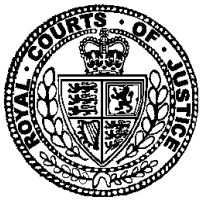

Neutral Citation Number: [2023] EWHC 1874 (Comm)

Case No: CL-2022-000351

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

Rolls Building
7 Rolls Building Fetter Lane
London EC4 1NL

Date: 21/07/2023

Before :

THE HON.MR JUSTICE BRYAN

- -

Between :

LAKATAMIA SHIPPING COMPANY LTD	**Claimant**
- and -	
(1) NOBU SU (aka HSIN CHI SU aka NOBU MORIMOTO	
(2) CHANG TAI-CHOU	
(3) ARNAUD ZABALDANO	**Defendants**

- -
- -

S.J. Philips K.C. and **James Goudkamp**
(instructed by **Hill Dickinson LLP**) for the **Claimant**
Edward Ho (instructed by **Mishcon de Reya LLP**) for the **Third Defendant**

Hearing date: 12 July 2023

- -

Judgment

MR JUSTICE BRYAN:

A. INTRODUCTION

1. The parties appear before the Court on the hearing of the application of the Third Defendant, Maître Zabaldano, to set aside service of the Claim Form against him on the basis that this Court does not enjoy jurisdiction over him in relation to the three claims advanced against him, namely that together with the First Defendant ("Mr Su") and the Second Defendant ("Mr Chang") he committed the torts of (i) unlawful means conspiracy (the "Subsidiary Conspiracy"), (ii) intentionally causing damage by unlawful means and (iii) intentionally and knowingly inducing a violation of rights in judgment (also known as the *Marex* tort) as a result of aiding Mr Su to dissipate assets (part of the proceeds of sale of two villas in Monaco) in breach of an English worldwide freezing order (the "Blair Freezing Order") in the context of substantial judgments of the Commercial Court against Mr Su (the "Cooke Judgments").

2. This is not virgin territory. Mr Su's mother Madam Su (as well as the companies involved, namely Cresta Overseas Limited ("Cresta"), Portview Holdings Limited ("Portview") and UP Shipping Corporation ("UP Shipping")) have already been found by me to have conspired together to injure Lakatamia by unlawful means, namely by (amongst other matters), dissipating the net sales proceeds (the "Monaco Proceeds") of the two villas in Monaco (the "Principal Conspiracy") and to have committed the *Marex* tort – see *Lakatamia Shipping Corporation v Nobu Su & Others* [2021] EWHC 1907 (the "Bryan Judgment").

3. Whilst Mr Su (the First Defendant) and Mr Chang (the Second Defendant) are not before the Court on this hearing (this being the jurisdictional challenge of the Third Defendant Maître Zabaldano, the Monégasque lawyer who actioned the transfer of the sale proceeds from Cresta Oversea to UP Shipping), no one is suggesting that the case against Mr Su and Mr Chang is anything other than a strong one. The undisputable evidence is that both those individuals knew full well of the Blair Freezing Injunction and Cooke Judgments and were involved in the transfer of the Monaco Sale proceeds. The merits of the underlying conspiracy claim (at least against alleged co-conspirators) is accordingly strong. This is not a case where the very existence of an underlying conspiracy can be seriously in dispute. The issue on the merits at this jurisdictional stage is whether there is a serious issue to be tried as to whether Maître Zabaldano was party to the Subsidiary Conspiracy giving rise to the alleged causes of action against Maître Zabaldano. The serious issue to be tried threshold, as those acting on behalf of Maître Zabaldano rightly, and candidly, accept, "is not a high one".

4. Furthermore, the evidence served on behalf of Lakatamia is that regardless of the outcome of Maître Zabaldano's jurisdictional challenge, these proceedings will continue to trial against Mr Su and Mr Chang, evidence I accept as Lakatamia has every incentive to do so as (1) in the case of Mr Su it will re-set the limitation clock for enforcement proceedings (and to date recoveries have been limited so this is a very real potential benefit to Lakatamia) and (2) Lakatamia does not yet have a judgment against Mr Chang (who is himself a businessman and, as such, he may well have assets).

5. These are not mere points of background (though they are important in that context too). Not only do they underline the strength of the case against the other conspirators in what is said to be a conspiracy that involves Maître Zabaldano, but the consequence is that there

will inevitably be proceedings to trial in this Court involving Mr Su and Mr Chang, with the result (in the context of the forum issues that arise) that on the basis of Maître Zabaldano's jurisdictional challenge, if it were to succeed, the consequence would be that two courts (the Commercial Court and the Monaco court) would be adjudicating on the very same issues, and there could, of course, be the risk of inconsistent findings in that scenario. This is a point that will need to be considered at the forum stage as addressed in due course below.

6. Unlike many conspiracy cases, this case is not one that was commenced (often for understandable reasons) without engagement with the potential Defendant. Maître Zabaldano is a leading Monégasque lawyer. He is the managing partner and founder of one of Monaco's pre-eminent law firms, Zabaldano Avocats, one of the three largest firms in Monaco. In such circumstances, and as one would expect, Lakatamia provided a detailed pre-action protocol letter from their solicitors Hill Dickinson to Maître Zabaldano dated 12 January 2022. This produced an equally detailed response from Mishcon de Reya dated 28 February 2022 (collectively the "Pre-Action Letters"). Many of the issues were accordingly well aired between the parties in the Pre-Action Letters before the Particulars of Claim dated 6 July 2022 were drafted, and the application to serve out was made by Lakatamia (as supported by the first witness statement of Russell Gardner of 13 July 2022 and Lakatamia's accompanying skeleton argument). The Pre-Action Letters were themselves before Cockerill J when she granted Lakatamia permission to serve Maître Zabaldano (and Mr Chang) out of the jurisdiction on 15 July 2022.

7. In such circumstances, it is perhaps unsurprising that Maître Zabaldano does not make any allegation of any failure to give full and frank disclosure on the without notice application for permission to serve out, which very much narrows the scope of the issues arising on this application in contra-distinction to many jurisdictional challenges.

8. In this regard Maître Zabaldano challenges the Court's jurisdiction on three grounds (re-ordering them into the correct and logical order for consideration):-

    (1) There is no good arguable case that any of the three jurisdictional gateways which Lakatamia relied on to obtain permission to serve out (the "tort" gateway, the "property" gateway and the "necessary or proper party" gateway) were satisfied.

    (2) Lakatamia's claims do not give rise to a serious issue to be tried on the merits. It is said that all three claims depend on Lakatamia establishing that Maître Zabaldano intended to harm Lakatamia, and it is said that there is no serious issue to be tried that he did.

    (3) Monaco is clearly and distinctly a more appropriate forum than England for the trial of Lakatamia's claims, and Lakatamia can obtain justice there.

9. In contrast Lakatamia submits that:-

    (1) Lakatamia has a good arguable case in relation to each of the three gateways relied upon, whilst pointing out (rightly) that it need only show that at least one of its three claims against Maître Zabaldano passes through at least one of the three gateways on which it relies (this is because it is not, or cannot be, disputed that all of Lakatamia's claims against Maître Zabaldano "arise out of the same or closely connected facts" with the result that if any one of its claims passes through any one of the gateways, the others

will pass though gateway 4A(c) – see also, in this regard, what was stated in *Tulip Trading v Bitcoin Association for BSV* [2023] 4 WLR 16 at [41] as to the approach of the Court in such cases).

(2) Lakatamia's claims each give rise to a serious issue to be tried (i.e. that it has a real as opposed to fanciful prospect of success on each such claim).

(3) England is clearly and distinctly the most appropriate forum to try the claims (including those against Maître Zabaldano as an alleged co-conspirator), all such claims ultimately being founded on the Blair Freezing Order and Cooke Judgments.

B. BACKGROUND

10. In 2008, Lakatamia and Mr Su entered into a contract by which Mr Su's major positions in derivative instruments priced by reference to the forward freight markets were taken over by Lakatamia. Under the contract in question, Mr Su was supposed to repurchase those positions a month later but in breach of contract failed to do so.

11. In 2010, Cresta received loans totalling approximately €33 million from Barclays Bank ("Barclays") for the purchase and redevelopment of two substantial properties in Monaco ("the Monaco Villas"). Lakatamia says that at all material times Mr Su was the UBO of Cresta.

12. On 24 March 2011, Lakatamia issued proceedings against Mr Su in the Commercial Court ("the 2011 Proceedings"). Shortly thereafter, on 19 August 2011, Mr Justice Blair granted Lakatamia a worldwide freezing order against Mr Su freezing all his assets up to the sum of approximately US$48.8 million (the "Blair Freezing Order").

13. Following a trial, on 5 November 2014 and 16 January 2015, Mr Justice Cooke entered judgments against Mr Su in the combined principal sum of almost US$50 million (the "Cooke Judgments"/ "the Judgment Debts") - see *Lakatamia Shipping Co Ltd v. Su* [2014] EWHC 3611 (Comm); [2015] 1 Lloyd's Rep. 216. Mr Su failed to make any voluntary payment in respect of the sum due. The present value of the Cooke Judgments exceeds US$60 million (when account is taken of interest that has accrued, unsatisfied costs orders and the limited recoveries that have been made).

14. By 2015 Cresta had defaulted on its loans from Barclays, so Barclays brought proceedings in Monaco to force the sale by auction of the Monaco Villas. Cresta instructed Maître Zabaldano to represent it in those proceedings and oppose the auctioning of the Monaco Villas. Ultimately Barclays succeeded, the Monaco Villas were sold and the proceeds paid into the Caisse des dépôts et consignations, which appears to be the Monégasque equivalent of a payment into Court on 6 November 2015. After further dispute between Cresta and Barclays, on or around 9 February 2017, the sum of €27,127,855.01 was paid out of the Caisse des dépôts et consignations into Maître Zabaldano's client account where it was held for Cresta ("the Cresta Overseas Monies").

15. On 21 February 2017, Maître Zabaldano was instructed by Mr Chang (the Second Defendant and director of Cresta) to transfer the US dollar equivalent of €25.4 million ("the Monaco Sale Proceeds") of the Cresta Overseas Monies from the firm's client account to UP Shipping (a company I was subsequently to find was owned by Madam Su, Mr Su's

mother). On 23 February 2017, Maître Zabaldano authorised the transfer and the Monaco Sale Proceeds were received by UP Shipping on 1 March 2017. As I was subsequently to find, that transfer occurred in breach of the Blair Freezing Order.

16. In February 2019, Mr Su was cross-examined with regard to his assets in accordance with CPR Part 74. The cross-examination focused largely on the Monaco Villas. Lakatamia had discovered that Mr Su had been their owner and that they had had been sold at auction in 2015 for the combined sum of €65.1 million, yielding a significant surplus after the redemption of mortgages that had been granted in favour of Barclays. Mr Su had owned the Monaco Villas via two British Virgin Islands companies, Portview and Cresta. In this regard Mr Su owned the shares in Portview, which in turn owned the share capital in Cresta, which in turn had owned the legal title to the Monaco Villas. When Mr Su was asked what had happened to the net sale proceeds, he told the Court that they had been transferred to his mother (Madam Su).

17. On 29 March 2019, Sir Michael Burton GBE committed Mr Su to 21 months' imprisonment for numerous breaches of, in particular, the Blair Freezing Order (see *Lakatamia Shipping Co Ltd v. Su* [2019] EWHC 898 (Comm)). He held that Mr Su had owned the Monaco Villas via Portview and Cresta and that he had dissipated the Cresta Overseas Monies (see at [14] and [16]), such findings being to the criminal standard of proof (given the nature of the proceedings).

18. In light of the evidence that Mr Su gave during the CPR Part 74 hearing, on 6 March 2019 Lakatamia issued proceedings against Mr Su, Madam Su, Portview, Cresta, UP Shipping and others ("the 2019 Proceedings"). In the period leading up to the trial, Mr Su dishonestly obtained an order declaring himself bankrupt with the result that the 2019 Proceedings were stayed against him, although the bankruptcy order was ultimately annulled. The 2019 Proceedings proceeded to trial before me against, Madam Su, Cresta, Portview and UP Shipping and others.

19. Following a lengthy trial (in which Madam Su gave evidence) I entered judgment against Madam Su, Cresta, Portview, UP Shipping and others on 8 July 2021 ([2021] EWHC 1907 (Comm)). Whilst there is no substitute for reading the judgment as a whole, in summary, and for present purposes, I held that the Defendants in the 2019 Proceedings had unlawfully conspired with Mr Su and each other to breach the Blair Freezing Order by concealing the proceeds of the net sale proceeds of the Monaco Villas from Lakatamia. I considered that Madam Su and Mr Su had likely entered into this conspiracy (the Principal Conspiracy) in or around December 2016 in Taipei. I am told that none of the judgment debt owing under the Bryan Judgment has thus far been discharged (see Gardner 1 at [23]).

20. By its Particulars of Claim in the present action, Lakatamia alleges that it has been the victim of a further unlawful conspiracy (essentially parasitic upon the Principal Conspiracy) between Mr Su, Mr Chang and Maître Zabaldano, to dissipate the Cresta Overseas Monies and thereby injure Lakatamia (the Subsidiary Conspiracy).

21. In December 2010, both Mr Su and Cresta instructed the Monégasque law firm GZ Avocats, (which had apparently been formed by Maître Zabaldano and another Monégasque lawyer, Maître Thomas Giaccardi (see Giaccardi 1 at [4], [7])). It is very much in issue whether Maître Zabaldano had any involvement at this stage (his evidence is that he did not).

22. Such instructions from Mr Su were in connection with substantial loans that he was seeking from Barclays with a view to enabling him to develop the Monaco Villas. On 22 December 2010, Mr Su (in his capacity as a director of Cresta) signed documents by which Cresta agreed to borrow €25 million from Barclays. Mr Su also signed as a guarantor.

23. The terms of the Barclays' loan agreement required a board resolution from Cresta confirming that it was authorised to enter into the loan agreement. How and when that board resolution was created and by whom is in issue between Lakatamia and Maître Zabaldano. The evidence before me is that the same day (22 December 2010) Maître Zabaldano created a Word file (which has not been disclosed to date) which, at least by 2012, contained text for a board resolution for Cresta Overseas. Its metadata show that Maître Zabaldano initially created the file on 22 December 2010 and that the total amount of time for which it had been edited since it had been created was only 30 minutes. Lakatamia submits that this file was a board resolution for Cresta when Maître Zabaldano created the file in 2010 (such that it required only minimal work in 2012 to generate a board resolution for the same company). Lakatamia submits that Maître Zabaldano had worked for Cresta in 2010.

24. Maître Zabaldano denies having worked for Cresta whilst at GZ Avocats (see Zabaldano 1 at [58–59.1]), and he has also served evidence from Maître Thomas Giaccardi supportive of that stance. It is not possible (and would not be appropriate) to attempt to resolve such matters on a jurisdictional challenge not least in advance of proper disclosure of all material documentation (for his part Maître Zabaldano has disclosed only limited documentation to date). For present purposes I would only note that Lakatamia submits that this area gives rise to what it characterises as a number of very significant questions as to whether or not the Court is being told the truth, and Lakatamia's case is that it is not (see Gardner 2 at [4]). I am not in a position to form any view about that at an interlocutory stage and without the benefit of full disclosure and oral witness evidence. Such matters are classically the type of matters that would have to be resolved at trial.

25. The evidence before me is that, in 2011, Maître Zabaldano and Maître Giaccardi went their separate ways, and Cresta initially remained Maître Giaccardi's client. In the period that followed, Cresta defaulted on the loans and Barclays sought to enforce its security. Because he was also instructed on behalf of Barclays, Maître Giaccardi ceased acting for Cresta. On 13 May 2013, Mr Su resigned as a director of Cresta and appointed his 18-year-old elder daughter (who was then a student), in his place. On 19 February 2015, Mr Su appointed a Mr James Garrett as a co-director of Cresta and the same day Mr Garrett instructed Maître Zabaldano to act on behalf of Cresta, as evidenced by the engagement letter from Maître Zabaldano to Cresta ("C/o Mr James Garrett") dated 19 February 2015 that is before me. Mr Su, in his capacity as a director of Portview, gave Mr Garrett a power of attorney in this regard.

