of the Facility Agreement.

50. Accordingly, there is no basis whatsoever for any challenge to the validity of the assignment and the novation, which are clearly valid and effective, from which it follows that SCBHK was a creditor of IPTL.

51. In the Plaint, IPTL and PAP contend that the security documents (the Security Deed and the Mortgage of land and Charge of Shares) required registration under the Tanzanian Companies Ordinance and are thus completely ineffective for want of registration. There are a number of answers to this point, which is a bad one, some of which I referred to at [120] and [121] of the jurisdiction judgment. First, to the extent that IPTL and PAP rely upon the decision of the CAT in *Shinyanga Regional Trading v National Bank of Commerce* [1997] TLR 78, in support of the proposition that want of registration makes the Security Deed and the Mortgage of land and Charge of Shares void generally, I accept the evidence of the claimants' Tanzanian law expert, Mr Zervos, that that case was not only per incuriam, because it was decided without reference to pre-1922 English authorities which are binding in Tanzania, but it appears to ignore the express wording of section 79 of the Companies Ordinance.

That makes it clear that lack of registration makes the charge void as against the liquidator and any creditor, not against the chargor himself. As I said at [121] of the jurisdiction judgment, the correct position on the basis of those pre-1922 decisions (*In re Ehrmann* [1906] 2 Ch 697 and *In re Monolithic* [1915] 1 Ch 643, 667-668 approved by the House of Lords in *Smith v Bridgend County BC* [2002] 1 AC 336 at [21]) is that failure to register does not make any charge void against IPTL as chargor.

52. Second, whatever might be the position under Tanzanian law in relation to any requirement of registration, this could not affect the validity of the Security Deed which is governed by English law. Notwithstanding that it is dealing with assets abroad, it nevertheless creates English law equitable security interests: see (e.g.) *British South Africa Co v De Beers Consolidated Mines Ltd* [1910] Ch 502, at 523-524. Again this was a point I made at [121] of the jurisdiction judgment. As Mr Davies-Jones QC put it, the position under the Security Deed is of particular importance because it operates as an umbrella security agreement, under which IPTL not only promised to enter into other security documents such as the Mortgage, (a promise which amounted to an English law governed equitable mortgage, even over foreign land: see *Fisher & Lightwood's Law of Mortgage* 14th edition [3.1]; *Re Anchor Line (Henderson Bros) Ltd* [1937] 1 Ch 483) but, by clause 3.1 granted an immediate fixed and floating charge over its assets. I agree with Mr Davies-Jones QC that the security given by the Security Deed amounted to a comprehensive set of English law governed interests which operated *in personam* as equitable security interests. Accordingly, on any view, this entitled SCBHK to be treated as a secured creditor of IPTL.

53. Third, whilst the arguments put forward by IPTL and PAP in Tanzania focus on the security provided by IPTL, they ignore the Charge of Shares. So far as Mechmar was one of the chargors under that Charge, it has never been contended by the defendants that the charge given by Mechmar, the majority shareholder, duly registered in Malaysia, is ineffective and, given that majority shareholding, SCBHK was and is entitled to control IPTL by voting those shares. So far as VIP's 30% shareholding is concerned, I accept the evidence of Mr Zervos that the Charge of Shares was not a registerable charge under section 79 of the Companies Ordinance. Even if it were, as I have already held in the context of IPTL, lack of registration makes the charge void as against the liquidator and any creditor, not against the chargor himself, in this instance VIP. Accordingly, the Charge of Shares provides further effective security in respect of IPTL's obligations under the Finance Agreements.

54. Fourth, if IPTL had sought to rely upon failure to register in Tanzania as a ground of invalidity of the security as a defence to the present English proceedings, it would be seeking to take advantage of (i) its own breach of its obligation to register the security under Clause 18(A)(1) and (20) of the Facility Agreement, a contract governed by English law; and (ii) its breach of its statutory duty to register under section 80 of the Tanzanian Companies Ordinance, which provides for a fine in default. As a matter of English public policy, this court would not permit IPTL to rely upon its own wrongdoing in that fashion.

55. Furthermore, any attempt by IPTL to rely upon want of registration in Tanzania as a ground of invalidity of the security would have been precluded by the doctrine of contractual estoppel. By Clause 16(A)(4) and (5) of the Facility Agreement, IPTL warranted, on each Interest Payment date, that each of the Financing Agreements

contained valid, legally binding and enforceable obligations and that all registrations required by law had been effected. By Clause 16(B), those warranties were qualified *"as to matters of law only"* by the qualifications, reservations and observations in the legal opinion to be delivered pursuant to Clause 3. Nothing in that legal opinion qualifies the factual warranty that the registration had been effected. Accordingly, IPTL would be precluded from contending the contrary.

56. Finally in relation to the status of SCBHK as a secured creditor of IPTL by virtue of the assignment and novation of the package of Financing Agreements, without re-treading the ground already covered by the jurisdiction judgment in relation to the various proceedings in Tanzania, I agree with Mr Davies-Jones QC that nothing in those proceedings amounts to any decision on the merits as to whether SCBHK is a secured creditor. It follows that nothing that has taken place before the Tanzanian courts could preclude this court from determining that SCBHK is a secured creditor of IPTL. In all the circumstances, I find that none of the contentions made by IPTL and PAP in Tanzania gives rise to a sustainable defence in these proceedings to SCBHK's claim that it is a secured creditor of IPTL. It follows that the claimants are entitled to the declarations sought at paragraphs 9 to 13 of the draft Order.

57. In their Plaint in Tanzania, IPTL and PAP claim damages against SCBHK exceeding U.S. $3 billion, the premise of which is that SCBHK has falsely asserted that it is a secured creditor of IPTL. Given the finding I have just made that SCBHK is a secured creditor of IPTL and that IPTL and PAP have no sustainable defence to a claim on that basis, this claim in Tanzania is wholly without merit as a matter of English law which governs the relevant Financing Agreements. However, even if the claim for damages had any merit, it could not give rise to a defence to SCBHK's claim in the present proceedings for the amount outstanding under the Facility Agreement (including contractual interest). This is because any right of set-off was excluded by Clause 21.1 of the Security Deed and/or Clause 10(A) of the Facility Agreement. These take effect in accordance with their terms, so that SCBHK is entitled to summary judgment without set-off: see for example *Coca-Cola Financial Corp v Finsat International Ltd* [1998] QB 43 at 52-53 per Neill LJ.

58. In conclusion in relation to IPTL and PAP, I am quite satisfied that neither of them has any defence to the claim against them by the claimants in the present proceedings which has any prospect of success, from which it follows that the claimants are entitled to the summary judgment they seek against IPTL and PAP.

The position of VIP in Tanzania

The pleaded case

59. As is apparent from VIP's letter to the court of 21 July 2016, the case which VIP now intends to advance in Tanzania is one founded upon the experts' reports it served in its Tanzanian proceedings on 9 February 2016, shortly before the trial in Tanzania began on 16 February 2016. That is a case that the 2001 and 2003 Variations (but not the original Facility Agreement) were tainted by illegality. However, that is not VIP's pleaded case in Tanzania, which is different. Although it would appear from the letter to the court that VIP is no longer intending to pursue its pleaded case, Mr Davies-Jones QC dealt with that pleaded case in his submissions, on the basis that it might

still represent a case which VIP would have put forward, if it had continued to participate in the present proceedings.

60. VIP's pleaded case in Tanzania is set out in its Plaint dated 12 November 2013, which is advanced against six defendants, Standard Chartered Bank plc, SCBHK, Standard Chartered Bank Tanzania Ltd, Mechmar, Wartsila and Wartsila Tanzania Ltd. As Mr Davies-Jones QC submitted, although it is not clearly drafted, a considerable number of the allegations appear to be directed at the other defendants than the Standard Chartered defendants. It is only necessary to address the allegations which appear to be directed at the Standard Chartered defendants.

61. It is an important consideration that VIP is not the borrower under the Facility Agreement and that, to the extent that the actual borrower, IPTL, has not adopted VIP's allegations, it seems to me that the court should be all the more sceptical as to the validity of those allegations. This is *a fortiori* the position with its new expert case of illegality of the Variations, not a case pursued by IPTL in Tanzania, but it is also the case with some of VIP's pleaded case.

