Neutral Citation Number: [2021] EWHC 2949 (Comm)

Case No: CL-2018-000704

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane, London EC4A 1NL

Date: 04/11/2021

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

MINISTER OF FINANCE (INCORPORATED) **1 MALAYSIA DEVELOPMENT BERHAD**	**Claimants**
- and -	
INTERNATIONAL PETROLEUM INVESTMENT COMPANY **AABAR INVESTMENTS PJS**	**Defendants**

- -

Toby Landau QC and Peter Webster (instructed by **Eversheds Sutherland (International) LLP**) for the **Claimants**
Laurence Rabinowitz QC, Craig Morrison and Nathaniel Bird (instructed by **Clifford Chance LLP**) for the **Defendants**

Hearing dates: 9, 10, 11 June 2021

- -

Approved Judgment

This is a reserved judgment to which CPR PD 40E has applied.
Copies of this version as handed down may be treated as authentic.

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 09.30 am on 4 November 2021.

.....

MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker :

Introduction

1. This unusual arbitration claim seeks to challenge under s.67 or s.68 of the Arbitration Act 1996 ('the Act') a Consent Award dated 9 May 2017 by which an LCIA arbitration between the parties, LCIA Ref. 163357 ('Arbitration 1'), was concluded. It came before Robin Knowles J in March 2019, to consider:

   (a) an application by the defendants ('IPIC' and 'Aabar') for the claim to be stayed under s.9 of the Act, alternatively as a matter of case management, pending a further LCIA arbitration between the parties, LCIA Ref. 184124 ('Arbitration 2' – there were in fact two references, under the Settlement Deed and Supplemental Settlement Deed to which I refer below, but they were consolidated so I shall use the singular),

   (b) an application by the claimants ('MOFI' and '1MDB') to restrain IPIC and Aabar by injunction from pursuing Arbitration 2 pending this claim, and

   (c) the question whether time should be extended for the bringing of this claim, which was brought on 30 October 2018 whereas s.70(3) of the Act required it to be brought within 28 days of the date of the Consent Award, i.e. on or before 6 June 2017, subject to the power of the court to extend time provided by s.80(5) of the Act.

2. In relation to extending time, the defendants applied to strike the claim out for failure to make an application to extend time in their Claim Form. Robin Knowles J dismissed that application at the hearing in March 2019, essentially on the basis that although the extension of time application should have been made explicitly within the Claim Form, it was clear enough from the witness statement served in support and referred to compendiously in the Claim Form as setting out the basis of the claim that the claimants accepted that they were out of time and sought the necessary extension. Substantive consideration of the extension of time application was adjourned, with a direction for it to be heard separately but on the basis that it would remain open to the court to decide after full argument that whether to extend time should be put off again so as eventually to be decided only at a 'rolled-up' final hearing of the claim.

3. On the cross-applications for a stay and an injunction, Robin Knowles J handed down a judgment on 8 May 2019 on the basis of which he granted the stay sought by the defendants, on case management grounds, dismissing their reliance on s.9 of the Act, and dismissed the application for an injunction: [2019] EWHC 1151 (Comm). On 26 November 2019, the Court of Appeal allowed an appeal by the claimants, discharging the stay and granting an injunction: [2019] EWCA Civ 2080. While this Claim was stayed and the pursuit of Arbitration 2 was not restrained by injunction, Arbitration 2 progressed as far as service by the defendants (as arbitration claimants), in October 2019, of a reply and defence to counterclaim.

4. The hearing of the extension of time application was listed for the end of June 2020, but was adjourned twice by consent because of settlement discussions between the parties. It finally came on before me on 9, 10 and 11 June 2021.

5. There were also before me:

   (a) an application by the defendants to strike out the s.67 claim, on an argument that the matters alleged by the claimants did not affect the substantive jurisdiction of the arbitrators in Arbitration 1 so as to give rise to any claim under s.67, and

   (b) a responsive cross-application by the claimants for permission to amend the Arbitration Claim Form so as to assert that the matters they had alleged as giving rise to a s.67 challenge amounted, if they did not go to substantive jurisdiction, to a serious irregularity affecting the Consent Award within s.68(2)(b) of the Act (arbitrators exceeding their powers otherwise than by exceeding their substantive jurisdiction).

6. The defendants' strike-out application was unnecessary, because if the s.67 claim were apt to be struck out it would not be right to extend time for it to be pursued. Having heard Mr Landau QC's opening, I concluded that the s.67 claim could not succeed, on a basis that meant that a claim under s.68(2)(b) also could not succeed. I therefore indicated that I would not extend time for the s.67 claim or grant permission to amend, and that Mr Rabinowitz QC need deal only with the question whether time should be extended for the existing s.68 claim, which is put under s.68(2)(g) (award obtained by fraud or in a way that is contrary to public policy).

7. This judgment deals primarily with whether time should be extended for the claim under s.68(2)(g), and determines that issue. I do not regard it as necessary or appropriate to defer that determination to a 'rolled-up' hearing, although that possibility was previously left open as I mentioned above. This judgment also sets out my reasons for the conclusion I reached concerning the claim under s.67 and/or s.68(2)(b). Except in that section of the judgment, where I refer to the claim brought herein it is to the claim under s.68(2)(g).

The Claim

8. In *Orascom TMT Investments SARL v VEON Ltd* [2018] EWHC 985 (Comm), at [2]-[5], I was critical of the common practice in s.68 claims of setting out in the Claim Form bare and excessively brief, that is to say inadequate, particulars, with a compendious reference to a witness statement in which supposedly to find the nature and basis of the claim to be advanced. That bad practice was followed here.

9. At my encouragement, fuller particulars of the intended claim were prepared during the hearing. They were only ready just as Mr Rabinowitz QC was completing his submissions, but Mr Rabinowitz QC did not object to my considering them if he had an opportunity to comment on them in writing after the hearing. I therefore received the further particularisation of the claim immediately after the hearing, written submissions from Mr Rabinowitz QC dated 21 June 2021, and a written reply from Mr Landau QC dated 23 June 2021.

10. As pleaded in the Claim Form, the claim under s.68(2)(g) is that:

    (a) the Consent Award "*formed part of an attempt by Mr Najib and others to conceal earlier fraudulent activity, contrary to the interests of [MOFI] (and contrary to the interests of the Malaysian people). Moreover, the Defendants*

knew that Mr Najib was acting in this way." Mr Najib is Dato' Sri Haji Mohammad Najib bin Tun Haji Abdul Razak, the former Prime Minister and Minister of Finance of Malaysia, whose alleged involvement in what is said to have been kleptocracy on a massive scale is the background to this claim; and

(b) that irregularity caused serious injustice "*to the Claimants (and, as a consequence, to the Malaysian people) because it led to an award comprising grossly disadvantageous terms on behalf of the Claimants and provisions requiring payment of substantial sums to the Defendants, which are not justified by the merits of the claim [i.e. the claim that was before the Arbitration 1 arbitrators] and would not have been awarded had the matter fairly been determined on its merits.*"

11. The notion of injustice through a consent award creating a result that would not have been awarded had the matter been determined fairly on the merits seems to me, provisionally, to create real difficulties. The Consent Award, needless to say, reflected and gave effect to a settlement, in fact a settlement pursuant to a Settlement Deed and Supplemental Settlement Deed (together, 'the Deeds') executed by all four parties. It is commonplace and may often be of the essence of a settlement that it will not or may not match what it might be shown (if capable of proof) would have been the result if the arbitration had not been settled; and there is an obvious discomfort if a s.68 challenge, the outcome of which if successful would be a continuation of the subject arbitration from where it had reached just prior to the settlement, depended on proof before the court of what the outcome of that arbitration would have been in the absence of the settlement.

12. Giving the two propositions pleaded a fair reading, in the context that they are meant to encapsulate a challenge to the Consent Award under s.68(2)(g), the gist of the claimants' claim is that the settlement given effect by the Consent Award was concluded, on the claimants' side, by or at the behest of Mr Najib, to the knowledge of the defendants acting contrary to the claimants' interests by agreeing grossly disadvantageous settlement terms outside any range of terms that an honest individual acting in the claimants' interests might have considered agreeing, in an attempt to conceal earlier fraudulent activity.

13. As even that very preliminary analysis suggests, there is not in this case an attack on the Consent Award, or the process by which it was procured, separate from or independent of the claimants' real complaint, which concerns the Deeds. I was not asked to say that the claim under s.68 is incompetent for that reason. Mr Rabinowitz QC made clear that, for the present purpose of the claimants' extension of time application, the defendants did not contend that a claim as just summarised, if it could be made out, was incapable of giving rise to the setting aside of a consent award pursuant to s.68(2)(g).

14. It seems to me that was a sensible concession. The parties having agreed in the Deeds that the settlement terms should be given effect by a consent award, they subjected to scrutiny under s.68 the process by which that award was obtained, and it must be arguable that that means in substance, or at all events includes, the process by which the Deeds were concluded. I also think, provisionally, that there is support for such an argument in the basis on which the Court of Appeal decided that Robin Knowles J erred

in approach when considering whether this claim ought to be stayed pending Arbitration 2.

15. My reading of the essence of the claim is confirmed by how it was pleaded in paragraph 12 of the witness statement served with the Claim Form (passing over the fact that any such pleading should have been in the Claim Form). That is the first statement (there are now nine in all) of Mr Richard Little, the partner at the claimants' solicitors with conduct of this claim, dated 30 October 2018 ('Little 1'). There, Mr Little alleges:

    (a) that the Consent Award "*formed part of an attempt by Mr Najib to cover up his and his fellow conspirators' fraud (including senior officers of IPIC and Aabar …), contrary to the interests of MOFI, 1MDB and the Malaysian people, in whose interests he was constitutionally bound to act*",

    (b) that IPIC and Aabar "*knew that [Mr Najib] was acting in this way and were complicit in his fraud: their agents colluded with him in the original fraud, and then both IPIC and Aabar … colluded with him again in seeking to cover up the fraud by means of the Award and other agreements*", and

    (c) that "*this was a continuation of the fraud and … the way in which the Award was procured was clearly contrary to public policy. In addition, the settlement agreements upon which the Consent Award is based are void and would, if they were not void, be unenforceable on grounds of illegality.*"

16. The post-hearing particularisation (see paragraph 9 above) is set out in an Appendix to this judgment. On any view, it includes, more fully particularised, the claim articulated in paragraphs 12 and 15 above.

The 1MDB Affair

17. Mr Najib became Prime Minister of Malaysia on 3 April 2009. He left office because he lost a general election on 9 May 2018. It was common ground that no challenge to the Consent Award on the grounds now put forward would ever have been contemplated while Mr Najib was in power, and that the claimants should not be shut out from pursuing those grounds because no challenge was brought until after the May 2018 general election, notwithstanding that the claimants were by then already 11 months out of time.

18. The 1MDB affair, involving (as alleged) the dishonest siphoning off of over US$6 billion from 1MDB for the personal benefit of various individuals including Mr Najib and his stepson, Riza Shahriz bin Abdul Aziz ('Mr Aziz'), has been a huge scandal in Malaysia. In this judgment, when I refer to the apparent facts concerning the 1MDB affair I shall in general refer to round figures even where more precise figures are in evidence. To a substantial and remarkable degree of depth and detail, the 1MDB affair has been in the public domain worldwide since 2015, thanks *inter alia* to the efforts of the *Wall Street Journal* in breaking and covering the story and to a series of highly publicised civil enforcement actions brought by the US Department of Justice ('the DoJ'), claiming to freeze or seize assets said to have been acquired in the US using the proceeds of funds diverted from 1MDB. The court filings by which those actions were commenced have been referred to as the 'DoJ Complaints', the most significant of which (because of its very full account of the various stages of the underlying fraud, as

alleged) was filed in June 2017 ('the 2017 DoJ Complaint'). The existence of the affair, and Mr Najib's involvement, as alleged, was the major issue in the 2018 general election and is widely regarded as the reason why he lost.

19. This is not the occasion for a full account or analysis of the 1MDB affair, let alone for considering what, if any, liabilities the defendants might have to the claimants arising out of it. It was common ground before me that there is a compelling *prima facie* case that 1MDB suffered dishonest misappropriation of funds on a massive scale, and that Mr Najib was personally involved, acting to enrich himself and Mr Aziz (and, it may be, others), contrary to the interests and at the expense of the claimants, and at the potential expense of the defendants. It was the claimants' case that there is also good *prima facie* evidence that others involved included or may have included:

    (a) Low Taek Jho, also known as Jho Low ('Mr Low'), a friend of Mr Aziz;

    (b) Amhari Effendi bin Nazaruddin ('Mr Amhari'), a close aide to Mr Najib and "Special Officer to the Prime Minister" at material times;

    (c) Khadem Abdulla Al Qubaisi ('Mr Qubaisi'), at material times the Managing Director of IPIC; and

    (d) Mohamed Ahmed Badawy Al-Husseiny ('Mr Husseiny'), at material times the CEO of Aabar.

