Neutral Citation Number: [2020] EWHC 303 (Comm)

Case No: CL-2018-000161

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2020

Before :

PETER MACDONALD EGGERS QC
(Sitting as a Deputy Judge of the High Court)

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Between :

GAZPROM EXPORT LLC	**Claimant**
- and -	
DDI HOLDINGS LIMITED	**First Defendant**
MR SASHO GEORGIEV DONTCHEV	**Second Defendant**
OVERGAS MREZHI AD	**Third Defendant**
OVERGAS INC. AD	**Fourth Defendant**
OVERGAS HOLDING AD	**Fifth Defendant**
DD MANAGEMENT AD	**Sixth Defendant**

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Mr Alain Choo-Choy QC (instructed by **Baker & McKenzie LLP**) for the **Claimant**
Mr Neil Calver QC and Mr Richard Howell (instructed by **Squire Patton Boggs (UK) LLP**) for the **Defendants**

Hearing dates: 3 and 4 December 2019

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Approved Judgment

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

Peter MacDonald Eggers QC :

Introduction

1. The Claimant ("GPE") is owned by Gazprom PJSC (which in turn is more than 50% directly or indirectly owned by the Russian Federation) and supplies natural gas to Bulgaria. GPE and Gazprom PJSC on the one hand and companies controlled by the Second Defendant ("Mr Dontchev") on the other hand entered into a joint venture. Pursuant to the joint venture, GPE/Gazprom PJSC and the Fifth Defendant ("Overgas Holding") each hold a 50% shareholding in the Fourth Defendant ("Overgas Inc"). Mr Dontchev controlled Overgas Holding through the First Defendant ("DDI Holdings") and the Sixth Defendant.

2. GPE and Overgas Inc had entered into a gas supply contract ("the Supply Contract") whereby GPE agreed to supply Overgas Inc with natural gas from 1st January 1997. GPE ceased to supply gas under the Supply Contract on 31st December 2015. GPE claims that approximately US$105 million was owing by Overgas Inc to GPE under the Supply Contract.

3. In February 2016, Overgas Inc commenced ICC arbitration proceedings against GPE in Switzerland. In those ICC arbitration proceedings, Overgas Inc claimed damages against GPE on the ground that GPE allegedly had acted in breach of EU and Bulgarian competition law and in breach of the Supply Contract and claimed a right to set-off those damages against the US$105 million owed to GPE. In the same ICC arbitration proceedings, GPE counterclaimed for US$105 million.

4. On 12th December 2018, the ICC Arbitral Tribunal - constituted by Mr Christer Söderlund, Professor Kaj Hobér and Professor Vladimir Yarkov - by its Award ("the ICC Award") dismissed Overgas Inc's claims for breach of competition law and for breach of the Supply Contract and allowed GPE's counterclaim. Overgas Inc applied to challenge the ICC Award before the Swiss Federal Tribunal, but the application was dismissed in June 2019.

5. Until April 2016, Overgas Inc owned a 99.628% shareholding in the Third Defendant ("Overgas Mrezhi"), a gas distribution company involved in the design, construction, operation and maintenance of gas distribution networks, facilities and equipment relating to the use and sale of natural gas in Bulgaria. Overgas Mrezhi sells natural gas to consumers in Bulgaria.

6. In the current proceedings before this Court ("the English proceedings"), GPE claims damages from the Defendants on the ground that there was a scheme on the part of the Defendants to dilute the shareholding of Overgas Inc (the joint venture company) in Overgas Mrezhi from approximately 99.628% to 38.471%, by issuing shares to DDI Holdings amounting to a 61.385% majority shareholding in Overgas Mrezhi at an under-value to the detriment of GPE and Gazprom PJSC. GPE alleges that the purpose of this scheme was to frustrate the recovery of sums owed to GPE by Overgas Inc and to transfer value from Overgas Inc to DDI Holdings. GPE also claims a declaration that the issue of shares to DDI Holdings is void if and to the extent that GPE does not receive adequate compensation directly for its own loss or for the benefit of Overgas Inc.

7. The Defendants deny GPE's claim, alleging that the share issue was lawful and part of a legitimate emergency rescue package made necessary after the cessation of supply of natural gas to Overgas Inc from 1st January 2016, because, it is said, Overgas Inc could no longer fund Overgas Mrezhi. Further, the Defendants deny any wrongdoing on their part and allege that, in any event, any alleged loss sustained by GPE was caused by GPE's own unlawful conduct, namely its own failure to supply gas to Overgas Inc in breach of competition law.

8. The defence based on GPE's alleged breaches of competition law, set out in paragraphs 61(a) and 80(a)(i) of the Amended Consolidated Defence and Counterclaim ("the Amended Defence"), is advanced by all of the Defendants other than Overgas Inc (the joint venture company and the Fourth Defendant). The counterclaim based on GPE's alleged breaches of competition law is advanced by Overgas Mrezhi in paragraphs 96-126 of the Amended Defence. I shall refer to the Defendants other than Overgas Inc (that is, the First, Second, Third, Fifth and Sixth Defendants) as "the Principal Defendants". Overgas Inc had advanced a similar counterclaim in paragraphs 127-132 of the Amended Defence, but has since discontinued that counterclaim. Overgas Inc's counterclaim was made pending the ICC Arbitral Tribunal's determination of whether it had jurisdiction to deal with this allegation of breaches of competition law. Once the Arbitral Tribunal determined it had jurisdiction, the discontinuance of Overgas Inc's counterclaim was inevitable given that the same issue between GPE and Overgas Inc raised in the said counterclaim was disputed and eventually determined in the ICC arbitration proceedings. During the hearing of GPE's application, Mr Neil Calver QC, who appeared with Mr Richard Howell, on behalf of the Defendants confirmed that the defence based on breaches of competition law set out in paragraphs 61(a) and 80(a)(i) of the Amended Defence was not being advanced by Overgas Inc, even though those paragraphs had been formally pleaded by all of the Defendants.

9. GPE applies for an order, pursuant to CPR rule 3.4(2)(b), striking out the Principal Defendants' defence and counterclaim based on the allegation of GPE's breaches of competition law, set out in paragraphs 61(a) and 80(a)(i) of the Amended Defence of the Principal Defendants, and the entirety of Overgas Mrezhi's counterclaim at paragraphs 96-126 of the Amended Defence. The application is made on the ground that the allegation of breaches of competition law which the Principal Defendants (*i.e.* the Defendants other than Overgas Inc) advance in the proceedings before the English Court formed the basis of Overgas Inc's claim against GPE in tort for breaches of EU and Bulgarian competition law and in contract for breach of the Supply Contract in the ICC arbitration proceedings, which allegation was rejected by the ICC Arbitral Tribunal, after full pleading, argument and evidence which was considered and analysed in the ICC Award.

10. GPE argues that it is an abuse of the process of the Court for the identical allegations of breaches of competition law which had been determined by the ICC Arbitral Tribunal in the ICC arbitration proceedings between GPE and Overgas Inc to be advanced in the English proceedings by the Principal Defendants (that is the Defendants other than Overgas Inc). There is no suggestion made by GPE in this application that any of the Principal Defendants were privy to Overgas Inc's claim in the ICC arbitration proceedings, although GPE maintains that some assistance and possibly funding were provided by some of the Principal Defendants to Overgas Inc in the ICC arbitration proceedings. Accordingly, there is no suggestion in this application that the Principal

Defendants are bound by the findings in the ICC Award by reason of estoppel *per rem judicatam* (*res judicata*) or issue estoppel, as Overgas Inc is so bound. However, the point made against the Principal Defendants is that GPE's alleged anti-competitive conduct in respect of the Supply Contract has been finally determined in proceedings between the parties to that Supply Contract, namely GPE and Overgas Inc; and yet the Principal Defendants, who were not parties to the Supply Contract, wish to advance the very same allegations in the English proceedings. GPE contends that such a collateral attack by the Principal Defendants on the Arbitral Tribunal's findings in the ICC Award, if permitted to be continued, would be deeply unfair and unjust to GPE by permitting GPE to be vexed twice by allegations that have already been considered and determined on the merits after argument and on consideration of the evidence by a legitimate tribunal and would have the effect of bringing the administration of justice into disrepute by creating a real risk of alternative and conflicting decisions as to the relationship between GPE and Overgas Inc and a risk of challenge to the enforcement of the ICC Award.

11. The Principal Defendants respond to GPE's application to strike out the breaches of competition law allegations by observing that there is no suggestion that the allegations are otherwise irrelevant to the issues in these proceedings and that there is no application for summary judgment made by GPE. In particular, the Principal Defendants contend that the application for a strike out must be dismissed because it would not be manifestly unfair to GPE to allow the allegation of breaches of competition law to be tried. There can be no abuse of process where the ICC arbitration proceedings took place between GPE and Overgas Inc and concerned issues of competition on the gas wholesale and trading market in which Overgas Inc operated, whereas the English proceedings concern the gas retail and distribution market, where the "*principal focus*" lies, in which Overgas Mrezhi operates, and Overgas Mrezhi is attempting to recover in these proceedings losses which were not and could not have been claimed in the ICC arbitration proceedings. It is said that the allegations of breaches of competition law will be supported by witness and documentary evidence different from that adduced in the ICC arbitration proceedings, where documentary disclosure was limited. It is argued that there is no principle that it is an abuse of process for third parties to contend that an arbitration award between contracting parties as to their contract is wrong, especially so where the Principal Defendants and Overgas Inc have divergent interests. Any such principle would be contrary to the EU law principle of effectiveness in competition cases. In any event, the limited assistance provided by Overgas Mrezhi to Overgas Inc in the ICC arbitration proceedings was insufficient to render the allegation in the English proceedings an abuse of process. Further, it is said, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards does not make arbitral awards binding on third parties, and as the application presupposes the recognition of the ICC Award, if there have in fact been breaches of EU competition law, the recognition of the ICC Award would be contrary to public policy.

Abuse of process: the law

The authorities

12. Although it may have been a matter of dispute at one stage, the parties were agreed that the Court should apply English law to the question of whether the pursuit of the breach

of competition law allegations in the English proceedings is an abuse of process as a matter of procedural law (the law of the forum).

13. CPR rule 3.4(2)(b) provides that "*The court may strike out a statement of case if it appears to the court – … (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings …*".

14. In *Hunter v Chief Constable of the West Midlands* [1982] AC 529, the plaintiffs issued a civil claim against the defendants for damages caused by an alleged assault at the hands of the police. The plaintiffs had been charged with murder on the basis of confessions given by the plaintiffs. The plaintiffs argued that those confessions had been induced by threats and violence made by the police. The criminal court held that the prosecution had established beyond a reasonable doubt that there were no such violence and threats. The plaintiffs were convicted of murder (their convictions were subsequently quashed). The defendant police constables applied for an order striking out the statements of claim issued against them. The House of Lords held that the statements of claim should be struck out. Lord Diplock said (at pages 536 and 541):

> "… this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied …
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> The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made."

15. At page 541, Lord Diplock said that "*the dominant purpose of this action … has not been to recover damages but is brought in an endeavour to establish, long after the event when memories have faded and witnesses other than the Birmingham Bombers themselves may be difficult to trace, that the confessions on the evidence on which they were convicted were induced by police violence, with a view to putting pressure on the Home Secretary to release them from the life sentences that they are otherwise likely to continue to serve for many years to come*". The House of Lords held that this civil claim amounted to a collateral attack on the earlier decision of the criminal court.

16. In *Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 132, Lloyd's underwriters had originally insured CTI International Inc ("CTI") but had become dissatisfied with the risk and threatened to avoid the policy for non-disclosure and misrepresentation unless the run-off of the Lloyd's policy was reinsured. Oceanus therefore agreed to insure CTI and reinsure Lloyd's underwriters in respect of

their run-off. Oceanus sought to avoid both the CTI policy and the Lloyd's reinsurance. This led to two separate proceedings being instituted against Oceanus, one instituted by CTI and the other by Lloyd's underwriters. An application to consolidate both actions was refused. Two specific issues of non-disclosure and misrepresentation raised by Oceanus by amendment to their pleading in the CTI action were ultimately determined at trial against Oceanus. At that trial, Lloyd's underwriters were subpoenaed to give evidence. In the proceedings instituted by Lloyd's underwriters against Oceanus, Oceanus sought to raise the same issues of non-disclosure and misrepresentation which had been determined against them at the CTI trial. The plaintiff Lloyd's underwriters sought to strike out these issues as an abuse of process. The Court of Appeal dismissed the application. At page 138, Kerr, LJ said:

> "… defendants who wish to relitigate a particular line of defence in a subsequent action, albeit that they were unsuccessful in this respect in a previous action, are clearly in an a fortiori position from that of the plaintiff in that case. As I mentioned during the argument, one can think of the following kind of illustration. Suppose that a client instructs accountants to investigate and report on some company which the client is thinking of buying. The accountants then produce a report and sue the client for their fees. The client's defence is that the investigation was negligent and that the report is worthless, and this defence succeeds. Suppose that a third party, to whom the report has been passed and who has bought the company in reliance on it, then sues the accountants in negligence. Could it possibly be said that the accountants are precluded from denying negligence on the ground that this issue had already been fully investigated and decided against them in the action against their client? In my view, the answer would clearly be No. Of course, such situations are highly undesirable. They should, if possible, be avoided by a joinder of all the parties concerned in one action, or by consolidation if there are several actions. But where, as here, consolidation was in fact sought by the party in question, I cannot begin to see how any question of abuse of the process of the Court could be said to arise … Counsel for Oceanus also submitted that, quite apart from these considerations, this is not a case of an identical relitigation, in the sense that the present action would be a mere repetition of what had happened in the C.T.I. action. He said that in the present action Oceanus would have fuller discovery and would also be able to cross-examine witnesses from Lloyd's instead of having to call them on subpoena, as happened in the C.T.I. action. Moreover, the effect of the "purple amendment" in the present action might well be that Heath, and in particular Mr. Fleetwood, would be attacked not only by Oceanus but also by Lloyd's. I think, in agreement with the Judge, that there is force in these submissions."