62. However, a critical pleaded allegation made by VIP is the same section 172 point as made in IPTL and PAP's Plaint. As I have already held at [44] and [45] above, the point is misconceived. It is no better in the hands of VIP and yet, as Mr Davies-Jones QC points out, this has been a central plank of VIP's argument that SCBHK is not a secured creditor since 2005. It is a point which is hopelessly bad as a matter of law, but in any event, of course, it is not a point made against SCBMB whose claim as Facility Agent is not challenged by VIP.

63. The VIP Plaint then puts forward various arguments about the form of the Novation Notice. Clause 26(C) of the Facility Agreement, which I have set out above, provides for a two stage process: (i) delivery of a notice to the Facility Agent, followed by (ii) counter-signature by the Facility Agent *"for and on behalf of itself and the other parties to* [the Facility Agreement]*"*. The initial allegation made by VIP is that: *"The purported 'Novation Notice' did not conform to the method prescribed in the Facility Agreement."* However, that does not seem to be raising any independent point beyond its other complaints about the form of the Notice.

64. VIP contends that the Novation Notice was ineffective because it was addressed to the Security Agent, not the Facility Agent. I agree with Mr Davies-Jones QC that this is not a requirement of Clause 26(C), which does not require that the Notice be <u>addressed</u> to the Facility Agent, but that it be <u>delivered</u> to the Facility Agent, which it was. In any event, the clause requires a notice *substantially* in the form of the model form of notice set out in Schedule 3 of the Facility Agreement; it does not require total conformity. Even if there were a requirement that the notice be addressed to the Facility Agent, the fact that it was addressed to the Security Agent instead would not prevent it being in *substantially* the required form.

65. The Novation Notice in this case plainly was in substantially the form of Schedule 3 for the following reasons. It purports to be a Novation Notice executed under Clause 26(C) and it describes the process of novation in conventional terms of release and assumption of identical rights and obligations. It replicates the language of clauses 1 to 6 of the form in Schedule 3, save that it does not contain a sub-clause 2 (B), but that cannot possibly mean it is not in substantially the required form. That sub-clause

relates to confirmation that any consent required in accordance with Clause 26(C) has been obtained, but no such consents were required here, so that the provision would be of no relevance.

66. The Notice is clearly concerned with all the debt due at the time of the Notice in 2005. It was signed by all the people required to sign it: the existing bank, the new bank and the Facility Agent. The allegation by VIP that the Notice was not countersigned by the Facility Agent is simply factually incorrect: it was countersigned by Mr Devi of SCBMB, which had been appointed Facility agent by the outgoing Facility Agent. Furthermore, no-one receiving the Notice could have been in any doubt as to what it was intending to do. IPTL clearly understood that SCBHK had taken over as lender, as is apparent from the notes to IPTL's audited 2007 accounts. Even if IPTL had been in any doubt, the construction of the Notice has to be approached objectively and, even if the Notice in fact delivered to the Facility Agent was mistakenly addressed as VIP contends, it will have been valid if it was sufficiently clear and unambiguous to leave a reasonable recipient in no reasonable doubt as to how and when the Notice was intended to operate: see the test propounded by Lord Steyn in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 768F-H. That test was clearly satisfied here

67. In any event, I also agree with Mr Davies-Jones QC that wrongly addressing the Notice which was in fact delivered to the Facility Agent is the type of mistake curable by the process of construction identified by Lord Hoffmann in relation to contractual notices in the *Mannai Investment* case in particular at 779-780, and would not prevent the Notice being effective.

68. The next point taken by VIP as to why the Novation Notice was ineffective is that: *"The purported 'Novation Notice' failed to provide the notices required upon [the] appointment of [a] successor Facility Agent."* However, the model form of Notice in Schedule 3 to the Facility Agreement does not require any notification as the appointment of a Facility Agent. To the extent that this is a point about the appointment of SCBMB, it is a bad one. The outgoing Facility Agent, BCBB, gave notice of its intention to resign, no appointment of a new agent was made by the lender banks and the outgoing agent appointed SCBMB as its successor by letter dated 22 September 2005 as Clause 22(H) of the Facility Agreement contemplates.

69. Even if there had been some technical defect in the Novation Notice, it was plainly waived by IPTL, which clearly recorded SCBHK as its creditor for some U.S. $123 million in its 2007 accounts. In any event, any such technical defect would not avail VIP since it would not invalidate the assignment of the outstanding debt by Danaharta Managers to SCBHK by the Deed of Assignment. That Deed was an absolute assignment in writing under hand within section 136(1) of the Law of Property Act 1925. It is also clear that notice in writing of the assignment was given to IPTL, for example the Deed was provided to PriceWaterhouse Coopers as agent for the provisional liquidator for the purpose of their considering SCBHK's claim.

70. Quite apart from the fact that there was a legal assignment, the SPA between Danaharta Managers and SCBHK amounted to an equitable assignment by which Danaharta Managers disposed of its entire interest in the facility. SCBHK is entitled to sue in its own name without joining Danaharta Managers because to do so would

serve no useful purpose: see *Raiffeisen Zentralbank Österreich AG v Five Star Trading LLC* [2001] EWCA Civ 68, [2001] QB 825, at [60] per Mance LJ.

71. It follows that, for all the above reasons, SCBHK clearly became the lender under the suite of Financing Agreements by virtue of a valid novation and by virtue of a valid assignment in law or in equity and furthermore was a secured creditor of IPTL. The lengthy and confused contention advanced by VIP in its Plaint that there has been fraud by SCBHK because it has falsely asserted that it was a secured creditor of IPTL is therefore plainly hopeless, based as it is in large measure on the thoroughly bad Section 172 point run by all the defendants.

72. There is also an allegation in the Plaint that SCBHK breached a duty of care owed to VIP in tort and committed "corporate waste" in relation to IPTL. Again it would appear that the relevant breach is alleged to be that SCBHK had wrongly asserted that it was a creditor of IPTL, which as I have just held, is a hopeless premise. Even if there were some basis for the claim in tort, it could not amount to a defence to the contractual debt claim against IPTL.

73. In his oral submissions Mr Davies-Jones QC took me carefully through the VIP Plaint and I am quite satisfied that there is nothing in that pleading which could give rise to an arguable defence to the claimants' claims in the present proceedings. That Plaint does not raise any allegation that the debt is unenforceable for illegality as a matter of English law. That allegation is first made in the expert evidence served by VIP in the Tanzanian proceedings shortly before trial.

Status of experts' reports

74. In the Tanzanian proceedings, VIP produced five experts' reports in February 2016, a week before the trial in Tanzania commenced:

(1) DB&C's Report on *"IPTL Financials"* ("the Financial Experts' Report");

(2) Karel Lankenau's Report on "the conduct of IPTL Lenders under International Banking Standards and Procedures" ("the Banking Expert Report");

(3) Dirk van Leeuwen's Report on *"Criminal Law Analysis of Financial Flows out of IPTL"* ("the Criminal Law Expert Report");

(4) The English Law Expert Report on Illegality of a barrister, Ian Meakin ("the English Law Report");

(5) DB&C's Report on *"VIP's Damages and Losses"*. This seeks to quantify VIP's tortious losses and is therefore of no relevance to this application for summary judgment.

75. Mr Davies-Jones QC referred to these reports (the first two in some detail) in both his written and oral submissions for the present application, out of fairness to VIP, even though VIP has not in fact sought to deploy these reports in evidence in these English proceedings. Furthermore, I was invited to read the first three reports before the hearing and did so. The English Law Report, from an English barrister, is of course inadmissible in any event before an English court and, in any event, is predicated on

the factual and other assumptions in the other reports, particularly the Financial Experts' Report and the Banking Expert Report.

76. Even in Tanzania, their status is in issue. As I have said, they were produced shortly before the Tanzanian trial and go to a serious allegation of illegality which is not pleaded. Although the trial judge decided to allow VIP to rely upon these reports, that decision is the subject of a Revision application by SCBHK before the CAT.