20. It is necessary nonetheless to identify in some detail the main stages of the alleged misappropriation of funds from 1MDB, and the transactions and corporate entities principally involved. They set the scene for a Binding Term Sheet ('the BTS') entered into between the parties now before the court dated 28 May 2015, with an associated side letter. The BTS in turn sets the scene for the Deeds and the Consent Award because Arbitration 1 was commenced by the defendants to pursue claims arising out of the BTS, and the Deeds and Consent Award operated to settle Arbitration 1.

21. In the rest of this part of this judgment, to avoid repetition, it should be understood that I am setting out facts as alleged by the claimants in respect of which the defendants either accept that there is a clear *prima facie* case or have not sought to challenge the claimants' case for the purposes of the present application; I am not making or intending to make final findings of fact at this stage.

22. I start with the parties before me:

    (a) MOFI is a corporation sole created by the Malaysian Minister of Finance (Incorporation) Act 1957. By that Act, the Malaysian Minister of Finance (*viz.* Mr Najib at all material times until May 2018) was deemed to be a body corporate empowered to hold property on behalf of the Malaysian state.

    (b) 1MDB is a strategic investment and development company wholly owned by MOFI, effectively therefore a sovereign investment fund of Malaysia.

    (c) IPIC is an investment company indirectly owned by the Government of Abu Dhabi, UAE, effectively a sovereign investment corporation of Abu Dhabi.

    (d) Aabar is a wholly owned subsidiary of IPIC.

23. Next comes Aabar Investments PJS Limited, a company incorporated in the BVI ('Aabar BVI'). Aabar BVI was incorporated by Messrs Qubaisi and Husseiny so as purportedly to be a subsidiary wholly owned by Aabar, but the defendants say that it was nothing to do with them. It was, they say, a creature conceived and controlled by the individuals behind the 1MDB fraud, incorporated for use by them, and in fact used by them, as an instrument for the taking of funds from 1MDB. The figure of US$6 billion in paragraph 18 above for the total amount that may allegedly have been extracted dishonestly from 1MDB comprises:

    (a) US$1 billion said to have been diverted from 1MDB in 2009 (US$700 million) and 2011 (US$330 million) via Good Star Limited ('Good Star'), a Seychelles company beneficially owned by Mr Low, US$20 million of which found its way to an account held by Mr Najib at AM Bank.

    (b) US$1.59 billion said to have been diverted via Tan Kim Loong, "Eric" Tan ('Mr Tan'), as summarised below, Mr Tan being an associate of Mr Low's thought to have acted from time to time as his proxy.

    (c) US$3.5 billion in aggregate said to have been diverted in various different ways, as summarised below, via Aabar BVI and/or a company of the same name incorporated in the Seychelles ('Aabar Seychelles').

24. It is not suggested that IPIC or Aabar, or anyone acting or purporting to act on their behalf, had any involvement in any initial diversion of funds via Good Star or the receipt or distribution of the proceeds. Nor (I think) is it suggested that IPIC or Aabar or anyone acting or purporting to act on their behalf was involved in the diversion of funds via Mr Tan referred to in paragraph 23(b) above, although it is said that it would or should have been apparent to the defendants that funds had been diverted on a massive scale at that stage because the US$1.59 billion in question ought to have been identified as absent from an intended US$3 billion capitalisation by 1MDB of a 50:50 joint venture with Aabar.

25. As regards the US$3.5 billion said to have been diverted via Aabar BVI / Seychelles, Messrs Qubaisi and Husseiny were intimately involved, giving rise to the question whether IPIC and/or Aabar had or have any liability to 1MDB in relation to it, one aspect of which may be whether other individuals at IPIC or Aabar had knowledge of what was happening or had happened, and if so when. The essential, dishonest method employed was the raising of debt funding by 1MDB a substantial proportion of which was diverted via Aabar BVI / Seychelles rather than being used by or for the benefit of 1MDB. There were three phases. In other descriptions of the 1MDB affair, different numberings have been used, e.g. the Good Star misappropriation has been described as a first phase. My focus is on the aspects that involved IPIC and Aabar, and my numbering is on that basis.

<u>First Phase – Energy and Langat Notes</u>

26. In May 2012, two subsidiaries of 1MDB, 1MDB Energy Limited ('Energy') and 1MDB Energy (Langat) Ltd ('Langat') each issued US$1.75 billion in loan notes redeemable in 2022 ('the Energy Notes' and 'the Langat Notes'), to fund the purchase of energy assets: the purchase by Energy of the assets of Tanjong Energy; the purchase by Langat of assets from Mastika Lagenda Sdn Bhd. 1MDB and IPIC both guaranteed the

respective issuer's obligations under the Notes. As between 1MDB and IPIC, by a related co-guarantors' agreement, 1MDB was liable in full for the performance of the Notes and stood liable to indemnify IPIC if its guarantee of the Notes was called upon.

27. The offering circulars for the Energy and Langat Notes anticipated that, if fully subscribed, after deducting fees, commissions and expenses, the Energy Notes would raise c.US$745 million in excess of the funds required for the purchase of assets from Tanjong and the Langat Notes would raise c.US$945 million in excess of the funds required for the purchase of assets from Mastika. Around 80% of that US$1.69 billion 'headroom' in the Note issues, namely c.US$1.365 billion, was diverted to Aabar BVI.

28. By an option agreement between Energy and Aabar, Aabar was granted an option to purchase 49% of Energy's shares in the subsidiary used to acquire the Tanjong assets. But also:

    (a) a materially identical option agreement was purportedly entered into between Energy and Aabar BVI, acting by Mr Husseiny,

    (b) a further contract was purportedly entered into between Aabar BVI, acting by Mr Husseiny, and Energy, for Energy to pay Aabar BVI a "*credit enhancement and underwriting contribution*" of c.US$575 million as the supposed price for IPIC having provided its guarantee of the Energy Notes, repayable if certain conditions for a proposed IPO of the Tanjong assets were met, and

    (c) c.US$575 million of the proceeds of the Energy Notes indeed went to Aabar BVI.

29. By an option agreement between Langat and Aabar, Aabar was granted an option to purchase 49% of Langat's shares in the subsidiary that was to acquire the Mastika assets. But also:

    (a) Aabar BVI, acting by Mr Husseiny, purportedly contracted with 1MDB Energy Holdings Ltd ('Holdings'), a subsidiary of 1MDB that was to become the direct parent of Energy and Langat within the 1MDB group, that it would procure Langat to grant Aabar BVI a materially identical option,

    (b) within that (purported) contract Holdings undertook to pay Aabar BVI a "*credit enhancement and underwriting contribution*" for IPIC's having guaranteed the Langat Notes, of c.US$790 million, which (in contrast to paragraph 28(b) above) was not said to be repayable either by reference to any proposed IPO or at all, and

    (c) that sum was transferred to Aabar BVI out of the proceeds of the Langat Notes when they were placed.

30. Thus, c.US$1.365 billion was diverted from 1MDB, initially to Aabar BVI. Out of those diverted funds:

    (a) US$30 million went to an AM Bank account of Mr Najib's;

    (b) c.US$240 million went to Red Granite Capital Limited, Mr Aziz's film production company, of which c.US$100 million was used to buy real estate in

the US and the balance was used in funding (I know not whether with any sense of irony) the Hollywood film *The Wolf of Wall Street*, based on the book of the same name concerning the rise to fortune of Jordan Belfort and his subsequent fall from grace when his dishonest financial market methods unravelled;

(c) at least a substantial proportion of the rest was transferred, directly or indirectly, to accounts ultimately for the benefit of (predominantly) Mr Qubaisi and (to a lesser extent) Mr Husseiny (unless they were, in turn, acting for others), in particular using an account at Standard Chartered Bank in Singapore held by Blackstone Asia Real Estate Partners ('Blackstone'). Blackstone was beneficially owned by Mr Tan.

31. The payments to Aabar BVI were booked at 1MDB as having generated an asset in the form of a "*refundable deposit … held aside as collateral for the guarantee*".

Second Phase – Global Notes

32. In March 2013, 1MDB and Aabar (acting by Mr Qubaisi) contracted for a 50:50 joint venture. The joint venture vehicle was to be called Abu Dhabi Malaysia Investment Company ('ADMIC'). It was to be capitalised by US$3 billion from each of the joint venture partners. A BVI subsidiary of 1MDB, 1MDB Global Investments Limited ('Global'), issued US$3 billion in loan notes, redeemable in 2023 ('the Global Notes').

33. Global's covenant was supported by a "Letter of Support" dated 14 March 2013 signed by Mr Najib on behalf of the Government of Malaysia stating that:

(a) if 1MDB failed to ensure that Global was able to service its obligations under the Global Notes, then Malaysia would "*step in to inject the necessary capital into the Issuer or make payments to ensure the Issuer's obligation in respect of the Debt are fully met*", and

(b) "*To the fullest extent permitted by law*", Malaysia would waive sovereign immunity and submit to the jurisdiction of the English courts in connection with any dispute arising out of the Letter.

34. Global received just over US$2.7 billion in net proceeds from the Global Notes on placement. Within about a week, US$1.59 billion of those proceeds had been diverted. Over half of the diverted funds, some US$835 million, went to an account at Falcon Bank held by Tanore Finance Corporation ('Tanore'), a company beneficially owned by Mr Tan. Payments of US$620 million and US$61 million were made from that account to an account held by Mr Najib personally at AM Bank. Mr Tan pretended to Falcon Bank that the recipient account was owned by SRC International ('SRC'), a subsidiary of 1MDB, and that there was a loan agreement between Tanore and SRC.

35. Five months later, in late August 2013, a different AM Bank account, presumably also owned by Mr Najib, paid (just over) US$620 million to Tanore's account at Falcon Bank. Mr Najib has claimed that the US$620 million paid to him by Tanore was a gift or a political funding donation from the Saudi Royal Family.

Third Phase – Deutsche Bank Loans

36. In 2014, 1MDB was looking to place the Tanjong and Mastika assets on the Malaysian stock exchange through an IPO. That could not be achieved while there were options outstanding to acquire 49% of the owning subsidiaries.

37. On 22 May 2014 Holdings, by now the immediate parent of both Energy and Langat, contracted with Aabar BVI, purportedly acting by Mr Husseiny, for Aabar BVI's options to be assigned to Holdings at a price to be agreed. Although Holdings' counterparty is named as Aabar BVI, its address is given in the contract as that of Aabar in Abu Dhabi. It will be recalled that Aabar and Aabar BVI have the same name, except for 'Limited' at the end of Aabar BVI's name.

38. On 26 May 2014, Deutsche Bank AG, Singapore Branch, extended a bridge loan facility to Holdings to fund the option buy-back under that contract. Holdings' obligations under this Deutsche Bank facility were guaranteed by Energy and 1MDB. The next day, 27 May 2014, Holdings drew down US$240 million under the facility ('the First DB Loan'), of which US$175 million was immediately transferred by Holdings to Aabar BVI.

39. On 26 June 2014, Aabar and a company by the name of 1MDB Energy Holdings Limited contracted for Aabar's options to be assigned to it for US$529 million. However, that proposed option assignee was not Holdings, which is incorporated in Labuan, but a company with an identical name in the BVI ('Holdings BVI'), incorporated only on 1 July 2014 after this supposed contract had been concluded by which, purportedly, it was bound to pay US$529 million for Aabar's options. Holdings BVI was not at any time part of the 1MDB corporate group.

40. On 1 September 2014, Deutsche Bank extended a US$975 million syndicated bridge loan facility to Holdings, said to be for the purpose of refinancing the First DB Loan and buying back the options. This September facility appears to have been drafted on the basis that a company with Aabar BVI's name owned the options and that there was or would be an option termination agreement between Holdings and that company pursuant to which the options would be terminated at a price Holdings would fund by drawing on the facility. Mr Najib, on behalf of the Government of Malaysia, provided a Letter of Support to Deutsche Bank similar in terms to the Letter of Support provided in respect of the Global Notes.

41. The next day, 2 September 2014, Holdings drew down on the September facility ('the Second DB Loan'). The draw-down instruction included an instruction for a payment of US$223 million to be made to an account at UBS AG in Singapore held by Aabar Seychelles. The account had been opened for Aabar Seychelles in early June 2014 by Mr Husseiny, who in the account-opening form represented to UBS that any funds on the account would be owned beneficially by the Government of Abu Dhabi.