26. Lakatamia alleges that Mr Garrett provided this to Maître Zabaldano (see Gardner 2 at [19]). This is a point of some potential significance. There is some evidence before me that supports the conclusion that this was the case. In this regard on 24 March 2016 the Court of Appeal of Monaco referred in a judgment to, "the withdrawal by Maître Arnaud ZABALDANO, Defence Counsel, faxed to the General Court Registry on 17 March 2016, accompanied by a special power of attorney granted to Jame [sic] GARRETT, the legal representative of CRESTA OVERSEAS LIMITED". Once again it will not be possible (nor would it be appropriate) to express any factual conclusions on this point, but if Maître

Zabaldano was aware (via the power of attorney) that Mr Garrett, when acting for Cresta, was acting for Mr Su, then Maître Zabaldano would know (or would arguably know) that Mr Su was the Ultimate Beneficial Owner (UBO) of Cresta in circumstances in which (as appears below) Maître Zabaldano knew of the Blair Freezing Order and Cooke Judgments against Mr Su.

27. On 16 March 2015, Barclays issued proceedings against Cresta ("the Attachment Proceedings"). Lakatamia, which by this time had discovered that Mr Su owned the Monaco Villas, sought to prevent them from being sold (see Gardner 1 at [32]). On 30 September 2015, a Monégasque lawyer instructed by Lakatamia wrote to Barclays' lawyer Maître Joelle Pastor-Bensa. This is an important letter. In that letter she notified Barclays of the Cooke Judgment (expressly stated to be against Mr Su in the body of the letter) and the Blair Freezing Order (also clearly against Mr Su), attaching copies of the same. In that letter she stated, amongst other matters as follows;-

> "You are instructed by BARCLAYS BANK PLC, Monaco Branch, which has instituted proceedings for the attachment of property **against a company called CRESTA OVERSEAS LIMITED, in which it appears that the said Nobu SU (alias Hsin Chi SU) has interests**".

She then drew attention to the terms of the penal notice on the Blair Freezing Order which she set out;

> "Any other person who knows of this Order and does anything which helps or permits any of the Defendants to breach the terms of this Order may also be held in contempt of Court and may be sent to prison, fined or have their assets seized".

She concluded that letter by stating;-

> **"I am of course sending a copy of this letter to Maître Arnaud ZABALDANO, who is acting for CRESTA OVESRSEAS LIMITED"**

(emphasis added)

28. I am satisfied that it is abundantly clear from this letter (as it would be to any recipient who understands English as Maître Zabaldano professes to do) that Lakatamia had obtained both a judgment and a freezing order against Mr Su, that it was being asserted that Mr Su has interests in Cresta, and that there were potential penal consequences for any person who does anything which helps or permits Mr Su to breach the terms of the freezing injunction (such as transferring proceeds held by Cresta in which Mr Su has an interest). Yet further the terms of the Blair Freezing Order were considered relevant to be brought to the attention of the lawyer acting for Cresta (Maître Zabaldano), something that Maître Zabaldano would also appreciate.

29. Dr Géraldine Gazo did, indeed, as contemplated, write to Maître Zabaldano, the very same day enclosing a copy of that letter, stating in this letter:-

> "Dear Maître Zabaldano,

> In my Clients' interests, please find attached a copy for your information of the official letter I have sent to Maître PASTOR-BENSA in the above case.
>
> Trusting that you will find this in order".

30. Whilst Maître Zabaldano makes the point that he was only provided with a copy of the letter to Barclays' lawyer, I am satisfied that he would have read it, would have understood it, and would have known thereby about the Cooke Judgments and the Blair Freezing Order and the fact that these were considered relevant to Cresta, for whom he was acting. His own evidence is that he and Ms Zoccola, "took note of the letter and (more importantly) its attachments, so far as we were able to understand them under English law" (Zabaldano at [35.2]). Whilst his evidence is that he did not find "any relevance of what we were doing for Cresta in Monaco as against Barclays, which was to prevent the villas being sold", it will be open to Lakatamia at trial to submit that Maître Zabaldano thereby not only knew of the Cooke Judgments and the Blair Freezing Order (something that Maître Zabaldano cannot seriously deny) but also that Maître Zabaldano knew thereby (if he did not already know) of Mr Su's interest in Cresta. Equally, whilst this is before the subsequent transfer of sale proceeds, it will be open to Lakatamia to submit that, having acquired such knowledge, Maître Zabaldano continued to have that knowledge at the time of the transfer. It perhaps goes without saying, but questions as to Maître Zabaldano's knowledge, and as to Maître Zabaldano's intentions, are quintessentially matters for exploration at trial, and are not capable of resolution on a jurisdictional challenge.

31. In October 2015, Maître Zabaldano and the lawyer for Barclays Bank, Maître Joëlle Pastor-Bensa, exchanged numerous letters. Maître Zabaldano indicated to Maître Pastor-Bensa that a third party would discharge Cresta's loans. Maître Pastor-Bensa responded that Barclays would not accept payments deriving other than from Cresta and stressed the importance of its being able to verify the source of the funds. It might be said that this, of itself, would or should have alerted Maître Zabaldano to the need to be cautious in relation to entities surrounding Cresta.

32. On 20 October 2015 Maître Joëlle Pastor-Bensa wrote two letters to Maître Zabaldano. In the first she stated, amongst other matters that;-

> "In the most recent submission of the LAKATAMIA SHIPPING COMPANY and the information that they provide on the situation of its debtor. **<u>There could be no question of my client taking part in the realisation of an act which could constitute a fraud against the rights of a creditor</u>**" (emphasis added)

33. In the second letter of the same date Maître Joëlle Pastor-Bensa stated to Maître Zabaldano, amongst other matters that;-

> "My client must draw the consequences of the voluntary intervention of the LAKATAMIA SHOPPING COMPAGNY

company, which now intends to assert its rights before the courts of Monaco and which can now demonstrate a definitive decision in Great Britain,

Since you cite the letter from Maître GAZO of 30 September, this was also sent to you and, to my knowledge, you have not replied on the point of knowing who the real economic beneficiary of CRESTA is.

The operation envisaged due to the total absence of information on your part, could well fall within an action for fraud by this creditor, or even others which could follow."

(emphasis added)

34. The link between Mr Su, Cresta, and the Cooke Judgment and Blair Freezing Order and the relevance to the Monaco Villas (given the intervention of Lakatamia, including before the courts of Monaco) could therefore not have been clearer to Maître Zabaldano, it being spelled out by Maître Joëlle Pastor-Bensa in two separate letters that, in view of the situation regarding Mr Su, the work that he was doing on behalf of Cresta at that time "*could well fall within an action for fraud by*" Lakatamia.

35. On 20 October 2015, Lakatamia applied to intervene in the Attachment Proceedings. It did so on the basis that it appeared that Mr Su controlled Cresta and was subject to the Blair Freezing Order and Cooke Judgments. Maître Zabaldano himself appeared at the hearing on behalf of Cresta (and so cannot but have known about such contentions). Lakatamia's application, which Maître Zabaldano resisted, was rejected. The basis on which it was rejected is in dispute between Lakatamia and Maître Zabaldano. However, whether or not this was the only basis on which it was rejected (which is in issue) the evidence before me supports Lakatamia's submission that a major reason for such rejection was that Lakatamia had not filed French translations of the documents on which it relied (such as the Blair Freezing Order), with the result that it apparently had no admissible evidence before the Monaco court.

36. The same day (20 October 2015), Mr Su was trying to secure funds to repay Barclays, and attended a full-day meeting with financiers in this regard. Those efforts failed when it became clear to the prospective lenders during the course of the meeting that Mr Su was subject to the Blair Freezing Order and Cooke Judgments (see Gardner 1 at [36]). Mr Garrett, who attended the meeting, telephoned Maître Zabaldano immediately after it (Gardner 1 at [37]). Given the context and timings, Lakatamia will invite the Court at trial to infer that Maître Zabaldano would thereby have become aware (if he was not already aware) that it was the Blair Freezing Order that had put paid to the attempts by Mr Su to refinance Cresta's obligations (as UBO of Cresta), so that by this route as well Maître Zabaldano would have known of the ownership of Cresta and the associated risks of any dealing with Cresta assets.

37. On 21 October 2015, the Monaco Villas were the subject of a distressed sale. The purchase price was €65.1 million. Barclays paid that sum into the Caisse des Dépôts et Consignations. Whether that is the norm or whether this was in view of the fact that Mr Su was subject to the Blair Freezing Order is not capable of determination at this time (Barclays were certainly very wary about the potential effect of the Blair Freezing Order).

Maître Zabaldano's evidence, which Lakatamia has indicated it will wish to explore in due course if the action proceeds, is that this was done in accordance with "the usual procedure" (see Zabaldano 1 at [43]).

38. On 1 February 2017, Barclays and Cresta partially compromised their dispute. Pursuant to their agreement, Cresta Overseas was entitled to receive €27,127,855.01 (i.e., the Cresta Overseas Monies). On 9 February 2017, the funds were paid to Maître Zabaldano on Cresta's behalf. Some of these funds (€281,528.80 according to a letter from Mishcon de Reya dated 6 July 2023) were taken by Maître Zabaldano himself.

39. On 21 February 2017, Mr Chang, who was a director of Portview and (having succeeded Mr Su's elder student daughter) a co-director of Cresta, requested Mr Garrett to join him in instructing Maître Zabaldano to transfer the residual funds to UP Shipping. Lakatamia's case is that Mr Garrett was unprepared to do so in view of the Blair Freezing Order and immediately resigned from his directorship of Cresta.

40. I have already made findings about this (as between the parties in the 2019 Proceedings) at [490] of the Bryan Judgment:

> "On 21 February 2017, Cresta's other director (Mr Garrett) had resigned, stating in an email to Ms Chao, *"I understand that my resignation is necessary"*, Ms Chao stating to Mr Garrett, *"We understand your intention…Please can we process the unanimous agreement to transfer funds from lawyer between you and Mr Chang of directors of Cresta…, then we will process the resignation procedure…"* to which he replied, *"I am no longer a Director of Cresta…so this is not within my authority"*. It seems clear enough that Mr Garrett resigned as he was not willing to approve the transfer (no doubt because of concerns as to the propriety of doing so not least given the existence of the Blair Freezing Order, and involvement of Hill Dickinson, of which he was surely aware)."

41. Lakatamia intend to call Mr Garrett in the present case. His evidence is likely to be of considerable importance, not least in the context as to why he resigned, but also as to what (if anything) Maître Zabaldano knew about the circumstances of his resignation. Maître Zabaldano's evidence before me (Zabaldano 1 at [53.3]) is that;

> "Mr Garrett was asked to countersign the transfer instruction. It was at this point that we learned of his resignation as co-director of Cresta. We did not know why he had resigned, and it was none of our business why he had done so. We did not know that it had anything to do with the transfer of the Sale Proceeds from our client account to UP Shipping. I note that Mr Gardner says that Mr Garrett was "not prepared to be privy to what amount to an (unlawful) breach of the [WFO]": Gardner 1/§41. I can categorically confirm that Mr Garrett did not relay any such concern to me directly or through Ms Zoccola at that time."

42. I cannot form a view as to the accuracy of what is said on an interlocutory jurisdiction challenge, but Lakatamia submits that it is just not credible that Maître Zabaldano did not ask Mr Garrett why he was resigning given what Maître Zabaldano knew about the Blair Freezing Order and Mr Su's interest in Cresta, and that even if he did not ask Mr Garrett, then alarm bells should have been ringing given the background, and that he was being asked to transfer Cresta's assets away to a third party. What is clear is that if the matter proceeds, the evidence of Mr Garrett, and the cross-examination of Maître Zabaldano on this topic, will be of considerable importance.

43. Mr Chang, as the sole remaining director of Cresta, instructed Maître Zabaldano to transfer the funds to Taiwan. There would appear to be considerable force in Lakatamia's submission that he did so at the direction of Mr Su, who was his employer and the beneficial owner of both Portview and Cresta (see Gardner 1 at [45] and [47]).

44. On 23 February 2017, Maître Zabaldano gave effect to Mr Chang's instruction having first deducted €200,000 to fund prospective work for Cresta (see Zabaldano 1 at [53.2]), which was in addition to the deductions made when the money first came in. It appears that Maître Zabaldano made the transfer without conducting any due diligence or other checks regarding, amongst others, UP Shipping.

45. Lakatamia submits that the transfer of the Cresta Oversea Monies was a flagrant breach of the Blair Freezing Order in circumstances where Mr Su was the UBO of Cresta.

46. On 1 March 2017, UP Shipping received the Monaco Sale Proceeds. The funds were thereafter further dissipated (see Gardner 1 at [43]). In the 2019 Proceedings, I held that Madam Su owned and/or controlled UP Shipping (Bryan Judgment at [741] to [751]).

47. After the Cresta Overseas Monies had been transferred to UP Shipping, Zabaldano Avocats took instructions from Mr Su on behalf of Cresta. On 11 October 2017, Mr Su, to whom Zabaldano Avocats had sent Maître Zabaldano's invoice No.962, wrote an email to an accountant employed by Zabaldano Avocats. In his email, Mr Su requested that €35,000 be transferred "*back to us*". Lakatamia point out that the request was actioned almost immediately, and that no record of any correspondence with Mr Chang seeking his consent to the transfer, or giving him notice of it, has been disclosed, despite the fact that Mr Chang was the, by this stage, the only director of Cresta. Lakatamia submit that this strongly suggests that Maître Zabaldano ultimately took his instructions from Mr Su and very well knew that he was the true owner of Cresta and the Cresta Overseas Monies.

48. Maître Zabaldano thereafter met with Mr Su on at least two occasions in 2018 (see Gardner 2 at [22]). One of these meetings (the apparent purpose of which was to consider a claim against Barclays for selling the Monaco Villas at an undervalue) was attended by a former employee of the bank. She regarded Maître Zabaldano as having "represented Nobu during and after the auction of the property".

49. On 17 April 2018, Maître Zabaldano sent Mr Su an email. It is undoubtably an email about which he will be cross-examined at trial if the matter proceeds against him. In that email he states;-

> "Dear Nobu,

> I guess that even though I am in Cc of your email below, you are not referring to me when you talk about "your lawyer" as I am Cresta's **which I understand you no longer are the UBO of nor legal representative**."

(emphasis added)

50. Whatever the context and import of this email (which would no doubt be explored at trial), Lakatamia submits (with some force) that it amounts, at least at first blush, to an admission by Maître Zabaldano that he knew that Mr Su **had been** Cresta's ultimate beneficial owner (as, indeed, was the case).

51. Against that background, Lakatamia alleges that not later than the 23 February 2017, the Defendants to these proceedings (including Maître Zabaldano) combined with each other to transfer the Cresta Overseas Monies out of Monaco knowing that Mr Su (i) was subject to the Blair Freezing Order, (ii) owed the Judgment Debts, and (iii) was the beneficial owner of the Cresta Overseas Monies, and therefore alleges that each of the Defendants committed the torts of unlawful means conspiracy, intentionally inflicting damage by unlawful means, and the *Marex* tort.

52. Lakatamia's case is that as a consequence of the implementation of the Subsidiary Conspiracy, the value of the Cooke Judgments has been reduced. But for the Defendants' conduct, Lakatamia would have been able to enforce the Cooke Judgments against the Cresta Overseas Monies in circumstances where the relevant Orders of Cooke J. were recognised by the Monaco courts on 6 July 2017 (see Gardner 1 at [53]). As a result, Lakatamia says that it has suffered loss and damage in an amount equivalent to the value of the Cresta Overseas Monies.