77. So far as their status in England is concerned, quite apart from the fact that VIP has not sought to deploy them in evidence here, these reports do not comply with CPR Part 35 and there is no permission from the court for such non-compliant expert reports. As Mr Davies-Jones QC rightly submits, this is not some arid formality. An expert owes an over-riding duty to the court and the Rules require a special form of statement of truth for an expert report. There is no suggestion that these experts understood the duties owed by an expert, or the role to be played, as summarised by Cresswell J in *The Ikarian Reefer* [1993] 2 Lloyd's Rep 68, at 81-82, principles now set out in Part 35 and the Practice Direction under it, for example PD35 para 2(2): *"Experts should assist the court by providing objective, unbiased opinions on matters within their expertise, and should not assume the role of an advocate"*. Having considered the Financial Experts' and Banking Expert's Reports in particular in detail, I do not consider that they have been prepared with the objectivity and independence which CPR 35 and the *Ikarian Reefer* principles require of expert evidence in this jurisdiction.

78. Had VIP wished to deploy this expert evidence before the English courts, it would have had to obtain revisions of the reports to make them CPR Part 35 compliant. I agree with Mr Davies-Jones QC that the conclusion must be either that VIP was not willing to risk the experts producing CPR Part 35 compliant reports with objective, unbiased opinions or was not willing to serve such reports if they were produced, because they would be inconsistent with the experts' evidence in Tanzania.

79. Of course, what is striking is that not only has VIP not sought to deploy that expert evidence in this jurisdiction, but it has not sought to run this illegality argument (or indeed any of its other arguments) by way of defence to the summary judgment application. I agree with Mr Davies-Jones QC that if VIP had had any confidence that these arguments would enable it to resist summary judgment, one would have expected it to seek to run them. After all, it had nothing to lose, since it has submitted to the jurisdiction of the English courts not only, as I found in the jurisdiction judgment, by virtue of the jurisdiction clause in the relevant agreements, but by its unconditional acknowledgment of service in May 2016, after the Court of Appeal judgment.

80. In the circumstances, I have reached the very firm conclusion that all the experts' reports deployed by VIP in Tanzania are inadmissible in evidence in the English proceedings and have no status here. Accordingly, although as I have said, out of fairness Mr Davies-Jones QC in his submissions took the court to the reports, particularly of the Financial Experts and the Banking Expert, in some detail, I do not consider it necessary or appropriate, given its inadmissibility, to set out that expert case in another jurisdiction in detail in this judgment. I will simply focus on what, in my judgment, are the salient points.

81. Given the inadmissibility in evidence of the only material to support what is, even in Tanzania, an unpleaded case, that material is incapable of demonstrating that VIP has any sort of arguable defence to the claimants' claims based on an allegation of illegality in relation to the 2001 and 2003 Variations.

82. Before considering the salient aspects of the reports, there are two points which merit emphasis even if, contrary to my firm conclusion, this so-called expert material were admissible. First, it is important to keep in mind the extent to which each of the reports set out at [74] above is dependent upon the conclusions of the report before it. Thus, the conclusions in the Banking Expert's Report are dependent upon those of the Financial Experts' Report, the conclusions of the Criminal Law Expert are dependent upon those of the Financial Experts and the Banking Expert and the English Law Expert report is dependent upon the conclusions of all three reports which proceed it. Putting it another way, if the conclusions and assumptions in the Financial Experts' Report are erroneous, which as I set out hereafter, they are, then the entire expert edifice comes tumbling down like a house of cards.

83. Second and, in a sense, a point following on from that first point, it is important to have in mind, so far as it is discernible from a great deal of obfuscation and repetition in these so-called expert reports, exactly what the illegality case is on the facts which they are advocating (and certainly in the case of the Banking Expert I use that word advisedly). On analysis that case is, as Mr Davies-Jones QC submits, inherently fanciful and obviously misconceived.

84. Mr Davies-Jones QC supported that submission by reference to seven points or steps, with each of which I agree. The first four seem to me to be unexceptionable in any event, but none of the seven steps seem to me to be capable of serious challenge. First it is not suggested by any of the defendants, that the entering into the Finance Agreements in June 1997 was illegal and, second, apart from IPTL having overlooked the ninth advance, none of the defendants is disputing that U.S. $85.86 principal was advanced. That sum was not advanced for an illegal purpose, but to fund the construction of a power station. Third, having advanced that sum, the lenders were clearly entitled to repayment of that principal plus interest pursuant to the terms of the Facility Agreement. As Mr Davies-Jones QC submits, that third step is a statement of the blindingly obvious, but it is a critical point which the experts seem to completely overlook. However IPTL spent the money advanced to it, for example irrespective of whether it overpaid Wartsila or got value for money, the irrefutable fact is that it had a loan of over U.S. $85 million from the lenders. Any complaint VIP has as to how the loan was deployed can only be directed at IPTL and cannot conceivably be a defence to a claim for repayment of the loan plus contractual interest on it.

85. The fourth step, which again does not seem to be disputed, is that, because IPTL failed to pay any interest on the loan during the period of the Tariff Arbitration between 1998 and 2001 (caused by Tanesco failing to pay) by 30 September 2001, the date of the 2001 Variation, the outstanding debt, including contractual interest, stood at U.S. $120.2 million. There could have been no possible defence to a claim by Danaharta Managers for repayment of that sum as of that date. It is only at this stage, of the 2001 Variation, that VIP and its experts say any question of illegality arose. They contend that the 2001 Variation was an instrument for defrauding IPTL because it permitted certain payments to be made to Mechmar. However, the idea that a financial institution such as Danaharta Managers (let alone a Malaysian state owned

entity whose whole purpose was to maximise recovery on otherwise non-performing loans) which had a legitimate loan outstanding of over U.S. $120 million, would jeopardise its unanswerable claim by entering a scheme to defraud the borrower, is as I said at [30] above preposterous.

86. Furthermore, as I also pointed out at [30] above, this VIP expert case ignores completely the obvious commercial benefits to IPTL of the restructuring. The amount of the principal was not increased and, if the other terms were complied with, there was a carrot of U.S. $8 million debt forgiveness. There was also a grace period for repayment of interest and a reduction in the rate of default interest. Overall, this restructuring which IPTL requested and freely agreed to, was clearly to its commercial advantage. The experts seem to suggest that the Variation extended the period of the loan to eleven years and this was disadvantageous to IPTL. This suggestion is nonsense: quite apart from the fact that a longer period gave IPTL more time to repay, there was always the facility to repay early without penalties.

87. VIP's Banking Expert in particular completely ignores those commercial advantages. He latches on to the fact that Danaharta Managers proceeded with the consent of only the directors of IPTL appointed by the majority shareholder Mechmar (in fact because VIP and its appointed directors had stopped cooperating, which he also overlooks) to suggest: *"[This] evidences Danaharta and Mechmar's joint understanding that the conditions of the new loan [that's the 2001 Variation] did not benefit the interests of IPTL or VIP but only the Mechmar and Danaharta"*. As Mr Davies-Jones QC submitted, this is breath-taking and the failure to have regard to the obvious commercial advantages of the Variation is another indication that this expert is not impartial and independent.

88. VIP's expert case also completely misunderstands the nature of the payment to Mechmar permitted by the Variation which the experts seek to impugn. As the terms of the Variation make clear, the payment in question was in fact repayment of a U.S. $5.2 million short term loan facility which had been extended by Danaharta Managers, through Mechmar as guarantor, to IPTL. The experts complain that this payment gave Mechmar priority over the bank, but quite apart from the fact that the bank could waive whatever priority rights it chose, the experts have misunderstood the nature of the short term loan through Mechmar to IPTL, which was for the entirely legitimate purpose of enabling IPTL to get the power station operating. Furthermore, the experts' argument that this provision for repayment of Mechmar was somehow detrimental to IPTL overlooks that, in circumstances where IPTL as borrower had two legitimate loans, one from Danaharta Managers and one from Mechmar, Danaharta Managers was perfectly entitled to say that the loan from Mechmar would no longer be subordinated to its loan. IPTL had no conceivable basis for complaint about that: quite apart from the fact that all this restructuring was at its request, the amount of money it owed to its two lenders always remained the same.