17. At pages 138-139, Sir David Cairns said:

> "I do not accept the proposition advanced by Counsel for the appellant Heath that when an issue has already been decided in proceedings between A and B it is prima facie an abuse of the process of the Court for B to seek to have the issue decided afresh in proceedings between himself and C and that in such circumstances there is an onus on B to show some special reason why he should be allowed to raise the issue against C.
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> On the contrary, I consider that it is for him who contends that the retrial of the issue is an abuse of process to show some special reason why it is so. Since the cases in which the retrial of an issue (in the absence of an estoppel) has been disallowed as an abuse of process are so few in number, it would be dangerous to attempt to define fully what are the circumstances which should lead to a finding of abuse of process. Features tending that way clearly include the fact that the first trial was before the most appropriate tribunal or between the most appropriate parties for the determination of the issue, or that the purpose of the attempt to have it retried is not the genuine purpose of obtaining the relief sought in the second action, but some collateral purpose.
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> It would in my judgment be a most exceptional course to strike out the whole or part of a defence in a commercial action, or to refuse leave to amend a defence in such an action, simply because the issue raised or sought to be raised had been decided in another commercial action brought against the same defendant by a different plaintiff. The facts that the first action had been fairly conducted and that the issue had been the subject of lengthy evidence and argument could not, in my view, be sufficient in themselves to deprive the defendant of his normal right to raise any issue which he is not estopped from raising.
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> If further the defendant was at some disadvantage in the earlier proceedings from which he would be free in the later ones, that is a positive reason why he should not be deprived of the opportunity of raising the issue afresh."

18. In *Secretary of State for Trade and Industry v Baker (No. 2)* [1999] 1 WLR 1985, the Securities and Futures Authority (the SFA) began disciplinary proceedings against the respondent, who was a director of a company which became insolvent, to determine whether he was a fit and proper person to remain on the SFA register. Those proceedings were eventually dismissed, but the Secretary of State sought an order under sect. 6 of the Company Directors Disqualification Act 1986 disqualifying the respondent from being a company director, on the ground that his conduct had made him unfit to be a director. At the trial, the respondent applied for the proceedings to be stayed on the ground that they were an abuse of the process of the court, since they concerned substantially the same conduct as the SFA proceedings, and infringed the principle against double jeopardy. The Court of Appeal dismissed the application. At page 1990, Chadwick, LJ said:

> "The overriding consideration, as it seems to me, is the need to preserve public confidence in the administration of justice. The court is entitled - indeed bound - to stay the proceedings where to allow them to continue would threaten its own integrity. In the words of Lord Diplock, proceedings should be stayed where to allow them to continue would bring the administration of justice into disrepute among right-thinking people.
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> Right-thinking people will not rush to a conclusion that - in refusing to stay the disqualification proceedings - the court is allowing its process to be used as an instrument of oppression, injustice or unfairness - in short, that the process of the court is being abused - without taking care to understand the nature of the S.F.A. proceedings and of the present disqualification proceedings and the interrelation between them. It is necessary, as Jonathan Parker J. appreciated, to examine whether the issues upon which the court will need to adjudicate in the present proceedings are the same, or substantially the same, as those which have already been investigated and adjudicated upon in the S.F.A. proceedings."

19. The Court concluded that the focus of the SFA inquiry and the focus of the disqualification proceedings were different, the one concentrating on the respondent's conduct as a manager and the other on his conduct as a company director.

20. In *Johnson v Gore Wood & Co* [2002] 2 AC 1, the plaintiff, acting on behalf of a company in which he owned the majority of shares, instructed the defendant solicitors in connection with the exercise of an option for the purchase of property. Subsequently, there was litigation between the company and the vendor, as a result of which the plaintiff's company contended that it suffered losses. It was brought to the attention of the defendants that the plaintiff also had a personal claim for negligence against the defendants, which would be dealt with after the disposal of the company's claim. The company's claim was eventually settled with the defendants paying a substantial proportion of the amount claimed by the company. The plaintiff subsequently issued a writ against the defendants in respect of his personal claim. The defendants applied to strike out the writ. The House of Lords dismissed the application and considered the law, especially as regards *Henderson v Henderson* abuse of process. At page 31, Lord Bingham said:

> "Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence

> should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not … it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

21. In *In re Norris* [2001] UKHL 34; [2001] 1 WLR 1388, the defendant had been convicted of drug offences; the Customs and Excise Commissioners applied for a confiscation order in respect of the defendant's property; upon hearing of the application, the defendant's wife - who was not a party to the proceedings - gave evidence that the matrimonial home belonged to her; the Crown Court disbelieved her evidence and made the confiscation order. In subsequent proceedings in the High Court to enforce the confiscation order, the defendant's wife applied to vary the order on the ground that she had an interest in the house. The Court of Appeal dismissed the application, because it would be an abuse of process for the Court to allow a third party to re-litigate issues which had already been decided in the Crown Court on substantially the same evidence and submissions and where the third party had had a fair opportunity to put her case at the earlier hearing (as a witness). The House of Lords allowed the wife's appeal. Lord Hobhouse held that the issues in the two sets of proceedings were related but not the same; the wife's interests were not identical with those of the defendant; before the Crown Court, the wife was a mere witness with no right of representation and no control of the proceedings (para. 23-25). In the present case, Lord Hobhouse said that the wife did not have a full opportunity of contesting the decision in the court in which it was made (para. 26). Lord Hobhouse continued (at para. 26):

> "… Attempts to relitigate issues which have already been the subject of judicial decision may or may not amount to an abuse of process. Ordinarily such situations fall to be governed by the

> principle of estoppel per rem judicatam or of issue estoppel (admitted not to be applicable in the present case). It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse. As previously explained, the present case does not involve such relitigation …"

22. In *Conlon v Simms* [2006] EWCA Civ 1749; [2008] 1 WLR 484, the defendant was a solicitor who had been in partnership with the claimants. The defendant was found by the Solicitors Disciplinary Tribunal (on an application by the Office of Supervision of Solicitors) to have acted dishonestly in certain transactions and the Tribunal struck him off the roll of solicitors. The claimants sued the defendant alleging that he had induced them to enter into a partnership agreement with him, seeking to rely on the findings of the Tribunal. The defendant denied the allegations and contended that the Tribunal's findings were inadmissible as evidence of the facts found against him. The judge at first instance held that the defendant was abusing the process of the Court by making a collateral attack on the Tribunal's findings. The Court of Appeal allowed the defendant's appeal. At para. 139 and 146-147, Jonathan Parker, LJ said:

> "139. As I have already pointed out, we are bound by the decision of this court in the Bairstow case [2004] Ch 1—a decision which, in so far as it relates to abuse of process, was in turn based upon the decision of the House of Lords in the Hunter case [1982] AC 529. Accordingly, the starting point on this aspect of the case must be Sir Andrew Morritt V-C's proposition (d) in para 38 of his judgment in the Bairstow case. I quote that proposition again, in full:
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> "If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute."
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> 146. In such circumstances I consider that there is force in Mr Simms's submission that in denying the allegations of dishonesty made against him in the present action he is doing no more than continuing to protest his innocence of the charges brought against him by the Law Society, albeit he is doing so in the face of the adverse findings of the SDT and the Divisional Court: to use his own words, he has initiated nothing. At the very least, as it seems to me, that is a factor which should be brought into account in considering whether the Bairstow conditions are satisfied, on the basis that in general the court should be slower in preventing a party from continuing to deny serious charges of which another court has previously found him guilty than in preventing such a party from initiating proceedings for the

> purpose of relitigating the question whether he is guilty of those charges.
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> 147. It should also be borne in mind, when determining whether a party (be he claimant or defendant) is abusing the process of the court by mounting a collateral attack on a previous court decision, that the practical effect of finding him guilty of such an abuse is to prevent him denying the allegations against him save in circumstances where he is in a position to adduce additional evidence which could not with reasonable diligence have been adduced in the earlier proceedings and which, if admitted, would have "changed the whole aspect of the case": see Phosphate Sewage Co Ltd v Molleson (1879) 4 App Cas 801, 814, per Earl Cairns LC, and the Hunter case [1982] AC 529, 545b–f, per Lord Diplock. To that extent the party guilty of abuse of process will, as I see it, be placed in a worse position in regard to the adducing of evidence than he would have been in had the previous decision been admissible as prima facie evidence (for it would be no more than that) of the facts found."

23. The Court decided that there was no abuse of process because the defendant had not "*initiated*" the allegation and because the facts to be established in the proceedings before the Tribunal were different from the proceedings initiated by the claimants against the defendant (para. 149-150).

24. In *Laing v Taylor Walton* [2007] EWCA Civ 1146; [2008] PNLR 11, a property development company owned by Mr Laing secured a loan from a company owned by Mr Watson and there was a dispute between them as to the security for the loan agreed between them. Mr Watson claimed to be entitled both to a 12.5% share in the profits of the development and to a beneficial interest in a 12.5% shareholding in the property development company. Mr Laing contended that, by virtue of an oral agreement between them, all that Mr Watson had been granted beneficially was the 12.5% share in the profits. His interest in the 12.5% shareholding was only as security for that share in the profits. The Court held that Mr Watson's case as to the agreements and understandings between them was true and declared that the 12.5% shareholding was beneficial and that Mr Watson's company's entitlement to the share of profits remained binding on Mr Laing. In separate, later proceedings, Mr Laing sued the defendants (TW), his solicitors, for negligence in failing to record in their preparation of the agreement in question that the shareholding granted to Mr Watson's company was by way of security only. In order to succeed in his claim against the defendant, Mr Laing had to establish that the underlying agreements between Mr Laing and Mr Watson were as alleged by Mr Laing. However, the Court in the earlier proceedings had already decided that that case was not correct. The Court of Appeal struck out this claim insofar as it rested on this premise. Buxton, LJ said (at para. 25 and 27):

> "25. I therefore conclude that it would bring the administration of justice into disrepute if Mr Laing were to be permitted in the second claim to advance exactly the same case as was tried and rejected by H.H. Judge Thornton. If H.H. Judge Thornton's judgment was to be disturbed, the proper course was to appeal,

> rather than seek to have it in effect reversed by a court not of superior but of concurrent jurisdiction hearing the second claim. That the second claim is in substance an attempt to reverse H.H. Judge Thornton is important in the context of wider principles of finality of judgments. In Hunter, at 545D, Lord Diplock said that the proper course to upset the decision of a court of first instance was by way of appeal. Where, wholly exceptionally, a collateral, first instance, action can be brought it has to be based on new evidence, that must be such as entirely changes the aspect of the case: see per Earl Cairns L.C. in Phosphate Sewage v Molleson (1879) 4 App. Cas. 801 at 814. The second claim in our case not merely falls short of that standard, but relies on no new evidence at all …
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> 27. I of course agree that it will not necessarily, or perhaps usually, be a valid objection to a claim for solicitors' negligence in or about litigation that the claim asserts matters different from those decided in that litigation. That is so not only of cases where the solicitors have made what might be called administrative errors that have prevented the earlier proceedings from being properly pursued or their outcome challenged by the proper means (e.g. Walpole v Partridge & Wilson [1994] A.C. 106); but also where errors in assembling the evidence or understanding the law are alleged to have led to an incorrect result, as was the case in Hall v Simons itself. But the present case is significantly different from those just mentioned. The difference is that, as shown in [19] above, in order to succeed in the new claim Mr Laing has to demonstrate not only that the decision of H.H. Judge Thornton was wrong, but also that it was wrong because it wrongly assessed the very matters that are relied on in support of the new claim. That is an abusive relitigation of H.H. Judge Thornton's decision not by appeal but in collateral proceedings, and in substance if not strictly in form falls foul of the Phosphate Sewage rule."

25. In *Arts & Antiques Ltd v Richards* [2013] EWHC 3361 (Comm); [2014] PNLR 10, the insured (A&A) was a jeweller who suffered a loss as a result of a robbery and made a claim for an indemnity under an insurance policy. The insurer (Zurich) defended the claim on the basis of the insured's failure to comply with a condition precedent in the policy. The claim was referred to arbitration and the arbitrator dismissed the claim and held that the policy included the condition precedent. The insured then sued its insurance brokers (Towergate and Mr Richards) before the Court for damages for negligence in that (a) if the policy included the condition precedent, the brokers did not properly advise the insured as to the effect of that provision and (b) if the policy did not include the condition precedent, the insured was misled by the brokers to believe that it did and was induced to participate in a costly arbitration as a result. The brokers applied to strike out the insured's statement of case before the Court insofar as it pleaded that the policy did not include the condition precedent because it involved an abuse of process. Hamblen, J allowed the application and said at para. 45-46:

> "45. In support of their case Towergate and Mr Richards rely in particular on the Court of Appeal decision in Taylor Walton v Laing which they contend is analogous. That case also concerned the determination by another tribunal of what the contract was. The losing contracting party in those proceedings was not allowed to bring a claim against a third party predicated on the earlier decision to which he was party being wrongly decided. The proper way to challenge that earlier decision was by appeal, rather than by seeking to reverse it in further proceedings. That has been attempted in this case, but the attempt has emphatically failed.
>
> 46. I agree that the Taylor Walton v Laing decision supports a finding of abuse of process in this case. Aside from the fact that the earlier decision was in arbitration, the two cases are analogous. There is in this case no new evidence which casts doubt on the Arbitrator's decision. Indeed, for reasons set out below, such further evidence as there is confirms the correctness of his decision. That decision has sought to be challenged by appeal but the application has been dismissed on the basis that the decision is "not open to serious doubt". For the issue to be relitigated in this court involves a collateral attack on the Arbitrator's final and binding decision. Further, that decision relates to the terms of the contract as between A&A and Zurich, which have been determined in accordance with the agreed contractual machinery, namely by arbitration. In all the circumstances, I conclude that it would bring the administration of justice into disrepute, and would be oppressive and unfair on Towergate and Mr Richards, for A&A to be allowed to fight the issue of whether or not the contract contained CP2 all over again. It would accordingly be an abuse of process."