53. For his part Maître Zabaldano denies that he committed any such torts and submits that, "rather he was, unbeknownst to him, unwittingly used to assist in the dissipation of Mr Su's assets" (Maître Zabaldano Skeleton Argument at para 25(3)). It will be seen, therefore, that Maître Zabaldano's knowledge, or otherwise, is at the heart of the causes of action, and Maître Zabaldano jurisdictional challenge (in the context of serious issue to be tried).

54. On 5 December 2022, Mr Justice Jacobs held in the 2011 Proceedings that Mr Su was unable to assert privilege in certain correspondence that he had exchanged with Maître Zabaldano by reason of his iniquity, see *Lakatamia Shipping Co Ltd v. Su* [2022] EWHC 3115 (Comm). In doing so, he was satisfied that Mr Su had (at least) used Maître Zabaldano "to assist in the concealment and dissipation of [his] assets" (at [43]). In doing so the Court made no findings of wrongdoing as regards Maître Zabaldano (whose conduct was not relevant to the enquiry at that stage).

C. APPLICABLE LEGAL PRINCIPLES AND THEIR APPLICATION

C.1 SERVICE OUT OF THE JURISDICTION – THE GATEWAYS

55. On 22 December 2022, Maître Zabaldano issued his application notice challenging the Court's jurisdiction. To prevail, Lakatamia must "establish (1) a good arguable case that the claims fall within one of the gateways in CPR PD 6B, paragraph 3.1; (2) a serious issue to be tried on the merits; and (3) that England is the appropriate forum for trial and the court

ought to exercise its discretion to permit service out of the jurisdiction" (see *FS Cairo (Nile Plaza) LLC v. Brownlie* [2021] UKSC 45; [2021] 3 W.L.R. 1011 at [25]).

56. To the extent that there is any disputed allegation of fact regarding the gateways, Lakatamia need only "show at this interim stage a plausible evidential basis that [it] has the better argument" - see *Manek v. IIFL Wealth (UK) Ltd* [2021] EWCA Civ 264 at [35];-

> "35. The court's approach to disputed evidence in jurisdictional challenges has been the subject of considerable recent judicial pronouncement: see *Brownlie v Four SeasonsHoldings International* [2017] UKSC 80; *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34; and *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV and others* [2019] EWCA Civ 10. In short, in respect of any disputed allegation of fact, a claimant endeavouring to persuade the court to accept jurisdiction – in this case the appellants – has to show at this interim stage a plausible evidential basis that he or she has the better argument: see paragraph 73 of *Kaefer*."

57. Equally to the extent that there is any dispute as regards the relevant law opening the gateways (or in relation to whether there is a "serious issue to be tried"), the well-known warnings against deciding contested propositions of law on a summary procedure are "important" and fully applicable - see *Tulip Trading Ltd v. Bitcoin Association for BSV* [2023] EWCA Civ 83; [2023] 4 W.L.R. 16 at [12] to [15]:-

> **"**12 The merits test can be summarised as being whether there is a serious issue to be tried, which is the same as there being a real as opposed to fanciful prospect of success, and is the same as the test for summary judgment (see e g *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804, paras 71 and 82, *Lungowe v Vedanta Resources plc* [2019] UKSC 20; [2020] AC 1045, para 42).
>
> 13 So far so good, but what is to be done about points of law? It is not easy to reconcile all the statements in the authorities on the approach to points of law on applications of this kind. The question boils down to whether jurisdiction applications are treated differently from other kinds of summary procedure. Is the court bound to decide a question of law, or at least should the court normally decide it, because the application is a jurisdiction application? Does it depend on whether the question goes to jurisdiction itself, i e the gateways, or "only" to the merits test? Moreover how does all this fit with another general principle, pulling in the opposite direction, that on a summary procedure it is no part of the court's function "to decide difficult questions of law which call for detailed argument and mature consideration" (*American Cyanamid Co v Ethicon Ltd* [1975] AC 396, 407, cited in this context in *Altimo*, para 84), and the frequent warning in the authorities against deciding controversial points of law in

> a developing area on assumed or hypothetical facts rather than on the basis of actual factual findings (e g *Altimo*, paras 84–86 and *Begum v Maran (UK) Ltd* [2021] EWCA Civ 326; [2022] 1 All ER (Comm) 940, per Coulson LJ, paras 23 and 71)?
>
> 14 In my judgment the same principles, about how to approach points of law, should apply to the merits test aspect of a jurisdiction application as to the test under the gateways, and I believe that view is supported by the first sentence of para 86 of *Altimo* as follows:
>
> "There is no reason why the same principle *[that it is not normally appropriate in a summary procedure to decide a controversial question in law in a developing area]* should not apply to the question whether, in a service out of the jurisdiction case on the 'necessary or proper party' head, a claim is 'bound to fail' as well as to the question whether there is a 'serious issue to be tried' in the claim against D2."
>
> 15 Therefore the court may, but is not bound in law to, decide any legal question arising whether it is under the merits limb or the gateway limb. No doubt an important factor in deciding whether to do that will be the fact that the question goes to the jurisdiction of the court. If the point goes to jurisdiction and it can be decided summarily then no doubt it should be. However another important factor is the warning against deciding controversial points of law in a developing area on assumed or hypothetical facts. This concern does not cease to apply simply because the point arises in a jurisdiction application (whether under the merits test or the gateways). It is always an important factor to bear in mind."

C.2 THE "TORT" GATEWAY

58. A claim will pass through the "tort" gateway where, relevantly, "damage was sustained … within the jurisdiction", see CPR PD 6B, r.3.1(9)(a).

59. Lakatamia's case (as confirmed in Lakatamia's Skeleton Argument at [29.1]) is that its damage consists in a reduction in the value of the debt that Mr Su owes it under the Cooke Judgments.

60. For his part Maître Zabaldano submits that the damage which Lakatamia has pleaded in its Particulars of Claim is different, namely an inability to enforce against the Monaco Sale Proceeds in Monaco. It is submitted that this means that damage did not occur in England, it occurred in Monaco, where the Judgment Debts could have been enforced; and the subject matter of Lakatamia's claims principally concerns the Monaco Sale Proceeds, not the Judgment Debts.

61. However I consider it clear enough that the inability to enforce against the Cresta Overseas Monies has caused a reduction of the value of the debt that Mr Su owes under the Cooke

Judgments, and that Lakatamia is entitled to advance its claim on such basis, with the result that damage was sustained in England.

62. In this regard it is important to bear in mind that the word "damage" is to be given a wide meaning and extends to any form of damage including indirect and consequential damage. Following on from the views of the majority (Baroness Hale, Lord Wilson and Lord Clarke) in *Brownlie 1* ([2018] 1 WLR 192), in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] 3 WLR 1011 ("*Brownlie 2"*) the Supreme Court held that the word "damage" is not confined to damage which would be necessary to complete a cause of action in tort, Lord Lloyd-Jones (with whom Lord Reed, Lord Briggs and Lord Burrows agreed) stating as follows at [49] and [51] :-

> "49. … We are concerned here not with the completion of a cause of action in tort, a matter of substantive law, but with the scope of a jurisdictional rule which is intended to identify the appropriate forum for the adjudication of the resulting claim. In my view there is no justification in principle or in practice, for limiting "damage" in paragraph 3.1(9)(a) to damage which is necessary to complete a cause of action in tort or, indeed, for according any special significance to a place simply because it was where the cause of action was completed. First, while damage is an essential element of many torts including negligence, many other torts, including trespass to the person and trespass to goods, are actionable per se, without proof of damage. There is therefore no warrant for reading paragraph 3.1(9)(a), which is a rule of general application to claims in tort, in such a restrictive way.
>
> …
>
> 51. Thirdly, damage is likely to be relevant to the identification of an appropriate jurisdiction for the adjudication of a claim in tort not because it may complete a cause of action but, more generally, because the damage actually suffered by the victim may, depending on all the circumstances of the case, serve to link the wrongdoing to a particular jurisdiction. In my view, therefore, there is no reason to read "damage" in paragraph 3.1(9)(a) as limited to the damage which violates the claimant's right and which completes the cause of action. **On the contrary, the word in its ordinary and natural meaning and when considered in the light of the purpose of the provision extends to the physical and financial damage caused by the wrongdoing, considerations which are apt to link a tort to the jurisdiction where such damage is suffered**…."

(emphasis added)

63. In this regard Lakatamia submits that it is well-established that English judgments are payable in England, relying upon the Court of Appeal authority of *In re A Debtor (No.1838 of 1911)* [1912] 1 K.B. 53 (CA) and what was said by Cozens-Hardy M.R. at [56], where

he observed with reference to a judgment debt that "*creditors must come within the realm, and if they are within the realm, then no doubt the debtor must search them out*".

64. In *Lakatamia v. Su* [2019] EWHC 1145 Sir Michael Burton stated at [19]: "The "gateways" are available in respect of both torts as … (ii) in respect of both torts, Mr Head concedes that there is a question as to damage suffered within the jurisdiction …". I consider that Sir Michael Burton was here expressing his agreement with such concession (otherwise he would not have accepted that the gateway was available). Maître Zabaldano submits that the concession was wrongly made, that Sir Michael Burton was wrong to accept it, and that in any event the concession is not binding upon him. I disagree. I consider that the concession was rightly made both by reference to *In re A Debtor* and given the breadth of "damage" in the context of the gateway (see then *Brownlie 1*, and now *Brownlie* 2).

65. In the 2019 Proceedings I also found that Lakatamia's damage was suffered in England for the purposes of determining the proper law of the torts that Lakatamia alleged had been committed against it (see at [844] to [848], referring, in particular, to *In re A Debtor* at [56]).

66. Butcher J reached the same conclusion on the ex parte service out application in relation to service upon Ms Tseng in the proceedings between Lakatamia and Ms Tseng, and Chiharu Morimoto (one of Madam Su's daughters) - *Lakatamia Shipping Company v Tseng & Morimoto* 25/10/2022 at [17].

67. Maître Zabaldano submits that all such judges are wrong to have so found, submitting that *In re A Debtor* does no more than confirm the general rule that a debt is situated in the country where the debtor resides (see Maître Zabaldano Skeleton Argument at [53(3)]), referring, amongst other matters, to what was said by Peter MacDonald Eggers Q.C., sitting as Deputy High Court Judge in *Hardy Exploration & Production (India) Inc v Government of India* [2019] QB 544 at [82] (a decision in which the Court of Appeal decision in *In Re A Debtor* is not cited, and does not appear to have been referred to).

68. I cannot but help think that a jurisdictional challenge is not the appropriate forum to opine at length on a point of law such as where English judgments are payable having regard to the well-known warnings against deciding contested propositions of law on a summary procedure (see *Tulip Trading Ltd v. Bitcoin Association*, supra at [3]-[5]).

69. However, on any view, I am satisfied that Lakatamia has a good arguable case that Lakatamia suffered damage within the jurisdiction as a result of a reduction in value of the Judgment Debts in circumstances where Lakatamia have the better of the argument that English judgments are payable in England.

70. Contrary to Maître Zabaldano' submissions, I consider it clear from what was said by the Master of the Rolls in *In Re a Debtor* that English judgments are payable in England. Thus he stated at [56]:-

> "But we have here, not a mercantile business transaction between a firm in Paris and a debtor in London, **but a formal judgment of the High Court**, a judgment which I think must

> have for this purpose just the same operation and effect as it would have had in the days of Lord Coke.
>
> I see, therefore, no reason to doubt that under the obligations of this judgment the debtor was not bound to go to Paris. **The creditors must come within the realm, and if they are within the realm, then no doubt the debtor must search them out.**

(emphasis added)

71. It is clear from this that it was, at least principally, the status of the debt as a judgment debt that drove the decision that it was to be paid in England. See also what was said by Fletcher Moulton LJ at [60];-

> "The Court does not know and the Court does not care to know, (because it would be quite immaterial,) whether the original debt was incurred in England in respect of money payable in England and the creditors have changed their place of abode, or whether it was incurred in connection with things in France, or things in any other part of the world. **All that can be material is that there is a judgment debt which has been obtained in an English Court,** and it is the object of the bankruptcy notice to enforce that debt; i.e. to enforce the legal obligations which arise out of it. **I am satisfied that the duty of a judgment debtor is to find the judgment creditor and pay to him the amount of the judgment, provided that the judgment creditor is in England** ; but he has no obligation to go out of the realm in order to find him."

(emphasis added)

72. I do not consider that there is anything inconsistent in the judgment in *Hardy Exploration & Production v. Government of India* [2018] EWHC 1916 (Comm); [2019] Q.B. 544 (the case relied upon by Maître Zabaldano at [51] of his skeleton argument). That case is authority for the unremarkable proposition that debts are sited where they are properly recoverable or enforceable. In the case of a judgment debt, unless and until, for the most part, it is declared enforceable somewhere else, it is enforceable in the jurisdiction in which it is delivered. *Hardy*, if anything, illustrates the point. In that case the Judge made clear that where the Indian courts had jurisdiction over a contractual debt, the debt was payable in India (the jurisdiction in which judgment would have to be entered); and that an obligation to effect payment in England against that Indian judgment would only arise if that Indian judgment were to be recognised and enforced in England: see at [87]:-

> "Mr Kendrick submitted that the relevant debt in this case is admitted by IIFC (UK). However, the debt cannot be enforced without a judgment or award to that effect, and such a judgment or award can be obtained only in India. Of course, if the judgment or award is obtained, it can then be executed or enforced by the procedures available in England and Wales, where IIFC (UK) is resident or domiciled. However, pending

> such a judgment or award, the debt is recoverable not in England and Wales, but in India. In those circumstances, the debt under the Guarantee Fee Agreements is situated in India, not England and Wales."

73. In the above circumstances I am satisfied that Lakatamia has established a good arguable case that damage was sustained within the jurisdiction for the purpose of the "tort" gateway.

C.3 THE "PROPERTY" GATEWAY

74. A claim will pass through the "property" gateway where "The subject matter of the claim relates wholly or principally to property within the jurisdiction, provided that nothing under this paragraph shall render justiciable the title to or the right to possession of immovable property outside England and Wales" (see CPR PD 6B, r.3.1(11)). In this regard it should be appreciated that "property" for the purposes of the gateway encompasses intangible property such as rights and obligations, see *Vestel Elektronik Sanayi Ve Ticaret AS v. Access Advance LLC* [2021] EWCA Civ 440; [2021] 4 W.L.R. 60 at [62] per Birss LJ:

> "62 As the judge held at para 110, in *Conversant Wireless Licensing SARL v Huawei Technologies Co Ltd* [2018] EWHC 808 (Pat), [108]–[110], Henry Carr J decided that the UK designations of European patents were property within the jurisdiction for the purposes of this gateway. I agree with that conclusion."

75. The debt owing pursuant to the Cooke Judgments is a chose in action giving Lakatamia rights to be paid in England (as addressed above). Accordingly I am satisfied that Lakatamia has established a good arguable case that Lakatamia's claims against Maître Zabaldano, each of which are connected with or founded upon the Cooke Judgments, pass through the "property" gateway.

C4. THE "NECESSARY OR PROPER PARTY" GATEWAY

76. Whilst the "tort" gateway and the "property" gateway depend on the Judgment Debts being situated in England, in contrast, the "necessary or proper party" gateway is open where (CPR PD 6B, r.3.1(3)):

> "(3) A claim is made against a person ("the defendant") on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim".

77. I am in no doubt whatsoever that all the preconditions to the availability of this gateway are satisfied, and that Lakatamia has (and in fact has very much more than) a good arguable case that the claims fall within this gateway.

78. First, it is indisputable that both Mr Su and Mr Chang were served other than in reliance on this gateway. Lakatamia believes that Mr Su was served while he was in England (see Gardner 2 at [32]) and in any event he was served in reliance on the "tort" and "property" gateways, as was Mr Chang.