89. In any event, as Mr Davies-Jones QC submitted, in the extremely unlikely scenario that the 2001 Variation was intended to defraud IPTL in some way, then the Mechmar directors at IPTL who agreed it would have acted without authority and the transaction would not have been binding on IPTL. In all the circumstances, Mr Davies-Jones QC's fifth step, that nothing about the 2001 Variation could have converted the loan into an illegal loan is clearly correct.

90. His sixth step is similar, that nothing about the 2003 Variation could have converted the loan into an illegal loan. The VIP expert case is that there was illegality tainting that Variation because it permitted payments to Wartsila and Mechmar in supposed priority to the bank. The same arguments as the claimants put forward in relation to the 2001 Variation apply with equal force here. Above all, on the basis that the debts owed to Mechmar and Wartsila were genuine debts expressly permitted and contemplated by the Financing Agreements, as I have held they were in [31] above, IPTL was in no worse position if one creditor was given priority over another and the bank was entitled to waive whatever priority rights it had.

91. Illegal performance of the Facility Agreement was not required of Danaharta Managers or, after the novation and assignment, of SCBHK. The monies lent for a legitimate purpose had already been fully advanced. What remained was performance by IPTL of its obligations under the Facility Agreement to repay the principal and contractual interest. The Variations were intended to facilitate that performance and did so, turning a NPL into a performing loan. So far as payments to Mechmar and Wartsila are concerned, the Financing Agreements provided for shareholders' loans and Wartsila was entitled to be paid under the EPC contract, so such payments were entirely regular.

92. Mr Davies-Jones QC's seventh and final step is that, even if the 2001 and 2003 Variations had converted the loan into an illegal loan (and, in any event, there would no basis for impugning the original loan which stood at U.S. $120.2 million as at 30 September 2001) in the hands of Danaharta Managers, that cannot affect SCBHK given that the novation to it in 2005 was a new contract. As Mr Davies-Jones QC correctly submitted, no bank pays U.S. $76.1 million for a loan it knows to be unenforceable for illegality. This simply reinforces the strength of SCBHK's case and the preposterousness of a case that the bank would have paid that sum in order to participate in a scheme to defraud IPTL, the very party to whom it would be looking for repayment, in circumstances which would or might render that loan unenforceable.

93. It follows that, before one even looks at some of the detail of the expert case and why the factual and legal assumptions on which it is premised are erroneous, the overall picture which emerges is of an illegality case so implausible that it verges on the nonsensical, certainly a case which would have no prospect whatsoever of success at trial in England. As set out hereafter, further consideration of the detail of the expert case in Tanzania, does not improve the case for VIP, if anything it makes it appreciably worse because there are so many errors and misconceptions in that expert case.

The Financial Experts' Report

94. The lengthy Financial Experts' Report is by Mr Groentjes and Mr Hoeksema and analyses IPTL's financial statements from 1994 to 2013, focusing mainly on the period before 2006. Their key "findings" are to the effect that: (i) IPTL's accounts recorded both Mechmar and Wartsila as creditors without any contractual or other justification; (ii) between 2002 and 2006 payments were made to Mechmar and Wartsila before the bank lending had been paid off; and (iii) the overall payments made by IPTL between 2002 and 2006 for operating the plant, by way of principal and interest under the Facility Agreement, and to Mechmar and Wartsila vastly

exceeded the figures in the *"Financial Model"* (Annex F to the ICSID Award in the Tariff Arbitration).

95. These "findings" are founded on erroneous assumptions about the Mechmar debt, the Wartsila debt and the Financial Model, but even if they were not, none of the "findings" is of any relevance to the enforceability of the debt. The first erroneous assumption is about the Mechmar debt and is one I have already discussed: the experts assume that Mechmar should only have injected funds into IPTL by way of subscription of shares, not by way of loan. As they say: *"Mechmar was to be merely a shareholder, not also a creditor with a right to interest and redemptions. We note that we have not seen …any evidence that VIP or any of its directors had consented to such a loan".*

96. I have already held that this finding is misconceived. It overlooks the fact that the Facility Agreement and other Financing Agreements expressly contemplated that the part of the project expenditure which would be funded by the shareholders rather than the loan could be in the form of equity subscription or subordinated loans from the shareholders: see [20] above. Once that fundamental misconception by the Financial Experts is identified, many of their conclusions, such as that Mechmar was to be *"merely a shareholder"* or that there was no evidence that VIP agreed to shareholder debt are demonstrable nonsense: VIP was a party to the Shareholder Support Deed and accepted the terms of all the Financing agreements, which, as I have said, expressly contemplated shareholder loans.

97. Furthermore, under the terms of the Financing Agreements and contrary to the Financial Experts' "findings", the fact that shareholder loans were subordinated debt did not mean that there could be no payment to a shareholder until all the lending had been repaid. On the contrary, it simply meant that payment of interest or capital in respect of a shareholder loan fell within the definition of *"Restricted Payment"* which, in broad terms meant that they could be paid off provided that no event of default had occurred and was continuing: see [20(6)] above, another point completely ignored by the experts.

98. The 2003 Variation allowed for payment of interest to Mechmar at U.S. $79,000 per month. Even if, as the experts contend, that was allowed for ahead of the principal repayments due to Danaharta Managers, no loss was caused to IPTL, because all payments of principal due to Danaharta Managers (and, after the novation and assignment) to SCBHK in the period until April 2006 were paid in full. The default which occurred thereafter was not because of payments to Mechmar, which as I have held were, in any event, permitted under the terms of the Financing Agreements, but because Tanesco stopped paying IPTL at all. Of course, as Mr Davies-Jones QC pointed out, in the absence of the interest payments to Mechmar, the Mechmar debt (which was a legitimate debt and liability of IPTL) would simply have compounded.

99. There appears to be some suggestion in the Financial Experts' Report that the Mechmar debt set out in IPTL's 2001 accounts was not in fact advanced, but any such suggestion is hopeless. The accounts were audited by Deloitte and there is no basis for supposing that they are not accurate. Furthermore, under Clause 4 of the Facility Agreement, no funds would have been advanced by the banks unless the Facility Agent was satisfied that the required *"Shareholders' Funds"* had been or would be provided by the draw down date.

100. The Financial Experts' Report notes an increase in the Wartsila debt from U.S. $27 million shown in the 1999 accounts of IPTL to U.S. $34 million in its 2001 accounts which it ascribes to *"interest and maintenance costs in those years"*. It describes the overall Wartsila debt as: *"most likely to a very large extent an unpaid part of the US$114 million of the EPC Contract price and to a smaller extent operation and maintenance costs owed to Wartsila Tanzania"*. Accordingly, I agree with Mr Davies-Jones QC that on the face of it, there was nothing objectionable about the Wartsila debt.

101. The Financial Experts criticise the fact that IPTL did not adjust the debt it owed Wartsila after the Final Award in the Tariff Arbitration, but this involves a fundamental misconception as to the relevant contractual and other relationships. The Tariff Arbitration was between IPTL and Tanesco. In broad terms, the Tribunal was critical of IPTL for entering the EPC Contract with Wartsila, rather than accepting a cheaper tender from Hyundai. They adjusted the prices to be paid by Tanesco, which was the genesis of the Financial Model. However, Wartsila was not a party to the Tariff Arbitration and there are no grounds for impugning the enforceability of its EPC Contract with IPTL, which Wartsila performed and pursuant to the terms of which Wartsila was entitled to be paid. If IPTL had gone to Wartsila after the Tariff Arbitration and demanded that, in the light of the Final Award, it reduce its prices, Wartsila would have been entitled to refuse to do so, there being no legal basis for requiring such a reduction. The criticism by the Financial Experts is entirely misplaced.

102. Then the Financial Experts are critical of the 2003 Variation because it provided for payments in respect of IPTL's debt to Wartsila before the bank lending had been repaid. I have already held at [31] above that this allegation is misconceived. The contractual structure necessarily envisaged that the Wartsila debt would be paid off before the bank lending, because it was the bank lending plus the shareholders' funds which were going to pay the project costs. That was reflected in the payment waterfall in Clause 6(a) of the Calculations and Forecasting Agreement. Likewise, insofar as the Wartsila debt represented *"operation and maintenance costs"* incurred running the power station, those were operating expenses the payment of which had priority over the bank lending in the payment waterfall in Clause 6(b) of the Calculation and Forecasting Agreement.