42. On 29 September 2014, Holdings drew down again on the September facility, this time borrowing US$457 million, again with an instruction that it be paid to the Aabar Seychelles account at UBS ('the Third DB Loan').

43. Thus, as a result of the First, Second and Third DB Loans, US$855 million was paid to Aabar BVI (US$175 million) and Aabar Seychelles (US$681 million), meaning, in practical terms, into the control of Messrs Qubaisi and Husseiny.

44. On 6 October 2014, an "Agreement for Provision of Guarantees" ('the APG') was purportedly signed between Global and "Aabar Investments PJS Limited". Since that is the name of both Aabar BVI and Aabar Seychelles, but the address given for it in the APG was that of Aabar in Abu Dhabi, I shall refer to Global's APG counterparty as 'the APG Aabar' to avoid begging the question of which 'Aabar' it was.

45. Under the APG, Global agreed to pay US$1.15 billion to the APG Aabar as "Top-Up Collateral", in consideration of the APG Aabar agreeing:

    (a) to relax the IPO conditions that had to be met to trigger the repayment obligation in respect of the c.US$575 million paid out of the proceeds of the Energy Notes (see paragraph 28(b) above), and

    (b) to provide a further guarantee relating in some way to the Global Notes (the detail was obscurely described in Little 1 as a promised "*further guarantee of additional fund unit investments relating to the [Global] Notes …*", and this was not explained further in argument).

46. The APG provided that upon the relaxed IPO conditions being met, the so-called credit enhancement collaterals would be repaid by the APG Aabar (that is to say, or at least includes, the US$1.365 billion paid to Aabar BVI out of the proceeds of the Energy and Langat Notes – the APG gives a larger figure of US$1.44 billion – even though in respect of the Langat Notes no repayment obligation was originally articulated (see paragraph 29(b) above)), and that the so-called top-up collateral of US$1.15 billion would be repaid by a date in May 2023.

47. Clause 1.3(i) of the APG required US$855 million previously paid (that is, presumably, the US$855 million referred to in paragraph 43 above) to be treated as part-payment of the US$1.15 billion top-up collateral, and continued that, "*For the avoidance of doubt and notwithstanding the foregoing, sums due under commercial arrangements for the Options Termination shall remain due and owing to Aabar in accordance with such arrangements*". That would appear to mean that the US$855 million no longer stood (if otherwise it would have stood) as payment or part-payment of anything purportedly due under the option buy-back arrangements.

48. Following the APG, by payments made on 7, 14 and 23 October, 4 and 13 November 2014, Global paid Aabar BVI, in aggregate, US$1.242 billion. On the logic of the APG, if taken at face value, that would appear to mean that Global paid c.US$950 million in respect of the release of the call options over the Tanjong and Mastika assets (US$1.242 billion LESS (US$1.15 billion LESS US$855 million) = US$947 million).

The US$3.5 Billion

49. It follows that Aabar BVI and Aabar Seychelles between them received, in total, c.US$3.5 billion from the 1MDB group:

    (a) US$1.365 billion from the proceeds of the Energy and Langat Notes.

(b) US$855 million from the proceeds of the Deutsche Bank Loans.

(c) US$1.242 billion from Global following the APG.

50. As ultimately documented, taking the APG into account, that total purportedly comprised US$2.515 billion paid by the 1MDB group so as to collateralise the defendants' exposure under guarantees of external 1MDB group debt, supposedly repayable, or potentially repayable, if those guarantees were never called on, and c.US$950 million paid for the release of options granted or promised indirectly in respect of the Tanjong and Mastika assets. So far as I can see, no attempt has been made to assess or evidence whether those options (if the First Phase transaction documents are taken at face value) had something like that value or, if they did not, what (if any) value they had.

51. Whatever the true basis (if any) for, or the rights or wrongs of, the payments summarised in paragraph 49 above, their main relevance for present purposes is that in Arbitration 1, the claimants as arbitration respondents defended themselves, and cross-claimed against the defendants as arbitration claimants, by reference to the US$3.5 billion thus paid from within the 1MDB group. To get there, however, I must first introduce the BTS and the claims made under it by the defendants.

The BTS

52. The BTS, dated 28 May 2015, described itself as a "TERM SHEET FOR SETTLEMENT AGREEMENTS BETWEEN [1MDB/MOFI] AND [IPIC/AABAR] GROUPS". By Clause 1, it stated that 1MDB and its shareholder, MOFI, and Aabar and its shareholder, IPIC, were entering into the BTS to set out "*the terms for the settlement on an overall basis, and thereafter release and discharge, of all outstanding obligations and liabilities which any of 1MDB and/or its subsidiaries ("**1MDB Group**"), or any of IPIC and/or its subsidiaries ("**IPIC Group**") (which includes Aabar and/or its subsidiaries ("**Aabar Group**")) may owe to one another in exchange for the creation of certain new obligations between them as set out in [the BTS]*."

53. Clause 5 of the BTS was entitled "**Debt-Asset Swap**". By Clause 5.1, IPIC undertook in exchange for 1MDB's and MOFI's promises in Clause 5.2:

(a) to pay US$1 billion to 1MDB on or before 4 June 2015,

(b) to assume all obligations to pay interest under the Energy and Langat Notes from 4 June 2015 until the Closing Date as defined in the BTS,

(c) to waive or procure the waiver, on the Closing Date as defined in the BTS, "*of the obligations of certain members of the 1MDB Group to pay to members of the IPIC Group all monies due and owing to those members of the IPIC Group ("**Forgiveness of Debts**")*", and

(d) to assume all obligations to pay principal and interest under the Energy and Langat Notes from the Closing Date.

Some of the references to the Closing Date would, in certain circumstances, be to the Receipt Date as defined in the BTS instead, but that complication does not matter for my purposes, so I ignore it.

54. Clause 5.1 concluded with a provision that the US$1 billion, the assumption of obligations under the Notes, and the Forgiveness of Debts, "*shall collectively be referred to as the "**IPIC Contribution**", the amount of which the Parties agree shall not in any circumstances exceed the amount determined in writing between them on the date of [the BTS] (such amount being the "**Agreed Amount**")).*"

55. The primary *quid pro quo*, in Clause 5.2(a) of the BTS, was that 1MDB and MOFI undertook to transfer or cause to be transferred to IPIC or its nominated recipient "*as soon as reasonably practicable but in any event no later than 30 June 2016 … any combination of any assets ("**Assets**") to be mutually determined by 1MDB and [MOFI] and IPIC, together having a value in total not less than the amount of the IPIC Contribution … ("**Asset Transfer**")*".

56. Clause 6 of the BTS provided that upon each Asset Transfer, IPIC would notify 1MDB and MOFI of the aggregate asset value transferred to date. The Closing Date, then, was the date on which that notified aggregate asset value became equal to or greater than the Agreed Amount. The Forgiveness of Debts and assumption of responsibility for the Notes was to become effective on the Closing Date.

57. The side letter of the same date, 28 May 2015, stated *inter alia* an agreement that "*the aggregate amount to be waived under the Forgiveness of Debts is USD481,000,000.00.*" It also stated that US$950 million of the US$1 billion to be paid by IPIC under the BTS would be used in discharging the US$975 million Deutsche Bank facility.

58. Reading Clause 5.1 of the BTS with the side letter, there was an undertaking by IPIC to waive or procure the waiver of up to US$481 million of debt owed by 1MDB group companies to IPIC group companies, in return for the receipt of assets of equal value. But there is nothing in the BTS (or side letter) from which it is possible to identify what, if any, such debt existed, capable of being the subject of such an arrangement.

59. Nor does the BTS deal with the fact that under the previous arrangements as documented, US$2.515 billion was supposedly repayable from supposed IPIC group companies to 1MDB group companies, unless it was required to secure IPIC's right to an indemnity if called on to make payments as guarantor of the Energy or Langat Notes. On the logic of the BTS, IPIC would assume all liability under the Energy and Langat Notes *in return for assets of equal value* (and the side letter stated an agreed value for the assumption of Note liabilities as at 28 May 2015 of just under US$5 billion). If the US$2.515 billion paid to Aabar BVI / Seychelles was collateral for 1MDB's responsibility, as between itself and IPIC, for the discharge of the Notes, then upon the Notes becoming IPIC's responsibility *in return for the receipt by it of assets fully covering the value of that liability*, one might think it would be repayable at the Closing Date, unless perhaps it would be treated as released to IPIC as one of the asset transfers triggering the Closing Date.

60. Clause 11.1 of the BTS provided for an immediate release and discharge, in the following terms:

> "*11.1 On the date of this Binding Term Sheet, 1MDB of the one part and IPIC, together with Aabar, on the other part, each:*
>
> *(a) unconditionally and irrevocably release, discharge, waive, terminate and extinguish forever all its rights, title and interest in and under any and all agreements, documents and arrangements which may have been previously entered into by and between 1MDB Group and the IPIC Group or Aabar Group (save and except (i) with regard to matters subject to the Forgiveness of Debt; (ii) this Binding Term Sheet; and (iii) agreements following therefrom) (Past Arrangements") and*
>
> *(b) unconditionally and irrevocably discharge the other and each of their past and present predecessors, successors, subsidiaries, parent, officers, directors, employees and other agents from any and all known and unknown claims, disputes, demands, debts, liabilities, obligations, contracts, agreements, causes of actions, proceedings and costs of whatever nature or description which the Parties had, now have or may have related to any Past Arrangement and/or any of the matters which arise out of, from, asserted in, or which could have been asserted in connection with any Past Arrangements.*"

61. I envisage there may be room for debate whether that (or the opening language of Clause 1, quoted in paragraph 52 above) is apt to exclude or defeat any claim against IPIC or Aabar in respect of the dishonest siphoning off of funds from 1MDB or its subsidiaries. Subject to that, however, it is not obvious why that language does not discharge any obligation to repay (at the very least) the US$2.515 billion of collateralisation (if that is what it had been), yet there appears to be no logic to justify such a discharge upon the signing of the BTS (rather than, perhaps, at the Closing Date if the release of the collateral were treated as an asset transfer under the BTS).

62. There never was a Closing Date under the BTS, however. Under Clause 7, there was to be an interim assessment on 31 December 2015 of whether the aggregate amount paid by IPIC under the BTS by that date (the 'Interim Cash Amount') had been at least matched by asset transfers. If so, the BTS was to continue towards a future Closing Date. If not, however, it was to be in general effect unwound. Specifically, in that case:

    (a) by Clause 7.3(a), 1MDB was obliged to pay IPIC an amount equal to the Interim Cash Amount, plus interest at 2% per annum,

    (b) by Clause 7.3(b), any assets transferred were to be re-transferred, after payment under Clause 7.3(a),

    (c) all further debt-asset swap obligations terminated (Clause 7.3(c)-(d)), and

    (d) 1MDB was once again liable to indemnify IPIC in respect of (its guarantees of) the Notes (Clause 7.3(f)).

63. However, in addition (which goes further than just unwinding the BTS or its performance), in that same case:

    (a) MOFI was jointly and severally liable under Clauses 7.3(a) and 7.3(f), and

(b) various specific parts of the BTS were to continue to have effect, including the governing law and dispute resolution provisions and a waiver of sovereign immunity clause.

64. The dispute resolution provision, Clause 20, provided for LCIA arbitration.

Arbitration 1

65. Pursuant to the BTS, IPIC paid US$1 billion, as referred to in Clause 5.1(a), and paid just over US$100 million in respect of interest due under the Notes in late 2015. No assets were transferred in return, whether by 31 December 2015 or at all. IPIC paid a further US$100 million in respect of interest due under the Notes, as guarantor, in the Spring of 2016.

66. Arbitration 1 followed, commenced by a Request for Arbitration dated 13 June 2016 filed by Clifford Chance LLP as solicitors for IPIC and Aabar.

67. The main claims by IPIC intimated in the Request for Arbitration were claims for:

(a) payment of US$1.1 billion under Clause 7.3(a) of the BTS;

(b) indemnification in respect of the Spring 2016 interest payment under the Notes, US$100 million;

(c) declaratory relief concerning 1MDB's and MOFI's continuing obligation, as alleged, to indemnify IPIC in respect of any further payments it might make as guarantor of the Notes.

68. There was also a claim by IPIC, which appears to have been baseless, for an award ordering that assets be transferred to it, to a value of US$6.5 billion (the aggregate value, it was said, of the IPIC Contribution), despite the termination of the debt-asset swap by operation of Clause 7 of the BTS; and an equally demurrable claim, or so it appears to me, for an award requiring IPIC to be provided with security equivalent to US$4.78 billion, said to be its potential aggregate liability as guarantor of the Notes.