79. Turning to the second question, whether there is a "real issue to be tried" between Lakatamia and Mr Su and/or Mr Chang which it is reasonable for the Court to try. The *"*real issue to be tried*"* test "broadly replicates the summary judgment test", see *Vedanta Resources plc v. Lungowe* [2019] UKSC 20; [2020] A.C. 1045 at [9] and [42].

80. Perhaps surprisingly, Maître Zabaldano denies that there is a real issue to be tried between either Mr Su and Lakatamia (if he is the anchor defendant) or Mr Chang and Lakatamia (if he is the anchor defendant in circumstances where the claims against him pass through the tort and property gateways), even though Lakatamia does not have a judgment against either of Mr Su or Mr Chang in respect of the claims advanced (and indeed has only made claims against Mr Chang in these very proceedings).

81. At [55] of Maître Zabaldano's Skeleton there are identified what Maître Zabaldano characterises as three relevant principles when considering whether there is a "real issue between the claimant and a defendant which it is reasonable to try":

    (1) It is highly unlikely that there will be a real issue which it is reasonable for the Court to try where, at the time the Claimant seeks permission to serve out, the anchor defendant did not intend to defend the claim: see e.g. *Satfinance Investment Limited v Athena Art Finance* [2020] EWHC 3527 (Ch) at [40], [46], [60], [86]-[89].

    (2) A claim that is duplicative of another claim which is already being advanced, and which does not give rise to greater monetary recovery, may be one which there is no utility for the Court to determine and which it is therefore not reasonable for the Court to try: see e.g. *Satfinance* at [46]-[47]; *Erste Group Bank AG v JSC 'VMZ Red October*' [2015] 1 CLC 706 at [78(vi)].

    (3) While the Court must assess whether, at the time permission to serve out was sought, the anchor defendant intended to defend the claim, the Court can look to events after that date as evidence of the position at that time: see e.g. *Satfinance* at [54] & [80].

82. On the basis of such authorities, Maître Zabaldano then submits that there is no real issue to be tried against Mr Su because (in particular) Lakatamia has the ability to obtain a judgment against Mr Su (if Lakatamia applied to lift the stay in the 2019 Proceedings and if the judge following such application was prepared to enter judgment against Mr Su), alternatively Mr Su either will or may not defend the claim, and even if a judgment were obtained it would not be for any greater quantum than it would be able to obtain in the 2019 Proceedings if the stay were lifted.

83. I do not consider that these points bear examination, or that these authorities are apposite on the facts of the present case.

84. In the first place it is well established that, "the fact that D1 is sued only for the purpose of bringing in the foreign defendants is a factor in the exercise of the discretion **and not an element in the question whether the action is "properly brought" against D1, provided that there is a viable claim against D1**" (emphasis added) - see *Altimo Holdings and Investment Ltd v. Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 W.L.R. 1804 at [79]) (followed in *Erste Group Bank AG v JSC (VMZ Red October)* [2015] EWCA Civ 379, at [43]). Such submission would therefore go (at most) not to the issue of gateways but to *forum conveniens.*

85. Secondly, and more fundamentally, Maître Zabaldano's argument ignores the fact that there is between Lakatamia and Mr Su a real issue which it is reasonable for the court to try namely whether there was the Subsidiary Conspiracy involving Mr Su **and others** – this is not (as Maître Zabaldano portrays it) an academic issue, for whilst if Lakatamia succeeds against Mr Su it would not affect the quantum of the damages that Lakatamia is entitled to recover from him (if the stay were lifted), it would restart the clock in relation to any time limits that apply to enforcement, here or overseas, and for that reason alone there is a real issue which it is reasonable for the Court to try.

86. Yet further, by the very nature of the conspiracies, they are entered into by more than one person, and Mr Su is at the very epicentre of the alleged conspiracy (in reality a conspiracy that it is difficult to envisage being successfully defended, in the case of Mr Su and Mr Chang). Mr Su is the obvious anchor defendant (being both served in the jurisdiction and being at the epicentre of the conspiracy as the main protagonist) to which other defendants stand to be added (and logically tried together with Mr Su in this jurisdiction).

87. Lakatamia therefore has legitimate reasons for suing Mr Su in this jurisdiction, and for proceeding to trial against him even if Mr Su did not take part in the trial, and there is utility in Lakatamia doing so. Lakatamia has confirmed that it will proceed to trial (and not seek default judgment) and that it needs to obtain a judgment at trial (if the judgment is to be enforceable in Taiwan) – and there is evidence before the Court in support of that proposition. Lakatamia has a legitimate interest that is better served by proceeding to a trial and judgment (see *Satfinance* at [94] per Morgan J) and there is utility in Lakatamia doing so (see *Erste* at [78(vi)] per Gloster LJ). This is a case where there is "particular advantage" for Lakatamia to be gained from the English court trying the claim against the anchor defendant (*Gunn v Diaz* [2017] 2 All E.R. 129 at [99]-[100]).

88. The enforcement position in Taiwan is also a reason why an alternative of asking the Court to lift the stay on the proceedings against Mr Su in the 2019 Proceedings might be of no utility (given that Mr Su did not take part in that trial in the context of his bankruptcy with the result that any judgment might not be enforceable in Taiwan).

89. It also by no means follows that Mr Su would not have taken part in the proceedings at the time of seeking service out, and will not take part in the proceedings. He has engaged in other proceedings involving Lakatamia in the recent past. He also issued an application notice in these proceedings the day before the jurisdiction hearing. Whilst that application was unfocussed, and not clearly directed at these proceedings, it shows that Mr Su is engaging with Lakatamia. The application also contained an indication that Mr Su may not have been fully aware of the claims against him in these proceedings previously, as a result of which it cannot be said that at the time Lakatamia sought permission to serve out, the anchor defendant (Mr Su) did not intend to defend the claim, and subsequent

events suggest that he may well do so (and would have done so as at the time of the application to serve out had he been fully aware of the proceedings).

90. Maître Zabaldano's argument on real issue to be tried is also somewhat circular. As Lakatamia has made clear, if it did apply to lift the stay against Mr Su in the 2019 Proceedings it could, and would, at the same time apply to amend its statement of case to plead the Subsidiary Conspiracy and join (and serve out) in respect of Maître Zabaldano (and under the very same gateways). Yet further it by no means follows that the Court on the lifting of a stay would enter judgment against Mr Su or if it did that this would be of any utility in enforcing in Taiwan bearing in mind that Mr Su did not give evidence at trial, and did not appear at the trial, and so never had the opportunity to put in evidence or give evidence in his own defence (albeit that it might be said that he had only had himself to blame for that in the context of the bankruptcy proceedings).

91. Quite apart from the position in respect of Mr Su, Maître Zabaldano's argument can have no application to Mr Chang as an anchor defendant (Mr Chang having proceeded through the tort and property gateways) in circumstances where Lakatamia does not have any judgment against him (the application for a worldwide freezing order against him having been dismissed by Jacobs J). Clearly, there is between Lakatamia and Mr Chang a real issue which it is reasonable for the Court to try (including whether he is party to the alleged conspiracy and has committed the torts alleged).

92. In the 2019 Proceedings, Sir Michael Burton rightly concluded that the issue of whether Mr Su was liable in damages in respect of his role in the dissipation of the Cresta Overseas Monies as a result of the Principal Conspiracy was sufficient to open the "necessary or proper party" gateway for the purposes of jurisdiction over Madam Su - see *Lakatamia Shipping Co Ltd v. Su* [2019] EWHC 1145 at [19]. Madam Su sought the permission of the Court of Appeal to appeal against the order granting Lakatamia permission to serve her out of the jurisdiction. The Court of Appeal refused permission.

93. In the above circumstances I am satisfied that there is between Lakatamia and each of Mr Su and Mr Chang a real issue which it is reasonable for the Court to try.

94. Equally, Maître Zabaldano is clearly a necessary or proper party to the claims against Mr Su and Mr Chang, and the Court will necessarily be asked to make findings in relation to his conduct at trial. What is alleged is a conspiracy involving Mr Su, Mr Chang and Maître Zabaldano and on Lakatamia's case Maître Zabaldano interacted with both Mr Su and Mr Chang (and conspired with each of them). In such circumstances Maître Zabaldano is a necessary or proper party to the claims against the other parties to the alleged conspiracy.

95. In this regard the sentiments expressed by Edis J in *Eurasia Sports Ltd v. Tsai* [2016] EWHC 2207 (QB), at [55] (in the context of gateway 4A(c)) are apposite:-

> "[w]here the justiciable claim is a claim in conspiracy, the connections between the individual alleged conspirators and the victim involving the same subject matter and existing at or about the same time are highly likely to meet the test"

Whilst those sentiments were expressed in the context of the 4A(c) gateway, they also have resonance in the context of the "necessary or proper party" gateway.

96. It is notable that nowhere in his submissions does Maître Zabaldano explain why there is no real issue between Lakatamia and Mr Chang, or why Maître Zabaldano is not a necessary or proper party to that claim, not least in circumstances where the claim against Mr Chang is that he conspired with (amongst others) Maître Zabaldano.

97. In the above circumstances Lakatamia have very much more than a good arguable case that the claims fall within the "necessary or proper party" gateway.

98. Accordingly, and whilst the claims only need to pass through one gateway, for the reasons I have identified I am satisfied that the claims pass through each of the gateways relied upon.

D. SERIOUS ISSUE TO BE TRIED AND ITS APPLICATION

D.1 THE RELEVANT PRINCIPLES

99. As was stated in *Tulip Trading Ltd v. Bitcoin Association for BSV*, supra at [12], "The merits test can be summarised as being whether there is a serious issue to be tried, which is the same as there being a real as opposed to fanciful prospect of success, and is the same as the test for summary judgment (see e g *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804, [71] and [82], *Lungowe v Vedanta Resources plc* [2019] UKSC 20; [2020] AC 1045, at [42]). See also, in this regard, *Okpabi v. Royal Dutch Shell* [2021] UKSC 3; [2021] 1 W.L.R. 1294 at [127]. It is common ground that this is the test to be applied, and as has already been noted, Maître Zabaldano candidly and rightly acknowledges that the threshold is "*not a high one*" (Maître Zabaldano's Skeleton Argument at [42]).

100. As was stated in *Okpabi* at [22], "the analytical focus should be on the particulars of claim" and the facts averred therein must be regarded as correct unless "demonstrably untrue or unsupportable". It is impermissible to make "determinations in relation to contested factual evidence" (at [120]). As already noted, the "frequent warning in the authorities against deciding controversial points of law in a developing area on assumed or hypothetical facts rather than on the basis of actual factual findings … does not cease to apply simply because the point arises in a jurisdiction application … It is always an important factor to bear in mind" (*Tulip,* supra, at [12], [15]).

101. Full allowance must also be made for the possibility that *"*disclosure may materially add to or alter the evidence relevant to whether the claim has a real prospect of success" (see *Okpabi*, at [128]). In relation to this particular case Lakatamia highlights that (1) Maître Zabaldano has disclosed almost no documents (see Gardner 2 at [48]), and in this regard it is also in issue between the parties as to whether Maître Zabaldano has complied with his CPR obligation to give initial disclosure under the pre-action protocol; and (2) Jacobs J has already held that Cresta cannot assert any privilege in its correspondence with Maître Zabaldano.

102. The fact that the material focus should be on the particulars of claim and that full disclosure may materially add to or alter the evidence relevant to whether the claim has real prospect success, is also linked to the very nature of conspiracy claims which needs to be borne well in mind when considering whether there is a serious issue to be tried. Conspiracy

claims are invariably based on circumstantial evidence, and inferences to be drawn from the material that does exist. I addressed the relevant authorities in this regard in the 2019 Proceedings, and they need to be borne in mind when considering whether there is a serious issue to be tried in relation to the causes of action pleaded by Lakatamia against Maître Zabaldano - see the Bryan Judgment at [59] to [65]:-

> "59. It is also the case that, just as in cases alleging civil fraud and questions of knowledge, so too in cases alleging that entities and individuals participated in a conspiracy, much of the evidence is likely to be circumstantial evidence given that conspirators are very unlikely to have entered into a conspiracy in an open and documented manner, and the case is likely to be an inferential one based on the cumulative evidential picture, much of which is likely to consist of circumstantial evidence.
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> 60. In this regard, as O'Connor L.J. stated in the criminal law case of *R. v. Siracusa* (1990) 90 Cr. App. R. 340, 349 :
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> > "the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is agreement or adherence to the agreement, can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity".
>
> 61. In *Kuwait Oil Tanker Co SAK v Al Bader (No. 3)* [2000] 2 All E.R. (Comm) (" *Kuwait Oil Tanker")* at [111], Nourse LJ stated that this passage was fully applicable to the tort of unlawful means conspiracy, and added at [112], that *"*It will be the rare case in which there will be evidence of the agreement itself".
>
> 62. In similar vein, in the present case, when granting Lakatamia's application to amend the Particulars of Claim to add the Aeroplane Conspiracy on 25 January 2021, Waksman J said this (reported as *Lakatamia v. Su* [2021] EWHC 203 at [37]):-
>
> > "The final point I make in relation to the Aeroplane Conspiracy, and it is true of much of the rest of it, is that this is an inferential case, as claims in conspiracy often are. There is an asymmetric relationship because by

definition the claimant is not likely to have much by way of documents itself or direct evidence, quite often all it can do is raise inferences from the documents which it has. It is really, so far as the Aeroplane Conspiracy is concerned, when I say "more of the same" I mean more of the same kind of allegation that is already in the existing action."

63. The nature of circumstantial evidence is that its effect is cumulative, and the essence of a successful case based on circumstantial evidence is that the whole is stronger than individual parts. In relation to circumstantial evidence, and the drawing of inferences, in *JSC BTA Bank v Ablyazov & Others* [2013] EWHC 510 (Comm) Teare J stated at [197] – [198]:-

"197. So far as Mr Zharimbetov's own liability for the Bank's losses is concerned it is necessary to determine whether, when he signed the "minutes", he knew that Mr Ablyazov was, by means of the Original Loans, misappropriating the Bank's money for his own purposes.

198. Mr Zharimbetov said that he did not know this. He is not a reliable witness but I have to decide whether the Bank has established that he did not know. The bank must do so on the balance of probabilities but the allegation is extremely serious and exposes Mr Zharimbetov to a personal liability of over US$1 billion. The evidence must therefore be of a cogency commensurate with the seriousness of the allegation. The Bank's case is based upon inference from circumstantial evidence. In this regard it is helpful to recall what Rix LJ said about circumstantial evidence in his judgment on the occasion of Mr Ablyazov's appeal against the finding of contempt at [2012] EWCA Civ 1411 at para 52 :

"It is, however, the essence of a successful case of circumstantial evidence that the whole is stronger than individual parts. It becomes a net from which there is no escape . That is why a jury is often directed to avoid piecemeal consideration of a circumstantial case: *R v Hillier* (2007) 233 ALR 63 (HCA), cited in Archbold 2012 at para 10-3. Or, as Lord Simon of Glaisdale put it in *R v Kilbourne* [1973] AC 729 [1973] AC 729 758 , 'Circumstantial evidence … works by cumulatively, in geometrical progression, eliminating other possibilities' . The matter is well put in *Shepherd v R* (1990) *170 CLR 573 (HCA)* at 579/580 (but also passim):

> '… the prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact - every piece of evidence - relied upon to prove an element by inference must itself be proved beyond reasonable doubt. Intent, for example, is, save for statutory exceptions, an element of every crime. It is something which, apart from admissions, must be proved by inference. But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately.'