103. The Financial Experts' Report assumes that any payments by IPTL not envisaged by the Financial Model were necessarily wrongful. This is to entirely misunderstand its origin and purpose. It was produced during the course of the Tariff Arbitration as a method of calculating the Tariff payable by Tanesco to IPTL and Tanesco and IPTL entered a Stipulation Agreement which became Appendix F to the Final Award, by which they agreed that the Tariff would be calculated by reference to the Financial Model. However, the Financial Model was not an agreement between IPTL and its shareholders or between the shareholders *inter se*, or between IPTL and its creditors, including Wartsila. Contrary to the views of the Financial Experts, it did not provide a cap on what IPTL could expend its money on.

104. At their Finding 21, the Financial Experts level criticism at the original banks for: *"accept[ing] draw-downs from the loan facility for houses not built for an amount of USD 6m and for a USD 10m last minute raise of the tender price."* There is no evidence whatsoever to support this assertion. In fact, as the Tribunal found in their

Final Award in the Tariff Arbitration, the number of houses specified in the EPC contract were built and the price under the EPC Contract, including the last minute U.S. $10 million increase, was approved by all the directors of IPTL, including those appointed by VIP. Furthermore, given that the last draw down from the original banks was in December 1999, their rights to repayment of U.S. $85.86 million plus contractual interest (rights which have been validly novated and assigned to SCBHK) accrued at that point in time. Nothing which happened thereafter, including in the Tariff Arbitration in 2001, can have deprived the original banks of those rights, since the money had been advanced. In any event, none of this could be of the slightest relevance to SCHK's rights under the novation.

105. The Financial Experts contend at their Finding 22 that the 2001 Variation *"replaced"* the original facility with a new credit line. As I have already held at [29] above, this contention is completely misconceived. The 29 October 2001 letter was clearly a variation of the existing Facility Agreement, not a new loan agreement. Finding 22 also asserts: *"the allocation of IPTL funds to Mechmar and Wartsila ahead of repayment of the 1997 Facility, thus waiving the lenders' priority rights*". This point is equally misconceived, for the reasons I have already given. It also ignores the fact that IPTL's net debt position would remain the same even if payments were made to three creditors, not one.

106. Finding 23 concerns both Danaharta Managers and SCBHK and the fact that payments were made by IPTL in the period from 2002 to 2006 through accounts controlled by them, including payments of principal and interest to those banks and payments to Mechmar and Wartsila. These payments were all in respect of outstanding debts and any suggestion that there was anything untoward in such payments is misconceived for the reasons already given. Furthermore, this Finding acknowledges the role of Arthur Andersen and then Ernst & Young in monitoring the Tanzanian and Singapore accounts of IPTL from which the monies were paid. If these payments had been improper as alleged, one or other of those leading auditing firms would surely have picked that up.

107. To the extent that the Financial Experts seek to contend that the 2003 Variation was a new loan agreement, it clearly was not. It expressly provided that it was a variation of the 2001 Variation, stating: *"the terms for the restructuring of the Term Loan facilities set out in our letter of 29 October 2001 shall be varied as follows, effective 30 April 2003... All other terms and conditions as per the Letter of Offer dated 29 October 2001 will remain."* Clearly, those terms and conditions include the provision that, save as varied by the Variations, the terms and conditions of the original Facility Agreement remained in full force and effect.

108. The complete failure of the Financial Experts to appreciate these fundamental points about shareholders' loans, the two Variations and the Financial Model, even if that failure was not wilful, casts considerable doubt on the extent to which they could be said to have fulfilled the duties of independence and objectivity which the English court would expect of an expert. It is difficult to see how any independent, objective expert who had considered the materials properly and carefully, could have reached the conclusions they did. This is a criticism which becomes overwhelming in relation to the Report of the so-called Banking Expert, which I now come on to consider.

The Banking Expert's Report

109. The Banking Expert Mr Lankenau is a Dutch banker who claims to have twenty years investment banking experience, although as is apparent from analysis of his Report as set out hereafter, he exhibits what is apparently a distinct lack of experience. Although his Report purports to have been prepared: *"in accordance with my professional standards as a banker"* and by reference to various sets of written standards (including those of the Dutch Central Bank, the relevance of which is not immediately apparent) his conclusions on SCBHK's conduct are not assessed by reference to any written standard, apart from the Basel II regime, which was not even in force at the relevant time and which, for reasons I will come on to, was and is wholly irrelevant. Furthermore, Mr Lankenau does not refer in his Report to having exercised a degree of independence and objectivity which could even begin to equate with the obligations placed on an expert in this jurisdiction set out in CPR Part 35 and *The Ikarian Reefer.*

110. What is also immediately striking about his Report is that it is parasitic upon the conclusions of the Financial Experts. As he says: *"All conclusions and opinions expressed in this report are the result of my analysis of the Financial Expert Report, the underlying documentation and information provided by [VIP's legal team]"*. Given the fundamental flaws in the assumptions made by the Financial Experts to which I have alluded, the Banking Expert Report can have no validity, but in any event, closer examination of that Report demonstrates that it is not only based upon a series of fundamental misconceptions, but it fails to demonstrate the degree of independence and objectivity which this court expects of an expert.

111. The Report refers to six *"phases"* in terms of the chronology, only the last of which is of any relevance to SCBHK. However, his conclusions in relation to the first five phases are fundamentally flawed because they are based on the same flawed conclusions of the Financial Experts about the debt owed by IPTL, the Tariff Arbitration and the 2001 Variation as I have already referred to, so that those conclusions by the Banking Expert can be disregarded.

112. There are other fundamental difficulties with the Banking Expert Report, even before one begins to look at his detailed conclusions. He completely ignores the true role of Danaharta Managers which I have already referred to at [27] and [28] above, of which he should have been aware if he was an impartial expert. The approach which Danaharta Managers adopted to the NPLs it took over emerges clearly from the Danaharta Final Report. In the section headed: "The Danaharta Story" it states:

> *"Danaharta had chosen to adopt an asset management company approach. It proposed to deal with the NPLs in its portfolio on an account by account basis choosing the recovery strategy that would reap the best recovery value in each case. This was due to several key factors that were peculiar to the Malaysian banking sector...*
>
> *The relatively small number of accounts and borrowers made it feasible for Danaharta to adopt the true AMC [asset management company] approach as it was able to actively manage the NPLs on an account by account basis. It also allowed Danaharta to extract maximum recovery from each account."*

113. In the section headed: "Management of NPLs" it states:

> *"If a borrower's business was viable, the soft approach would be used. The methods under the soft approach were namely Plain Loan Restructuring, Settlement of Loans and Schemes of Arrangement…*
>
> *Generally, the soft approach yielded better recovery compared to the hard approach. As such, Danaharta was always keen to use the soft approach."*

114. In the section headed "Foreign Loans", the Report states:

> *"In general, Danaharta undertook the recovery work for its NPLs and did not dispose of them outright, except for the foreign loans in its portfolio. These foreign loan accounts were non-Ringgit loans and marketable securities extended to or issued by foreign companies. They were taken over primarily from three financial institutions – the overseas branches of the now defunct Sime Bank Berhad and Bank Bumiputra Malaysia Berhad and Sime International Bank (L) Ltd (Sime Labuan), an offshore bank.*
>
> …
>
> *Danaharta realised that it did not have a comparative advantage in resolving the foreign loans as they lay outside the jurisdiction of the Danaharta Act. So, it was decided that the foreign loans would be disposed of for cash or swapped into loans of Malaysia-domiciled borrowers. The swapping of loans allowed Danaharta to dispose of the foreign loans in exchange for loans of Malaysia-domiciled borrowers, upon which it could exercise its special powers."*

115. It can thus be seen that, in relation to the non-Malaysian loan to IPTL, Danaharta Managers conducted itself entirely in accordance with the strategy set out in that Final Report, first in employing the soft approach successfully, agreeing the Variations which turned what was an NPL into a performing loan, then in selling off that performing loan for cash to SCBHK. There are no grounds whatsoever for criticism of Danaharta Managers. The fact that the Banking Expert felt able to criticise Danaharta Managers betrays a surprising ignorance about its role and purpose.