69. The Request for Arbitration also outlined a case explaining the US$481 million figure for alleged debt liable to be forgiven pursuant to the BTS had it run its full course. That case was that:

(a) Aabar had received only US$47,050,000 of the US$529,000,000 due under the contract referred to in paragraph 39 above;

(b) there had therefore been a balance owing to Aabar from Holdings BVI of US$481,950,000;

(c) the US$481 million value stated in the side letter for the prospective forgiveness of debts pursuant to the BTS was that balance, after an exchange rate adjustment and rounding.

70. Aabar intimated a claim for US$481 million on an argument that 1MDB and MOFI had been unjustly enriched by the dissolution of Holdings BVI in June 2015 shortly after the BTS had been concluded, whereby (it was said) Aabar had been deprived of any

effective recourse in respect of the alleged debt owed by Holdings BVI as thus described, and by what was said to have been a sale of the Tanjong and Mastika assets to China General Nuclear Power Corporation ('China GNP'), agreed in November 2015.

71. Responses to the Request for Arbitration were submitted on behalf of 1MDB and MOFI dated 11 July 2016, from Weil Gotshal & Manges LLP as solicitors for 1MDB, and 18 July 2016, from Macfarlanes LLP as solicitors for MOFI. Each Response purported to reserve position as to jurisdiction in Arbitration 1, but articulated no challenge to jurisdiction and affirmed the arbitration clause in the BTS. On the merits, the Response from Macfarlanes on behalf of MOFI essentially adopted what had been said the week before in the Response from Weil Gotshal on behalf of 1MDB, which was (in summary):

    (a) that the Request for Arbitration disclosed no possible basis for the extravagant claims by IPIC referred to in paragraph 68 above;

    (b) that as regards IPIC's basic claim for payment of US$1.2 billion, IPIC could not demand payment without giving credit for "*sums previously paid by 1MDB or its group to … Aabar BVI … which was held out by [IPIC and Aabar] as a member of their group. Such payments include (but are not limited to) cash collateral in excess of US$2.5 billion as well as a further payment of US$993 million, in addition to other substantial amounts*", apart from which no indication of any defence was given;

    (c) that as regards Aabar's unjust enrichment claim, no proper attempt had been made in the Request for Arbitration to set out grounds for any such claim.

72. Clifford Chance served a Claimants' Statement of Case on behalf of IPIC and Aabar dated 20 January 2017. All of the claims outlined in the Request for Arbitration were pursued. In addition, presumably anticipating a defence along the lines indicated in paragraph 71(b) above, the Statement of Case disowned Aabar BVI and any payments made to it from the 1MDB group, on the basis, so it was said, that "*Aabar BVI is not and never was a member of the IPIC or Aabar Groups*". Further or alternatively, it was submitted that any liability of IPIC or Aabar in respect of payments to Aabar BVI had been discharged by the release and discharge provisions of the BTS.

73. A slightly fuller explanation of Aabar's unjust enrichment claim was given. Thus, it was said that:

    (a) the BTS had been entered into on the basis that Holdings BVI's debt of US$481 million was preserved and would only be forgiven as part of the debt-asset swap;

    (b) in reliance on that arrangement, Aabar did not seek to impede the sale to China GNP (which it was said had completed in March 2016);

    (c) that sale having completed, the call options had no value, and since Holdings BVI had been dissolved, there was no realistic prospect of recovery on the (unforgiven) debt;

(d) 1MDB was therefore to be regarded as having been unjustly enriched at Aabar's expense by the sale to China GNP.

74. The Arbitration 1 tribunal issued a Procedural Order No.1 dated 31 January 2017 requiring each of 1MDB and MOFI to provide a Statement of Defence and Counterclaim by 13 March 2017 and setting out a full procedural timetable for steps thereafter up to and including the holding of a 10-day final hearing in December 2017.

75. The Defences responded robustly to the extravagant claims asserted by IPIC and the unjust enrichment claim asserted by Aabar. In the latter respect, not only was it said that there was no basis for the claim, if there had been any original debt, but also it was disputed that there had been any outstanding US$481 million due in relation to the termination of options. It was said that the effect of the BTS and side letter in that regard was only that IPIC was to waive the disputed claim that it or a member of its group was owed US$481 million; presumably the logic of that position, although it was not made clear, was that there was only an obligation to transfer assets up to the value of any debt that in fact existed, any dispute as to which would have been a matter for arbitration pursuant to the BTS had the debt-asset swap arrangement not terminated at the end of 2015.

76. The defence to the basic claim for US$1.2 billion was that US$3.5 billion had been paid to Aabar BVI by way of security or refundable pre-payment only, in reliance on representations by Messrs Qubaisi and Husseiny that Aabar BVI was an IPIC/Aabar subsidiary and that sums paid to it would be for the benefit of IPIC/Aabar (or their ultimate owners) and/or would stand to the credit of 1MDB in its dealings with them, so that either (a) that amount indeed stood to the credit of 1MDB in its dealings with IPIC and Aabar pursuant to the BTS or (b) if, as IPIC and Aabar were now saying, Aabar BVI had nothing to do with them, then they had a damages liability to 1MDB in like amount for misrepresentation. There was also a claim for a declaration that the BTS has been procured by misrepresentations by Messrs Qubaisi and Husseiny, but that would be apt merely to put IPIC's entitlement to reimbursement of the US$1.2 billion it had paid pursuant to the BTS on a different footing.

77. In the event, no Reply was served by IPIC and Aabar in Arbitration 1, because instead the Deeds were executed and the Consent Award was obtained so as to terminate the reference.

The Deeds

78. The Settlement Deed is dated April 2017 and was executed on 22 April 2017. The Supplemental Settlement Deed is dated, and was executed on, 22 April 2017. The main obligations under both were conditional upon the making of the Consent Award by 31 May 2017, and on the face of things that condition was satisfied.

79. The Settlement Deed recited parties' entry into the BTS, the existence of issues between them in respect of it and the commencement of Arbitration 1, and that "*The Parties wish (without admission of liability) to resolve by way of commercial agreement the issues submitted to the Arbitration (as defined below) and other issues between them on the terms set out below*".

80. The primary obligations under the Settlement Deed itself were:

(a) obligations upon 1MDB and MOFI under Clauses 2.2.1 and 2.2.2 respectively to date and release to Aabar certain transaction documents unwinding various joint venture arrangements involving Aabar;

(b) an obligation upon 1MDB and MOFI under Clause 5.1.1 to instruct their respective legal representatives in Arbitration 1 "*to notify the Tribunal that they withdraw their respective Counterclaims in the Arbitration on the basis that such withdrawal is without prejudice and conditional on the making of the Consent Award*";

(c) an obligation on all four parties under Clause 5.1.2 "*to request, and [they] shall irrevocably instruct their respective legal representatives in the Arbitration to request, that the Tribunal and the LCIA make the Consent Award*";

(d) an obligation upon 1MDB and MOFI under Clause 6.1 promptly to fulfil their payment obligations under the Consent Award without asserting any set-off or counterclaim; and

(e) obligations upon 1MDB and MOFI under Clauses 7 and 8, in summary, to ensure that the Energy and Langat Note obligations were discharged in full and to indemnify IPIC and Aabar in connection with the Notes.

81. Clause 10 of the Settlement Deed provided in comprehensive terms for the discharge or termination of all other Past Arrangements, a defined term that included the BTS, upon the making of the Consent Award, in consideration of the parties' respective consent to the Consent Award and acceptance of the Deed. That was bolstered by Clause 11, which was in these terms:

> "*Each of the Parties acknowledges and affirms (for itself and on behalf of its subsidiaries) that other than pursuant to the terms of this Deed, no member of the IPIC group and no member of the Aabar Group has any outstanding liability or obligation (whether actual, prospective or contingent) to any member of the 1MDB Group or [MOFI] in respect of the Past Arrangements, and undertakes that it shall not assert or contend otherwise.*"

82. Clause 12 of the Settlement Deed provided for a joint press release, and the form for a Regulatory News Service ('RNS') announcement by IPIC, giving notice of the settlement and its main financial consequences. The press release and RNS notice trod very lightly on the US$3.5 billion paid away from the 1MDB group, stating just that "*The parties have also agreed to enter into good faith discussions in relation to payments made by 1MDB Group to certain entities*".

83. The Settlement Deed defined Past Arrangements to mean "*any and all agreements, documents and arrangements which may have been entered into by and between (a) 1MDB Group and/or [MOFI] of the one part and (b) the IPIC Group, prior to the Effective Date, which for the avoidance of doubt includes each of the Identified Transactions <u>but excludes any payments which have been made by 1MDB Group to companies which name bears reference to "Aabar" but are purportedly not members of the IPIC Group</u>*" (my emphasis). The BTS was one of the Identified Transactions, the definition of which I deal with below.

84. It is not difficult to see how it might be said that the exclusion I have emphasised within the definition of Past Arrangements preserved any liability that IPIC or Aabar might have in respect of the payments referred to in paragraph 49 above if Aabar BVI and Aabar Seychelles were not members of the IPIC Group, as asserted by IPIC and Aabar.

85. It might be more difficult to say that on the language of that definition, taken alone, claims survived against IPIC or Aabar in respect of those payments upon an argument that Aabar BVI or Aabar Seychelles *were* within the IPIC Group, given that:

    (a) the Settlement Deed defined Identified Transactions as having the meaning given to it in Clause 4.1;

    (b) Clause 4.1 provided that "*each of the Parties acknowledges, represents and warrants that Schedule 4 correctly records all the transactions between the members of the 1MDB Group and the [MOFI] Group (which in the case of the [MOFI] Group shall be limited to entities which are or were at some time members of the 1MDB Group) on one side and the IPIC Group on the other side prior to the date of this Deed and the payments made by and received by the IPIC Group in relation to those transactions (each being an "****Identified Transaction****")*"; and

    (c) Schedule 4 does not record the payments referred to in paragraph 49 above.

86. However:

    (a) in Arbitration 1, 1MDB and MOFI had counterclaimed the US$3.5 billion aggregate of the payments referred to in paragraph 49 above;

    (b) the primary basis for that counterclaim was that they were to be treated as payments to or for the account of IPIC or Aabar (see paragraph 76 above);

    (c) in the Consent Award, the terms of which were set by Schedule 1 to the Settlement Deed, the parties recited that the withdrawal of the counterclaims in Arbitration 1 was agreed to be "*without prejudice to any right to assert such Counterclaims in another forum*" and that the Settlement Deed settled "*the claims which remain in the Arbitration*" (and see also paragraph 80(b) above); and

    (d) by Clause 6.8 of the Supplemental Deed, "*For the avoidance of doubt, neither [1MDB and MOFI] nor [IPIC and Aabar] (each for itself and on behalf of its subsidiaries) waives, releases or discharges the other Party from any claim(s) in respect of any of 1MDB's Payments to Other Entities (or waives any defences or Counterclaims with respect to such claim(s)), and nothing in this Deed or the Settlement Deed shall be deemed or construed to suggest otherwise*" (see below for the meaning of '1MDB's Payments to Other Entities').

87. There was a sting in the tail of that last provision (Clause 6.8 of the Supplemental Deed), since it continued that, "*For the further avoidance of doubt [1MDB and MOFI] will not assert any claim in respect of, or other allegation relating to, 1MDB's Payments to Other Entities as a defence or other objection to the enforcement of the Consent Award*". That cannot oust the court's jurisdiction under s.68 of the Act, however, since

that is a mandatory provision having effect notwithstanding any contrary agreement between the parties (see ss.4(1) of and Schedule 1 to the Act).

88. The recitals to the Supplemental Deed and Clauses 3 to 5 of that Deed concerned the claim that there was a US$481 million receivable due from the 1MDB Group referred to in paragraph 69 above. It recited that:

(a) Aabar had entered into the agreement dated 26 June 2014 referred to in paragraph 39 above, although it did not state with whom Aabar had done so;

(b) IPIC had recorded a receivable from 1MDB and/or MOFI of US$481 million which was to be the subject of the forgiveness of debts referred to in the BTS; and

(c) the Parties wished to resolve issues relating to that receivable.

89. Then by Clause 3.1, 1MDB and MOFI acknowledged "*that they have assumed liability to IPIC and Aabar to make payment of the US$481 million Receivable and interest thereon [as then specified]. This liability continues and is not subject to the release and discharge in Clause 10 of the Settlement Deed*"; but by Clause 3.2 IPIC and Aabar agreed not to enforce their claim in respect of the US$481 million receivable unless IPIC had certified pursuant to Clause 9.1 of the Settlement Deed that an Event of Default had occurred.