26. In *St Vincent European General Partner Ltd v Robinson* [2016] EWHC 2920 (Comm); [2016] 2 CLC 807, the claimant - St Vincent - had commenced proceedings in Cyprus against 19 defendants in respect of a series of agreements, including a pledge agreement. The agreements included an English jurisdiction agreement, but the pledge agreement included a Cypriot jurisdiction agreement. Upon an application made by certain, but not all, of the defendants, the Cypriot court ruled that it had no jurisdiction because the pledge agreement was only a secondary agreement and that the parties' intention was that the English courts should have jurisdiction. The claimant then commenced proceedings against 11 defendants in England; all of the 11 defendants had been defendants in the Cypriot proceedings. Three of the defendants (the applicants) challenged the jurisdiction of the English court on the ground that the claim was made in respect of the pledge agreement and that agreement included a Cypriot jurisdiction agreement, and that any decision of the Cypriot court was not binding on the applicants, because they had not challenged the jurisdiction of the Cypriot court; that application had been made by other defendants. Mr Richard Salter QC, sitting as a judge of the High Court, dismissed the challenge to the Court's jurisdiction, holding that as all of the claims made in the English proceedings had been made in the Cypriot proceedings, the decision of the Cypriot court was that it had no jurisdiction in relation to the claims

brought in the English proceedings and that the English Court was bound under the Brussels Regulation Recast to follow that decision. The Court went on to consider whether the Cypriot court's decision was binding on the applicants, given that they were not a party to the application challenging the jurisdiction of the Cypriot Court. Mr Salter QC said at para. 49-52:

> "49. Ms Weaver also relied upon the decision of the Court of Appeal in Resolution Chemicals Ltd v H Lundbeck A/S [2013] EWCA Civ 924, in which the Court of Appeal cited with approval the following observations by Sales J in Seven Arts Entertainment Ltd v Content Media Corp plc [2013] EWHC 588 (Ch) at [73]:
>
> '… the basic rule is that, before a person is to be bound by a judgment of a court, fairness requires that he should be joined as a party in the proceedings, and so have the procedural protections that carries with it. This includes the opportunity to call any evidence he can to defend himself, to challenge any evidence called by the claimant and to make any submissions of law he thinks may assist his case. Although there are examples of cases in which a person may be found to be bound by the judgment of a court in litigation in relation to which he stood by without intervening, in my judgment those cases are illustrations of a very narrow exception to the general rule. The importance of the general rule and fundamental importance of the principle of fair treatment to which it gives expression indicate the narrowness of the exception to that rule.'
>
> 50. It is clearly right that, in general, a person should only be bound by a judgment given in an action or an application to which he himself is a party. Cases which fall outside that general rule are exceptional. However, in my judgment, this is plainly such an exceptional case.
>
> 51. As the Court of Appeal noted in the Resolution Chemicals case, 'The law recognises that there are some classes of case where fairness demands that party C should be precluded from re-litigating a matter, even though he was not a party to the previous proceedings between A and B' [[2013] EWCA Civ 924 at [24], per Floyd LJ]: and, as Lord Bingham of Cornhill made clear in his speech in Johnson v Gore Wood [2002] 2 AC 1 at 31D and 32D, the approach of the court to issues of this kind involves a 'broad, merits-based judgment', and should not be formulaic.
>
> 52. The fact that the Applicants were not themselves parties to the application which led to the Interim Decision is unquestionably 'a powerful factor in the application of the broad merits-based judgment' [Aldi Stores Ltd v WSP Group plc [2007] EWCA Civ 1260; [2008] 1 WLR 748, CA, at [10], per Thomas LJ]. But it 'does not operate as a bar to the application

> of the principle' [ibid.]. In the present case, there are two powerful countervailing factors, which, when taken together, greatly outweigh that factor."

27. The two powerful factors on which the Court relied were that, first, it was open to the applicants, as parties to the Cypriot action, to join in the application challenging the Cypriot court's jurisdiction, and second the applicants had positively relied on the Cypriot court's decision in applying for an order setting aside the Cypriot proceedings and all prior orders against the applicants "*on the grounds that the Court lacks jurisdiction to hear this claim and/or the present claim constitutes an abuse of the proceedings before the Court*". At para. 56, Mr Salter QC concluded that "*Taking these two factors into account, it would in my judgment be wholly unjust to permit the Applicants to deny the commonality and privity of their interest with those who applied for and obtained the Interim Decision. The Applicants took the benefit of the Interim Decision by arguing before the NDC that the Interim Decision determined the issue of jurisdiction in their favour*".

28. In *JSC BTA Bank v Ablyazov (No. 15)* [2016] EWCA Civ 987; [2017] 1 WLR 603, the claimant bank applied for a final charging order over property which it alleged belonged to the defendant judgment debtor, Mr Ablyazov. In support of its application, the claimant relied on a finding by the judge in earlier committal proceedings against the defendant that the property belonged to the defendant. In those earlier proceedings, the defendant's brother-in-law, Mr Shalabayev, gave evidence that he, not the defendant, was the beneficial owner of the property. The judge in the committal proceedings found Mr Shalabayev's evidence to be unreliable. In the current proceedings, Mr Shalabayev maintained that he was the beneficial owner of the property and applied for an order that he be added as a respondent to the claimant's application and that the determination of the application be adjourned until there was a trial of the ownership of the property. The judge dismissed the application on the ground that it would be an abuse of process. The Court of Appeal reversed the decision of the judge that Mr Shalabayev's application was an abuse of process. Gloster, LJ said at para. 47-51:

> "47. Had it not been for the lengthy arguments in this case, I would have written an extremely short judgment concluding that, whatever the outer limits of the legal principle of collateral attack, this was clearly a case where the appeal should be allowed and Mr Shalabayev should be permitted, in proceedings to which he is formally joined as a defendant, to resist the bank's claim …
>
> "48. My reasons for reaching such a conclusion are very briefly the following. Like Tomlinson LJ, I am also concerned that Mr Shalabayev has had no proper opportunity to establish his claim to ownership of Alberts Court by being a party to any relevant judicial process. Being a witness in Mr Ablyazov's committal proceedings was a totally different ball game from being a participant as an alleged contemnor. Witness status did not entitle him to address the court upon the conclusion to be derived from the totality of the evidence. There was a limited personal interest, so far as Mr Shalabayev was concerned, in expending

> his own funds, or perhaps, more importantly, his own time, in obtaining documentary evidence to defend Mr Ablyazov's position. There was no indication from the bank at that stage that it would piggy-back on any conclusions reached by Teare J in the contempt proceedings, treat them as binding as against Mr Shalabayev in relation to the property and proceed to enforce against any interest he might have in the property as a result, without affording him any further opportunity to defend his position or adduce any further evidence. The focus of the contempt proceedings was, not surprisingly, upon establishing Mr Ablyazov's contempt of court so that the court could be invited to make an order punishing that content …"
>
> 51. In all the above circumstances, I do not consider that Mr Shalabayev has had a proper opportunity to put forward his case in proceedings to which he is formally a party and in relation to which the issue is whether he is its ultimate beneficial owner, whether through his beneficial ownership of Bensbourogh, or simply because that company was acting as his nominee for the purposes of holding the property …"

29. Gloster, LJ then reviewed the earlier authorities, in particular *In re Norris*, which had similar facts, and concluded at para. 62:

> "62. For all the above reasons, including those which I have summarised in paras 48-52 above, whilst I do not accept Mr Sheehan's proposition that the principle of abuse of process by means of collateral attack does not extend beyond a case where at least one party or his privy was party to the previous proceedings giving rise to the judgment which is allegedly under attack, in my judgment the judge was wrong, as a matter of principle, to conclude that the circumstances amounted to an abuse of process involving a collateral attack on the committal judgment. Mr Shalabayev, in seeking to defend the bank's claim to deprive him (or Bensbourogh) of his/its alleged beneficial interest in the property and to obtain a determination in the context of the charging order proceedings as to the ownership of the property, is not acting abusively, or seeking collaterally to attack the committal judgment. This is not a case where it would be unfair to the bank to litigate the ownership of the property. Its rights to a charging order, and to defeat any beneficial interest of Mr Shalabayev in the property, arise exclusively under the Charging Orders Act 1979; it did not derive any such rights to do so from findings made against Mr Ablyazov in the committal proceedings. Nor, for similar reasons, would the litigation, in proceedings properly constituted as between the bank, as applicant, and Mr Shalabayev and Bensbourogh, as respondents, of the ownership issue in relation to the property "bring the administration of justice into disrepute". As Lord Hobhouse said in In re Norris, [2001] 1 WLR 1388, para 26: "It will be a rare

> case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse." Although the judge paid lip service to this principle in his judgment, he did not to my mind provide adequate reasons why the present case was "a rare case". It was unfortunate that he was apparently not referred to In re Norris. In my judgment not only was he wrong as a matter of principle but also, as Mr Sheehan submitted, he took into account and gave undue weight to inappropriate factors."

30. In *Michael Wilson & Partners Ltd v Sinclair* [2017] EWCA Civ 3; [2017] 1 WLR 2646, the claimant provided legal and consultancy services to Sokol Holdings Ltd in respect of natural resources transactions in Kazakhstan. Mr Sinclair was the managing director and a major shareholder of Sokol. The Part 20 Defendant, Mr Emmott, had been a director and employee of the claimant. He had received shares in a company, Max, and funds. The claimant alleged that Mr Emmott acquired these benefits with the knowing assistance of the Sokol and Mr Sinclair, or alternatively, that the transfer of the benefits constituted the payment of a bribe or secret commission for which Sokol and Mr Sinclair were liable to the claimant. The claimant had earlier commenced arbitration proceedings against Mr Emmott claiming that he received the shares and funds as a bribe or secret profit. The arbitral tribunal dismissed the claimant's claim and concluded that Mr Emmott received the shares on behalf of Mr Sinclair and that he had no control over them. Sokol and Mr Sinclair applied to strike out the claimant's claim against them. The Court of Appeal dismissed the application. Simon, LJ said at para. 13 and 48:

> "13. At its most simple, the issue can be expressed as follows: whether it is an abuse of the court's process for A to claim in legal proceedings against C, on a basis which has been decided against A in arbitration proceedings between A and B? …
>
> 48. The following themes emerge from these cases that are relevant to the present appeal.
>
> (1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; see Lord Diplock in Hunter's case [1982] AC 529, Lord Hoffmann in the Arthur J S Hall case [2002] 1 AC 615 and Lord Bingham in Johnson v Gore Wood & Co [2002] 2 AC 1. These interests reflect unfairness to a party on the one hand, and the risk of the administration of public justice being brought into disrepute on the other, see again Lord Diplock in Hunter's case. Both or either interest may be engaged.
>
> (2) An abuse may occur where it is sought to bring new proceedings in relation to issues that have been decided in prior proceedings. However, there is no prima facie assumption that

> such proceedings amount to an abuse: see Bragg v Oceanus [1982] 2 Lloyd's Rep 132; and the court's power is only used where justice and public policy demand it, see Lord Hoffmann in the Arthur J S Hall case.
>
> (3) To determine whether proceedings are abusive the court must engage in a close 'merits based' analysis of the facts. This will take into account the private and public interests involved, and will focus on the crucial question: whether in all the circumstances a party is abusing or misusing the court's process, see Lord Bingham in Johnson v Gore Wood & Co and Buxton LJ in Laing v Taylor Walton [2008] PNLR 11.
>
> (4) In carrying out this analysis, it will be necessary to have in mind that: (a) the fact that the parties may not have been the same in the two proceedings is not dispositive, since the circumstances may be such as to bring the case within 'the spirit of the rules', see Lord Hoffmann in the Arthur J S Hall case; thus (b) it may be an abuse of process, where the parties in the later civil proceedings were neither parties nor their privies in the earlier proceedings, if it would be manifestly unfair to a party in the later proceedings that the same issues should be relitigated, see Sir Andrew Morritt V-C in the Bairstow case [2004] Ch 1; or, as Lord Hobhouse put it in the Arthur J S Hall case, if there is an element of vexation in the use of litigation for an improper purpose.
>
> (5) It will be a rare case where the litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse of process, see Lord Hobhouse in In re Norris.
>
> To which one further point may be added.
>
> (6) An appeal against a decision to strike out on the grounds of abuse, described by Lord Sumption JSC in Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2014] AC 160, para 17 as the application of a procedural rule against abusive proceedings, is a challenge to the judgment of the court below and not to the exercise of a discretion. Nevertheless, in reviewing the decision the Court of Appeal will give considerable weight to the views of the judge, see Buxton LJ in the Laing v Taylor Walton case, para 13."

31. At para. 100, Simon, LJ held that the burden of establishing that the making of the relevant allegations was manifestly unfair rested on the party asserting such abuse. Moreover, the standard of proof - the "*threshold which engages the court's duty to act to prevent abuse of its process*" - is a high one (para. 87). Simon, LJ then considered the manner in which the abuse of process principle might be applied where the earlier proceedings were arbitration proceedings, rather than court proceedings. Simon, LJ

referred to Mance, LJ's judgment in *Sun Life Assurance of Canada v Lincoln National Life Insurance Co* [2004] EWCA Civ 1660; [2005] 1 Lloyd's Rep 606, at para. 68, where Mance, LJ identified the different considerations attending litigation before the Court and arbitration: in litigation, the Court has "*compulsive powers*" to join additional parties to a dispute or to consolidate proceedings, mindful of "*the public nature of litigation*" and "*the public interest in the efficient administration of justice*", whereas arbitration is "*a consensual, private affair between the particular parties to a particular arbitration agreement*" and the inconvenience of the arbitral tribunal's inability to join parties or consolidate proceedings, in the absence of the parties' consent, is often outweighed by the confidentiality and privacy of the arbitral process. At para. 54 of his judgment in *Michael Wilson v Sinclair*, Simon, LJ said: "*What is clear is that there are good reasons why a court should be cautious before accepting that later court proceedings are an abuse of its process because it involves a collateral attack on an earlier arbitration award …*". Simon, LJ then considered the decisions of the High Court of Hong Kong in *Parakou Shipping Pte Ltd v Jinhui Shipping and Transportation Ltd* [2011] 2 HKLRD 1, Hamblen, J in *Arts & Antiques Ltd v Richards*, and the judge at first instance in *Michael Wilson v Sinclair* at para. 50, where Teare, J said (at para. 50: [2012] EWHC 2560 (Comm); [2013] 1 All ER (Comm) 476):

> "… I have therefore concluded that there can be no rule that the court can have no such duty merely because the tribunal whose decision is under attack is an arbitral tribunal. However, it will probably be a rare case where an action in this court against a non-party to an arbitration can be said to be an abuse of the process of this court. Where a claimant has a claim against two or more persons and is obliged to bring one such claim in arbitration the defeat of that claim in arbitration will not usually prevent the claimant from pursuing his claim against the other persons in litigation. Arbitrations are private and consensual and non-parties cannot, in the absence of consent, be joined or be affected by the decisions of the arbitral tribunal."