116. Furthermore, he criticises Danaharta Managers for continuing to deal with the Mechmar appointed directors of IPTL and not consulting the VIP appointed directors. Quite apart from the fact that this criticism ignores the fact that under Clause 6 of the Shareholders Agreement: *"the sole and absolute right to establish, manage and operate [IPTL] for the duration of the project"* vested in the directors appointed by Mechmar, by April 2001 the VIP appointed directors had effectively walked out. By February 2002 VIP had issued its winding up petition, which as I held in the jurisdiction judgment was in breach of the Shareholders Agreement and the

Shareholder Support Deed and in 2003, the LCIA ruled against VIP in relation to those matters, but VIP wrongfully refused to comply with that Award.

117. In those circumstances, Danaharta Managers obviously could only deal with the cooperating Mechmar directors in order to restructure the loan to maximise its recovery and benefit IPTL. Given that VIP was in breach of its obligations, it could scarcely complain that Danaharta Managers did not deal with it, since doing so would simply have led to obstruction. It seems to me that any properly independent expert would have recognised that Danaharta Managers, and hence SCBHK, could not be blamed for a problem of cooperation with VIP which VIP had created. Furthermore, the Banking Expert, like the Financial Experts before him, completely ignores the fact that the debt restructuring pursuant to the 2001 Variation was successful in turning an NPL into a performing loan and hence was to the benefit of IPTL (and thus its shareholders) as well as Danaharta Managers.

118. In relation to his sixth phase, Mr Lankenau concludes that in acquiring the debt, SCBHK must have been acting dishonestly and for an illegal purpose. He seems to have relied on six factors in reaching that conclusion, all of which are misconceived and demonstrate that he cannot be regarded as an objective, independent expert. The first factor is reliance on the conclusions of the Financial Experts, but since as I have concluded, these conclusions are fundamentally misconceived, they are no better in the hands of the Banking Expert.

119. The second factor is the absence of VIP consent to the 2001 and 2003 Variations. For the reasons already set out at [116]-[117] above, this is a bad point, but in any event, even if the 2001 and 2003 Variations were invalid because of absence of consent from VIP, Danaharta Managers would still have been entitled to recover (and to transfer to SCBHK) the outstanding amount under the unamended loan, plus contractual interest. Ultimately this (and similar points about the invalidity or even illegality of the 2001 and 2003 Variations) have very little financial impact. As I have already indicated, if the Variations are valid, the amount outstanding as at 31 July 2016 is some U.S. $166.8 million. If the Variations are invalid and recovery can only be made under the unamended loan plus contractual interest, the amount outstanding is some U.S. $166.1 million. Accordingly, all the sound and fury about alleged illegality makes a difference of minimal significance in the overall context, of only some U.S. $700,000.

120. The third factor is that Mr Lankenau contends that the SPA was *"contrary to sound banking practice"* because it: *"Does not contain a valuation report; Does not contain a full write-up of the history of the loan; Does not contain a due diligence report at the time the NPL were transferred from the Malaysian consortium of banks to Danaharta; Does not include a report from compliance, credit, audit or risk management from within SCBHK containing the rationale for the credit approval, awareness of the significant breaches of risk and compliance by Danahart[a]"*.

121. This is an extraordinary contention. One would never expect a Sale and Purchase Agreement to contain such matters. Those would all be internal matters for SCBHK to investigate by way of due diligence before it signed the SPA. So far as the SPA is concerned, if it had contained such matters, it would have been contrary to normal banking practice. The standard forms used in the market such as those of the Loan Market Association do not contain such information, nor does the Banking Expert produce any evidence to support his contention. The fact that he says what he does is

an example of the sort of wild assertion made in his report which demonstrates that he is not on analysis a banking expert at all and is certainly not objective and independent.

122. The fourth factor, on which he appears to place considerable weight, is his contention that the waivers and exclusions in the SPA are so extraordinary as to demonstrate that SCBHK must have been acting dishonestly and illegally. The relevant provisions are as follows:

> "*Clause 6(b)... The Vendor specifically disclaims any misrepresentation or warranty with respect to: […] (b) the execution, legality, validity, enforceability, registration, perfection, priority, genuineness, sufficiency, collectability or value of the Sale Assets and the Asset Documentation or any collateral therefor or guarantee thereof or any other instrument or document furnished pursuant thereto; […]*
>
> "*Clause 8(e)…the Purchaser hereby agrees and acknowledges that:*
>
> *(i) The Purchaser assumes the risk of non-payment of any principal or interest on Sale Assets and any fees or other amounts payable in connection therewith, and any present or future defaults by any Obligor under the Sale Assets or Sale Documentation or any agreements executed in connection therewith or any other non-payment;*
>
> *(ii) the Vendor shall not be responsible for the correctness as to form, the due execution, legality, validity, enforceability, registration, perfection, priority, genuineness, sufficiency, or collectability or the completeness of the Sale Assets and the Asset Documentation, any collateral, any guarantees or any other document relating thereto, or for any failure by any Obligor to perform the obligations thereunder, for any Obligor's use of the proceeds therefrom, or for the preservation of any collateral or the loss, depreciation, or release thereof;*
>
> *Clause 10 […]The Purchaser hereby releases and forever discharges each Vendor Party from any and all past, present and future claims...The Purchaser shall not file any charge or complaint or sue or take any action or cause any Vendor Party to be charged or sued regarding any matter stipulated herein except in respect of obligations arising from the expressed representations and warranties by the Vendor in this Agreement and any breach by the Vendor of this Agreement or fraud on the part of the Vendor…"* (emphasis added)

123. Mr Lankenau says that the waivers in the SPA are: *"far broader than anything I have seen."* In relation to the fraud carve-out in Clause 10 which I have underlined above, he says:

> *"I have never seen a statement where the parties have found it necessary to expressly preserve a claim for 'fraud', especially in light of the extraordinary waivers given by SCBHK.* ***I also have never seen a transaction in which the seller disclaimed liability for an illegal transaction, as in Clause 6(b)****. Had this transaction been undertaken under ordinary, arm's length commercial standards and in good faith, the suggestion of fraud would have resulted in immediately stopping the credit approval process. This combination of a lack of essential documentation, obvious deficiencies in the documentation that is actually disclosed by the vendor and extraordinarily broad waivers for the benefit of the vendor, clearly indicates that both parties, Danaharta and SCBHK, very experienced banks, knew or did not care that the loan was very likely to be illegal or the product of fraudulent or oppressive conduct…"*

124. As Mr Davies-Jones QC rightly submitted, this is breath-taking. It is also nonsensical. Only a conspiracy theorist with no real experience and no objectivity could reach this conclusion. The suggestion that a fraud carve-out such as that in Clause 10 is extraordinary is simply wrong. In *Thomas Witter Limited v TBP Industries* [1996] 2 All ER 573 at 598, Jacob J considered that, for the purposes of the Misrepresentation Act 1967 and the Unfair Contract Terms Act 1977, it would inevitably be unreasonable *"to exclude misrepresentation for fraudulent misrepresentation"*. Thus, there is a risk that a clause drafted too broadly (i.e. so as to extend to fraudulent misrepresentation) will be entirely ineffective. To avoid that risk, it has become common drafting practice to include fraud carve-outs of the kind seen in Clause 10 of the SPA in a wide variety of commercial contexts to make it clear that the relevant exclusion clause does not operate to exclude liability for fraud. The carve-out reflects the commercial common sense that a contracting party may be prepared to assume the risk of negligence by his counterparty, but not the risk of fraud. Putting such a carve-out in the contract does not mean that the party suspects that the counterparty has been fraudulent, let alone that the party wishes to participate in a fraudulent scheme, as Mr Lankenau seems to think.