64. Rix LJ's observations are of general application (see, for example, *Kazakhstan Kagazy Plc v. Zhunus [2017] EWHC 3374 (Comm) at [159]* per Picken J). Of course, what Rix LJ stated in *Ablyazov* (including as to *"a net from which there was no escape"*) was stated in the context of contempt where the standard of proof is to the criminal standard namely " *beyond reasonable doub*t" / " *satisfied so that you are sure* " (in terms of a direction to a jury) where the " *net* " metaphor is particularly apt. However, care needs to be taken in utilising a similar metaphor where the standard is that of balance of probabilities. Something can be proved on balance of probabilities even if all other possibilities have not been excluded, which is why Lord Millett in *Three Rivers* referred to *some* fact which tilts the balance and justifies (for example) an inference of dishonesty in a particular case. Nevertheless, the points that are made that it is the essence of a successful circumstantial case that the whole is stronger than the individual parts, and that circumstantial evidence works cumulatively, are equally apt in a context such as the present, and allegations of unlawful means conspiracy against various individuals and entities.

65. In this regard, and consistently with Rix LJ's observations, in evaluating the evidence it is best to avoid compartmentalising particular points relied upon, or treating points in "silos", or adopting a piecemeal approach to evidence relied upon; rather it is appropriate to take account of *"previous findings in*

considering the likelihood of the later facts having occurred" or, in other words, to *"stand ... back and consider ... the effects of the implications of the facts ... found in the round"* (see *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWHC Civ 408; [2020] 4 W.L.R. 55 at [70] per Sir Geoffrey Vos C)."

D.2 UNLAWFUL MEANS CONSPIRACY

D.2.1 The Elements of the Tort of Unlawful Means Conspiracy

103. In *Digicel (St Lucia) Ltd v. Cable & Wireless Plc* [2010] EWHC 774 (Ch) (Annex I), at [2] Morgan J identified the elements of the tort of unlawful means conspiracy as follows: "[t]he necessary ingredients of the conspiracy alleged are: (1) there must be a combination; (2) the combination must be to use unlawful means; (3) there must be an intention to injure a claimant by the use of those unlawful means; and (4) the use of the unlawful means must cause a claimant to suffer loss or damage as a result". See also in this regard *Kuwait Oil Tanker v A Bader & ors* [2000] 2 All ER (Comm) 271 at p. 312.

104. A useful summary of the key elements of the cause of action was set out in the judgment of Cockerill J in *FM Capital Partners Ltd v Marino* [2019] EWHC 768 (Comm) at [94];-

> "The elements of the cause of action are as follows:
>
> i) A combination, arrangement or understanding between two or more people. It is not necessary for the conspirators all to join the conspiracy at the same time, but the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of: *Kuwait Oil Tanker* at [111].
>
> ii) An intention to injure another individual or separate legal entity, albeit with no need for that to be the sole or predominant intention: *Kuwait Oil Tanker* at [108]. Moreover:
>
> a) The necessary intent can be inferred, and often will need to be inferred, from the primary facts – see *Kuwait Oil Tanker* at [120-121], citing *Bourgoin SA v Minister of Agriculture* [1986] 1 QB: "[i]f an act is done deliberately and with knowledge of the consequences, I do not think that the actor can say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them".
>
> b) Where conspirators intentionally injure the claimant and use unlawful means to do so, it is no defence for them to show that their primary purpose was to further or protect their own interests: *Lonrho Plc v Fayed [1992] 1 AC 448, 465-466* ; see also *OBG v Allan [2008] 1 AC 1 at [164-165]* .

> c) Foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention: *OBG* at [166].
>
> iii) In some cases, there may be no specific intent but intention to injure results from the inevitability of loss: see Lord Nicholls at [167] in *OBG v Allan* , referring to cases where:
>
> "The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort."
>
> iv) Concerted action (in the sense of active participation) consequent upon the combination or understanding: McGrath at [7.57].
>
> v) Use of unlawful means as part of the concerted action. There is no requirement that the unlawful means themselves are independently actionable: *Revenue and Customs Commissioners v Total Network [2008] 1 AC 1174 at [104]*."
>
> vi) Loss being caused to the target of the conspiracy."

105. Cockerill J's summary of the key elements of the cause of action has been adopted in numerous subsequent decisions of this Court including by Butcher J in *Iranian Offshore Engineering and Construction Co v Dean Investment Holdings SA* [2019] EWHC 472 (Comm), by Calver J in *ED&F Man Capital Markets Limited v Come Harvest* [2022] EWHC 229 (Comm), and by myself in *Lakatamia v Su* (Bryan Judgment at [79]).

106. Other matters to note about this tort (of relevance in this case) include that;-

(1) Dishonesty is not itself an element of the tort, see *Arcelormittal USA LLC v. Ruia* [2020] EWHC 3349 (Comm), at [27(3)].

(2) Justification is not a defence, see, for example, *Palmer Birch v. Lloyd* [2018] EWHC 2316 (TCC); [2018] 4 W.L.R. 164, at [192]–[193]; the Bryan Judgment, at [81]; *Seneschall v. Trisant Foods Ltd* [2023] EWHC 1029 (Ch), at [151]–[160]. Justification cannot be a defence since the element of unlawful means connotes the absence of justification, see *JSC BTA Bank v. Khrapunov* [2018] UKSC 19; [2020] A.C. 727 at [10]. As will appear below, this is of particular relevance in the context of Maître Zabaldano seeking to rely upon Monégasque law.

(3) The combination element requires that "at least one of" (but not necessarily all of) the conspirators will use unlawful means - see *Revenue and Customs Commissioners v. Total Network SL* [2008] UKHL 19; [2008] 1 A.C. 1174, at [213]. Thus, there is no requirement that all of the conspirators will use unlawful means. It is also

unnecessary that the combination be, for example, contractual in nature, or that it be an express or formal agreement, see *Kuwait Oil Tanker Co SAK v. Al Bader (No.3)* [2000] 2 All E.R. (Comm) 271 (CA), at [111].

(4) The element of unlawful means comprises conduct lacking "just cause or excuse" (see *JSC BTA Bank*, at [10]). Contempt of court and steps taken to prevent the enforcement of judgments constitute unlawful means (see at [16]).

(5) The intention to injure need not be the defendant's predominant intention, see *JSC BTA Bank*, at [13]. Nor need he or she act maliciously in the sense that harm to the claimant need not be the end sought.

(6) It is enough that harm to the claimant was the means by which the defendant sought to achieve his or her end, *i.e.*, that the defendant knew (or turned a blind eye to the fact) that injury to the claimant would ensue - see *ED&F Man Capital Markets Ltd v. Come Harvest Holdings Ltd* [2022] EWHC 229 (Comm) 487, [500]. In *The Eurysthenes* [1977] Q.B. 49 (CA) at 68, Lord Denning M.R. said that "If a man, suspicious of the truth, turns a blind eye to it, and refrains from inquiry – so that he should not know it for certain – then he is to be regarded as knowing the truth".

(7) The damage requirement calls for proof of "*damage caused by the conspiracy*", *Palmer Birch v. Lloyd*, supra, at [239].

107. On this jurisdictional challenge there has been considerable emphasis and debate (particularly in oral argument) in relation to the intention to injure element and the distinction between doing an act deliberately and with knowledge of its consequences (see, in particular, *Bourgoin SA v Minister of Agriculture* [1986] QB 716) versus mere foresight that unlawful conduct may or will probably damage the claimant (see *OBG v Allan* [2008] AC 1).

108. For his part, Mr Ho, on behalf of Maître Zabaldano, seeks to suggest that the latter, rather than the former, is applicable in the present case. As to foresight, Mr Ho refers to what was said by Lord Nicholls in *OBG Ltd v Allan* (albeit not in an unlawful means conspiracy case) at [166]. In order to put this passage in context it is convenient to quote paragraphs [164] to [167] of Lord Nicholls' judgment:-

> "164. I turn next, and more shortly, to the other key ingredient of this tort: the defendant's intention to harm the claimant. A defendant may intend to harm the claimant's business either as an end in itself or as a means to an end. A defendant may intend to harm the claimant as an end in itself where, for instance, he has a grudge against the claimant. More usually a defendant intentionally inflicts harm on a claimant's business as a means to an end. He inflicts damage as the means whereby to protect or promote his own economic interests.
>
> 165. Intentional harm inflicted against a claimant in either of these circumstances satisfies the mental ingredient of this tort. This is so even if the defendant does not wish to harm the

claimant, in the sense that he would prefer that the claimant were not standing in his way.

166. Lesser states of mind do not suffice. A high degree of blameworthiness is called for, because intention serves as the factor which justifies imposing liability on the defendant for loss caused by a wrong otherwise not actionable by the claimant against the defendant. The defendant's conduct in relation to the loss must be deliberate. In particular, a defendant's foresight that his unlawful conduct may or will probably damage the claimant cannot be equated with intention for this purpose. The defendant must *intend* to injure *the claimant* . This intent must be a cause of the defendant's conduct, in the words of Cooke J in *Van Camp Chocolates Ltd v Aulsebrooks Ltd [1984] 1 NZLR 354* , 360. The majority of the Court of Appeal fell into error on this point in the interlocutory case of *Miller v Bassey [1994] EMLR 44* . Miss Bassey did not breach her recording contract with the intention of thereby injuring any of the plaintiffs.

167. I add one explanatory gloss to the above. Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort. This accords with the approach adopted by Lord Sumner in *Sorrell v Smith [1925] AC 700* , 742:

> 'When the whole object of the defendants' action is to capture the plaintiff's business, their gain must be his loss. How stands the matter then? The difference disappears. The defendant's success is the plaintiff's extinction, and they cannot seek the one without ensuing the other.'

109. In [166] above Lord Nicholls was dealing with a situation where there was mere foresight that unlawful conduct may or will probably damage the claimant and contrasting it with a case (at [167]) where the defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked, and the defendant cannot obtain the one without bringing about the other. As Lord Nichols identifies, if the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient. The former (foresight) is to be contrasted with the situation where an act is done deliberately and with knowledge of its consequences which will amount to an intention to injure (see, in particular, *Bourgoin SA v Minister of Agriculture* [1986] QB 716 as addressed below).

110. Mr Ho also refers to *Meretz Investments NV v. ACP Ltd* [2008] Ch. 244 and what was said by Arden LJ at [127] and by Toulson LJ at [174]. In *Meretz,* and after referring to the metaphor of the "obverse side of the coin" of Lord Nicholls in *OBG* at [167] Arden LJ stated at [127]:

> "127 But these propositions do not, in my judgment, apply where the causative act is something which the party doing it **believes** he has a contractual right to do as against the relevant person, notwithstanding that the act would coincidentally cause that person detriment or loss. In this case the defendants envisaged that when FP exercised the power of sale Britel would lose its right to the development sublease. However, as I have explained, they were advised **and believed** that the exercise of the power of sale would overreach Britel's rights to the development sublease. This was an inevitable result of the arrangements to which Britel agreed. The mere fact that Mr Tamimi or FP intended that result to occur does not mean that they had the intention to cause harm for the purposes of the tort of inducing breach of contract. All they intended to do was to produce a result which **they believed**, as a result of the contractual arrangements between ACP, FP and Britel, that they were entitled to produce."

(emphasis added)

111. At [174] Touslon LJ stated that, "Although my conclusion on the issue of unlawful means makes it unnecessary to decide the point, I would support Arden LJ's view, at para 127, that it is a defence to an action for conspiracy to injure by unlawful means if the defendant not only acted to protect his own interests but did so **in the belief** that he had a lawful right to act as he did" (emphasis added).

112. It will be seen that such sentiments are dependent upon the defendant having such belief. Whilst Mr Ho seeks to argue that Maître Zabaldano is in an analogous position I consider that he faces two difficulties. The first is a matter for trial (and cannot be determined at the serious issue to be tried stage) as Maître Zabaldano's state of mind is very much in issue. Lakatamia will submit (and will cross-examine Maître Zabaldano with a view to establishing) that Maître Zabaldano did not, and could not have had, such belief and knew perfectly well what the consequences of his (wrongful) action would be. The second difficulty is, in my view, likely to be unsurmountable. I am in no doubt whatsoever that this is not a foresight case at all but one based on knowledge on the part of Maître Zabaldano who transferred Cresta's assets to UP Shipping knowing that by doing so Lakatamia would suffer harm by such dissipation of Mr Su's assets resulting in a reduction in value of the Judgement Debt. That is Lakatamia's pleaded case, and the facts (as already addressed and quoted above) are strongly supportive of such a conclusion.

113. As was stated in *Bourgoin SA v. Minister of Agriculture* [1986] Q.B. 716 (CA) by Oliver LJ at p 777 (in a part of his judgment with which both Parker and Nourse LJJ agreed) that:

> **"If an act is done deliberately and with knowledge of the consequences, I do not think that the actor can say that he**

did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them"

(emphasis added)

114. Not only is this principle binding upon me but it is clearly right, and has been repeatedly followed in subsequent cases. It was quoted with approval in the subsequent Court of Appeal case of *Kuwait Oil Tanker Co SAK v. Al Bader (No.3)*, supra, at [120]-[121] where, after quoting such passage, Nourse LJ (giving the judgment of the court) stated, "The facts of the instant case are a good example. On the judge's findings of fact the defendants' principal purpose was no doubt to line their own pockets, but they cannot be heard to say that they did not intend to injure the claimants or that their acts were not aimed at the claimants".

115. The passage from *Bourgoin* has been cited with approval in many subsequent cases where the distinction between foresight and knowledge has been identified as part of the summary of the key elements of the tort, including by Cockerill J in *FM Capital Partners Ltd v Marino*, supra, by Butcher J in *Iranian Offshore Engineering and Construction Co v Dean Investment Holdings SA, supra*, by Calver J in *ED&F Man Capital Markets Limited v Come Harvest* [2022] EWHC 229 (Comm), supra, at [466] and by myself in *Lakatamia v Su* (Bryan Judgment at [79]).

116. This point is, I consider, of considerable importance in circumstances where Maître Zabaldano repeatedly asserts that he did not "intend to harm or injure Lakatamia, nor did he intend to violate Lakatamia's Judgment Debt rights" (see, for example, Maître Zabaldano's Skeleton Argument at [22]) in circumstances where Lakatamia's case is that Maître Zabaldano knew that the Cresta Overseas Monies ultimately belonged to Mr Su and that by facilitating the transfer of those monies to UP Shipping those assets would be dissipated in breach of the Blair Freezing Order and Lakatamia would damage suffer as a result.

117. As already noted, the House of Lords in *OBG Ltd v Allan*, at [167] identified that "*where loss to the claimant is the obverse side of the coin from gain to the defendant*", the two are "*inseparably linked*". If the defendant knows that he "*cannot obtain the one without bringing about the other*" but goes ahead anyway, he will intend the loss. In this regard the fact that one co-conspirator knew that a gain to another co-conspirator would cause loss to the claimant is sufficient. There is no requirement that each co-conspirator intend a gain to themselves.

118. In the present case, the direct obverse of Maître Zabaldano transferring the money from Cresta to UP Shipping is that Lakatamia suffered the loss, as Maître Zabaldano did know or should have known would be the consequence of his actions. This is to be contrasted with cases such as *Barretts & Baird (Wholesale) Ltd v Institution of Professional Civil Servants* [1987] *IRLR 3* (referred to with approval in *OBG Ltd v Allan* at [64]) where a strike by civil servants in the Ministry of Agriculture in support of a pay claim merely had the foreseeable consequence of abattoirs being unable to obtain certificates to enable them to export meat.

119. The most recent conspiracy to injure by unlawful means case of the most highest authority is the Supreme Court decision in *JSC BTA Bank v Ablyazov and another* [2020] AC 727 which has striking parallels to the facts of the present case. In that case the claimant

bank was granted a worldwide freezing order against the first defendant (Mr Ablyazov) in support of proceedings which it had brought to recover large sums of allegedly stolen money. Mr Ablyazov breached that order by dealing with frozen assets and, having been found in contempt of court, absconded to France. Alleging that the second defendant (his son-in-law Mr Khrapunov who was domiciled in Switzerland) had assisted Mr Ablyazov in his wrongful dealings with frozen assets that were located abroad, the bank brought an action against both defendants in the tort of conspiracy to injure by unlawful means, the means relied on being the breaches of the freezing order. Mr Khrapunov applied, inter alia, for an order setting aside the claim form on the grounds that contempt of a court order could not constitute unlawful means for the purposes of the tort and that he should, in any event, be sued in Switzerland, the place of his domicile, pursuant to article 2 of the Lugano Convention.