32. Simon, LJ then adopted Teare, J's approach (at para. 67-68):

> "67. In my view Teare J correctly stated the law in para 50 of his judgment in the present case. There is no "hard edged" rule that a prior arbitration award cannot found an argument that subsequent litigation is an abuse of process. The court is concerned with an abuse of its own process; and there are abundant references in the authorities to the dangers of setting limits and fixing categories of circumstances in which the court has a duty to act so as to prevent an abuse of process.
>
> 68. I agree with Reyes J's observation in the Parakou case [2011] 2 HKLRD 1 that, although a court will be cautious in circumstances where the strike-out application is founded on a prior arbitration award, that caution should not inhibit the duty to act in appropriate circumstances. I would also add my agreement with Teare J's observation at para 50 of his judgment that it will probably be a rare case, and perhaps a very rare case,

where court proceedings against a non-party to an arbitration can be said to be an abuse of process."

33. At para. 87-94, Simon, LJ concluded:

"87. Despite these arguments and the judge's careful reasoning, I am clear that his conclusion was wrong and that the high threshold which engages the court's duty to act to prevent abuse of its process was not met.

88. There were a number of material considerations which weighed heavily against the conclusion that the claim was an abuse of process.

89. The prior proceedings relied on to support the application to strike out were arbitration proceedings to which Mr Sinclair was not a party. Not only had he not been a party, he had been invited by MWP to join as a party to the arbitration and agree to be bound by an award so that the issue of beneficial ownership of the Max shares could be conclusively determined in a way that would bind each of MWP, Mr Emmott and Mr Sinclair, giving rise to res judicata or creating estoppels on which each could subsequently rely. He had refused to join in the arbitration; and had adopted the position in the Bahamian proceedings that the outcome of the arbitration was "totally irrelevant to the dispute" between MWP and him.

90. Despite this, he now relied on the arbitration proceedings and award to characterise MWP's claim against him as an abuse of process, seeking to take the benefit of an arbitration award by which the Sinclair defendants would not have been bound had it been decided differently. This was the point about lack of mutuality which plainly troubled the judge; and it was a highly material, if not dispositive, factor. As Kerr LJ said in Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd [1982] Lloyd's Rep 132: "where, as here, consolidation was in fact sought by the party in question, I cannot begin to see how any question of abuse of the process of the court could be said to arise." …

93. This was not a case in which there had been a prior claim by MWP against the Sinclair defendants; and it follows that the application to strike out could not be founded on the private interest of a party not to be vexed twice for the same reason. MWP's only means of pursuing its clams against them was by means of the present action. Nor was Mr Emmott being vexed twice, since he was only a party in the litigation at the suit of the Sinclair defendants, by whom he was subsequently released. The judge's suspicion that his late joinder by the Sinclair defendants

> was only done to strengthen the abuse argument appears to be justified.
>
> 94. It also seems to me that the judge placed too much weight on his view that, because MWP was inviting the court to come to a different view to the arbitrators in relation to the nature and discharge of Mr Emmott's obligations, it was mounting an illegitimate collateral attack on the award. However, as Lord Hobhouse expressed it in the Arthur J S Hall case [2002] 1 AC 615, 743C, "There is no general rule preventing a party inviting a court to arrive at a decision inconsistent with that arrived in another case."

34. In *Kamoka v The Security Service* [2017] EWCA Civ 1665, the appellants were Libyans said to have been members or associates of the Libyan Islamic Fighting Group (LIFG), which had been opposed to the regime of Colonel Qadhafi in Libya. The appellants sought asylum in the United Kingdom. In 2005, after the United Kingdom government formed closer links with the Qadhafi regime, the LIFG was proscribed as a terrorist organisation in the United Kingdom. Libya signed a Memorandum of Understanding (MOU) which gave assurances of safety on return of its nationals. The appellants were convicted of criminal or terrorist offences and were subjected to control orders or detained pending deportation. The appellants appealed to SIAC; two of the appeals were determined and the others were stayed. SIAC concluded that both appellants were a danger to national security but that it would not be safe for them to return to Libya, notwithstanding the MOU. After the fall of the Qadhafi regime in 2011, documents obtained from the Libyan intelligence service showed the extent of the knowledge and complicity of the United Kingdom security services in extraordinary rendition and torture by the Libyan security agencies. The appellants argued that such collusion led to the serious risk that the Qadhafi regime would have regarded the MOU as mere "*window dressing*" and any assurances given as to safety on return were so unreliable that the decisions on deportation would have been unlawful. The appellants commenced proceedings against the respondents claiming that their detention by the Home Secretary pending their appeals to SIAC against the decision to deport them and the subsequent restriction of their liberty by control orders were unlawful. The appellants claimed damages against the respondents for the torts of false imprisonment, trespass (to person and property) and misfeasance in public office. The respondents applied to strike out the appellants' Particulars of Claim. The Court of Appeal dismissed the application, holding that there was no abuse of process, taking into account the fact that the appellants did not have access to the newly discovered material and were unaware that they had a cause of action against the respondents at the time of the earlier proceedings in SIAC and the control order proceedings (para. 93). The Court held that the current proceedings did not represent a collateral attack on the earlier judgment of SIAC or on the decisions of the Court in relation to the control orders (para. 101).

35. At para. 70-71, Flaux, LJ emphasised the open-textured nature of the Court's jurisdiction to strike out a statement of case on the grounds of an abuse of process:

> "70. … the doctrine is a flexible one which is not dependent upon identity of parties or issues and in an appropriate case is equally applicable whether the previous proceedings were criminal or

> civil. Accordingly, I reject any suggestion by Mr de la Mare QC that Hunter-type abuse cannot arise where the earlier proceedings were civil and there is no identity or privity between the parties. The authorities to which I have referred do not support any such wide proposition.
>
> 71. Nonetheless, when the subsequent litigation does not involve an issue previously decided between the same parties or their privies, that subsequent litigation will rarely be an abuse of process …"

36. Flaux, LJ referred to the Court's assessment of whether there has been an abuse of process as "*a broad, merits based judgment, a multi-factorial exercise*" (para. 90).

The principles relevant to abuse of process

37. The principles which emerge from these decisions for the purposes of determining whether or not a statement of case constitutes an abuse of the Court's process, where an allegation or case is advanced which has already been determined in earlier proceedings, in the absence of estoppel *per rem judicatam* (*res judicata*) or issue estoppel, are as follows:

    i) There will be an abuse of process only if (a) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (b) to permit such re-litigation would bring the administration of justice into disrepute (*Hunter*; *Secretary of State for Trade and Industry v Bairstow* [2003] EWCA Civ 321; [2004] Ch 1, para. 38). These two limbs of abuse of process reflect the private interest of a party not to be vexed twice with the same allegation and the public interest of the state in not having issues repeatedly litigated (*Michael Wilson v Sinclair*, para. 48).

    ii) There is no general rule preventing a party inviting the Court to arrive at a decision inconsistent with that arrived in an earlier case (*Michael Wilson v Sinclair*, para. 94). It is not sufficient for such an abuse of process to be found to exist merely because the earlier proceedings had been fairly conducted and that the issue had been the subject of lengthy evidence and argument. There must be some "*special reason*" why the facts of the case make the determination in the current proceedings of the issue which has been determined in earlier proceedings an abuse of process (*Bragg v Oceanus*).

    iii) It will be a rare case where the litigation of an issue which has previously been decided, but not between the same parties or their privies, will amount to an abuse of process (*In re Norris*, para. 26; *Michael Wilson v Sinclair*, para. 68; *cf. Laing v Taylor Walton*, para. 25). This indicates that there must be a "*special reason*" (or "*positive reason*") contributing to the conclusion that there has been an abuse of process (*Bragg v Oceanus*).

    iv) There may be an abuse of process where the decision of an earlier proceeding is an arbitration award (*Arts & Antiques v Richards*, para. 45-46). That said, the fact that arbitration is a private process to which other parties may not have access is a relevant consideration in determining whether the advancing of an

allegation in later proceedings is an abuse of process (*Sun Life v Lincoln*; *Michael Wilson v Sinclair*, para. 54, 67-68).

v) In order to determine whether there is an abuse of process, the Court "*must engage in a close 'merits based' analysis of the facts*", taking into account the relevant private and public interests (*Michael Wilson v Sinclair*, para. 48; *Kamoka*, para. 90). There is no closed list of circumstances in which such an abuse of process may be found to exist (*Hunter*; *Bragg v Oceanus*; *Johnson v Gore Wood*). Indeed, there is no requirement that any of the parties to the later proceedings were a party or privy to the earlier proceedings (*Ablyazov*, para. 62; *Michael Wilson v Sinclair*, para. 48(4); *Kamoka*, para. 70), although it must be said that for such an abuse of process to exist, the case must be very exceptional.

vi) A number of considerations may be taken into account in order to determine whether there is such manifest unfairness or the allowance of the case to be run would bring the administration of justice into disrepute. Such considerations are not closed and include:

a) Whether the person wishing to advance the allegation had a reasonable opportunity to deal with the allegation in the earlier proceedings (*Hunter*; *Bragg v Oceanus*; *In re Norris*, para. 26; *St Vincent v Robinson*; *Ablyazov*, para. 48, 51). This consideration will arise especially if the person wishing to advance the allegation again was a party to the earlier proceedings (*Laing v Taylor Walton*; *Arts & Antiques v Richards*; *St Vincent v Robinson*).

b) Whether the party advancing the allegation in the later proceedings was also the party advancing the allegation in the earlier proceedings (*Laing v Taylor v Walton*; *Arts & Antiques v Richards*; *cf. Conlon v Simms*, para. 146).

c) Whether the party wishing to advance the allegation in question had earlier adopted a contrary position without a satisfactory explanation for the change of case (*St Vincent v Robinson*).

d) Whether any attempt has been made to include the party now making the relevant allegation in the earlier proceedings (*Bragg v Oceanus*; *Michael Wilson v Sinclair*).

e) Whether the earlier proceedings were before the most appropriate tribunal or between the most appropriate parties for the determination of the issue (*Bragg v Oceanus*).

f) Whether the purpose of the party wishing to have the matter determined afresh was not the genuine purpose of obtaining the relief sought in the second action, but some collateral purpose (*Hunter*; *Bragg v Oceanus*).

g) Whether the relevant party was at some disadvantage or was subject to a restriction in the earlier proceedings from which that party would be free in the current proceedings. Such a disadvantage or restriction might include the non-availability of documentation or other evidence in the

earlier proceedings (*Bragg v Oceanus*; *Conlon v Simms*, para. 147; *Ablyazov*, para. 49).

h) Whether the party now making the relevant allegation provided assistance, or funding, to one of the parties to the earlier proceedings. In *Michael Wilson v Sinclair*, at para. 97, Simon, LJ said that "*I do not agree that the fact that (1) Mr Sinclair was a witness in the arbitration, and (2) funded the defence, bore any material weight in the light of his equivocal approach to the arbitration*". I consider that the provision of assistance in the form of documents or evidence is of limited, if any, relevance in support of a finding that there has been an abuse of process (*In re Norris*, para. 23-25; *Ablyazov*). The provision of funding is perhaps of greater relevance.

vii) The burden is on the party alleging the existence of an abuse of process, by reason of a manifest unfairness to a party or bringing the administration of justice into disrepute, to establish such abuse and the "*threshold which engages the court's duty to act to prevent abuse of its process*" is a high one (*Michael Wilson v Sinclair*, para. 87, 100).

viii) In carrying out this assessment, the Court is not engaging in an assessment of the merits of the relevant allegation. It is not a summary judgment application (*Kamoka*, para. 98).