125. Three recent cases dealing with different commercial situations serve to demonstrate how such carve-outs are routinely included in exclusion clauses. No doubt many others could be found. *Invertec Ltd v De Mol Holding BV* [2009] EWHC 2471 (Ch) was a case about a share purchase agreement decided by Arnold J. The contract contained a clause in these terms:

> *"No limitation in cases of fraud etc.*
> *<u>The provisions of Schedule 5 shall not operate to limit the liability of the Vendor under or in connection with the Warranties where the liability arises as a result of fraud</u> on the part of the Vendor, the Company or any of the officers or employees of the Company, or any agents or representatives of the Company or of the Vendor or where a matter has been deliberately concealed or withheld by the Vendor or any of the officers of the Company."* (emphasis added)

126. *Marex Financial Ltd v Fluxo-Cane Overseas Ltd* [2010] EWHC 2690 (Comm) was a case about sugar contracts decided by David Steel J. The relevant part of the clause reads as follows:

> *"**General exclusion**: Neither we nor our directors, officers, employees or agents shall be liable for any direct or indirect losses, damages, costs or expenses incurred or suffered by you under this Agreement (including any Transaction or where we have declined to enter into a proposed Transaction) unless arising directly from our or their respective gross negligence, wilful default or fraud. In no circumstances shall we have any liability for consequential or special damage."* (emphasis added)

127. *Swynson Ltd v Lowick Rose LLP* [2014] EWHC 2085, [2014] PNLR 27, was an accountants' negligence decided by Rose J. The due diligence report contained a paragraph in these terms:

> *"The liability of Hurst Morrison Thomson LLP (including its partners, staff and associated entities) in respect of breach of contract or breach of duty or fault or negligence or otherwise whatsoever arising out of or in connection with this engagement, shall be limited in total to £5 million to cover claims of any sort whatsoever (including interest and costs) arising out of or in connection with this engagement. This provision shall have no application to any liability for death or personal injury, or any other liability for which exclusion or restriction is prohibited by law or to liability arising as a result of fraud on the part of Hurst Morrison Thomson LLP."* (emphasis added).

128. Equally, Mr Lankenau's suggestion that clauses such as Clause 6(b) of the SPA containing a waiver in respect of: *"execution, legality, validity…"* are extraordinary is also wrong. Such clauses are commonly found in a variety of commercial contexts, particularly where a seller is not the original contracting party, and are entirely legitimate. The decision of the Court of Appeal in *National Westminster Bank v Utrecht-America Finance Co* [2001] EWCA Civ 658, [2001] 3 All ER 733 is a case where such a clause is to be found. That case concerned a take-out agreement by which the interest in a credit agreement was bought. The relevant clause provided as follows:

> *"save for the Seller's Warranties, the Seller makes no representation or warranty, nor assumes any liability for, the due execution, legality, validity, effectiveness, adequacy or enforceability of the Credit Agreement, the UK Facility Agreement, the Security Documents or the collectability or value of the Transfer Assets"*

129. Far from considering this provision to be extraordinary or somehow indicative of fraud, the Court of Appeal judgment was clearly intended to uphold the very wide disclaimers in the contract. The same clause in the same contract, albeit in a dispute between different parties was considered without adverse comment by Colman J in *National Westminster Bank plc v Rabobank Nederland* [2005] EWHC 1368 (Comm). Similar provisions were considered by Aikens J in *Standard Chartered Bank v Banque Marocaine Du Commerce Exterieur* [2006] EWHC 413 (Comm) and by

Gloster J in *JP Morgan Chase Bank v Springwell Navigation Corp* [2008] EWHC 1793 (Comm).

130. Furthermore, as Mr Davies-Jones QC points out, Clause 16.2.8 of the Security Deed, one of the original suite of Financing Agreements which VIP has not sought to challenge contained a very similar provision: *"... neither the Charges nor the Liabilities shall be affected in any way by ... the illegality, invalidity or unenforceability of, or any defect in, any provision of any agreement or document relating to the Liabilities or any security, guarantee or indemnity…."*

131. Accordingly, waivers or disclaimers of this kind are entirely common-place and unexceptionable. In the context of the SPA they are consistent with Danaharta Managers' role as temporary manager of the debt, with the strategy it was pursuing of shedding responsibility for non-Malaysian loans and with its finite life. The mission was to complete its activities by December 2005 and the SPA was one of the last transactions it entered. These waivers were obviously intended to ensure a clean break. Furthermore, the SPA was a standard form Danaharta Managers document for its *"restricted tender exercises"* and the letter inviting bids made it clear that the sale was to be on an "as is, where is" basis and the bids were to be unconditional, in other words without recourse to Danaharta Managers. Mr Lankenau's opinion which I quoted at [122] above, ignores completely that legitimate commercial purpose of the waivers and disclaimers, so far as Danaharta Managers was concerned.

132. The fifth factor to emerge from Mr Lankenau's Report is his conclusion that SCBHK would have had to reserve at 100% to cover its exposure to the debt. This is premised on the assumption that, at the time of the SPA, the debt was a NPL and had been so for seven years. That reserve was said to be required because of the application of the Basel II regime. This point is completely wrong. Quite apart from the fact that Basel II was not available for implementation until the end of 2006 and so was not in force at the time the SPA was entered in 2005, the fundamental fallacy in all this is the assumption that the loan was a NPL at the time of the SPA. It was not. By 2005 it was a performing loan and had been since 2002. All payments of capital and interest pursuant to the restructured terms were up to date. Danaharta Managers itself characterised the loan as a performing one in an Inter-Office Memo of 1 April 2005: *"…the loan is a performing one with cumulative principal repaid to date of USD 19.85 mil."* The valuation of the loan in that memo is expressly on the basis that it is a performing account.

133. The same fundamental fallacy infects the sixth and final factor. This is Mr Lankenau's suggestion that SCBHK cannot have paid Danaharta Managers U.S. $76.1 million for the loan. His conclusion is: *"I therefore conclude: that it is very unlikely that this entire amount of USD 76.1m was actually paid …and, if this payment is actually evidenced, that the loan was not bought as a loan but as a trade asset which should have been resold within 90 days at par, which could only be done by representing the loan as though it were a perfectly legitimate loan or pressuring a vulnerable party not to examine all the facts and circumstances."* This speculation obviously proceeds on the fallacious assumption that the loan was not a performing one at the time of the purchase. In any event, the evidence is quite clear that SCBHK did pay Danaharta Managers U.S. $76.1 million for the loan, so what Mr Lankenau asserts as *"very unlikely"* to have happened, did happen. Furthermore, the evidence as to SCBHK's

exit strategy is that it bought the asset with a two to six year performance time-frame, not 90 days as asserted by Mr Lankenau.

134. This wild speculation, with its insinuation that SCBHK was participating in something illegal, is not only wrong but improper. Mr Lankenau had no business making such allegations without checking his facts. Had he done so he would have realised that SCBHK had paid U.S. $76.1 million for the loan. As Mr Davies-Jones QC says, the question is why Mr Lankenau felt constrained to advance this suggestion. The obvious answer is that even he must recognise that no bank would pay U.S. $76.1 million for a loan which, on the basis of his views, the bank must have known would be unenforceable for illegality.

135. In my judgment this suggestion is the final demonstration that Mr Lankenau is not independent or objective, that his views are based on fundamental fallacies and that, even if his Report were admissible in evidence before this court, it is worthless and should be disregarded.

The Criminal Law Expert Report

136. The Criminal Law Expert Report is from Mr van Leeuwen, a Dutch lawyer, who gives evidence of Dutch and Tanzanian law. Dutch law is irrelevant in this case and he is not a Tanzanian lawyer, so Tanzanian law is outside his area of expertise. His report should be disregarded on that ground alone. It is also fundamentally flawed because it is predicated upon the false assumptions and conclusions of the Financial Experts and the Banking Expert and upon the thoroughly bad point about Section 172 of the Companies Ordinance, with which I have dealt above.

137. Furthermore, his objectivity and independence appear to be just as questionable as in the case of the Financial Experts and the Banking Expert. This is demonstrated by the fact that the last ten pages of his Report espouse a theory that the purchase of the debt by SCBHK, and its pursuit of its rights under the loan, can be characterised as money laundering. This is obvious nonsense. The three UN Conventions he relies upon are international treaties imposing no obligations or prohibitions. The only Tanzanian statute he relies upon, the Anti Money Laundering Act ("AMLA") only came into force in 2007, after any of the conduct he seeks to impugn. In any event, even if AMLA had been in force, the loan of U.S. $85.86 million can hardly be characterised as for an illegal purpose: it was for the construction of a power station. Equally, the receipt into IPTL accounts operated by SCBHK of monies from Tanesco cannot be characterised as the receipt of the proceeds of crime because that money was paid by Tanesco in return for the generation and sale of electricity.