90. By Clauses 4 and 5 of the Supplemental Deed, subject to notification formalities, the obligation upon 1MDB and MOFI to pay US$481 million thus recognised:

(a) fell due for performance after an Event of Default (Clause 4.1), but

(b) would be extinguished if and when 1MDB and MOFI (i) performed in full all their obligations under the Deeds (Clause 5.1) or (ii) secured on or before 31 March 2018 a total release of IPIC from its obligations as guarantor of the Energy and Langat Notes.

91. Clause 6 of the Supplemental Deed made complex, lengthy provision for an agreed standstill between the parties as regards claims in respect of "*payments made by [1MDB and/or MOFI] and/or any of their subsidiaries (whether directly or indirectly) to or received by the Other Entities in the amounts identified in 1MDB's letter to IPIC dated 11 April 2016 (and irrespective of which Other Entities in fact received payment) ("1MDB's Payments to Other Entities") …*". It comes as no surprise to find that the Other Entities were defined to include Aabar BVI and Aabar Seychelles, amongst other 'Aabar' entities disowned by the defendants.

92. The detailed terms of Clause 6 included *inter alia*:

(a) a mutual promise to enter into good faith discussions with regard to 1MDB's Payments to Other Entities on 31 December 2017, if 1MDB and MOFI were not in breach of the Settlement Deed, such discussions to be completed by 31 December 2020,

(b) a promise by 1MDB and MOFI not to pursue any claim in relation to those payments prior to the later of the date on which they had discharged all their payment obligations under the Consent Award and 31 December 2020, and

(c) the provisions in Clause 6.8 quoted above.

93. At a superficial level, it might be said, and Mr Rabinowitz QC submitted, that the Deeds thus operated to 'undo' the BTS. US$1.2 billion had been paid by IPIC on the basis of the BTS, and that had to be repaid / reimbursed. But there was a lot more besides. There was MOFI as joint obligor, which has no obvious logic to it if this was an unwinding of the BTS, since it was only by the BTS that MOFI became (purportedly) an obligor. There was the *prima facie* concession of the US$481 million claim for which the defendants had been struggling to identify any viable basis in fact and law, and the holding of that concession over 1MDB and MOFI arguably *in terrorem* as punishment for failing to honour payment obligations under the settlement terms. There was the agreement to include in the Consent Award a provision in effect determining (by consent) that the BTS had been valid and binding until it was terminated by the Deeds. There was the attempt, within the provision quoted in paragraph 87 above, to prevent the claimants from defending themselves against payment demands by the defendants by a claim that the defendants had some liability in respect of the siphoning off of 1MDB funds.

94. So I do not accept the submission, to the extent that the argument for the defendants went this far, that the Deeds (and therefore the Consent Award) did not create any burden on the claimants that might be held to be a substantial injustice, if it be shown that they were entered into collusively with Mr Najib to serve (as alleged) his improper motives, such that the Consent Award might engage s.68(2)(g) of the Act.

The Consent Award

95. That brings me, finally, to the Consent Award that the claimants seek to challenge, which is in the terms provided for by the Settlement Deed. It was issued by the Arbitration 1 tribunal at the request of the solicitors of record for the parties. More particularly:

(a) The Request for Arbitration dated 13 June 2016 was submitted by Clifford Chance as solicitors for the claimants, who were identified as IPIC and Aabar. It identified the respondents as 1MDB and MOFI.

(b) 1MDB's Response dated 11 July 2016 was submitted by Weil Gotshal as solicitors and stated *inter alia* that "*1MDB is represented for the purpose of this arbitration by Weil, Gotshal & Manges whose contact details are as follows:*", with contact details given.

(c) MOFI's Response dated 18 July 2016 was submitted by Macfarlanes as solicitors and stated *inter alia* that "*[MOFI] is represented for the purposes of this arbitration by Macfarlanes LLP, whose contact details are:*", likewise with contact details given.

(d) In accordance with the above, Arbitration 1 was then conducted by the tribunal and the solicitors. It was an arbitration between IPIC and Aabar as represented

by Clifford Chance, 1MDB as represented by Weil Gotshal, and MOFI as represented by Macfarlanes.

(e) By letter dated 24 April 2017, Clifford Chance for IPIC and Aabar wrote to the Arbitration 1 tribunal and the LCIA confirming on behalf of all four parties that settlement had been reached, conditional upon the tribunal issuing a Consent Award in agreed terms by 31 May 2017. The letter requested the tribunal to issue by that date a Consent Award in the terms of a draft annexed to the letter and stated that all four parties "*confirm that they agree to the terms set out in the draft Consent Award annexed hereto*".

(f) That letter was counter-signed by Weil Gotshal as solicitors for 1MDB and by Macfarlanes as solicitors for MOFI.

(g) By letter also dated 24 April 2017, counter-signed as "*Acknowledged and agreed by Macfarlanes LLP on behalf of [MOFI]*", Weil Gotshal as solicitors for 1MDB wrote to the Arbitration 1 tribunal, cc. Clifford Chance, the LCIA and Macfarlanes, confirming that there had been a settlement and there would be a joint request for a Consent Award and, "*In consideration of these reliefs, and strictly subject to the making of the Consent Award*", requesting on behalf of both 1MDB and MOFI the tribunal's permission to withdraw their respective counterclaims, "*without prejudice to any right to assert such counterclaims subsequently in another forum in accordance with the Settlement*".

(h) Two small grammatical corrections were made by the tribunal, on which nothing could turn, subject to which the Consent Award dated 9 May 2017 was issued as requested by the solicitors.

96. The Consent Award, after identifying the BTS and setting out a procedural history of Arbitration 1, stated at paragraph 10 that on 24 April 2017, 1MDB and MOFI withdrew their counterclaims on the basis that such withdrawal was without prejudice to any right to assert them in another forum, and stated at paragraph 11 that the parties had settled "*the claims which remain in the Arbitration*" on terms providing *inter alia* for the issue of a consent award, before making the following substantive award:

> "*12. Pursuant to Article 26.9 of the LCIA Rules, and at the parties' joint request and with their consent, the Tribunal renders the following award:*
>
> *(a) The BTS was valid and binding upon the Claimants and the Respondents until terminated by the Settlement Deed;*
>
> *(b) The Respondents shall pay to the First Claimant by 31 July 2017 the sum of US$602,750,000;*
>
> *(c) The Respondents shall pay to the First Claimant by 31 December 2017 the sum of US$500,000,000;*
>
> *(d) The Respondents shall pay to the First Claimant by 31 December 2017 the sum of US$102,750,000, which has been paid by the First Claimant under or in relation to the Guarantees (as defined below) [i.e. the IPIC guarantees of the Energy and Langat Notes] since 31 December 2015;*

> *(e) The Respondents are obligated to indemnify the First Claimant in respect of all sums which may be paid hereafter by the First Claimant or any member of the First Claimant's Group (or on their behalf) or for which they may become liable under or in relation to … the Guarantees …, to be paid in each case within five (5) calendar days after receiving a demand from the First Claimant, up to the full sum potentially falling due under the Guarantees of US$4,732,700,000 …;*
>
> …
>
> *(i) The Respondents are jointly and severally liable as principal obligors for the obligations in paragraphs (b) to (g) above;*
>
> …"

97. Paragraphs 12(f)-(h) of the Consent Award provided for obligations to pay interest and dealt with the order in which any payments received by IPIC were to be applied in discharge of the various payment obligations set out in the Award. Paragraphs 12(j)-(k) provided for the parties to bear their own legal and other costs of Arbitration 1 and for the defendants and the claimants to pay the costs of the arbitration (i.e. the arbitrators' and the LCIA's fees and expenses) in equal shares.

The s.67 (or s.68(2)(b)) Claim

98. 1MDB and MOFI do not assert that Arbitration 1 was a nullity or that it was affected by any defect or irregularity of any kind prior to the Consent Award. To the contrary, the nature of the claim sought to be made (whether under s.67 (or s.68(2)(b)) or under s.68(2)(g)) is only that the Consent Award may and should be set aside by the court, reviving Arbitration 1 as it stood immediately prior to it. Given paragraph 13 above, it is not easy to see that in any such revived Arbitration 1 the Deeds could be raised by IPIC and Aabar, either in support of their claim or in defence of any counterclaim, given what would have to have been determined by the court in order for the challenge to the Consent Award to have succeeded, but no final decision on that is required.

99. There being no challenge to the validity of Arbitration 1, s.51(2) of the Act applied, which provides that upon settlement, "*The tribunal shall terminate the substantive proceedings and, if so requested by the parties and not objected to by the tribunal, shall record the settlement in the form of an agreed award*". To like effect, so far as material, the LCIA Rules 2014, which applied in Arbitration 1, provided by Article 26.9 that, "*In the event of any final settlement of the parties' dispute, the Arbitral Tribunal may decide to make an award recording the settlement if the parties jointly so request in writing (a "Consent Award") …*".

100. As Mr Landau QC neatly encapsulated this part of the case in oral argument, the submission was "*that there was no jurisdiction to … issue the consent award because the consent itself was tainted and the tribunal could only act if there was … consent on both sides. What we have asked for in the amendment is simply for exactly the same argument to be put in terms of powers instead of jurisdiction in section 68.*" The proposal to amend to put this part of the case under s.68(2)(b) rather than s.67 arose because one substantial submission for the defendants was that the complaint did not

go to the substantive jurisdiction of the Arbitration 1 tribunal as defined by ss.82(1) and 30(1)(a)-(c) of the Act so as to be a competent s.67 challenge.

101. The insuperable difficulty with the argument, however, whether put under s.67 or under s.68(2)(b), is that, as I noted above, Arbitration 1 was a reference to arbitration between IPIC and Aabar as represented by Clifford Chance, 1MDB as represented by Weil Gotshal, and MOFI as represented by Macfarlanes, conducted by those three firms of solicitors and the tribunal. The Consent Award was made upon the joint request in writing of those solicitors, who it is not suggested were not authorised to represent their respective clients, as they were doing, before the tribunal.

102. It is well-established that solicitors have a wide apparent authority to conduct litigation on behalf of their clients, including to compromise the matter: see *Bowstead & Reynolds on Agency*, 22nd Ed. (2021) at 3-004 and *Waugh v H B Clifford & Sons Ltd* [1982] Ch 374. In *Yonge v Toynbee* [1910] 1 KB 215 at 233, Swinfen Eady J explained that "*The manner in which business is ordinarily conducted requires that each party should be able to rely upon the solicitor of the other party having obtained a proper authority before assuming to act. … It is … essential to the proper conduct of legal business that a solicitor should be held to warrant the authority which he claims of representing the client; if it were not so, no one would be safe in assuming that his opponent's solicitor was duly authorized in what he said or did, and it would be impossible to conduct legal business upon the footing now existing; and, whatever the legal liability may be, the Court, in exercising the authority it possesses over its own officers, ought to proceed upon the footing that a solicitor assuming to act, in an action, for one of the parties to the action warrants his authority.*"

103. Here, as regards the Consent Award, what matters is whether the Arbitration 1 tribunal received what they were bound or at all events entitled to regard as the joint request of the parties before them. For it is their decision to issue the Consent Award, or their act in issuing it, that is sought to be challenged. There is neither allegation nor proposal to allege that the tribunal was on notice of, or had reason of any kind even remotely to suspect, any possible concern over the solicitors' authority to represent their respective clients before them in making that request. The request for the Consent Award to be issued *was* a request "*by the parties*" (s.51(2) of the Act), or a request "*of the parties jointly … in writing*" (Article 26.9 of the LCIA Rules), because it was a request made by their respective solicitors of record on their behalf. As a result – given that there is no challenge to the validity of Arbitration 1 as a whole – the Consent Award was unarguably within the jurisdiction of the tribunal, conferred by s.51(2) and/or Article 26.9, and did not involve the tribunal in exceeding its powers as an arbitration tribunal for the purpose of s.68(2)(b) of the Act.

The Cover-Up Claim

104. The claim, then, that falls to be treated as arguable for present purposes, a claim raised under s.68(2)(g) of the Act, is that the Deeds and therefore also the Consent Award begat by them were concluded, respectively obtained from the tribunal, by the claimants, to the knowledge of the defendants, not as a means to compromise in good faith the legal disputes referred to Arbitration 1, but in bad faith as a means to conceal, or further the concealment of, Mr Najib's prior fraud and dishonesty.