The allegations made in the ICC arbitration proceedings and in these proceedings

The ICC arbitration proceedings

38. In the ICC arbitration proceedings, Overgas Inc pleaded at paragraphs 240-349 of its Statement of Claim that GPE breached competition law, and sought relief on that ground. In summary, Overgas Inc's case in its pleading was as follows:

i) The relevant restrictions imposed for the purposes of preserving competition are located in Articles 102 and 101 the Treaty on the Functioning of the European Union ("TFEU") and Articles 21 and 37a of the Bulgarian Protection of Competition Act (paragraphs 240-246).

ii) The public enforcement of the prohibitions in Articles 102 and 101 TFEU are carried out by the European Commission and national competition authorities in each EU Member State. The European Commission had stated that there is no doubt that trade between EU Member States is being affected as a result of the sale and supply of natural gas by GPE in Bulgaria, that some of GPE's business practices constitute an abuse of its dominant market position in breach of EU antitrust rules, GPE is a dominant player on the Bulgarian upstream wholesale gas market, and that GPE isolated the Bulgarian gas market and may have been charging excessively high prices in Bulgaria compared to Western European benchmarks, especially liquid gas hubs (paragraphs 248-250). (I pause to add that the European Commission informed GPE on 18th December 2018 that a separate complaint before it concerning GPE had been closed following Overgas Inc's withdrawal of its complaint.)

iii) During the period from 2007 to 2012, GPE fixed the resale price at which Overgas Inc was able to sell natural gas to customers in Bulgaria in breach of Articles 102 and 101 TFEU (paragraph 252). In breach of Article 101 TFEU, GPE engaged in prohibited resale price maintenance. Between 2007 and 2012, Overgas Inc was deprived of the ability to set its own resale price in relation to the natural gas which it bought from GPE for onwards resale to Bulgargaz (paragraphs 284-293). This price-fixing had an anti-competitive object and effect. In breach of Article 102 TFEU, GPE abused its dominant position (paragraphs 253-283):

a) The relevant product market was the Bulgarian natural gas sector, namely (i) natural gas supplies by imports and from domestic production to be used for consumption in Bulgaria, (ii) gas trading/wholesale, including gas sales made by importers/wholesalers to suppliers of last resort and large end consumers; and (iii) gas retail, meaning gas sales made to small and medium-sized end consumers, namely (a) the supply of gas to large industrial customers from the transmission network, (b) the supply of gas to small industrial customers through local natural gas distribution networks, and (c) the supply of gas to household customers, through local natural gas distribution networks. GPE's infringements in the market (i) have eliminated competition in markets (ii) and (iii)(a) and have severely restricted competition in markets (iii)(b) and (c).

b) GPE occupied a dominant position in the market of natural gas supplies by imports and from domestic production to be used for consumption in Bulgaria. GPE's share in the market for the supply of natural gas to Bulgaria was close to 100%: during the period from 2006 to 2016, GPE's market share rose from 86% to 97%.

c) Between 2007 and 2012, GPE influenced the structure of the Bulgarian market for natural gas and hindered the maintenance of the degree of competition that could have existed otherwise. On 18th December 2006, GPE and Bulgargaz signed the 2006 Memorandum, by which GPE guaranteed that 1.416 billion cubic metres ("bcm") of natural gas per year for the period from 2007 to 2009 and 1.424 bcm for the period from 2010 to 2012 (referred to as "the Priority Volumes") would be delivered at preferential prices from 1st January 2007 to 31st December 2012 and further committed that these quantities would be delivered "*with priority via Overgas Inc*". GPE obliged Overgas Inc to agree to amendments to the Supply Contract requiring Overgas Inc to purchase fixed quantities of natural gas at fixed prices set out in the 2006 Memorandum, significantly lower than the prevailing market price. GPE also obliged Overgas Inc to amend its agreement with Bulgargaz, which Overgas Inc could not decline, because GPE was its sole supplier, fixing the same price at which Bulgargaz would purchase the natural gas from Overgas Inc as Overgas Inc agreed to pay GPE under the amended Supply Contract. Accordingly, GPE controlled the price at which Overgas Inc was required to sell the natural gas to Bulgargaz, controlled the volumes to be delivered, and removed any margin available to Overgas Inc on all

such volumes and restricted Overgas Inc's ability to pursue its independent competitive strategy.

d) GPE's imposition of a fixed resale price to be charged by Overgas Inc for its on-sales to Bulgargaz was an imposition of unfair trade terms on a trading partner in breach of Article 102.

iv) During the period from 2013 to 2015, in breach of Articles 102 and 101 TFEU, GPE restricted the volume of natural gas delivered to Overgas Inc, delivering less than was requested and instead allocating additional volumes of natural gas to Bulgargaz.

a) From 2013, GPE commenced a system whereby volumes and prices for natural gas to be delivered under the Supply Contract were only provided to Overgas Inc with very little advance notice, GPE would only confirm the volumes and prices for natural gas to be delivered under the Supply Contract by way of "*a short-term three-month look-ahead*" period, and GPE imposed on Overgas Inc insufficient quantities of natural gas and restricted the volume of natural gas delivered to Overgas Inc, delivering less than asked for and instead allocating additional volumes of natural gas to Bulgargaz. In addition, GPE did not agree to provide gas for more than a maximum of three months at a time which restricted Overgas Inc from competing in the market with Bulgargaz. These unreasonable or uneconomic conditions were imposed on Overgas Inc, not Bulgargaz, and hindered Overgas Inc from accessing the larger volume and higher margin parts of the market, for whom security of supply was of crucial importance. As a result, Overgas Inc could not compete effectively with Bulgargaz and could not grow its business. As GPE had a near-monopoly in the upstream wholesale market, Overgas Inc could not rely on an alternative source of supply to fill the gap between GPE's supplies and its customers' growing needs, and therefore struggled to maintain its activities in Bulgaria. This constituted a breach of Article 102 TFEU (paragraphs 296-311).

b) On 15th November 2012, GPE and Bulgargaz entered into the 2012 Bulgargaz Contract, a long-term contract for the supply of natural gas. The contracted volumes were 2.9 bcm of natural gas per year, a quantity which would allow Bulgargaz to service the whole of the market in Bulgaria should supplies to Overgas Inc cease. The Bulgarian government announced publicly that it required a direct long-term natural gas supply agreement between GPE and Bulgargaz and it desired the removal of all intermediaries (referring to Overgas Inc) in the supply of natural gas to Bulgaria. The Bulgargaz Contract contributed to and had as its object the exclusionary strategy agreed between GPE and Bulgargaz. Further, the Bulgargaz Contract exacerbated the anti-competitive effect of the exclusionary strategy agreed between GPE and Bulgargaz. The Bulgargaz Contract made it possible for GPE to supply volumes of natural gas sufficient to cover almost the entire consumption of natural gas within Bulgaria through Bulgargaz, given that Bulgaria's total natural gas consumption in 2015 was approximately 3.10 bcm. This was in breach of Article 101 TFEU which prohibited agreements or

concerted practices which have the object or effect or removing a competitor from the market (paragraphs 312-323).

v) During the period from 2016 onwards, GPE violated Articles 102 and 101 TFEU by refusing to supply Overgas Inc in concert with Bulgargaz, thereby effectively putting Overgas Inc out of business (paragraphs 325-349). From 1st January 2016, GPE refused to supply natural gas to Overgas Inc, a long-standing customer for the previous 18 years. This made it impossible for Overgas Inc to remain active in the downstream market for the supply of natural gas in Bulgaria. Upstream natural gas supply was indispensable for Overgas Inc and there was no alternative source of natural gas supply available to Overgas Inc to the supply provided by GPE. The refusal of supply by GPE led to the elimination of effective competition in the gas trading/wholesale and retail markets. This total elimination of competition was an inevitable consequence of the refusal to supply and must have been intended by GPE. There was no objective justification for GPE's cessation of supplies of natural gas to Overgas Inc. GPE abused its dominant position in the market for the wholesale supply of natural gas by terminating the supply of gas to Overgas Inc. Moreover, this cessation of supply was part of a strategy agreed between GPE and Bulgargaz with the object of removing Overgas Inc as a competitor. The cessation of supply to Overgas Inc was the result of an agreement or understanding reached between GPE and Bulgargaz in December 2015. On 31st December 2015, Overgas Inc received a letter from GPE stating that Overgas Inc would have no natural gas for the needs of its customers from GPE from 1st January 2016, and on the same day Bulgargaz's parent's CEO announced the end of supplies to Overgas Inc by GPE and that GPE assured Bulgargaz that "*there will be no problems to increase natural gas deliveries*".

39. On 12th December 2018, the ICC Arbitral Tribunal made its Final Award (the ICC Award). This followed a hearing over the course of five days between 5th and 9th March 2018 and the filing of detailed post-hearing briefs by Overgas Inc and GPE (amounting in total to 246 pages of submission in addition to the total of 675 pages of pleadings).

40. Having determined that it had jurisdiction to deal with the breach of competition law claims and that it was obliged to apply mandatory norms of EU law for public policy reasons (paragraphs 539-551 of the ICC Award), the ICC Arbitral Tribunal made the following findings:

i) With respect to the period from 2007 to 2012:

a) It was obvious that the arrangement between GPE and Bulgargaz was not intended to bring a benefit to the participators by limiting price competition on the Bulgarian market to the detriment of consumers and that the arrangement did not have such an effect; it simply constituted a *quid pro quo* for the cross-country transit services provided by Bulgargaz to GPE for the purposes of transporting GPE's natural gas to adjoining countries beyond Bulgaria. These events were entirely external to any matter of competition on the domestic market in Bulgaria (paragraph 648).

b) This case was not about artificially depressing prices for purposes of securing a competitive advantage and clearly did not have the object or effect of keeping out competitors (paragraph 651).

c) The arrangement had no relationship at all to resale price maintenance. The object and effect of the arrangement was to give consideration to Bulgargaz in exchange for Bulgargaz's provision of cross-country transit services; it did not have price-fixing as its object or effect (paragraphs 652-653).

d) The arrangement did not violate Article 101 or Article 102 TFEU (paragraph 654).

e) Overgas Inc's case that it suffered a loss by not being able to set prices freely for preferential volumes which it was forced by GPE to sell to Bulgargaz at artificially depressed, below-market prices was not arguable (paragraphs 658-661).

ii) With respect to the period from 2013-2015:

a) Overgas Inc and GPE agreed short-term amendments to the Supply Contract and entered into voluntary agreements as to the volumes to be supplied in each individual period. Overgas Inc never objected to the annual volume of 0.4 bcm allotted to it by GPE and there is no evidence that Overgas raised any concerns about missed-out transactions as a consequence of the particular supply undertakings given by GPE (paragraphs 737-745).

b) Based on the documentary record that was available to the Tribunal, there is no indication that GPE took measures to circumscribe Overgas Inc's operations on the Bulgarian market that would arguably constitute a breach of Articles 102 and 101 TFEU. There is nothing in the evidence that indicated a planned strategy to exclude Overgas Inc from the Bulgarian market to the benefit of Bulgargaz (paragraphs 754, 757).

iii) With respect to the period from 1st January 2016:

a) Although a dominant undertaking in the relevant market, GPE did not breach Article 102 TFEU by not directly supplying any alternative distributor in the Bulgarian market than Bulgargaz (paragraphs 888-897).

b) Overgas Mrezhi received supplies of natural gas from Bulgargaz as a supplier on the basis of a contract with Bulgargaz of 31st December 2015 (paragraph 902).

41. On the basis of these and other findings, the ICC Arbitral Tribunal dismissed Overgas Inc's claim against GPE for breaches of competition law.

<u>The allegations in the English proceedings</u>

42. In the Amended Defence in the English proceedings, the Principal Defendants allege that DDI Holdings' purchase of shares in Overgas Mrezhi was not unlawful, because it had legitimate commercial reasons to ensure that Overgas Mrezhi had sufficient funding to continue its business and not to fail. The cessation of supply by GPE of natural gas under the Supply Contract was in breach of EU competition law and/or in breach of contract (paragraph 61(a)) and the direct and effective cause of the loss and damage claimed by GPE was its own refusal to supply natural gas to Overgas Inc in breach of EU competition law, in breach of an agreement between the shareholders in Overgas Inc and in breach of article 63 of the Bulgarian Obligations and Contracts Law (paragraph 80(a)(i)).

43. In the Amended Defence, Overgas Mrezhi presents a counterclaim against GPE as follows:

    i) The relevant market in which GPE operated is and was the market for the supply of natural gas by way of imported gas and domestically produced gas to be used for consumption in Bulgaria (paragraphs 98 and 117).

    ii) Since 2007, GPE's share of the relevant market was never below 85%; there was no viable alternative source for significant volumes of natural gas supplied into the relevant market by GPE (paragraphs 99 and 117).

    iii) In December 2006, GPE and Bulgargaz EAD ("Bulgargaz") agreed that GPE would deliver to Bulgargaz 1.416 bcm of natural gas per year "*with priority via Overgas Inc*" at preferential (sub-market) prices (paragraph 102). Accordingly, Overgas Inc would supply Bulgargaz with the said volume at prices pre-agreed between GPE and Bulgargaz. It is alleged that Overgas Inc was coerced to agree to amendments to the Supply Contract and its agreement with Bulgargaz to align the arrangements between each of GPE, Overgas Inc and Bulgargaz (paragraph 103) and that Overgas Inc was compelled to sell the first 1.416 bcm of natural gas purchased from GPE per year to Bulgargaz at no margin, and later at a margin of just US$1 per mcm (paragraph 104).

    iv) As a result of an agreement between GPE and Bulgargaz in 2012, GPE agreed to supply Bulgargaz up to 2.9 bcm of natural gas annually, and GPE wanted to partition the market between large industrial and wholesale customers (accounting for 2.9 bcm of natural gas), which would be supplied by Bulgargaz, on the one hand and the customers of Overgas Mrezhi (and its predecessors in title) (accounting for 0.4 bcm of natural gas), which would be supplied by Overgas Inc, on the other hand (paragraphs 105-106). It is alleged that, as a result, between 2013 and 2015, GPE sold natural gas to Overgas Inc in such volumes and under such terms which meant that Overgas Inc was able only to supply Overgas Mrezhi (and its predecessors in title) and not more lucrative large industrial and wholesale customers, which GPE intended and ensured would be supplied by Bulgargaz (paragraph 107). It is alleged that Overgas Inc was coerced to execute amendments to the Supply Contract providing for the supply of natural gas on this restricted basis, such pressure having been exerted by GPE as the sole supplier and the only importer of natural gas into Bulgaria (paragraph 108).

v) On 30th December 2015, Bulgargaz's parent's CEO announced the end of supplies to Overgas Inc by GPE and that Bulgargaz would take over the supply of all of Overgas Inc's customers; this was confirmed by the Russian Ministry of Foreign Affairs on the following day. The Principal Defendants allege that it is to be inferred that GPE and Bulgargaz had colluded to reach a prior agreement that Overgas Inc's customers, including Overgas Mrezhi, would be transferred to Bulgargaz (paragraph 110).

vi) Since 1st January 2016, GPE ceased to supply natural gas to Overgas Inc under the Supply Contract, and Bulgargaz has been the sole purchaser in Bulgaria of imported natural gas from GPE and, as a result, Bulgargaz now supplies a very high market share of large industrial and wholesale customers and smaller industrial and residential customers. Bulgargaz is an actual or potential competitor of Overgas Mrezhi for smaller industrial and residential customers and Overgas Mrezhi is a potential competitor of Bulgargaz for large industrial and wholesale customers (paragraphs 100 and 109).

vii) Accordingly, GPE has knowingly prevented Overgas Inc from being able to supply natural gas to its customers, including Overgas Mrezhi, with the result that Overgas Inc has had no revenue stream since 1st January 2016 (paragraph 111).

viii) To GPE's knowledge, Overgas Mrezhi was at all material times prior to 1st January 2016 reliant on Overgas Inc as its predominant source of financing and that GPE's refusal to supply Overgas Inc would significantly harm Overgas Inc's ability to fund Overgas Mrezhi (paragraph 112).