138. Furthermore, the fact that SCBHK acquired the debt and has sought to enforce its rights in respect of the debt cannot be characterised as *"facilitating embezzlement"*. The monies were advanced to IPTL between 1997 and 1999. All SCBHK has sought to do is to enforce the right to repayment. If what is meant is that the original loan of U.S. $85.86 million to IPTL made the subsequent theft of some part of that money from IPTL possible, that is not legally relevant. If what is meant is that an individual at SCBHK intended to assist the theft of money from IPTL, Mr van Leeuwen would have had to identify an individual at SCBHK who performed the relevant acts with the relevant state of mind. He has not attempted to do so.

139. These were allegations that should never have been made and, in any event, they are inherently implausible. SCBHK would hardly have paid U.S. $76.1 million for a debt in order to participate in an illegal money laundering scheme.

The English Law Expert Report

140. The Report from the barrister Ian Meakin is inadmissible in any event because the court does not require expert assistance on English law and, in any event, it can be disregarded because its conclusions are entirely parasitic on the previous Reports and, in relation to the English law on illegality, it pre-dates the decision of the Supreme Court in *Patel v Mirza* [2016] UKSC 42; [2016] 3 WLR 399, to which I return later.

Conclusions on VIP's illegality case

141. For all these reasons, even if any of these expert reports were admissible in evidence, they are worthless and should be disregarded. Furthermore, as I concluded at [84]-[91] above, the illegality case advanced by VIP through these so-called experts in Tanzania is inherently fanciful. Given that there was nothing untoward, let alone illegal, in the two Variations, VIP's whole case, on the basis of its experts' reports in Tanzania, that the Variations were for an illegal purpose or amounted to money laundering, is plainly unsustainable and would not give rise to a defence to the claimants' claims in the present proceedings.

142. Even if that had been the effect of the Variations, the effect of the 2005 novation was to create new contracts as between IPTL and SCBHK. The expert case that SCBHK entered into the novation intending to participate in a fraud on IPTL or in a money laundering scheme is palpable nonsense for all the reasons I have given and would not give VIP any defence to the claimants' claims in the present proceedings.

143. The illegality case advance by VIP through its experts in Tanzania would not provide VIP with a defence to the claim in the present proceedings, even if it had any proper factual basis (which it does not), for three reasons. First, this is a case in which, if it were necessary, it would be appropriate to sever those provisions of the 2001 and 2003 Variations which allowed payments to Mechmar and Wartsila which on this hypothesis were intended to facilitate a fraud on IPTL. Each of the Financing Agreements contains a Partial Invalidity clause. For example, Clause 29 of the Facility Agreement provides:

> *"The illegality, invalidity or unenforceability of any provision of this agreement under the law of any jurisdiction shall not affect its legality, validity or unenforceability under the law of any other jurisdiction, nor the legality, validity or enforceability of any other provision."*

144. There were materially identical provisions at Clause 18.1 of the Security Deed, Clause 8.3 of the Shareholder Support Deed, Clause 14 of the Charge of Shares and a provision to similar effect at Clause 10.2 of the Mortgage. Clause 16.2.8 of the Security Deed was another form of severability provision (replicated at Clause 12.2.8 of the Charge of Shares):

> *"Without prejudice to the generality of Clause 16.1, neither the Charges nor the Liabilities shall be affected in any way by:*
>
> *the illegality, invalidity or unenforceability of, or any defect in, any provision of any agreement or document relating to the Liabilities or any security, guarantee or indemnity (including this Security Deed) or any of the Rights or obligations of any of the parties under or in connection with any such document or any security, guarantee or indemnity (including this Security Deed) whether on the grounds of ultra vires, not being in the interests of the Borrower or any other Person, not having been duly authorised, executed or delivered by the Borrower or any other Person or for any other reason whatsoever."*

145. It seems to me that, if necessary, the provisions in the Variations permitting payments to Mechmar and Wartsila could be severed and all these Partial Invalidity Clauses point to that course being adopted by the court. There is no public policy reason why such severance should not take place.

146. The second reason why the illegality case would not provide VIP with a defence in the present proceedings is that the application of the law of illegality as enunciated by the majority of the Supreme Court in *Patel v Mirza* does not require the present claims to be struck down. The relevant principles are stated in the judgment of Lord Toulson JSC at [99]-[100] and [120]:

> "99. Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand.
>
> 100. Lord Goff observed in the Spycatcher case, *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 286, that the "statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself provide any sure guidance to the solution of a problem in any particular case". In *Hall v Hebert* [1993] 2 SCR 159 McLachlin J favoured giving a narrow meaning to profit but, more fundamentally, she expressed the view (at 175-176) that, as a rationale, the statement that a plaintiff will not be allowed to profit from his or her own wrongdoing does not fully explain why particular claims have been rejected, and that it may have the undesirable effect of tempting judges to focus on whether the plaintiff is "getting something" out of the wrongdoing, rather than on the question whether allowing recovery for something which was illegal would produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system.

> 120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

147. Applying those principles, allowing the claims would not undermine or encroach upon the purpose for the rule against fraud, to prevent misappropriation of assets, because the claim is for repayment of sums advanced by way of loan. As such, the claim would not be seeking to give effect to a fraud or amount to SCBHK profiting from its own wrongdoing. Furthermore, the alleged illegality (payment to Mechmar and Wartsila before the bank lending was repaid) was entirely collateral to and remote from the loan.

148. Mr Davies-Jones QC very fairly and properly drew my attention to a passage in the judgment of Lord Sumption JSC at [255] leaving open the issue of unenforceability of an illegal loan:

> "I say nothing about cases in which an order for restitution would be functionally indistinguishable from an order for enforcement, as in a case of an illegal loan or foreign exchange transaction. The traditional view is that if the law will not enforce an agreement it will not give the same financial relief under a different legal label: *Boissevain v Weil* [1950] AC 327. I am inclined to think that the principle is sound, but I should prefer not to express a concluded view on the point. It is not the position here."

However, that is dealing with the position where the lender tries to get round the fact that a loan is illegal because of a statutory prohibition by bringing a claim in restitution. That is emphatically not this case: there is no suggestion that the original loan was prohibited by statute or for an illegal purpose.

149. Furthermore, I agree with Mr Davies-Jones QC that disallowing a claim for U.S. $166 million would result in an unmerited windfall for IPTL and would be a wholly

disproportionate response to the fact that SCBHK allowed IPTL to make interest payments to Mechmar of less than U.S. $1 million and payments to Wartsila for operating costs and in respect of the unpaid EPC Contract price. As Lord Toulson JSC said at [108] of *Patel v Mirza*: *"Respect for the integrity of the justice system is not enhanced if it appears to produce results which are arbitrary, unjust or disproportionate"*. Standing back and looking at the alleged illegality in the present case, even if it had any proper factual basis, it would be wholly arbitrary, unjust and disproportionate to disallow this claim on that basis.

150. The third reason why the illegality case would not provide VIP with a defence in the present proceedings is one I have alluded to more than once before, that any alleged illegality leaves unaffected the position of SCBMB against which no allegations are made in Tanzania. SCBMB has an unanswerable claim to the repayment of the loan plus contractual interest.

151. For all those reasons, VIP's illegality case does not give rise to any sustainable defence to the claims in the present proceedings.

Conclusion

152. In the circumstances, none of the defendants has any defence to the claimants' claim. The claimants are entitled to each of the declarations they seek in the draft order. So far as the debt claim is concerned, on 24 August 2016, SCBMB as Facility Agent certified the sum outstanding, as at 31 July 2016, as U.S. $166,841,800.39. Since the hearing, that figure has been updated for interest accruing between 31 July 2016 and 31 October 2016 and for further enforcement costs. The figure of U.S. $166,841,800.39 also included some enforcement costs referable to costs of these proceedings in respect of which a costs order has already been made on the jurisdiction challenges. Stripping out costs in respect of which a costs order has already been made, the figure resulting as certified by SCBMB as Facility Agent on 15 November 2016 is U.S. $168,800,063.87. Under Clause 25(C) of the Facility Agreement, that certification is conclusive and the claimants are entitled to judgment for that sum.