120. The judge (Teare J) refused the application, holding that: (i) the bank had a good arguable case that Mr Khrapunov had committed the tort of conspiracy to injure by unlawful means; and (ii) the English courts had special jurisdiction to hear the claims against the second defendant pursuant to article 5(3) of the Convention as the courts of the place where the harmful event had occurred, although only in respect of damage caused before Mr Ablyazov absconded to France. The Court of Appeal dismissed Mr Khrapunov's appeal, but allowed the bank's cross-appeal on the basis that the event which gave rise to the damage for which it was sought to hold the defendants liable was the making of their agreement to defeat the worldwide freezing order, which had taken place in England. The Supreme Court dismissed Mr Khrapunov's appeal to that Court.

121. At [4] of the judgment of the Supreme Court, Lords Sumption and Lloyd-Jones (with whom Lords Mance, Hodge and Briggs agreed) identified the nature of the claims advanced:-

> "The defendants are Mr Ablyazov and his son-in-law Mr Khrapunov, who is domiciled in Switzerland. Mr Ablyazov has taken no part in these proceedings, and the present appeal is concerned only with the position of Mr Khrapunov. The Bank's case against him is that he has at all times been aware of the freezing order and the receivership order, and that in about 2009 he entered into a combination or understanding with Mr Ablyazov to assist him in dissipating and concealing his assets. For present purposes, it may be assumed that they entered into it in England where Mr Ablyazov was then living. Teare J found that there was sufficient evidence to that effect, and the point has not been contested before us. It is alleged that both before and after Mr Ablyazov's flight abroad Mr Khrapunov actively participated in the agreed scheme, both on Mr Ablyazov's instructions and from time to time on his own initiative. He is said to have been instrumental in extensive dealings in the assets of Swiss, Belizean and Russian companies controlled by Mr Ablyazov and in laying a trail of false documents to conceal what had become of them. This is relied upon as constituting the tort of conspiracy to cause financial loss to the Bank by unlawful means, namely serial breaches of the freezing order and the receivership order."

122. Lords Sumption and Lloyd-Jones at [12] referred to the decision of the House of Lords in *Revenue and Customs Comrs v Total Network SL* [2008] AC 1174 (in which the House of Lords declined to apply to unlawful means conspiracies the condition which it had held in *OBG Ltd* v *Allan* to apply to the tort of intentionally harming the claimant by unlawful acts against third parties, namely that those acts should be actionable at the suit of the third party holding that the means were unlawful for the purpose of founding an action in conspiracy, whether they were actionable or not).

123. They then continued at [13] as follows:-

> "13. The leading speech was delivered by Lord Walker, with whom Lord Scott, Lord Mance and Lord Neuberger agreed. Lord Hope, without agreeing so in terms, proposed an analysis of this point which was consistent with Lord Walker's. The first point to be derived from the speeches concerns intention. The distinction between cases where there is and cases where there is not a predominant intention to injure the claimant, is an inadequate tool for determining liability because it does not exhaust the possibilities. **The emphasis in the authorities on cases in which the predominant purpose was to injure the claimant has diverted attention from the fact that both lawful means and unlawful means conspiracies are torts of intent. But the nature of the intent required differs as between the two. This is because a conspiracy may be directed against the claimant notwithstanding that its predominant purpose is not to injure him but to further some commercial objective of the defendant.** This point had been made, some years earlier, by the Supreme Court of Canada in *Canada Cement LaFarge Ltd v British Columbia Lightweight Aggregate Ltd [1983] 1 SCR 452* . After a careful analysis of the (mainly English) authorities, Estey J, delivering the judgment of the Court, concluded at pp 471-472 that
>
> > "whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
> >
> > (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,
> >
> > **(2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result**.

> **In situation (2)** it is not necessary that the pre-dominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, **it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue.** In both situations, however, there must be actual damage suffered by the plaintiff."
>
> (emphasis added)

124. At [16] they then applied such principles to the facts of that case:-

> "16. The unlawful means relied upon in this case are criminal contempt of court albeit that the offence is punishable in civil proceedings. The Bank does not of course contend that the defendants' predominant purpose in hiding Mr Ablyazov's assets was to injure it. Their predominant purpose was clearly to further Mr Ablyazov's financial interests as they conceived them to be. At the same time, damage to the Bank was not just incidental to what they conspired to do. It was necessarily intended. The freezing order and the receivership order had been made on the application of the Bank for the purpose of protecting its right of recovery in the event of the claims succeeding. The object of the conspiracy and the overt acts done pursuant to it was to prevent the Bank from enforcing its judgments against Mr Ablyazov, and the benefit to him was exactly concomitant with the detriment to the Bank as both defendants must have appreciated. In principle, therefore, we conclude the cause of action in conspiracy to injure the Bank by unlawful means is made out."

125. There is, as Mr Philips KC submits on behalf of Lakatamia, a remarkable correlation with the facts of the present case, as can be seen if one substitutes "Lakatamia" for the bank and "Mr Su" for Mr Ablyazov:-

> "[Lakatamia] does not of course contend that the defendants' predominant purpose in hiding [Mr Su's] assets was to injure it. Their predominant purpose was clearly to further [Mr Su's] financial interests as they conceived them to be. At the same time, damage to [Lakatamia] was not just incidental to what they conspired to do. It was necessarily intended. The freezing order and the receivership order had been made on the application of [Lakatamia] for the purpose of protecting its right of recovery in the event of the claims succeeding. The object of the conspiracy and the overt acts done pursuant to it was to prevent [Lakatamia] from enforcing its judgments against [Mr Su], and the benefit to him was exactly concomitant with the detriment to the [Lakatamia] as both defendants must have appreciated. In principle, therefore, we conclude the cause of action in

> conspiracy to injure [Lakatamia] by unlawful means is made out"

126. I consider such comparison to be apt, and that it evidences why, on any view, there is a serious issue to be tried in relation to the unlawful means conspiracy claim against Maître Zabaldano.

D2.2 Discussion

127. The constant theme throughout Maître Zabaldano's evidence and his Skeleton Argument is that he "did not intend to harm Lakatamia or cause it loss or damage" since his "sole concern was to ensure that [his] firm complied with its Monégasque law obligations to transfer the Sale Proceeds in accordance with the instructions given by Cresta" (see, for example, Zabaldano 1 at [54.1]).

128. I am satisfied that this assertion (for assertion it is) does not prevent there being a serious issue to be tried that Maître Zabaldano combined with Mr Su and Mr Chang to transfer the Monaco Sale Proceeds out of Monaco knowing that Mr Su was subject to the Blair Freezing Order, owed the Judgment Debts and was the beneficial owner of the Cresta Overseas Monies and committed the tort of unlawful means conspiracy.

129. First, Maître Zabaldano knew about both the Blair Freezing Order and Cooke Judgments at the relevant time (that is evidenced by the contemporary correspondence as already addressed, including by virtue of the Gazo letter dated 30 September 2015), and he accepts as much (Zabaldano 1 at [36]), and he had no basis for believing that they were not extant as at the date of the transfer. Maître Zabaldano seeks to turn around what he was told as to the Blair Freezing Order and Cooke Judgments, and what he was told by the Barclays lawyer as to the risk of fraud, by saying that he "did not know whether the Cooke Judgment Debt remained unsatisfied" at the time he authorised the transfer (Zabaldano 1 at [54.4]) but he would not appear to have had any evidential basis for concluding it did not on the evidence currently before me.

130. Equally, Maître Zabaldano deliberately, and with knowledge of the consequences (dissipation of assets beneficially owned by Mr Su and consequent damage to Lakatamia), effected the transfer of the Cresta Overseas Monies to UP Shipping. In such circumstances he cannot say that he did not intend the consequences or that the act was not "aimed" at the person (Lakatamia) who, it is known, would suffer them (see *Bourgoin SA v. Minister of Agriculture*, supra, at p. 777 and the above discussion).

131. As Lakatamia rightly point out, the **only** way in which Maître Zabaldano could comply with the unlawful instruction that he had received from Mr Chang (short of seeking relief from the English court which was open to him) was by injuring Lakatamia. Injuring Lakatamia was a means to the end that Maître Zabaldano was seeking to achieve and was thus intended. This, in of itself, suffices to supply the intention to injure element (as addressed above).

132. Secondly, the issue of whether Maître Zabaldano intended to injure Lakatamia is obviously one of fact - see, *e.g.*, *Lloyds Bank Ltd v. Marcan* [1973] 1 W.L.R. 339 (CA) at 344, "The word "intent" denotes a state of mind. A man's intention is a question of fact". Lakatamia has made clear that it will dispute Maître Zabaldano's evidence at trial that he

did not intend to injure it. Lakatamia is entitled to test Maître Zabaldano's evidence by way of cross-examination (including on the basis of all available documentation after the disclosure process). On established principles, it would not be appropriate for me to embark on a "mini-trial" with a view to divining what Maître Zabaldano's state of mind was at the time.

133. Thirdly, and as already noted, "If an act is done deliberately and with knowledge of the consequences, I do not think that the actor can say that he did not 'intend' the consequences or that the act was not 'aimed' at the person who, it is known, will suffer them" (see *Bourgoin SA v. Minister of Agriculture*, supra at 777 per Oliver L.J).

134. Much of the focus of Maître Zabaldano's evidence, and submissions, is based on what Maître Zabaldano asserts he was required to do, or might have considered that he was required to do, as a matter of Monégasque law, in terms of following the instructions of Mr Chang.

135. It is convenient to address the question of any relevance of Monégasque law at this point. The short answer is that it is not relevant whether Maître Zabaldano was, or might have considered he was, required to do what he did as a matter of Monégasque law for a number of reasons.

136. First and foremost, and this fundamentally undermines Maître Zabaldano's reliance on Monégasque law, justification is not a defence to the tort of unlawful means conspiracy (as addressed above, see, for example, *Palmer Birch v Lloyd*, supra at [27(3)], the Bryan Judgment at [81], and *Seneschall v Trisant Foods Ltd*, supra at [51]-[60]). Even if it were in general (which it is not), it would not be available as a defence on the facts of the present case, since it is never justifiable to breach an injunction - see, for example, *Northamber plc v. Genee World Ltd* [2022] EWHC 3562 (Ch), at [301]. It may be that there was a failure to focus on the fact that justification is not a defence to the tort of unlawful means conspiracy when directions were given in relation to the service of expert evidence as to Monégasque law, on the jurisdictional challenge.

137. Secondly, the issue of the content of Monégasque law is also a contested factual issue. Lakatamia disputes that Maître Zabaldano was obliged to act as he did as a matter of Monégasque law, and there are clear differences of opinion between the respective experts as to Monégasque law that will need to be explored in cross-examination before they can be resolved and appropriate findings made at trial.

138. To give but two examples in relation to the evidence of Lakatamia's experts (Mr Christian Charrière-Bournazel and Professor Thierry Revet) at [32] and [37]):-

> "**32. Instruction to commit an unlawful act**. In the hypothesis where a Monegasque lawyer is instructed to commit an act that he knows to be fraudulent, the execution of such an instruction would entail the following consequences. **Firstly,** the lawyer would be the co-perpetrator of a fraud; **then,** he would breach the essential principles of probity and prudence; **finally,** the fraud would constitute a fault likely to engage the liability of the lawyer on the civil and disciplinary level.

In these conditions, the undersigned are of the opinion that in application of the adage "fraus omnia corrumpit" and the essential principles of probity and prudence, the lawyer knowing of the fraudulent nature of the act ordered by his client must refuse to follow the client's instruction. The fact that the fraudulent act relates to a transfer of funds from his client's account is not relevant as, on the one hand, "fraud corrupts everything", which authorises the setting aside of article 1783 of the Monegasque Civil Code, and on the other hand, probity and prudence are essential principles applicable to the handling of funds.

…

37. Instruction to commit fraud. Before answering this question, it is necessary to state that it is assumed that in the case in question, the civil *"offence"*, in other words *"any unlawful act by the person engaging his civil liability, as a result of damage caused to another"*, constitutes fraud against the rights of the Lakatamia company**.** As stated previously, the commission of fraud by a lawyer establishes negligence likely to engage his tortious liability in application of article 1229 of the Monegasque Civil Code. Faced with an instruction from the client to commit fraud, the adage "*fraus omnia corrumpit"* is intended to apply, so the lawyer is entitled (and even has a duty) to refuse to apply the rules whose conditions have been met by the fraud".

The Monegasque lawyer is, furthermore, obliged to comply with the essential principles of prudence and probity in all circumstances. In application of these principles, the lawyer must display great intellectual strength by abstaining from committing a fault, nor can he knowingly participate in the carrying out of fraud.

In these conditions the undersigned are of the opinion that the lawyer receiving an instruction from his client to commit fraud must refuse that order in application of the essential principles of probity and prudence.

In so far as the object of the instruction from the client is fraud, the undersigned are of the opinion that the lawyer's refusal will not be improper as, by application of the adage "fraus omnia corrumpit", the lawyer is entitled and even has a duty to refuse to apply the rules whose conditions are met by the fraud."

Whilst such opinions (at least to an English lawyer) appear unremarkable, and what one might expect, my understanding is that Maître Zabaldano's experts on Monégasque law (Jean-Michel Lemoyne de Forges and Martine Coulet) do not accept that such opinions represent the position under Monégasque law. Such differences of opinion cannot possibly be determined on a jurisdictional challenge and must await trial.

139. Lakatamia also criticises aspects of the evidence of the experts called on behalf of Maître Zabaldano (including whether one of the experts can properly be regarded as independent), matters which Lakatamia would be entitled to explore in cross-examination, and the experts called on behalf of Maître Zabaldano also do not address all the issues that are of potential relevance to the questions they answered.

140. Thirdly, Maître Zabaldano had the option of seeking the guidance of this Court if (contrary to Lakatamia's case and evidence), he was of the view (per his evidence and that of his Monégasque law experts), that he was obliged under Monégasque law to give instructions to transfer the Monaco Sale Proceeds in circumstances where he knew that to do so would (or would arguably) breach the terms of the Blair Freezing Order. That this option was available to him was clear from the terms of the Blair Freezing Order (at [12]). In this regard Lakatamia also refer me to the Canadian case of *Carey v. Laiken* [2015] SCC 17; [2015] 2 S.C.R. 79, at [58]–[60] which I agree has certain parallels. Maître Zabaldano was on notice of the Blair Freezing Order and Cooke Judgments and was aware of their terms, and had been alerted to the same by Geraldine Gazo on behalf of Lakatamia, and had received the 20 October 2015 letter from Maître Joelle Pastor-Bensa on behalf of Barclays in which it was stated that, "there could be no question of [Barclays] taking part in the realisation of an act which could constitute a fraud against the rights of a creditor". Whilst such correspondence was a considerable time prior to the transfer, Lakatamia submits that the obvious and prudent course in such circumstances was to seek the guidance of the English court.

141. Whilst I do not consider that it would be appropriate to make findings on Monégasque law (that would require the experts to address all issues, for them to meet and identify areas of agreement and disagreement, and for their differences to be explored in cross-examination – all matters for trial), particular issues addressed by the experts have been debated before me at some length. I therefore identify some such points below, if only to illustrate, that the matters that arise are matters for trial, and if relevant, very much evidence why there is a serious issue to be tried if Monégasque law is of any relevance.

142. Maître Zabaldano's experts opine that a lawyer holding client funds is a "*depositary*", and that his or her obligations are governed by the elements of the Civil Code applicable to deposits (see LeMoyne de Forges/Coulet 1 at [4]). They say that there are only very limited exceptions to the obligation on the part of a depositary to return funds to a depositor. The exceptions are where there is a garnishment (under s.1783 of the Monégasque Civil Code); an objection to the sale of business assets (under art.3 of the Order of 23rd June 1907); or a judicial sequestration (see at [8] to [9]). They say that none of these exceptions was applicable when Maître Zabaldano effected the transfer of the Cresta Overseas Monies.