ix) Since 1st January 2016, Overgas Mrezhi has been obliged to procure natural gas from Bulgargaz to meet its supply obligations to its customers and was required to pay penalties to Bulgargaz to secure the necessary supply (paragraph 113).

x) GPE abused its dominant position on the relevant market and acted in bad faith by distorting competition between EU Member States and within Bulgaria (which has been a Member of the European Union since 1st January 2007), contrary to article 102 TFEU and articles 21 and 37a of the Bulgarian Protection of Competition Act, (paragraphs 114-118), as follows:

a) From 1st January 2007 to 31st December 2012 by virtue of the actions set out at paragraphs 102-104 of the Amended Defence, namely by strengthening Bulgargaz against potential competition from Overgas Mrezhi's predecessors in title, in particular GPE fixed Overgas Inc's resale price to Bulgargaz, ensuring favourable prices to Bulgargaz.

b) From 1st January 2013 to 31st December 2015 by virtue of the actions set out at paragraphs 105-108 of the Amended Defence, namely by colluding with Bulgargaz and its owner (the State of Bulgaria) to partition the market in favour of Bulgargaz, in particular GPE prevented Overgas Mrezhi and its predecessors in title from acquiring new customers, as the volumes of natural gas available to them through Overgas Inc were limited to up to 0.4 bcm of natural gas per year with all other volumes allocated to Bulgargaz.

c) Since 1st January 2016 by virtue of the actions set out at paragraphs 109-113 of the Amended Defence, namely by refusing to supply Overgas Inc and agreeing to increase the market share of Bulgargaz, in particular GPE (i) obliged Overgas Mrezhi to purchase natural gas from Bulgargaz on the terms of supply mandated by Bulgargaz and not on the more favourable terms that would have been available from Overgas Inc, (ii) obliged Overgas Mrezhi to purchase natural gas from Bulgargaz upon payment of penalties to Bulgargaz caused by its late notification of its desperate need for the urgent supply of natural gas, which could only be from Bulgargaz, and (iii) obliged Overgas Mrezhi to seek urgent refinancing as a result of the impact of these events on Overgas Inc, which was unable to fund Overgas Mrezhi, with Overgas Mrezhi replacing funding from Overgas Inc with higher cost funding.

xi) In breach of article 101 TFEU and article 15(1) of the Bulgarian Protection of Competition Act, GPE entered into certain agreements with Bulgargaz which distorted competition between EU Member States and within Bulgaria, amounting to an infringement by object and effect of EU and Bulgarian competition law (paragraphs 119-121). The agreements alleged were:

a) The December 2006 Memorandum by which GPE fixed Overgas Inc's resale price to Bulgargaz at a level favourable to Bulgargaz, which in turn prevented Overgas Mrezhi's predecessors in title from competing with Bulgargaz.

b) The 2012 Bulgargaz Contract, by which GPE partitioned the market in favour of Bulgargaz, allocating natural gas supplies away from Overgas Mrezhi's supplier, Overgas Inc, and by limiting supplies to Overgas Inc, preventing Overgas Mrezhi and its predecessors in title from competing with Bulgargaz.

c) An agreement to be inferred from the announcements made by Bulgargaz's parent company's CEO and the Russian Ministry of Foreign Affairs at the end of 2015, whereby GPE favoured Bulgargaz by ceasing supplies of natural gas to Overgas Mrezhi's supplier, Overgas Inc, thereby compelling Overgas Mrezhi to become a customer of Bulgargaz and preventing Overgas Mrezhi from competing with Bulgargaz.

xii) But for the alleged infringements, Overgas Mrezhi (and its predecessors in title) would have grown its market share more significantly and more rapidly by acquiring new customers in line with its business plan, would have received sufficient amounts of natural gas from Overgas Inc to supply its new customers, would have received sufficient funding from Overgas Inc to meet its investment obligations and business plan, would not have been obliged to purchase natural gas from Bulgargaz (its competitor), would not have been obliged to pay penalties to secure an immediate supply of gas from Bulgargaz from 1st January 2016, and would not have been obliged to obtain alternative funding in place of funding from Overgas Inc (paragraph 122).

xiii) As a result of the aforesaid infringements, Overgas Mrezhi has suffered loss and damage, including the difference between Overgas Mrezhi's actual profits and

the profits which would have been generated by Overgas Mrezhi (and its predecessors in title) had it grown its market share, the difference in price for natural gas supply from Bulgargaz since 1st January 2016, had Overgas Mrezhi not been obliged to pay penalties as aforesaid and had Overgas Mrezhi instead been able to continue to purchase natural gas from Overgas Inc, and the additional funding costs incurred by Overgas Mrezhi (paragraphs 123-126).

The extent, if at all, to which the allegations in each of the proceedings are the same

44. The fundamental basis of GPE's application is that the allegations of anti-competitive conduct which were advanced against GPE by Overgas Inc in the ICC arbitration proceedings are the same as those allegations advanced against GPE by the Principal Defendants in the English proceedings.

45. In his submissions, Mr Alain Choo-Choy QC on behalf of GPE, contended that the allegations in each set of proceedings are the same for the following reasons:

i) In both sets of proceedings, the allegations of breaches of competition law cover three distinct periods: 2007-2012, 2013-2015, and from 1st January 2016.

ii) In respect of the period from 2007 to 2012, Overgas Mrezhi alleges in the English proceedings that as a result of GPE's arrangement with Bulgargaz in relation to Priority Volumes of natural gas evidenced by the 2006 Memorandum, GPE coerced Overgas Inc into agreeing to the amendments to the Supply Contract, which effectively allowed GPE to fix the resale price at which Overgas Inc was required to resell to Bulgargaz the natural gas supplied by GPE to Overgas Inc, with the net result that Overgas Inc had to make such resales to Bulgargaz for little or no margin. This was in breach of Articles 101 and 102 TFEU and Articles 15(1), 21 and 37a of the Bulgarian Protection of Competition Act. These are the same allegations made in the ICC arbitration proceedings.

iii) In respect of the period from 2013 to 2015, Overgas Mrezhi alleges in the English proceedings that GPE artificially restricted supplies of natural gas to Overgas Inc to 0.4 bcm per year in order to prevent Overgas Inc from being able to supply sufficient volumes to Overgas Mrezhi and its predecessors in title to enable the latter in turn to supply large industrial and wholesale customers and that GPE coerced Overgas Inc into entering into short-term amendments to the Supply Contract providing for the supply of natural gas to Overgas Inc on a restricted basis; that such artificial restriction of the supplies by GPE to Overgas Inc arose against the background of substantial volume allocations by GPE to Bulgargaz upon the conclusion of the 2012 Bulgargaz Contract. This was in breach of Articles 101 and 102 TFEU and Articles 15(1), 21 and 37a of the Bulgarian Protection of Competition Act. This same allegation was made in the ICC arbitration proceedings, even though additional allegations were made in those ICC arbitration proceedings.

iv) In respect of the period from 1st January 2016 onwards, Overgas Mrezhi alleges in the English proceedings that GPE's cessation of supplies of natural gas to Overgas Inc was the result of a collusive arrangement between GPE and Bulgargaz whereby it was agreed that Overgas Inc's customers, including Overgas Mrezhi, would be transferred to Bulgargaz. This was in breach of

Articles 101 and 102 TFEU and Articles 15(1), 21 and 37a of the Bulgarian Protection of Competition Act. The same allegation was made in the ICC arbitration proceedings.

46. In support of GPE's analysis of the comparison of the allegations of breaches of competition law raised in each set of proceedings is supported by a schedule exhibited to Mr Andrew Moody's second witness statement dated 2nd August 2019 (para. 2.8 and exhibit AGM16) comparing Overgas Inc's allegations in the ICC arbitration proceedings, the decisions and references in the ICC Award, and the allegations in Overgas Mrezhi's statement of case in the English proceedings.

47. Mr Neil Calver QC, on behalf of the Principal Defendants, contended that there were central or key differences between the allegations in the two sets of proceedings:

i) The ICC arbitration proceedings were a contractual process between Overgas Inc and GPE. No claim was made by Overgas Inc on behalf of Overgas Mrezhi. Accordingly, the ICC Arbitral Tribunal had no power to award damages in respect of Overgas Mrezhi's loss. By contrast, Overgas Mrezhi is claiming relief for its own loss in the English proceedings, distinct from the loss claimed by Overgas Inc in the ICC arbitration proceedings.

ii) The ICC arbitration proceedings principally concerned restrictions on competition on the gas wholesale/trading market where Overgas Inc operated and not the gas retail/distribution market which is the principal focus of the English proceedings and in which Overgas Mrezhi operated. Further, it was argued, Overgas Mrezhi is seeking to recover losses in the English proceedings which were not and could not have been claimed in the ICC arbitration proceedings, where Overgas Mrezhi's position was irrelevant because - as Overgas Inc pleaded in the ICC arbitration proceedings - Overgas Mrezhi operated at a different level of the market or in the supply chain, as a licensed distributor selling gas at regulated price to residential consumers. Mr Calver QC pointed to the fact that Mr Moody in his witness statements (served on behalf of GPE) himself stated that Overgas Inc and Overgas Mrezhi acted "*at different market levels*" and that Overgas Inc and Overgas Mrezhi "*operated in different capacities in the Bulgarian gas market prior to 2016*" (paragraph 8.3 of his second witness statement and paragraph 6.9 of his third witness statement dated 5th November 2019).

iii) Accordingly, the allegations of breaches of competition law in each of the proceedings concern infringements of a different nature whose object or effect was restrictive of competition in different markets.

48. Having considered these submissions and reviewed the allegations of breaches of competition law as pleaded in the ICC arbitration proceedings and in the Amended Defence in the English proceedings, in my judgment, the allegations made in each of the proceedings are substantially the same. Both sets of allegations aver and rely on the alleged facts that (1) GPE dominated the Bulgarian wholesale and retail markets; (2) GPE compelled Overgas Inc to sell natural gas to Bulgargaz pursuant to amendments to the Supply Contract at prices below the prevailing market price during the period from 2007 to 2012, following the 2006 Memorandum agreed between GPE and Bulgargaz; (3) by reason of the 2012 Bulgargaz Contract, during the period from 2013

to 2015, GPE undertook to supply Bulgargaz with 2.9 bcm of natural gas, accounting for the bulk of the natural gas required for consumption in Bulgaria, thereby delivering to Overgas Inc limited quantities of natural gas, and thereby preventing Overgas Inc from competing effectively in Bulgaria; (4) from 1st January 2016, GPE ceased to supply natural gas to Overgas Inc under the Supply Contract with the result that Overgas Inc could not acquire alternative sources of natural gas to the supply provided by GPE; and (5) GPE's conduct constituted a breach of Articles 102 and 101 TFEU.

49. It is true to say that the argument had been formulated in different terms in the ICC arbitration proceedings than in the English proceedings, and additional facts were alleged in the ICC arbitration proceedings.

50. Nevertheless, the counterclaim presented by Overgas Mrezhi is essentially founded upon the same factual allegations which were raised and determined in the ICC arbitration proceedings. Moreover, in both sets of proceedings, the allegations of breaches of competition law refer to both markets in which Overgas Mrezhi and Overgas Inc operated. It follows that the defence relied on by the Principal Defendants that the losses claimed by GPE were caused by breaches of competition law also raises the same allegations as raised and determined in the ICC arbitration proceedings.

51. It is also true to say that the focus of the counterclaim in the English proceedings is on the loss sustained by Overgas Mrezhi, and the market in which it operated, rather than Overgas Inc, which operated in a different market and whose loss was the focus of the ICC arbitration proceedings. As explained below, this is a material consideration.

Is there an abuse of process in the Principal Defendants' allegation?

No privity of interest

52. It is common ground between the parties for the purposes of this application that Overgas Inc (the claimant in the ICC arbitration proceedings) and Overgas Mrezhi (the relevant counterclaimant in the English proceedings) - both of whom have advanced the allegation of breaches of competition law by GPE in the respective proceedings - are separate legal entities, and that Overgas Mrezhi was not a party to the ICC arbitration proceedings and is not therefore bound by the findings in the ICC Award by reason of estoppel *per rem judicatam* (*res judicata*) or issue estoppel.

53. Furthermore, it was common ground for the purposes of this application that the Principal Defendants, in particular Overgas Mrezhi, were not privy to the ICC arbitration proceedings. In this context, I refer to privity in the strict context so as to attract the doctrines of estoppel *per rem judicatam* (*res judicata*) or issue estoppel. In his skeleton argument, at paragraph 48(1), Mr Calver QC submitted that an identity of interest in the outcome of earlier proceedings between a party and a third party cannot render later claims by that third party abusive, absent a privity of interest between it and the party to the earlier proceedings and in support of that submission relied on Flaux, LJ's judgment in *Kamoka v The Security Service* [2017] EWCA Civ 1665, at para. 119:

> "If "identity of interest" is intended by the judge to be a reference to privity of interest, then the judge has failed to consider at all the applicable legal test, as laid down by the Court of Appeal in

> Resolute [sic] Chemicals and Standard Chartered. Had he done so, he could not have concluded that there was any privity of interest. If "identity of interest" is some wider concept than privity, it cannot render the claims of the first, third and fourth appellants abusive, absent privity of interest. As is clear from the authorities (specifically Lord Hobhouse in In re Norris at [26]) cases where subsequent proceedings are an abuse of process, notwithstanding that the claimant or his privy was not a party to the earlier proceedings, are entirely exceptional. This case is, as Mr de la Mare QC submits, not remotely like Ashmore v British Coal Corporation, which as Lord Hobhouse indicated was a case about marshalling litigation or, in more modern parlance, case management of group litigation. Since the second and fifth appellants' appeals to SIAC were not test or lead cases, the analysis in that case is inapplicable."