105. By s.68(2)(g) it is a serious irregularity if, with the result that substantial injustice has been or will be caused to the party seeking to challenge an award of arbitration, the award has been obtained by fraud or in a way that is contrary to public policy. The argument here is that a collusive settlement by which, in effect, one party connives to conceal or further the concealment of the other party's fraud and dishonesty, to keep it hidden from its victims (here, it is said, the Malaysian state and/or the Malaysian people whose interests Mr Najib is said to have subjugated to his own), is obtained by fraud or in a manner that is contrary to public policy, and therefore so also is a consent award giving effect to it. As I said, Mr Rabinowitz QC did not ask me to say that the argument is plainly bad, so I proceed on the assumption that it is arguable.

106. It is still important to identify the key elements of the claim, both because as a factor to be weighed in the balance when deciding whether to extend time, Mr Rabinowitz QC submitted that the claim can be seen as very weak even if he did not say it was unarguable, and because when examining why the claim has been brought so late, it is relevant to consider what 1MDB and MOFI needed or might reasonably decide they should do or have before making the claim.

107. Taking the Appendix to this judgment as the fullest and strongest articulation of the claim that 1MDB and MOFI say they can put forward, the claim has the following essential ingredients:

(a) a full defence to the claims made in Arbitration 1 should have included an averment of Mr Najib's dishonest involvement in the siphoning off of 1MDB funds, and the defendants "*were aware of this during [Arbitration 1] and exploited it*". I infer that the 'exploitation' alleged is the securing of settlement on the terms of the Deeds;

(b) Mr Najib wanted Arbitration 1 not to proceed any further than it did for a dishonest reason, namely to avoid allegations of his dishonest involvement in the siphoning off of 1MDB's funds being made, evidenced and considered in Arbitration 1;

(c) the defendants knew that Mr Najib had been involved in the underlying fraud upon 1MDB "*and that he would exercise his control over MOFI and 1MDB in order to protect himself and those close to him rather than the best interests of either entity*", and exploited that knowledge to obtain "*grossly one-sided*" settlement terms, colluding with Mr Najib by way of those settlement terms so as to cover up his fraud;

(d) there is substantial injustice as a result, in that the making of an award purportedly by consent to which there was no true consent is inherently such an injustice, and/or the terms of the Consent Award are grossly disadvantageous (as to which see again paragraphs 11-12 above) and/or deprived the claimants of an opportunity to present their defence to the defendants' claims (by which I think must be meant an opportunity to present what they now wish to say should have been identified as their full defence, the advancing of which was stifled by Mr Najib's conflicted position).

108. The pleaded claim, as set out in the Appendix, includes other allegations, but I do not think they add anything. There is an assertion that settlement on the terms of the Deeds

was "*a continuation of the fraud*", but that seems to me no more than a proposed characterisation of the prior allegation of a collusive cover-up. There is an untethered allegation that settlement negotiations were "*vitiated by the involvement … (certainly on the Malaysian side) of … individuals who had been involved in, and substantially benefited from, the Underlying Fraud*", *viz.* Mr Najib, Mr Amhari and Mr Low; there is an allegation that the Board of 1MDB thought that Arbitration 1 should be defended but were overridden by MOFI, acting by Mr Najib personally, as sole shareholder of 1MDB; and there are allegations that in procuring 1MDB to agree the settlement, and in agreeing it himself for MOFI, Mr Najib was acting contrary to Malaysian law, contrary to the Malaysian Constitution, and/or without authority or power, such that (it is said) neither 1MDB nor MOFI "*validly consent[ed] to the Settlement Deeds*". It is not clear to me how these allegations take 1MDB or MOFI anywhere unless it is said that IPIC and Aabar were aware of the alleged issues on the other side. The only allegation of untoward knowledge or motive on their part, however, is that summarised in paragraph 107(c) above. In a final pleading, perhaps the additional points would serve some role as particulars from which it would be said that such knowledge or motive should be inferred.

109. In the written submissions after the hearing, in response to the particularisation of the s.68(2)(g) claim to which I have just been referring, the defendants contended that the claimants were seeking to introduce a new and different case to anything previously indicated. I do not agree. As the defendants noted, and I have criticised the claimants for this, the claim was 'pleaded' sparsely in the Claim Form but with a compendious cross-reference to Little 1. It is perhaps a matter for regret that this was not raised with the court in March 2019. Certainly, if the defendants wanted the claimants' case to be more precisely defined, and confined, by a proper pleading, they should have sought an appropriate direction at that stage.

110. As it is, in my view it cannot be said of anything now put forward by way of particularisation of the claim, as reproduced in the Appendix below, that fair notice of it was not given by Little 1. Any concern to ensure that the case to be advanced at trial is clear and precisely pleaded is a concern properly to be addressed through case management, not through a refusal of the extension of time the claimants require.

111. I shall address further only one specific 'pleading point' taken, namely that in the allegation of substantial injustice (Appendix, paragraph 13) there is reference to a lack of real consent, given (if established) the collusive and improper motivations of Mr Najib and the defendants for entering into the Deeds and procuring the Consent Award. It is said that it is not open to the claimants to allege that, as part of the s.68(2)(g) claim, given my rejection of the claim under s.67 or s.68(2)(b). I do not agree. It is coherent, and not inconsistent with my conclusion on the s.67/s.68(2)(b) claim, to propose that the solicitors' authority to act for the parties rendered it competent (in terms of jurisdiction and arbitral powers) for the tribunal to issue the Consent Award, while at the same time Mr Najib's real motives were dishonest and the defendants (but not their or the claimants' solicitors) were aware of that and connived in or took advantage of it, and the claimants (to the knowledge of the defendants) had therefore not given their true consent to the settlement.

112. It will be appreciated from the summary I have set out of the underlying frauds (as alleged) that the principal actors are said to have been Messrs Qubaisi and Husseiny (acting together with Mr Najib and/or individuals associated with him on the Malaysian

side of things), who it is said were able to engage in frauds whereby to deprive 1MDB of huge sums because of their positions within the IPIC/Aabar group. But since one very significant by-product of the frauds, as alleged, is that IPIC stands as guarantor of the Energy and Langat Notes, the funds raised by which were to a substantial extent siphoned away, the defendants are also a victim of that underlying dishonesty; and that is acknowledged by the claimants in this claim.

113. I mention Messrs Qubaisi and Husseiny in the present context because they were long gone from the defendants by the time of Arbitration 1 and the Deeds. Mr Qubaisi was removed from IPIC and left Aabar in April 2015, and Mr Husseiny left the group in August 2015 having handed in his notice months earlier. There is no basis for any suggestion that either of them had any say in the BTS, concluded in May 2015, let alone in subsequent events on the defendants' side. Both have been convicted in Abu Dhabi of criminal offences relating to their time at the defendants, including in relation to 1MDB.

114. As regards the critical decision to settle Arbitration 1 on the terms of the Deeds, the case will be that Mr Najib *was* MOFI, and that he exercised control *de facto* over 1MDB. On the defendants' side, Messrs Qubaisi and Husseiny were nowhere to be seen. The claim, attacking the Deeds whereby to attack the Consent Award under s.68(2)(g) of the Act, avers that the defendants colluded in a dishonest cover-up by Mr Najib by settling Arbitration 1 as they did. That will require a case against an individual or individuals involved on behalf of the defendants in the settlement. That individual or those individuals cannot be or include Mr Qubaisi or Mr Husseiny.

115. In that respect (guilty knowledge at the defendants), the claim as it now stands is long on assertion that the defendants must have appreciated that Mr Najib was in a conflicted position and must have realised that he was deliberately flouting his duties to act in the best interests of 1MDB's and MOFI's by settling on the terms of the Deeds, rather shorter on real particulars. There is however evidence of telephone calls involving Mr Najib and (a) His Highness Sheikh Mohammed bin Zayed Al Nahyan, the Crown Prince of Abu Dhabi, (b) Mr Amhari, the latter conversation in turn relating to discussions Mr Amhari had been having with Mr Mubarak from the defendants, that it is said suggest an appreciation, on the part of the Crown Prince and Mr Mubarak, of Mr Najib's improper motivation for obtaining the settlement. There is also some evidence in the correspondence around the conclusion of the settlement that the claimants say indicates an appreciation that Mr Najib was in a corner and looking to settle to protect his own interests rather than for proper reasons, for example an email to Mr Amhari dated 4 April 2017 in the following terms:

> "*I assume you know that we have worked out a settlement agreement which we believe would be acceptable to our side and we are told is acceptable to your Boss [i.e., it is said, Mr Najib]. We are also told there is some resistance below that level at 1MDB. This settlement agreement is the last chance to resolve the situation amicably. If we do not receive a favourable response by April 20th we will be left with no choice but to respond to your defense in the arbitration. Such response, due by April 24, will be of substance and in the form we believe necessary to defend and win our claim. …*"

The last two sentences, it will be argued, were a threat to use Mr Najib's involvement in the underlying fraud in the arbitration, as leverage to secure settlement on the terms

of the Deeds. The suggestion will be that that was by nature an encouragement, and exploitation, of Mr Najib's dishonest breaches of duty, historic and continuing, to secure those favourable terms.

116. For the defendants, it was submitted that the idea they were colluding in a cover-up is incoherent: on the one hand, arbitration proceedings are conducted in private; on the other hand, the underlying fraud, as alleged, including the allegation that Mr Najib was personally involved in it and/or a substantial beneficiary of it, was already in the public domain. Indeed on the latter point, Mr Landau QC's skeleton argument for the claimants opened with the comment that "*The circumstances of this case are extraordinary and widely reported worldwide*"; and the latter part of that (worldwide notoriety) was true some considerable time before the Deeds were concluded in April 2017.

117. The high public profile of allegations about Mr Najib however does not render the suggestion that Mr Najib was improperly motivated by a desire to conceal or suppress the truth incoherent. Mr Najib's equally public position was to deny involvement, and he had been cleared of wrongdoing by the then Attorney General in Malaysia. It is readily possible to conceive that Mr Najib may have been motivated by his own dishonest self-interest, if what the claimants allege about his involvement is proved; and the evidence to which I referred in paragraph 115 above might be said to suggest exactly that.

118. It was said on behalf of the defendants that the terms of settlement, and the publicity given to them, likewise render the cover-up notion very implausible, because claims in respect of the US$3.5 billion payments away from 1MDB were "*not settled at all*" but merely "*deferred so as to allow for good faith discussions between the parties, and could be the subject of separate proceedings from the end of 2020*". I do not find it difficult to envisage that, in the Spring of 2017, buying the deferral until at least 2021 of any *inter partes* scrutiny of those payments, accompanied by an anodyne public statement capable of making it appear that there was an arm's length discussion to be had of the extent of the defendants' responsibility (if any) for them, might be held to have been solely in Mr Najib's selfish interests, if his involvement in the underlying misappropriation of funds is proved in due course at a trial. Upon that premise, and after the facts have been explored fully at a trial, the submission that "*the parties would [not] have agreed to publicise the making of the Consent Award if it had been intended to cover up a fraud*" might be found to be simplistic and to overlook the subtlety of what Mr Najib was doing, and achieving, by the settlement terms.

119. Finally, it was submitted for the defendants that there is "*no credible basis*" for the allegation that they (the defendants) appreciated Mr Najib was acting wrongfully in supporting settlement on the terms of the Deeds. I disagree. It seems to me that the terms were sufficiently favourable to the defendants (one-sided, Mr Landau QC submitted) to raise the question whether the boundary to which I refer in paragraph 123 below may have been crossed. Moreover, the specific evidence referred to in paragraph 115 above gives rise to real room for the argument that it was made plain to the defendants that Mr Najib was looking after himself rather than the claimants, when it came to settling Arbitration 1.

120. Contrary to Mr Rabinowitz QC's argument, the claimants' case on what motivated settlement on the terms of the Deeds, and whether that was known to the defendants, is

not badly undermined or destroyed by the fact that three major English law firms, and distinguished English counsel, were conducting Arbitration 1. The degree to which they were involved, and if they were involved their different perspectives on what was happening, may be relevant in any final assessment of the claimants' case, but I could not take that aspect any further without a trial, and Mr Landau QC showed me that there is evidence rather suggesting that the English legal teams were presented with a *fait accompli* and had no substantive input.

121. Mr Rabinowitz QC also submitted, to like effect, that there was involvement in or knowledge of the settlement terms on the part of Malaysian officials who have not come under any cloud of suspicion. That again will be a matter that may need to be investigated, both as to the basic facts thus alleged (as to involvement and knowledge), and as to how far those facts take matters. I could not say at this stage that they will or are very likely to blow the case out of the water.