143. However, for its part, Lakatamia submit that it would be remarkable if (as per Maître Zabaldano and his experts) the obligations of a Monégasque lawyer are precisely the same as those of a depositary and that there is no additional or augmented obligation on a Monégasque lawyer to ensure that he or she does not participate in tortious or fraudulent conduct. It appears to be Maître Zabaldano's case that even if a Monégasque lawyer is expressly told by his or her client that what that client wishes to do is to defraud or injure an innocent third party by dealing with the deposited funds, the lawyer must assist the client to perform that fraud or inflict that injury. In this regard, and as already noted,

Lakatamia's experts disagree with the views of Maître Zabaldano's experts on this point. They say that a Monégasque lawyer may (as a matter of Monégasque law) incur tortious liability for a plot intended to breach an English freezing order, see Charrière-Bournazel/Revet 1 at [28]; that a Monégasque lawyer is subject to essential principles of probity and prudence; and that if a Monégasque lawyer is instructed to commit a fraud, he or she has a duty not to comply with the instruction (see at [32] and [37] as already quoted above).

144. The first of those points (*i.e.*, whether Maître Zabaldano may have committed a tort as a matter of Monégasque law), is a point that Mishcon de Reya instructed Maître Zabaldano's experts to ignore. I consider that it is one that would need to be addressed in due course if this issue was prayed in aid by way of (alleged) defence to the conspiracy claim against Maître Zabaldano.

145. As to the second point (*i.e.*, whether Maître Zabaldano would have been justified in declining to participate in any such tortious conduct), the evidence of his experts is that the "*restitutionary obligation*" of a custodian to return property to its owner is fundamental (see LeMoyne de Forges/Coulet 2 at II.C.17) – i.e. that he had no choice but to comply with the direction to pay the money out of Monaco.

146. In support of this proposition, Maître Zabaldano's experts refer to a decree of the Commercial Chamber of the Court of Cassation of France in which a bank was compelled to return shares to Madam Y. The bank had transferred the shares to two other customers in order to conceal unauthorised transactions on those customers' accounts. Madam Y became an active participant in the fraud when she signed documents that purported to legitimise the transfers. The bank was nevertheless compelled to give the shares back when she demanded them.

147. At first blush, at least, this decision seems unsurprising. The shares were Madam Y's, and as the owner of the shares she was entitled to receive them back. It is difficult to see on what basis the bank would have any entitlement to keep them, not least in the context of a fraudulent purported transfer which it had put in train. I cannot see the relevance of that case to the facts under consideration. Here Cresta was not demanding that Maître Zabaldano return the Cresta Overseas Monies to its own bank account in Monaco (or for that matter transfer the monies to another account it held). Rather it was instructing him to pay monies, prima facie caught by the Blair Freezing Order (Mr Su being the UBO of Cresta) to a third party (UP Shipping) in another jurisdiction (Taiwan), a transaction which had all the hallmarks of either being an attempt to evade the Blair Freezing Order or, quite apart from that, a transfer to an overseas entity that was not Cresta, and in circumstances where the only other director to Mr Chang (Mr Garrett) had just resigned (in circumstances where he was not willing to authorise the transfer). One might have thought that such facts (assuming Maître Zabaldano was aware of them) might cause alarm bells to ring in any jurisdiction, for any lawyer. But Maître Zabaldano's evidence is seemingly that none of this concerned him at all (i.e. not that he was alarmed but had no choice, but that there was nothing to be alarmed about). Such evidence cries out to be tested in cross-examination and by reference to definitive evidence in relation to Monégasque law. Those are matters for trial.

148. In this regard there are continuing disputes as what the relevant Monégasque law is, and even disputes about precisely what the respective experts are saying. An example of the latter is that it is now suggested on behalf of Maître Zabaldano that Lakatamia's experts

have taken the view that Maître Zabaldano would only have been relieved of the obligation to effect a transfer of the monies if "*proof of fraud was filed in the Monégasque Courts prior [to] the transfer of the Sale Proceeds*" (see Maître Zabaldano's skeleton argument, at [29]). This appears to centre on a disputed translation of Lakatamia's experts' report. Lakatamia's position is that it does not understand the evidence to require the proof of fraud to be filed before the transfer was effected. However whether that is so or not cannot possibly be resolved on a jurisdictional challenge on contested foreign law evidence and without the benefit of cross-examination.

149. A constant theme in Maître Zabaldano's submissions on Monégasque law is that the Court should prefer the evidence of his experts over those called by Lakatamia, but to do so their respective views would have to be crystallised (with each expert dealing with all issues) and the differences between them would need to be explored in cross-examination. Those are not matters capable of summary determination on a jurisdictional challenge not least in circumstances where not all the experts have opined on all potentially relevant issues, and the differences between them can only be resolved at trial (if Monégasque law were to be relied upon in any defence).

150. I return to the question of whether Lakatamia has demonstrated that there is a serious issue to be tried – i.e. that there is a real as opposed to fanciful prospect of success (a threshold which is acknowledged to be "not a high one" (Maître Zabaldano's Skeleton Argument at [42])).

151. I have had careful regard to the Particulars of Claim (see *Okpabi*, supra, at [22] as to the relevance thereof). The facts there averred, if proved, would establish each of the three causes of action relied upon. Those facts have not been shown to be demonstrably untrue or unsupportable (indeed little, if any attempt has been made to attack them at all on this jurisdictional challenge). I also bear well in mind, and make full allowance for, the fact that disclosure may materially add to or alter the evidence relevant to whether each of the claims has a real prospect of success. Maître Zabaldano has disclosed almost no documents and Lakatamia alleges (though I am not in a position to decide) that Maître Zabaldano has not complied with his CPR obligation to give initial disclosure under the pre-action protocol. There may be battles ahead in relation to disclosure, but Jacobs J has already held that Cresta cannot assert any privilege in its correspondence with Maître Zabaldano, and there is a real possibility that disclosure will shed much light as to the actual interactions between Maître Zabaldano and the alleged co-conspirators, Mr Su and Mr Chang (as well as Mr Garrett).

152. An important consideration is that the claim is one of conspiracy (and the other two claims raise similar issues). Conspiracy claims are invariably based on circumstantial evidence, and inferences to be drawn from the material that does exist. That is, and will be, true in the present case. I addressed the relevant authorities in this regard in the 2019 Proceedings (Bryan Judgment at [59] to [65] as quoted above), and they need to be borne well in mind when considering whether there is a serious issue to be tried in relation to the causes of action pleaded by Lakatamia against Maître Zabaldano.

153. As Waksman J said in the 2019 Proceedings (in allowing an amendment to introduce the Aeroplane Conspiracy on the same test) (see *Lakatamia v. Su* [2021] EWHC 203 at [37]), "… this is an inferential case, as claims in conspiracy often are. There is an asymmetric relationship because by definition the claimant is not likely to have much by way of documents itself or direct evidence, quite often all it can do is raise inferences from the

documents which it has". In such cases it is necessary to "stand … back and consider … the effects of the implications of the facts … found in the round" (see *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWHC Civ 408; [2020] 4 W.L.R. 55 at [70] per Sir Geoffrey Vos C)."

154. In fact in the present case there is already rather more material available than in many conspiracy cases, and Lakatamia's case is not solely inferential. There are already proven facts that I consider strongly support its case, and which mean that there is at the very least a serious issue to be tried, the relevant test under consideration.

155. Maître Zabaldano knew about both the Blair Freezing Order and Cooke Judgments at the relevant time. This is evidenced by the contemporary correspondence as already addressed, including by virtue of the Gazo letter dated 30 September 2015 and Maître Zabaldano accepts as much (Zabaldano 1 at [36]). He was also expressly informed that it appeared that Mr Su had interests in Cresta (as identified in the Gazo letter). As such he would (or should) have been aware from the terms of the Blair Freezing Order that the assets in Cresta's were, or were likely to be caught by the Blair Freezing Order and that to transfer such assets would, or would be likely to be, a contempt of the English court (certainly by anyone giving instructions to him on Mr Su's behalf) and would result in Lakatamia suffering damage (by virtue of the dissipation of the assets and reduction in value of the Judgment Debts).

156. He was acting on Cresta's instructions. He was on notice of Mr Su's interests and knew who Mr Su was (and may have interacted with him). From the letter of Joelle Pastor-Bensa (Barclays' counsel) to him dated 20 October 2015 he was expressly warned by another Monaco lawyer (by reference to what that lawyer would not do on Barclays' behalf), and in the context of the re-financing under contemplation at that time, that in light of "the most recent submissions of [Lakatamia] and the information they provide on the situation of its debtor, there could be no question of my client taking part in the realisation of an act which could constitute a fraud against the rights of a creditor". Such sentiments applied equally to Cresta and Maître Zabaldano as already identified he had no reason to believe that they were not extant as at the date of the transfer. He also knew that in such circumstances, and as Lakatamia rightly point out, the only way in which he could comply with the unlawful instruction that he had received from Mr Chang (short of seeking relief from the English court which was open to him) was by injuring Lakatamia. Injuring Lakatamia was a means to the end that Maître Zabaldano was seeking to achieve and was thus intended. That is sufficient to supply the intention to injure element (as addressed above).

157. The position (per Lakatamia's case that it is entitled to advance) is that Maître Zabaldano deliberately, and with knowledge of the consequences (dissipation of assets beneficially owned by Mr Su and consequent damage to Lakatamia), effected the transfer of the Moaco Sale Proceeds to UP Shipping. In such circumstances, and on that basis, he cannot say that he did not intend the consequences or that the act was not "aimed" at the person (Lakatamia) who, it is known, would suffer them (see *Bourgoin SA v. Minister of Agriculture*, supra, at p. 777 and the above discussion).

158. Quite apart from all the above, and as already noted, the issue of whether Maître Zabaldano intended to injure Lakatamia is obviously one of fact (*Lloyds Bank Ltd v. Marcan*, supra, at 344) and Lakatamia has made clear that it will dispute Maître Zabaldano's evidence at trial that he did not intend to injure it. Lakatamia is entitled to test Maître Zabaldano's evidence by way of cross-examination (including on the basis of all available documentation after the disclosure process). On established principles, it would

not be appropriate for me to embark on a "mini-trial" with a view to divining what Maître Zabaldano's state of mind was at the time.

159. In the above circumstances I am satisfied that there is a serious issue to be tried that Maître Zabaldano combined with Mr Su and Mr Chang to transfer the Cresta Overseas Monies out of Monaco knowing that Mr Su was subject to the Blair Freezing Order, owed the Judgment Debts and was the beneficial owner of the Cresta Overseas Monies and in acting as he did committed the tort of unlawful means conspiracy.

D.3 CAUSING LOSS BY UNLAWFUL MEANS

160. In relation to causing loss by unlawful means, the editors of *Clerk & Lindsell on the Law of Torts*, at 23.78, identify that "The key conditions of liability … are (i) an intention to cause loss to the claimant; (ii) use of "unlawful means" against a third party; and (iii) interference with that third party's freedom to deal with the claimant".

161. The intention element is the same as that required for the tort of unlawful means conspiracy, see *Emerald Supplies Ltd v. British Airways plc (No.1)* [2015] EWCA Civ 1024; [2016] Bus. L.R. 145, at [133]. I have already addressed the intention element at length in the context of unlawful means conspiracy and the same considerations are equally applicable in relation to causing loss by unlawful means, as are my conclusions in that regard.

162. As to the unlawful means element, in *OBG Ltd v. Allan*, supra at [49], Lord Hoffmann said that "acts against a third party count as unlawful means only if they are actionable by that third party".

163. The dealing element is satisfied where a third party's ability to "perform their obligations" to the claimant is impeded, see *OBG* at [129], and see also *Secretary of State for Health v. Servier Laboratories Ltd* [2022] AC 959, at [41].

164. Per Sales and Stilitz, "*Intentional Infliction of Harm by Unlawful Means*" (1999) 115 L.Q.R. 411, 418, there is, as with unlawful means conspiracy "… no defence of justification" and I have already addressed the consequences of this in the unlawful means conspiracy section.

165. Lakatamia pleads that Mr Chang, by effectively asset stripping Cresta, breached the directors' duties that he owed to Cresta and that Maître Zabaldano assisted these breaches. Lakatamia also contends that Maître Zabaldano owed a *Quincecare*-type duty of care to Cresta.

166. In *Barclays Bank v Quincecare* [1992] 4 All ER 363, Steyn J held that it was an implied term of the contract between a bank and its customer that the bank would use reasonable skill and care in and about executing the customer's orders; this was subject to the conflicting duty to execute those orders promptly so as to avoid causing financial loss to the customer; but there would be liability if the bank executed the order knowing it to be dishonestly given, or shut its eyes to the obvious fact of the dishonesty, or acted recklessly in failing to make such inquiries as an honest and reasonable man would make; and the bank should refrain from executing an order if and for so long as it was put on inquiry by having reasonable grounds for believing that the order was an attempt to misappropriate funds - see *Singularis Holdings Ltd v. Daiwa Capital Markets Europe Ltd* [2020] AC 1189 at [1].

167. Lakatamia pleads that Maître Zabaldano breached such *Quincecare*-type duties by giving effect to Mr Chang's instruction to transfer the Monaco Sale Proceeds to Taiwan in circumstances where he had a reasonable basis for suspecting that Mr Chang's instruction was a fraud on Cresta (see the Particulars of Claim at [25.1]–[25.2]).

168. Once again, Maître Zabaldano's focus in seeking to submit that there is no serious issue to be tried relates to intention to cause loss. I do not consider that the points raised prevent there being a serious issue to be tried, for all the reasons given in relation to unlawful means conspiracy which apply equally to this claim (including Maître Zabaldano's knowledge (and the impact thereof on intent), the fact that justification is not a defence, and the fact that Monégasque law generally, and Maître Zabaldano's contention that he was required to act as he did as a matter of Monégasque law, are very much in dispute, with differences between the experts that could only be resolved at trial (if Monégasque law be of any relevance)).

169. I repeat what I have said above in relation to all three causes of action as pleaded in the Particulars of Claim, the relevance of disclosure, and the nature of claims such as the present and how such claims are proved which applies equally to causing loss by unlawful means.

170. I am satisfied that there is at least a serious issue to be tried on the merits in relation to Lakatamia's claim against Maître Zabaldano for causing loss by unlawful means.

D.4 INTENTIONALLY AND KNOWINGLY INDUCING VIOLATION OF A JUDGMENT DEBT (THE "MAREX" TORT)

171. I addressed the existence of this tort, and its elements in the 2019 Proceedings (see Bryan Judgment at [126]). Maître Zabaldano does not challenge the existence of such a tort, or the elements thereof, which I identified as "(1) The entry of a judgment in the claimant's favour, (2) Breach of the rights existing under that judgment, (3) The procurement or inducement of that breach by the defendant, (4) Knowledge of the judgment on the part of the defendant, and (5) Realisation on the part of the defendant that the conduct being induced or procured would breach the rights owed under the judgment".

172. By analogy to the tort of inducing a breach of contract, I accepted (at [127(4)]) that "[A]ny active step taken by the defendant having knowledge of the covenant by which he facilitates a breach of that covenant' falls within the ambit of the tort: see *British Motor Trade Association v. Salvadori* [1949] Ch. 556, 565 per Roxburgh J". At [131] I concluded that justification is not a defence to the tort concerned because there can never be a reason for inducing a violation of "rights established by due process and enshrined in a judgment".

173. As with Lakatamia's claims for the torts of unlawful means conspiracy and causing loss by unlawful means, the only ingredient of the tort of intentionally and knowingly inducing a violation of rights in a judgment the existence of which Maître Zabaldano would appear to dispute is the intention requirement. I do not consider that the points advanced prevent there being a serious issue to be tried for all the reasons given in relation to unlawful means conspiracy which apply equally to this claim.