54. I do not think Mr Calver QC maintained this submission during his oral argument. If he had, I could not have accepted it. There may well be an abuse of process when there is no privity or identity of interest between the parties to the earlier and later proceedings. When Flaux, LJ said that, absent any privity of interest, there could be no abuse of process, I consider that Flaux, LJ had abuse of process of the type established in *Henderson v Henderson* (1843) 3 Hare 100 in mind, rather than abuse of process of the *Hunter* type. This is demonstrated by Flaux, LJ's reference to *Resolution Chemicals v Lundbeck A/S* [2013] EWCA Civ 924; [2014] RPC 5, which was concerned with abuse of process of the *Henderson v Henderson* type, and by what Flaux, LJ said earlier in his judgment both at para. 70 (quoted above) and at para. 49:

> "… to the extent that Mr de la Mare QC sought to suggest that Hunter-type abuse does not really arise in cases where the earlier proceedings are civil proceedings and there is no identity or privity between the parties in the two sets of proceedings, so that neither the doctrine in Henderson v Henderson (1843) 3 Hare 100 nor issue estoppel applies, it seems to me that suggestion is not supported by the authorities. There are cases, albeit relatively rare, where the court has found subsequent proceedings abusive because they involve an attempt to re-litigate what was decided in an earlier civil case, albeit there is not identity of parties."

The parties' submissions on abuse of process

55. Mr Choo-Choy QC, on behalf of GPE, submitted that, nonetheless, the maintenance by the Principal Defendants of the allegation that there have been breaches of competition law by GPE is an abuse of the Court's process because (1) it unfairly vexes GPE with precisely the same allegations of breaches of competition law by Overgas Inc, who successfully defended such allegations in the ICC arbitration proceedings at great effort and expense, and (2) it brings the administration of justice into disrepute to permit Overgas Mrezhi and the other Principal Defendants to make such allegations against Overgas Inc when Overgas Inc itself is "*forever precluded (on res judicata, issue estoppel and abuse of process grounds) from advancing or repeating such allegations*

following the Award and the ruling of the Swiss Federal Tribunal upholding the Award".

56. In support of this general contention, Mr Choo-Choy QC submitted that:

i) The ICC Arbitral Tribunal decided that GPE was not guilty of any anti-competitive conduct and that decision was upheld by the Swiss Federal Tribunal.

ii) The central allegations of breaches of competition law advanced both in the ICC arbitration proceedings and in the English proceedings are essentially the same. The fact that Overgas Mrezhi is claiming for damages for its own loss in the English proceedings as distinct from the loss claimed by Overgas Inc in the ICC arbitration proceedings does not detract from the fact that Overgas Mrezhi's counterclaim for breaches of competition law in the English proceedings represents an abuse of the Court's process, because the counterclaim depends on proof of the same allegations advanced in the ICC arbitration proceedings, and dismissed by the ICC Arbitral Tribunal. In any event, any difference in the losses claimed by each of Overgas Mrezhi and Overgas Inc should not be overstated, because at least some of the losses claimed by both companies comprise the loss of market share represented by large industrial and wholesale customers.

iii) The legality of GPE's dealings with Overgas Inc in connection with the supply of natural gas fell squarely within the arbitration agreement between them.

iv) During the ICC arbitration proceedings, which lasted more than three years, the parties exchanged "*thousands of pages of pleadings, documents, witness and expert evidence … and post-hearing briefs*" and the oral hearing took five days and the total costs amounted to many millions of dollars (Mr Moody's 2nd witness statement, para. 4.7, 4.8. 4.12, 4.18).

v) As is common ground, Overgas Inc is legally precluded from claiming that its natural gas trading relationship with GPE was tainted by GPE's anti-competitive conduct, in any jurisdiction in which the ICC Award is entitled to recognition and enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Nevertheless, Overgas Mrezhi and the other Principal Defendants seek to characterise the relationship between GPE and Overgas Inc in a manner which Overgas Inc itself is legally precluded from doing. The proper characterisation of that relationship between GPE and Overgas Inc must be a matter for the ICC Arbitral Tribunal as the exclusive dispute resolution tribunal chosen by the parties to the Supply Contract (relying on *Art & Antiques v Richards*).

vi) The ICC Award is entitled to recognition and enforcement, including enforcement in the same manner as a judgment or order of the court to the same effect (sect. 66(1) and 101(2) of the Arbitration Act 1996). If the Principal Defendants' statement of case was not struck out in respect of the allegation of breaches of competition law, the Court may come to a judgment which is at odds with the decision of the ICC Arbitral Tribunal and create a risk that the ICC Award would be denied recognition in this jurisdiction and perhaps elsewhere.

That would bring the administration of justice into disrepute in that it would involve an inappropriate and unjustified disregard of the public interest in the finality of earlier judgments and arbitration awards and in the upholding and giving effect to arbitral awards in accordance with the terms of the New York Convention.

vii) The Court is being simultaneously required to accept that the ICC Arbitral Tribunal conclusively ruled as between GPE and Overgas Inc that GPE did not engage in anti-competitive conduct and to reconsider the same allegations against GPE because they are made not by Overgas Inc, but by the Principal Defendants. Overgas Mrezhi's pursuit of the same allegation in the English proceedings is in the nature of a collateral attack on the decision of the ICC Arbitral Tribunal, which had been contractually chosen by GPE and Overgas Inc to rule on the conduct of the relationship between them.

viii) This is a sufficiently unusual or exceptional circumstance to amount to an abuse of the Court's process.

ix) There is an inconsistency in the position adopted by the Principal Defendants in that they have deleted reference to GPE's alleged anti-competitive conduct being in breach of the Supply Contract between GPE and Overgas Inc in paragraph 80(a)(i) of the Amended Defence, but nonetheless maintain a claim in tort in respect of the same conduct. I note, however, that paragraph 61(a) still refers to the relevant conduct being in "*breach of contract*".

x) The alleged breaches of competition law advanced by Overgas Mrezhi against GPE in the English proceedings are the same as those breaches alleged against GPE by Overgas Inc in the ICC arbitration proceedings. The case advanced by Overgas Inc in the ICC arbitration proceedings must have been known to Overgas Mrezhi because there were close relationships between the two companies given the shareholding of Overgas Inc in Overgas Mrezhi and the fact that the two companies had overlapping senior management during the ICC arbitration proceedings through at least Mr Dontchev, Mr Svetoslav Ivanov and Ms Emiliya Georgieva, the first two of whom were witnesses for Overgas Inc in the ICC arbitration proceedings, and Mr Ivanov expressly stated that he gave evidence in his capacity as Overgas Mrezhi's Executive Director (Mr Moody's second witness statement, para. 4.21-4.25, and third witness statement, para. 6.1-6.8). Further, this case received or was capable of receiving practical support and contribution in terms of documents and witness evidence, and possibly funding, from Overgas Mrezhi (Mr Moody's second witness statement, para. 4.21-4.25). In this respect, during oral submissions and during an exchange of written submissions after the hearing, GPE submitted that, on the evidence of Overgas Inc's financial statements, Overgas Inc did not fund its conduct of the ICC arbitration proceedings, but that - it is to be inferred - Overgas Mrezhi, the principal trading and revenue generating company within the Overgas/Dontchev group of companies, must have ultimately funded the conduct of the ICC arbitration proceedings.

xi) The present case represents a stronger case of abuse of process than that identified in the Court's earlier decisions in *Laing v Taylor Walton* and *Arts & Antiques v Richards*. Although in those earlier decisions the party alleged to be

guilty of the abuse of process was a party to both sets of proceedings, the present case is a stronger case because GPE is at risk of being vexed twice by the same allegations, having successfully defeated them on the merits in the ICC arbitration proceedings.

xii) If GPE had been found by the ICC Arbitral Tribunal to be guilty of breaches of competition law, Overgas Mrezhi would have sought to treat any attempt by GPE to deny that it had acted contrary to competition law as an impermissible collateral attack on the ICC Award. Accordingly, considerations of mutuality strongly suggest that it would be likewise abusive for Overgas Mrezhi to maintain these allegations inconsistently with the finding of the ICC Arbitral Tribunal.

57. Mr Calver QC, on behalf of the Principal Defendants, submitted that:

i) It is only a rare or exceptional case where such an application should be permitted. It would not be manifestly unfair to GPE to allow the allegation of breaches of competition law to be tried.

ii) There can be no abuse of process where the ICC arbitration proceedings took place between GPE and Overgas Inc and concerned issues of competition on the gas wholesale and trading market in which Overgas Inc operated, whereas the English proceedings concern the gas retail and distribution market, where the "*principal focus*" lies, in which Overgas Mrezhi operates, and Overgas Mrezhi is attempting to recover in these proceedings losses which were not and could not have been claimed in the ICC arbitration proceedings.

iii) The allegation of breaches of competition law will be supported by witness and documentary evidence different from that adduced in the ICC arbitration proceedings. There was very limited documentary disclosure in the ICC arbitration proceedings, as the disclosure obligations of the parties were circumscribed by the specific requests made by each party, many of which did not translate into actual disclosure, as opposed to general disclosure of documents adverse to the parties' cases (Model D Extended Disclosure as has been ordered in the English proceedings). Further, it was submitted that:

a) In the ICC arbitration proceedings, Overgas Inc initially requested 64 categories of documents from GPE and then applied to the ICC Arbitral Tribunal for disclosure of 53 categories of documents, of which the ICC Arbitral Tribunal ordered disclosure of 10 categories of documents, thereby omitting disclosure of plainly material and relevant documents relating to the 2006 Memorandum, the price of gas supplied to Overgas Inc from 2013 to 2015 and the decision to cease supplies from 1st January 2016. In the event, GPE eventually produced only 128 "*contested documents*", only a handful of which were material to the alleged breaches of competition law (Mr Benjamin Holland's fifth witness statement, para. 48).

b) GPE has already disclosed to the Defendants in the English proceedings documents which were not available to Overgas Inc in the ICC arbitration proceedings, including the 2012 Bulgargaz Contract, GPE's

response to the European Commission's request for further information, and 77 documents exhibited to that response (Mr Holland's fifth witness statement, para. 49).

c) Overgas Mrezhi was not involved in the selection by Overgas Inc of documents it produced in the ICC arbitration proceedings, but did provide Overgas Inc with particular documents if specifically requested (Mr Holland's fifth witness statement, para. 52(c)).

d) It is clear from a number of findings made by the ICC Arbitral Tribunal that those findings were based on the documentary materials available in those proceedings and in a number of instances the ICC Arbitral Tribunal indicated that it could not make a finding in the absence of relevant materials.

e) The EU Damages Directive 2014/104/EU states in recitals (14) and (15) that a claimant who asserts a claim for damages for infringements of EU or national competition law often will not have access to the documents held by the defendant needed to articulate its claim fully and contemplates that disclosure will be ordered by the Court in a Member State without any requirement that the claimant will have to specify individual items of documentation.

iv) The Court should be slow to find an abuse of process where the earlier decision is an arbitral award in an arbitration to which the Principal Defendants were not parties. The ICC arbitration proceedings were between Overgas Inc and GPE and in those proceedings Overgas Inc did not make any claims on behalf of Overgas Mrezhi, the losses alleged in both sets of proceedings are distinct, and none of the Principal Defendants were invited to join those proceedings. None of the Principal Defendants would have the benefit of the ICC Award.

v) There is no principle that it is an abuse of process for third parties to contend that an arbitration award between contracting parties as to their contract is wrong. This is especially so where the Principal Defendants and Overgas Inc have divergent interests. There is no identity of interest between Overgas Inc on the one hand and Overgas Holding and its owners on the other hand. Overgas Inc was and is a joint venture in which GPE/Gazprom PJSC and Overgas Holding each have a 50% interest. Further, at the time of the ICC Award and during most of the ICC arbitration proceedings, Overgas Inc's interest in Overgas Mrezhi had been reduced from 99.628% to 38.471%.

vi) The Court should not find an abuse of process to exist in circumstances where, had the decision of the ICC Arbitral Tribunal been that there had been anti-competitive conduct on the part of GPE, such a decision would not have been binding on GPE.

vii) The Court should be slower to conclude that a party is guilty of an abuse of process where the relevant allegation is raised by way of defence and that party has "*initiated nothing*" (*Conlon v Simms*, para. 146).

viii) In any event, the limited assistance provided by Overgas Mrezhi to Overgas Inc in the ICC arbitration proceedings was insufficient to render the allegation in the English proceedings an abuse of process. The fact that Mr Dontchev gave evidence in the ICC arbitration proceedings and that Overgas Mrezhi provided documents to Overgas Inc when requested to do so does not of itself render the allegations of breaches of competition law abusive. Further, Overgas Inc did not report on the progress of the ICC arbitration proceedings to Overgas Mrezhi's board or other shareholders (Mr Holland's fifth witness statement, para. 37). Overgas Mrezhi did not pay the costs of the ICC arbitration proceedings; Overgas Inc paid for the ICC arbitration proceedings with its own funds (Mr Holland's fifth witness statement, para. 52(b)(i)). As further submitted during oral submissions and in the post-hearing exchange of written submissions, this is supported by a correct reading of Overgas Inc's financial statements and by a letter dated 12th December 2019 signed by Ms Izabela Dzhalazova of ISA Audit Ltd, the registered auditor of Overgas Inc for the years ended 31st December 2016, 2017 and 2018; certainly, it is said, there is nothing to gainsay Mr Holland's witness statement.

ix) The fact that the Swiss Federal Appeal Tribunal upheld the decision of the ICC Arbitral Tribunal is irrelevant, because none of the Principal Defendants had a right of appeal or were parties to the said proceedings. Further, there was no possibility of the Swiss Federal Tribunal reversing the ICC Award on its substance having regard to a violation of the EU or EEA competition rules (Commission Decision of 8th December 2017, Case AT.40208 - International Skating Union's Eligibility rules, C(2017) 8240 final ("the ISU Decision"), recital (5)).

x) The EU law principle of effectiveness in respect of EU competition law requires that it should be "open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition" (*Courage Ltd v Crehan* (Case C-453/99) [2002] QB 507, para. 26 (CJEU); *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04) [2006] ECR I-6619, para. 60-61 (CJEU); EU Damages Directive 2014/104/EU, art. 12). It is a matter for national courts of Member States which can make references to the CJEU for preliminary rulings to determine the compatibility of arbitration awards with EU competition law (*Genentech Inc v Hoechst GmbH* (C-567/14) [2016] 5 CMLR 9, para. AG55-AG72 (AG Wathelet)). Arbitral tribunals cannot make references to the CJEU and the Swiss Court has held that EU competition law does not form part of Swiss public policy (the ISU Decision, recitals (271)-(283)) (although, as Mr Choo-Choy QC said, there is no evidence of Swiss law before the Court). If Overgas Mrezhi was deprived of the right to bring its counterclaim for breaches of competition law by reason of the ICC Award delivered in proceedings to which it was not a party, that would fall foul of the principle of effectiveness. This consequence is not limited to Overgas Mrezhi and the other Principal Defendants, but extends to any person who has suffered loss by reason of the alleged breaches of competition law in Bulgaria.

xi) Nothing in the New York Convention renders an arbitral award binding on parties who were not parties to the relevant arbitration proceedings. In any event, the Court may refuse to recognise an arbitral award "*if it would be contrary to*

public policy to recognise or enforce the award" (sect. 103(3) of the Arbitration Act 1996). Where the recognition or enforcement of an arbitration award under the New York Convention would condone anti-competitive conduct contrary to EU law, that may well constitute a ground for refusing the award recognition or enforcement for being contrary to public policy (*Eco Swiss China Time Ltd v Benetton International NV* (C126/97) [2000] 5 CMLR 816, para. 39).

xii) The allegations of breaches of competition law are relevant to issues of causation.

xiii) It would be unfair to the Principal Defendants if they were precluded from advancing the allegations of breaches of competition law in the English proceedings.

xiv) The decisions in *Laing v Taylor Walton* and *Arts & Antiques v Richards* are distinguishable, because in both of those cases, the claimants in both sets of proceedings were seeking to revive claims which had been dismissed in the earlier proceedings; in the present case, GPE was defending Overgas Inc's claim in the ICC arbitration proceedings and is defending Overgas Mrezhi's counterclaim in the English proceedings. There is nothing inherently abusive about the claimant in those cases maintaining a defence, rather than a claim, in subsequent proceedings.