122. Overall, on the evidence put before the court on this extension of time application, I can see ample room for the argument, depending on how the full facts come out at a trial, that capitulating to the defendants' main claims and putting off for at least several years, as between the claimants and the defendants, any serious investigation into the payment away of the US$3.5 billion, might have been motivated, to the knowledge of the defendants, solely or predominantly by Mr Najib's personal interests, if what the claim says about the underlying fraud and his role in it is made out.

123. At a full trial, it might not be easy to locate the boundary between settling on very good terms and taking illegitimate advantage of an evident conflict of interest within the other party's camp, or to say whether on the facts that boundary has been crossed. I could not say that the claim appears at this stage to be a strong or clear one; but nor would it be right to say that it appears on the face of things a weak case. It is to my mind properly arguable, not merely fanciful or speculative. My assessment is thus similar to that of the Court of Appeal, which said in the judgment overturning the case management stay granted by Robin Knowles J, at [41], that "*The claimants' allegations are firmly denied, but they appear to raise issues which will need careful consideration in the light of what will no doubt be highly controversial factual evidence.*"

The *Kalmneft* Analysis

124. Both sides invited me to consider the extension of time application by reference to the guidelines given by Colman J in *Aoot Kalmneft v Glencore International AG* [2002] 1 Lloyd's Rep 128 at [59]. They call for a careful and balanced focus upon:

    (a) the length of the delay, as regards which the starting point is that the time limit for challenging an arbitration award is purposely very short, just 28 days: see on that, for example, *Kalmneft* itself at [51]-[54] and *Terna Bahrain Holding Company WII v Al Shamsi et al* [2012] EWHC 3283 (Comm) at [27] ("*Any significant delay beyond 28 days is to be regarded as inimical to the policy of the 1996 Act*"), reflecting which the current (10th) Edition of the Commercial Court Guide says at O9.2 that "*it is important that any challenge to an award be pursued without delay and the Court will require cogent reasons for extending time*";

(b) whether the applicant acted reasonably in all the circumstances, both (i) in permitting the time limit to expire and (ii) in permitting any subsequent delay to occur, as to which I agree with Butcher J in *STA v OFY* [2021] EWHC 1574 (Comm) at [25] that it is not necessary for there to have been a deliberate decision not to comply with the time limit before an applicant may be held to have acted unreasonably;

(c) whether the respondent to the application or the tribunal caused or contributed to the delay;

(d) whether irremediable prejudice to the respondent to the application resulting from the delay, beyond the mere loss of time, will be suffered if the extension of time is granted, as regards which an absence of such prejudice is not reason to grant the extension, it is just an absence of what may be a strong positive reason against granting it: see on that, *Nagusina Naviera v Allied Maritime Incorporated* [2002] EWCA Civ 1147, *per* Mance LJ (as he was then) at [39], *Daewoo Shipbuilding & Marine Engineering Co Ltd v Songa Offshore Equinox Ltd* [2018] EWHC 538 (Comm) at [74];

(e) whether the arbitration has continued during the period of delay and, if so, what might be the impact on progress or costs in the arbitration were the extension of time granted;

(f) the apparent strength of the challenge to the award, assessed provisionally as best the court may be able to do on an application for an extension of time;

(g) overall, but in particular in the light of (a) to (f) above, whether in broad terms it would be unfair to the applicant to be denied the chance to have its challenge to the award determined on its merits.

125. Every case will turn on its own facts and circumstances, assessed by reference to that framework. *Nigeria v Process and Industrial Development* [2020] EWHC 2379 (Comm) is a precedent showing it to be possible for even an extremely lengthy extension to be justified by particular facts. In that case, extensions of 3 years and 4½ years were granted. As part of judging each case on its particular facts:

(a) when considering whether the applicant acted reasonably, it may be that a party should not be required to show that evidence of fraud could not with reasonable diligence have been obtained sooner: *ibid* at [183], and by analogy *Takhar v Gracefield Developments Ltd* [2020] AC 450. It will not be necessary to decide in the present case whether, as Sir Ross Cranston was prepared to contemplate, this is a principle of law so that a finding that an applicant has not been reasonable in allowing time to pass cannot be founded upon a finding that with diligence it could have evidenced sooner allegations of fraud it comes to make;

(b) on any view, again when considering the applicant's conduct, it should be borne well in mind that allegations of fraud are not to be made lightly or without cogent evidence: *ibid* at [257];

(c) the fact that to refuse the extension is to shut the door upon a full investigation at trial of allegations touching the integrity of the dispute resolution system for

> which the court has a supervisory jurisdiction may be important when assessing prejudice to the respondent or the broad fairness of the matter overall: *ibid* at [273]. Sir Ross Cranston there addressed in particular the situation where on the extension of time application there was judged to be a strong *prima facie* case of a relevant fraud, but it seems to me that the logic of his observation means it has scope to apply in any case where a properly arguable challenge under s.68(2)(g) is raised (see to similar effect, *Chantiers De L'Atlantique S.A. v Gaztransport & Technigaz S.A.S.* [2011] EWHC 3383 (Comm), *per* Flaux J (as he was then) at [66]).

126. As regards the length of delay, the emphasis seen in the authorities upon the shortness of the 28-day period with which *ex hypothesi* the applicant has not complied means that a delay of weeks will often be regarded as excessive and inexcusable, and a delay of months perhaps typically so. For example, in *Kalmneft* at [61]-[62], on its facts, Colman J regarded delays of 11 and 14 weeks as "*very considerable*"; in *Terna Bahrain* at [65], on its facts, a 17-week delay was said to be "*a very substantial delay in the context of the statutory [i.e. 28-day] period*"; and in *STA v OFY* at [19], Butcher J said of a period of 38 days after expiry of the statutory period that there was "*no doubt in my mind that the delay was significant and substantial*".

127. Again, however, the facts of the individual case must be considered with care. There is no principle of law that any particular length of delay either cannot ever be unjustified, at one extreme, or will always be unjustified, at the other extreme.

128. Mr Landau QC advanced in that context a particular submission that in the case of a consent award, the principle of 'speedy finality', deriving from s.1(a) of the Act which provides that "*the object of arbitration is to obtain a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense*", does not naturally apply. I do not agree. It will be an unusual case where a consent award is susceptible to challenge at all under the Act, but I cannot see that the reference in question's having been brought to an early end by mutual accord makes it any less important, all things being equal, for the putative respondent to any challenge to know promptly that it is to be said that something is wrong with that outcome. The real point here is that the basis upon which it is said that s.68 is engaged, and more particularly s.68(2)(g), on the facts of the present case, even though the award was by consent, may have more capacity to generate lengthier justifiable delay than might other grounds for a possible challenge, and that is catered for by what I have already said in paragraph 125 above.

Length of Delay

129. It was sensibly conceded by the defendants that for present purposes, it cannot be argued that there was relevant delay until after Mr Najib was ousted from office. Given the nature of the challenge brought against the Consent Award, it is impossible to fault the claimants for failing to bring it while Mr Najib was in power, since while in power he was MOFI and had *de facto* control over 1MDB, at least so far as Arbitration 1 and the Consent Award are concerned.

130. That means the delay to be considered is not a delay of 511 days (a week short of 17 months) from 6 June 2017 (28 days from the Consent Award) to 30 October 2018 (when this Claim was issued), albeit of course that is the length of extension that now has to be sought. Any material delay occurred only within the period of 173 days from 10 May

2018, when (now former) Prime Minister Mahathir was installed following Mr Najib's election defeat, to the issue of the Claim.

131. Against the background of the notoriety of the 1MDB scandal in Malaysia and the prominent role it played in the election campaign, a review of Arbitration 1 and the related investigation and pursuit of any possibility that might exist of challenging the Consent Award ought to have been one of the highest of immediate priorities for those having responsibility for such matters after the departure of Mr Najib from office. The key witness evidence on that comes from Tommy Thomas, the first post-Najib Attorney General of Malaysia. Mr Thomas took up office on 6 June 2018 and was in post until 28 February 2020. His witness statement was provided in April 2020, served a year late and without permission as additional evidence in reply within the extension of time application.

132. I find it surprising that Mr Thomas was only asked to provide evidence then, given the central importance of having a clear and detailed account, preferably first hand, of why this Claim was not issued sooner than some 5½ months after Mr Najib's departure. That though seems to me a criticism of the claimants' English legal team and their analysis of what evidence ought to be presented in support of the application, and not something I would hold against the claimants. Mr Thomas' account is clear, straightforward and credible, and no reason was advanced why I should not accept it as honest and accurate, notwithstanding that it should have been provided much sooner in the proceedings.

133. Mr Thomas is a very experienced independent lawyer. He was called to the English Bar in 1974 and to the Malayan Bar in 1976. He was in continuous and active practice as a legal adviser and advocate for 40 years or so prior to appointment as Attorney General. Malaysia has a unified legal profession, but Mr Thomas says that his was always primarily a litigation practice equivalent to what would be a barrister's practice in England. He developed through his practice a particular expertise and substantial experience of matters involving financial fraud or financial organisations in difficulty.

134. Mr Thomas confirms the huge importance of this Claim in Malaysia. He says the claim to set aside the Consent Award is "*of … fundamental importance to Malaysia and to our people … . Not only are the financial sums involved extremely substantial, but obtaining a proper resolution of this dispute is critical to public trust. Determining whether the Consent Award was affected by the 1MDB fraud is a matter of the utmost public interest in Malaysia. In that regard, I note it has been a matter of substantial media attention.*" The question of what to do about the Consent Award, he says therefore, was treated by his office and by Mr Thomas personally "*as a priority and as urgent, as best could be done in the extraordinary circumstances in which we found ourselves*". To similar effect, but as regards 1MDB more generally, Mr Thomas declared to press reporters at the Attorney General's Chambers as he took up office on 6 June 2018 that "*The government's first and immediate priority is all matters pertaining to 1MDB. I have to study the papers in that scandal, and we shall institute criminal and civil proceedings in our courts against the alleged wrongdoers.*"

135. Indeed, Mr Thomas explains that the level of distrust of the previous regime, and fear that elements within it had acted against the interests of the Malaysian people or so as to protect their own or Mr Najib's interests, was such that the principal reason for his appointment as Attorney General by Dr Mahathir "*was to ensure that legal matters concerning 1MDB would be pursued independently and completely*". Mr Thomas'

appointment was the first time in Malaysia's history that an Attorney General had come from private practice. Mr Thomas says that within a few days of taking office he had instructed the Malaysian Treasury Solicitor to compile "*the relevant documents regarding the Consent Award*".

136. What is not said in the evidence is that anyone with post-Najib responsibility for these matters was ever unaware of the Consent Award or of the fact that challenges to English arbitration awards have to be brought promptly, within 28 days of the award. In particular, though he explains the steps that were taken to consider and prepare what became in the event this Claim (and leaving aside for the moment individual criticisms of those steps advanced on behalf of the defendants), Mr Thomas does not claim ever to have been ignorant of the time limit.

137. The position therefore was that any challenge to the Consent Award was and was understood to be a matter of the utmost importance and urgency; and it is right to proceed on the basis that it was also appreciated that even as Mr Najib was ousted from power, any such challenge was already about 11 months out of time.

138. The 5½ months then taken to bring this Claim was to my mind, in those circumstances, a substantial period.

Applicants' Conduct

139. The enquiry here is whether as applicants for a very long extension of time, the claimants acted reasonably (i) in permitting the time limit to expire, (ii) in permitting any subsequent delay to occur. In that regard, I am concerned only with – in effect, the applicants are – the post-Najib 1MDB and MOFI. That follows from paragraph 129 above and the nature of the claim that is brought. It would be a plain injustice to treat as unreasonable the claimants' failure when under the effective control of Mr Najib to launch a challenge to the Consent Award based on his dishonest abuse of that control, as alleged.

140. Thus, at the first stage, the claimants can and should be taken as having acted reasonably in permitting the original 28-day time limit to expire; and at the second stage, they can and should be taken as having likewise acted reasonably in permitting time thereafter to pass up to 10 May 2018.

141. That is more than a mere starting point. It is not just that any consideration of whether the claimants acted with reasonable expedition (and with what consequence if they did not) realistically must begin only with Mr Najib's departure from office. It is to be borne in mind, here and throughout, that though in one sense Mr Najib is the major focus of the challenge and the detailed factual background to it, the properly arguable claim is that the defendants acted in a manner contrary to public policy, by way of dishonest collusion with a fraudster so as to trick the Arbitration 1 tribunal into terminating proceedings before them without reference to the merits. The defendants could not have had a legitimate expectation that a challenge to the Consent Award alleging such misconduct on their part would be brought while Mr Najib was in power, let alone within 28 days of the Award (or anything like it).