174. I am satisfied that there is at least a serious issue to be tried on the merits in relation to Lakatamia's claim against Maître Zabaldano for intentionally and knowingly inducing violation of the Judgment Debts.

175. Accordingly, and for the reasons given above, I am satisfied that there is at least a serious issue to be tried on the merits in relation of each of Lakatamia's claims against Maître Zabaldano.

E. FORUM CONVENIENS

176. The final requirement is that England is the appropriate forum for trial and the court ought to exercise its discretion to permit service out of the jurisdiction. CPR r. 6.37(3) provides that "The court will not give permission [to serve the claim form out of the jurisdiction] unless satisfied that England and Wales is the proper place in which to bring the claim". As recognised by Lord Briggs in *Vedanta Resources plc v Lungowe* [2020] AC 1045 at [66], this long-standing concept has previously been labelled forum conveniens, and appropriate forum, but the changes in language have more to do with the Civil Procedure Rules' requirement to abjure Latin, and to express procedural rules and concepts in plain English, than with any intention to change the underlying meaning in any way. As Lord Briggs continued (at [66]);

> "The best known fleshed-out description of the concept is to be found in Lord Goff of Chieveley's famous speech in the *Spiliada* case, summarised much more recently by Lord Collins in the *Altimo* case at para 88 as follows:
>
> > "The task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice; …"
>
> That concept generally requires a **summary examination** of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred."

(emphasis added)

177. I am in no doubt whatsoever that the forum in which the case can most suitably be tried for the interest of all parties and for the end of justice (the forum conveniens, the appropriate forum and the proper place to bring the claim) is England, for the reasons I identify below.

178. In this regard;-

(1) A fundamentally important factor is that the Blair Freezing Order and Cooke Judgments lie at the very heart of the causes of action that Lakatamia assert, and the authority of this Court which the conduct challenged by Lakatamia is said to have undermined. Sir Michael Burton rightly regarded this fact as highly significant in holding that England was the proper forum for the 2019 Proceedings to be determined, see *Lakatamia Shipping Co Ltd v. Su* [2019] EWHC 1145. At [20(i)], he emphasised that "*The setting for the torts is the [2011 Proceedings] and the English judgment and the breach of the English orders*", whilst at [20(iii)], he stressed that "*The aim of the conspiracy was to breach and evade the English court orders*". Males LJ refused Madam Su permission to appeal (identifying that "the weight to be given to the various factors" in play was a matter for the judge, not the Court of Appeal). In this regard Butcher J (in granting permission to serve out against Ms Tseng) also considered that England was the forum conveniens (at [17]).

(2) Lakatamia's claims against Mr Su and Mr Chang will be determined at trial in this jurisdiction. Both Mr Su and Mr Chang are subject to this Court's jurisdiction and Lakatamia has good reasons for not entering default judgment against them as I have already identified (see, again, Gardner 2 at [42] to [43]). The fact that the proceedings will continue against Mr Su and Mr Chang in relation to a conspiracy claim in this jurisdiction is, and has long been recognised as, another very powerful factor. As Lord Briggs said in *Vedanta Resources* at [70]:-

> "70. In cases where the court has found that, in practice, the claimants will in any event continue against the anchor defendant in England, the avoidance of irreconcilable judgments has frequently been found to be decisive in favour of England as the proper place, even in cases where all the other connecting factors appeared to favour a foreign jurisdiction…"

(3) It makes obvious sense, when the central claim is of a conspiracy, for all the co-conspirators to be tried in the same jurisdiction, and in the jurisdiction that is at the heart of the claims which is England in the context of the Blair Freezing Order and Cooke Judgments, and which is where the claims against Mr Su and Mr Chang will inevitably proceed. It would make little sense for two co-conspirators (jurisdictionally anchored here) to be tried in England and another co-conspirator (Maître Zabaldano) to be tried separately in Monaco. Quite apart from the obvious risk of irreconcilable judgments, it would be wasteful in terms of costs, and potentially prejudicial, for Lakatamia to be expected to pursue parallel litigation in two separate forums, in relation to one of which (Monaco) there are little or no connecting factors at all (as further addressed below).

(4) It would be unattractive, and inappropriate, to pursue parallel proceedings in Monaco against Mr Su, Mr Chang and Maître Zabaldano to the proceedings that will continue in any event in England. Whilst it is said on Maître Zabaldano's behalf that such a claim could be brought in Monaco (from a jurisdiction perspective) this ignores the inherent uncertainties of whether or not, in fact, jurisdiction could be achieved and maintained against Mr Su and Mr Chang (and whether any judgment there obtained would be enforceable). Not only would requiring Lakatamia to bring its claims against Maître Zabaldano in Monaco give rise to the risk of irreconcilable judgments, it would

also be wasteful in costs and potentially prejudicial to expect it to pursue parallel litigation in two jurisdictions when proceedings are already extant in this jurisdiction.

(5) There is, and has long been, closely related litigation unfolding in England. Several applications were very recently heard in both the 2011 Proceedings and 2019 Proceedings (see Gardner 2 at [44.1] to [44.2]). There are also associated proceedings in this Court against Mr Su's eldest sister and Ms Tseng (who I held that Madam Su uses to conceal her assets - see at [715]) which are concerned, in part at least, with the Cresta Overseas Monies (see Gardner 1 at [83] and Gardner 2 at [44.3]). The existence of related litigation in this jurisdiction points in favour of England being the most appropriate forum (see, in this regard, *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460, at 485–486). In the 2019 Proceedings, Sir Michael Burton rightly held that the existence of the 2011 Proceedings supported the Court's exercising jurisdiction over Madam Su (see *Lakatamia Shipping Co Ltd v. Su* [2019] EWHC 1145 at [20(ii)]). Since that time there are considerably more related proceedings in this jurisdiction further increasing the significance of this factor.

(6) Lakatamia's damage has been suffered in and only in England (for the reasons that I have already addressed).

(7) By reason of the fact that Lakatamia's damage has been suffered in England, English law is the applicable law pursuant to art.4(1) of Rome II. I reached this conclusion in relation to Lakatamia's claims in the 2019 Proceedings. It is accepted in Maître Zabaldano's Skeleton Argument that those claims were "*very similar"* to those now advanced against him". I also held that even if the damage had been suffered in Monaco (as Madam Su had unsuccessfully argued), English law was nevertheless the applicable law under art.4(3) of Rome II because the proceedings were "*manifestly more closely connected with England*" (at [844] to [855]). The significance of English law being the proper law of the torts is reinforced by the fact that English law would also apply under Monaco's rules of private international law per the evidence of Lakatamia's experts on Monégasque law (see Charrière-Bournazel/Revet Report 1 at [9] to [10]), albeit it would appear that Maître Zabaldano's experts disagree (see LeMoyne de Forges/Coulet Report 1 at [7(iii)–[10]). Such dispute, if dispute there be, cannot be resolved other than at trial. Lakatamia's case will be that the applicable law is English law, and in that context the English courts are best placed to adjudicate on complex torts under English law with which a foreign court may be unfamiliar (and at the same time the Commercial Court has considerable experience of trying cases that do, or may, involve expert evidence on foreign law, in the event that Maître Zabaldano pleads Monégasque law in his defence).

(8) If Lakatamia's claims are heard in England, the Court will be presented, following disclosure, with a complete picture of what happened enabling the proceedings to be fairly determined. Although Maître Zabaldano relies (albeit somewhat selectively) on the fact that he owes professional secrecy obligations as a matter of Monégasque law (see, *e.g.*, Zabaldano 1 at [7]–[13]), the existence of a foreign privilege does not suspend English disclosure obligations - see, for example, *Health Secretary v. Servier Laboratories Ltd* [2014] 1 W.L.R. 4383 at [99]. If Lakatamia's claims were tried in Monaco the likelihood is that the Monaco court would be presented with an incomplete picture of the relevant events, by reason of the fact that Maître Zabaldano is entitled to refuse to disclose documents on the basis of professional secrecy while

at the same time is "*free to choose*" whether or not to disclose information which he considers to be "*indispensable*" to his defence (see Charrière-Bournazel/Revet Report 1 at [43]) a point on which there is agreement on the part of Maître Zabaldano's experts (see LeMoyne de Forges/Coulet Report 2 at [43]). The choice in this regard is therefore between a trial of Lakatamia's claims against Maître Zabaldano in England where both Lakatamia and Maître Zabaldano will be required to put all of their cards face up on the table, or in Monaco where, on the expert evidence to date, it appears that Maître Zabaldano can pick and choose which documents he deploys, whilst being under no obligation to disclose those that do not assist his case, or support that of Lakatamia.

(9) There is a vast amount of documentation relevant to Lakatamia's claims in the custody and control of its solicitors in England. The overwhelming majority of these documents are in English. Many of the very limited foreign language documents have already been translated into English (see Gardner 1 [76]). The likelihood is that many if not most of the relevant documents held by Maître Zabaldano will also be English, as he and Ms Zoccola communicated with Mr Su, Mr Chang and Mr Garrett in English (Gardner 2 at [4]). Accordingly, minimal translation work would be required if Lakatamia's claims were tried in England. Conversely, were Lakatamia's claims determined in Monaco, the relevant documents would need to be translated into French (past failures to do so have led to Lakatamia's claims in Monaco to be rejected). The cost of this would be very considerable. Whilst at one point it was suggested that translation costs per page might be modest (if using auto-translating) it is clear that this would not be appropriate, and the weight of the evidence before me is that the costs would be considerable, and based on the amount of documentation in existence, would run into many tens of thousands of pounds of (extra) costs. Equally, whilst Maître Zabaldano has suggested that there is an arbitrary cap on the number of documents that can be placed before the Monaco court (see Zabaldano 2 at [16]-[17]), he does not identify either the source, or the level, of the suggested cap and Lakatamia's evidence is that there is none (see Gardner 3 at [7]). If, however, there were a cap, and that would result in potentially relevant documents being incapable of being relied, that would itself militate against Monaco being an appropriate forum.

(10) Importantly, the principal independent witness, Mr Garrett, is resident in England and does not speak French (see Gardner 1 at [77.3]). This is a further factor that militates against Monaco being the appropriate forum since translating witnesses' evidence "is bound to affect, adversely, the ability of a court to gauge their credibility" (see Briggs, *Civil Jurisdiction and Judgments* (7th ed., 2021), at 22.14).

(11) All Maître Zabaldano's witnesses speak and understand English (and have given all their statements in English), and Mr Ho confirmed at the hearing that they will give evidence in English if the claims proceed in England. Given that intention, it is difficult to see any disadvantage to them in proceedings taking place in England. In the wider scheme of things, travel times by air or TGV are modest, as would be the associated costs.

179. There are then some factors connected to other jurisdictions around the world. Mr Su may be in Taiwan (or as per his modus operandi some 5 star hotel elsewhere in the world).

Mr Chang may be situated in Thailand or Taiwan. No one is suggesting any of these locations as an, or the, appropriate forum.

180. As for the alleged connecting factors to Monaco, I am satisfied that they are thin gruel indeed, and bear little weight in the balance:-

(1) It is submitted that the torts were committed in Monaco (Maître Zabaldano's Skeleton Argument at [59(2)]) presumably on the basis that the Cresta Overseas Monies were transferred from a Monaco bank account by Maître Zabaldano who lives in Monaco. However this is a factor of little weight in circumstances where the tort is "delocalised" and its elements "scattered" (see Briggs, *Civil Jurisdiction and Judgments* 7th edn. 2021 at 22.14). Here, the ingredients that constitute the various torts are dispersed because the damage was suffered in England, because Mr Chang's relevant acts took place in Taiwan (or possibly in Thailand) (see Gardner 1 at [9]) and because Mr Su's acts likely took place in Taiwan and/or Japan where he had homes and business interests (see Gardner at [3.3], [14.2]).

(2) Maître Zabaldano is a Monaco lawyer with professional obligations in Monaco (see, for example, Maître Zabaldano's Skeleton at [59(2)]). However, Lakatamia's claim is not premised on any breach of those obligations, but rather on a conspiracy whereby Maître Zabaldano allegedly combined with Mr Su and Mr Chang to breach an order of the English Court and to violate rights established by English court judgments knowing that damage to Lakatamia would inevitably result and thus intending it, such damage being suffered in England the situs of the judgment debt.

(3) Maître Zabaldano relies on Monégasque law, and it is presumably submitted that a Monégasque court would be best placed to receive and adjudicate upon such evidence and it would be most convenient to hear that evidence in Monaco. The weight to be attached to this factor is, I consider, limited. First, and for the reasons already identified, it is doubtful whether Monégasque law is even relevant (given the lack of an available justification defence), but even if pleaded, and of relevance, the Commercial Court is very experienced in hearing evidence as to foreign law, and even if the experts had to travel to England (assuming any areas of disagreement remained) and did not give evidence by live-link, the costs would be modest.

(4) Maître Zabaldano's expert evidence is that Lakatamia could bring its claims against Mr Su, Mr Chang and Maître Zabaldano in Monaco. Even assuming that this is true as a matter of jurisdiction, it cannot be known whether, in fact, that would be possible. Jurisdiction against Mr Su and Mr Chang has already been established in England.

(5) Maître Zabaldano and his witnesses might have to travel to England, whereas they live in Monaco (as coincidentally, and irrelevantly, does the owner of Lakatamia). Again I consider this is a factor of only modest weight – the travel time and cost of travel by plane or TGV would not be substantial in the context of the litigation as a whole.

181. In Maître Zabaldano's skeleton argument much is made of the fact that Mr Su already owes Lakatamia the Cooke Judgments with the result that any further judgment entered against him in England would be "duplicative" (see at [56(4)]). However, Lakatamia does not, as yet, have any judgment against Mr Su on the conspiracy claims, and the same is not true in relation to Mr Chang.

182. I consider that the weighing up of all the above factors overwhelmingly leads to the conclusion that the forum in which the case can most suitably be tried for the interest of all parties and for the end of justice (and which is the appropriate forum and the proper place to bring the claim), is England.

183. That is so even without considering Lakatamia's submission that there is a real risk that Lakatamia could not obtain substantial justice in Monaco. At one point in his witness evidence Maître Zabaldano doubted that any Monégasque lawyer would "*risk embarrassment*" by acting for Lakatamia (see Zabaldano 1 at [68]), although in his second witness statement at [18.1] he stated that he simply intended by that remark to "*reinforce the poverty of the allegations made by Lakatamia as they would be seen by reference to the law of Monaco*". However, of more substance, is the fact that in *Bourlakova v. Bourlakov* [2022] 4 W.L.R. 79, in concluding that England rather than Monaco was the appropriate forum for the resolution of the dispute in that case, Trower J emphasised the very limited resources of the Monégasque Bar. At [258], he held that the claimants' submission that there was a risk of injustice in the event of a complex dispute being determined in Monaco had "some substance … because of the size of the Monégasque bar". Certainly the evidence before me is that there are just 24 Avocats-Défenseur (including Maître Zabaldano) in Monaco (see Gardner 2 at [49]), and the evidence before me suggests that some half the market is already known to be conflicted or otherwise not persons who Lakatamia could reasonably be expected to instruct (see Gardner 2 at [50]-[51]), albeit it is possible to use French lawyers with a Monaco lawyer on the record. Whilst I do not consider this to be a factor of particular weight, it also weighs against Monaco being the appropriate forum. when weighing all factors in the balance.

184. Accordingly I am satisfied, and find, that England is the forum in which the case can most suitably be tried for the interest of all parties and for the end of justice, England being the forum conveniens, the appropriate forum, and the proper place to bring the claim.

F. CONCLUSION

185. In the above circumstances, and for the reasons set out herein, Maître Zabaldano's jurisdictional challenge fails, and Maître Zabaldano's application is dismissed.