Decision

58. The starting point in determining whether the Principal Defendants are abusing the process of the Court is the following considerations:

i) As I have found above, the allegations of breaches of competition law made in the ICC arbitration proceedings and the English proceedings are essentially the same. However, the losses claimed by Overgas Inc in the ICC arbitration proceedings and being claimed by Overgas Mrezhi in the English proceedings are distinct.

ii) The parties advancing the allegation of breaches of competition law in the ICC arbitration proceedings and in the English proceedings are not the same.

iii) There is no privity between Overgas Inc on the one hand and the principal Defendants on the other hand. Accordingly, there is no question of estoppel *per rem judicatam* (*res judicata*) or issue estoppel applying in this case.

iv) The person answering the allegation of breaches of competition law - GPE - was a party to the ICC arbitration proceedings and is the claimant in the English proceedings.

59. In order for the Court to find an abuse of process, it must undertake a broad, merits-based assessment with a view to determining whether allowing the allegation to be maintained (a) would be manifestly unfair to GPE in having the same issues re-litigated in the sense that GPE is required to be vexed twice with the same allegation or (b) would bring the administration of justice into disrepute and thereby engage the public interest of the state in not having issues repeatedly litigated.

60. I unhesitatingly come to the conclusion that permitting the Principal Defendants to maintain the allegation that GPE's conduct was in breach of EU and Bulgarian competition law in the English proceedings is not an abuse of the Court's process. My reasons are as follows.

61. First, Overgas Mrezhi is, in the first instance, entitled to present its claim for damages in respect of losses resulting from GPE's alleged conduct, which losses are distinct from those claimed by Overgas Inc, in the ICC arbitration proceedings. There is no reason that I can discern which should undermine that fundamental entitlement. The striking out of Overgas Mrezhi's counterclaim would operate as an obvious unfairness to Overgas Mrezhi. The same is true of any order which would restrict the ability of the Principal Defendants to defend the claim made against them by GPE by reason of a lack of causation referable to GPE's alleged anti-competitive conduct.

62. Second, although the essential facts underlying the allegations of breaches of competition law are the same, Overgas Mrezhi should be entitled to pursue its claim for damages in respect of its own distinct loss resulting from such alleged breaches irrespective of any determination of Overgas Inc's claim.

63. Third, Overgas Mrezhi did not have a full or reasonable opportunity to present its claim for damages in respect of losses resulting from GPE's alleged conduct in the ICC arbitration proceedings. In addition, the other Principal Defendants did not have a full or reasonable opportunity to participate in the ICC arbitration proceedings to put their case. The lack of such opportunity was the direct result of the fact that the ICC arbitration proceedings were necessarily limited to the parties to the arbitration agreement - GPE and Overgas Inc - and represented a private forum for dispute resolution between those parties.

64. Although Overgas Mrezhi may have provided some assistance to Overgas Inc, in the form of documents and/or evidence, in the latter's conduct of the ICC arbitration proceedings, that by itself is not sufficient to constitute an adequate opportunity for Overgas Mrezhi to participate in the ICC arbitration proceedings to present its claim for its own loss.

65. Fourth, whether GPE's conduct amounted to breaches of competition law insofar as it affected Overgas Inc is a matter between GPE and Overgas Inc and was a matter to be determined in arbitration, as between them, pursuant to the arbitration agreement. The same cannot be said about the impact of any such conduct on the other parties, in particular Overgas Mrezhi. Any claim by Overgas Mrezhi could not have been referred to the ICC Arbitration Tribunal in the absence of a pre-existing or *ad hoc* arbitration agreement. In those circumstances, I do not see how any decision of the ICC Arbitral Tribunal could be permitted to impose any restriction on the counterclaim or allegation being advanced by the Principal Defendants in the English proceedings.

66. Fifth, numerous cases may arise where proceedings determined between two parties, A and B, may result in a particular finding, and then later proceedings between B and C may give rise to the same issue, for example because B claims damages, an indemnity or a contribution from C as a result of the earlier finding. In those circumstances, there is no reason why C should be prevented from questioning whether the earlier finding made by a court or arbitral tribunal may have been wrongly decided, either because of a misinterpretation of the facts or the law or because B may not have presented a

particular argument or because the evidence adduced in the earlier proceedings was different from that which is available subsequently. To take a more specific example, if A and B both claim that C has been guilty of wrongful conduct (say, in tort) and that such conduct caused each of A and B loss, if an earlier tribunal or court dealing with A's claim held that C was not in fact guilty of such wrongful conduct, I do not see why B should not subsequently be entitled to claim damages from C alleging the same wrongful conduct. Accordingly, there must be some special reason or factor rendering such later proceedings an abuse of the Court's process. As I conclude below, there is no such special reason or factor in this case.

67. Sixth, the above considerations apply with particular force to claims relating to breaches of competition law. To deny Overgas Mrezhi the opportunity to pursue its own claim for breaches of EU competition law would be to deny it any effective means of having its claim for damages caused by GPE's alleged anti-competitive conduct determined merely because a separate claim made by Overgas Inc has been determined in GPE's favour by the ICC Arbitral Tribunal (*Courage Ltd v Crehan* (Case C-453/99) [2002] QB 507, para. 26 (CJEU); *Manfredi v Lloyd Adriatico Assicurazioni SpA* (C-295/04) [2006] ECR I-6619, para. 60-61 (CJEU)). Such a denial would be contrary to the principle of effectiveness. By art. 12 of the EU Damages Directive 2014/104/EU, it is provided that:

> "To ensure the full effectiveness of the right to full compensation as laid down in Article 3, Member States shall ensure that, in accordance with the rules laid down in this Chapter, compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer, and that compensation of harm exceeding that caused by the infringement of competition law to the claimant, as well as the absence of liability of the infringer, are avoided."

68. This approach is consistent with the approach adopted by the CJEU in refusing arbitral awards recognition or enforcement under the New York Convention on the grounds of public policy where a breach of EU competition law is alleged, by requiring the national court of a Member State to determine whether there has been any breach of EU competition law (*Eco Swiss China Time Ltd v Benetton International NV* (C126/97) [2000] 5 CMLR 816, para. 31-39).

69. This brings me to an additional point which was the subject of some oral argument, as well as being addressed in the parties' written skeleton arguments, namely the recognition due to be given to the ICC Award under sect. 101 of the Arbitration Act 1996 and the New York Convention. Both parties appeared to accept that the recognition which is to be given to an arbitration award under the Arbitration Act 1996 is limited in its binding effect to the parties to that award. Accordingly, I do not understand how that could affect the freedom of the Principal Defendants to pursue their allegations of breaches of competition law. I think Mr Choo-Choy QC's point was that if the Court were to allow the Principal Defendants to argue that GPE conducted itself *vis a vis* Overgas Inc in an anti-competitive manner and if the Court were to make a finding to that effect, that would give rise to an inconsistency between the Court's judgment and the ICC Award with the possible effect that the ICC Award would be denied recognition or enforcement. It is in this respect that the public interest would be

engaged. Whether the ICC Award should or should not be denied recognition or enforcement is a matter to be considered upon a relevant application being made. In any event, this is not a consideration which causes me to change my decision on GPE's application.

70. Seventh, the interests of Overgas Inc on the one hand and the Principal Defendants on the other hand have not been established by GPE to be sufficiently close to undermine the reasoning I have adopted in coming to my conclusion. In particular, Overgas Inc is owned 50/50 by GPE/Gazprom PJSC on the one hand and Overgas Holding on the other hand. In this respect, I have well in mind the fact that there were common directors between Overgas Inc and Overgas Mrezhi and, further, that Overgas Inc had a majority shareholding in Overgas Mrezhi until April 2016, when its shareholding was substantially reduced. The reduction of Overgas Inc's shareholding in Overgas Mrezhi is the subject of GPE's complaint in these proceedings. However, there is no reason to conclude that these considerations render the Principal Defendants' allegation of breaches of competition law an abuse of process on this ground. Moreover, there is no evidence which I have seen where I can safely conclude in an interlocutory hearing such as this that Overgas Mrezhi funded Overgas Inc's conduct of the ICC arbitration proceeding.

71. Eighth, I am aware of no authority which stands in the way of the decision to which I have come. In fact, I consider that the authorities referred to above support my conclusion (in particular, *In re Norris*, *Conlon v Simms* and *Ablyazov*), given that in each of those cases the person alleged to be guilty of an abuse of process had not been a party to the earlier proceedings and therefore did not have the opportunity to advance and prove its allegation in the earlier proceedings. The decisions in *Laing v Taylor Walton* and *Art & Antiques v Richards* gave me some pause. In any case, those decisions are distinguishable from the present case in that in each of those decisions, the Court held that it was an abuse of process for a contracting party in proceedings against a third party to the contract (a solicitor who advised in relation to the contract or an insurance broker who negotiated the contract) to present a case as to the contract's meaning or content, which was at odds with an earlier decision as to the contents of a contract in proceedings between the two contracting parties. These decisions might be justified having regard to the facts that (a) the person presenting the abusive allegation in each case was the same in each of the earlier and later proceedings, and (b) the defendant in the later proceedings was responsible in some manner, whether by reason of legal advice or contractual negotiation, for the contents of those contracts. In any case, I do not consider that those decisions compel me to come to a different decision on GPE's application.

72. Ninth, it is apparent from the ICC Award that there was an absence of documentary or evidential material in some respects in the ICC arbitration proceedings. The explanation provided by the Principal Defendants concerned the limited availability of certain documentation. Insofar as there is additional documentation and/or evidence available in the English proceedings which is relevant and was not available in the ICC arbitration proceedings - and I did not understand GPE to contest this - that reinforces my decision on the lack of any abuse of process. In this context, the fact that the ICC arbitration disclosure model is request-led and in the current proceedings the Court has adopted Extended Disclosure Model D, which is not request-led, is a material consideration. This is especially so, bearing in mind that the EU Damages Directive 2014/104/EU

states in recitals (14) and (15) that a claimant who asserts a claim for damages for infringements of EU or national competition law often will not have access to the documents held by the defendant needed to articulate its claim fully and contemplates that disclosure will be ordered by the Court in a Member State without any requirement that the claimant will have to specify individual items of documentation (see also *Cooper Tire & Rubber Co Europe v Bayer Public Co* [2010] EWCA Civ 864, at para. 43). Thus, the recitals state that:

> "(14) Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.
>
> (15) Evidence is an important element for bringing actions for damages for infringement of Union or national competition law. However, as competition law litigation is characterised by an information asymmetry, it is appropriate to ensure that claimants are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence. In order to ensure equality of arms, those means should also be available to defendants in actions for damages, so that they can request the disclosure of evidence by those claimants. National courts should also be able to order that evidence be disclosed by third parties …"

73. That said, I am not in a position to assess the probative value of any additional documents or evidence which have or might become available in the English proceedings which were not available in the ICC arbitration proceedings. Accordingly, to be clear, I would have come to the same decision on the application even if I had ignored this consideration.

74. Tenth, it was suggested by GPE that if the ICC Arbitral Tribunal had come to an opposite conclusion, GPE would have been bound by that decision and could not now assert otherwise in the English proceedings. However, I do not necessarily accept that premise. If it is permissible for the Principal Defendants to advance allegations of breaches of competition law against GPE, I do not see why GPE could not have advanced the contrary case in the English proceedings had the ICC Arbitral Tribunal found that it had acted in breach of competition law in the ICC arbitration proceedings (see *e.g. Conlon v Simms*).

75. Eleventh, I have seen no evidence to indicate that Overgas Mrezhi and the other Principal Defendants do not have the genuine purpose of advancing their counterclaim or defence by reason of the alleged breaches of competition law. There is no evidence

to suggest that the Principal Defendants are engaged in a collateral attack on the ICC Arbitral Tribunal's decision.

76. Twelfth, stepping back and looking at the facts in the round, in my judgment, in permitting the Principal Defendants to pursue the allegations of breaches of competition law against GPE, there is no manifest unfairness to GPE and this does not bring the administration of justice into disrepute by allowing the Court's process to be used as an instrument of oppression, injustice or unfairness. Indeed, the contrary conclusion would have caused manifest unfairness to the Principal Defendants. This is not one of those rare or exceptional cases where an abuse of process may be found to exist.

77. For these reasons, I dismiss GPE's application to strike out the Principal Defendants' statement of case insofar as it advances allegations of breaches of competition law against GPE.

78. I am grateful to both counsel for their very helpful and skilfully developed submissions.