142. With Mr Najib no longer in control, the essential timeline leading to the bringing of this Claim was, in the event, as follows:

(a) Mr Thomas was appointed on 6 June 2018, just under a month after Mr Najib was ousted. Nothing of relevance appears to have been done until Mr Thomas took up office.

(b) Within a few days, Mr Thomas had given his instruction to the Treasury Solicitor to compile documents relevant to the Consent Award. She provided him with two files of documents on 19 June 2018 that included the BTS and its side letter, the Consent Award itself, and some documents and correspondence from Arbitration 1.

(c) The Attorney General's Chambers did not have experience or expertise in international commercial arbitration. Mr Thomas therefore provided a copy of the documents he had been given to a local law firm, Messrs Mohanadass Partnership, for preliminary advice.

(d) In parallel with Mohanadass Partnership's review of the material provided to them, Mr Thomas took time "*to review the background facts of the case, the DOJ Complaints, review the documents, conduct legal research, and so on*". He also caused requests to be sent to Weil Gotshal on 21 June 2018 and to Macfarlanes on 29 June 2018, for a complete set of all their documents and correspondence from acting for 1MDB and MOFI respectively in Arbitration 1.

(e) At about the same time, on 25 June 2018, PwC were appointed by 1MDB as advisors, with the approval of the Ministry of Finance, to facilitate investigations and to work with lawyers in respect generally of 1MDB's asset recovery effort.

(f) On 6 July 2018, English counsel were instructed to provide a preliminary opinion on the prospects of a claim in this jurisdiction to challenge the Consent Award. They provided their opinion on 17 July 2018, over which privilege has been maintained so I do not know what it said. That led to instructions being given to proceed with drafting the Claim and supporting materials "*[s]hortly before the end of July*".

(g) Documents were received in stages, from Macfarlanes in July and August 2018, and from Weil Gotshal in mid-July, at the end of July and in mid-October 2018. The retrieval and cataloguing of 1MDB documents by PwC was a huge and difficult exercise that ultimately ran across a 9-month period from July 2018 to March 2019. It needs to be appreciated that from January 2018, if not earlier, 1MDB had become an insolvent shell with a single employee who was on 'garden leave' and was later dismissed. Documents held by MOFI relating to Arbitration 1 came to Mr Thomas' Chambers at the end of July 2018, with further documents following thereafter up to and after the issuing of the Claim at the end of October.

(h) Documents were also obtained, following a request made on 26 July 2018, from Wong & Partners, a Malaysian law firm that is part of the worldwide Baker & McKenzie legal practice. Wong acted for 1MDB over a 7-year period including on the Bond issues that form part of the underlying fraud. Their documents arrived in a large number of separate tranches between mid-August and mid-October 2018.

(i) Bank statements and other financial records confirming relevant fund transfers in respect of the underlying fraud were obtained in September and October 2018.

(j) Mr Najib (having by then already been charged with criminal offences in relation to other aspects of the underlying fraud, as alleged) was questioned by criminal investigators in relation to the settlement of Arbitration 1 on 16 and 18 October 2018.

(k) The Claim was issued on 30 October 2018, effectively in parallel with the filing of additional criminal charges against Mr Najib a few days earlier, on 24 October 2018, relating to payments made pursuant to the Deeds and Consent Award.

143. There were many other investigations and processes running in parallel throughout that period, resulting for example in the various sets of criminal charges filed against Mr Najib and others. I have focused the basic chronology above on the steps taken to get this Claim off the ground without overlooking the reality of the competing demands upon Mr Thomas and those reporting to him, and the rest of the new government generally, at this most extraordinary time.

144. A suggestion was made that pursuing criminal charges was prioritised over preparing this Claim. I do not accept that. This Claim was made ready in parallel with the pursuit, through to the filing of charges, of possible criminal proceedings in relation to the Deeds and the Consent Award. A view was taken that there should only be a final decision whether this Claim should be issued once the facts relating to it had been thoroughly reviewed and Mr Najib had been questioned about them. Since the investigative process as a whole pursued the underlying fraud through its stages in chronological order, and since the Deeds and the Consent Award came late in that chronological order, the formal legal processes that have now arisen out of them (criminal or civil, including therefore this Claim) came to be finalised and launched towards the end of the timeline of the post-Najib investigation into 1MDB. That relative lateness in the day is thus not because criminal charges were treated as a higher priority than other types of legal action in relation to 1MDB. If there had been an arbitration arising out of some earlier stage in the underlying fraud and an award susceptible to being challenged by reference to what was uncovered by the enquiries under Mr Thomas' ultimate responsibility, I envisage that any such challenge it was decided to make would have been brought forward in parallel with any criminal or other legal proceedings concerning that stage, as occurred here with this Claim.

145. That leads naturally to a consideration of the approach adopted by Mr Thomas and, therefore, by the claimants in this matter. Mr Thomas explains it in this way in his statement:

> "*33. … the approach that we adopted when pursuing this claim was that it would not be sufficient simply to rely on the 2017 DOJ Complaint (or, indeed, any other document containing allegations) to prove the underlying fraud. Such a document is evidence only that allegations had been made. On the contrary, … my approach was that evidence needed to be provided to our legal team to prove the allegations of fraud. This was particularly so, given that the allegations being made were of the most serious nature, namely, that our former Prime Minister had been involved in a multi-billion dollar fraud and that he had colluded at a Government to*

> *Government level with Abu Dhabi to have that covered up through the settlement of an arbitration in order … to protect his involvement and advance his own political ends. As well as implicating the former Prime Minister and potentially others in Malaysia, the case would also involve very serious allegations against senior individuals in Abu Dhabi. Further, … following a prior investigation, the previous Attorney General had concluded that there was no basis for proceedings against Mr Najib in connection with some elements of the underlying fraud. …*
>
> *34. In addition to the fact that our legal team preparing this case needed to work through the 2017 DOJ Complaint to understand it, to identify relevant allegations and then to identify the evidence to prove them, there is a further point: the focus of the 2017 DOJ Complaint is the underlying fraud. … The DOJ Complaint does not mention the BTS, the arbitration under it or the settlement … which resulted in the Consent Award. … the circumstances in which the BTS came to be agreed, the conduct of the arbitration under the BTS and the negotiation and conclusion of the settlement of that arbitration also needed to be considered. However, those acting in respect of this claim had not themselves been involved in those matters.*
>
> *35. Thus, those acting in respect of this matter needed to obtain material that would confirm (i) Mr Najib's involvement in both parts of the fraud, noting that he denied involvement, (ii) IPIC's and Aabar's involvement in both parts of the fraud, and (iii) IPIC's and Aabar's knowledge at the time of the arbitration of Mr Najib's involvement / exposure.*"

146. Criticisms were advanced on behalf of the defendants of particular steps taken, or of delay in taking particular steps, and I shall deal with those separately. Aside from specific criticisms of that kind, in my judgment the approach set out by Mr Thomas was in general reasonable, with one qualification.

147. Taking the qualification first, it arises from paragraph 144 above. It is not said that any specific deadline applied to the bringing of proceedings of any of the kinds being contemplated and investigated through the summer and early autumn of 2018, except that any challenge to the Consent Award was already well out of time. There is no evidence that putting together a case for challenging the Consent Award, if there was one, was treated as having any special urgency because of that, nor any sense from the evidence that it was prioritised over other matters because of that. To that extent there is force in the criticism that this Claim was insufficiently prioritised. The claimants were going to be at the mercy of the court in a necessary application to extend by over a year a deliberately short (28-day) primary limitation period. In my judgment, that ought to have marked this Claim out as having its own unique urgency. The valid criticism is not that the bringing of criminal charges was prioritised over the bringing of this Claim, but that the bringing of this Claim was not actively prioritised (if and to the extent that was practicable) over the pursuit of criminal proceedings.

148. More generally, however, in my view the approach adopted, as summarised by Mr Thomas, was reasonable. It meant that the claimants chose to do more than an irreducible minimum necessary for a conclusion, on advice, that a claim could be pleaded. Given the features of the situation, and the nature of the allegations that would need to be made, all as appreciated by Mr Thomas, it was reasonable to take the view that more should be done, essentially that the claimants should be in a position, if and when this Claim was launched, to support it with evidence fit to go to a trial.

149. A s.68 (or s.67) claim is a species of Part 8 Claim. Unless some other order is made, to which there is no entitlement, the claim when issued must be accompanied by the evidence upon which the claimant proposes to go to trial. Little 1, the witness statement filed and served with the Claim Form, ran to 63 pages, plus a 25-page Appendix 1 summarising and quoting from some of the press coverage of the 1MDB scandal and a short Appendix 2 with a chronology of the Mahathir government's investigations into the scandal. It exhibited over 4,000 pages of supporting material. In paragraph 223, the last paragraph at the end of the main body of the statement, Mr Little said that the claimants would seek an early CMC and indicated that they would propose directions for the Claim to proceed as if brought under Part 7. But the claimants could not assume that the court would adopt that approach, so Little 1 had to contain and exhibit evidence upon the basis of which the claimants would be content to take the claim to trial.

150. Mr Rabinowitz QC made it a repeated refrain of his argument on this main point that the underlying fraud, and the way Mr Najib was implicated in it, is but background fact that is not, indeed has never been, in dispute. It was said on that basis, in substance, that the claimants, acting effectively through Mr Thomas, should not have taken up any time reviewing for themselves and seeking to evidence properly the facts needed to establish the fraud and Mr Najib's complicity. However, I was shown no evidence that the defendants had at any time admitted the material facts (or had had any cause to do so). Mr Najib had vigorously disputed involvement in any wrongdoing, and had been cleared of wrongdoing by Mr Thomas' predecessor as Attorney General. Of course, it was apparent – and had been since long before the change of regime in Malaysia – that respected journalists (for example, at *The Wall Street Journal* and the BBC), and the DoJ, took the view that Mr Najib was guilty, or at least that there was a powerful case for him to answer. That does not mean the claimants were in a position to make and support a claim ready to go to trial without a lot of work of their own.

151. It is likewise the case, as Mr Rabinowitz QC emphasised, that the settlement of Arbitration 1 was the subject of strong public criticism by some politicians in Malaysia, in the summer of 2017, and an opposition youth group, claiming sufficient standing to raise the issue as a litigation complaint, had brought a claim in the Malaysian court accusing Mr Najib of having brought about a settlement on very unfavourable terms in order to cover up fraud. That may mean that the possibility of putting some such case to this court should have been identified promptly within any post-Najib investigation by or on behalf of the claimants of the 1MDB saga. It does not make it unreasonable that the claimants chose to investigate that prospective accusation with some care and advanced it only when they felt comfortable they had the evidence to make it good at a trial. Whether they took longer than they could or should have done to get to that point is a separate matter. At this stage, I am considering the bigger question of the reasonableness of the approach the claimants adopted.

152. I agree with a submission of Mr Rabinowitz QC that Little 1 was an improper mix of evidence, pleading and argument (see paragraph 8 above). However, I disagree with the conclusion he sought to draw from it, which was that by adopting an impermissible approach to the presentation of the claim, "*Cs seem to have conflated the standard required to plead their case with the question of evidencing their case at trial*". To the contrary, what was wrong with the way in which the Claim was put together was the failure to provide a proper statement of case, within or as an attachment to the Claim Form, separately from the evidence served in support of it. The preparation to

accompany it of the evidence upon which the claimants believed they could go to trial and establish their case was appropriate and required by the CPR.

153. Even if the claimants should have approached the preparation of the Claim as if it would be a Part 7 Claim from the off, which is not my view, nonetheless it was reasonable of Mr Thomas on their behalf, having carriage of the matter and reporting within government on it, to conclude that the claimants should gather, analyse and take advice on a sufficiently comprehensive set of materials that they could be satisfied that they had the evidence to prove the underlying fraud, and Mr Najib's involvement in or in relation to it, that they had taken reasonable steps to investigate and consider whether there was or might be exculpatory material pointing against the case they would need to allege, and that they had evidence they thought cogent and sufficient to connect the Deeds and the Consent Award to dishonest conduct on the part of Mr Najib, and to evidence or justify an inference of complicity on the part of the defendants, in a way that would arguably engage s.68(2)(g).

154. To be clear, I emphasise that this is a case in which, come what may, any challenge to the Consent Award was going to be made at least a year out of time. Different considerations might arise if a claimant was able, properly and reasonably, to advance within the statutory 28-day period the allegations required for a challenge, but was in need of more time to put together full evidence to take them to trial. The court might then expect proceedings to be commenced, with an immediate application to the court for directions to address that difficulty, unless there were some good reason against adopting that approach.

155. To illustrate the above conclusions, and this will also deal with one individual criticism advanced on behalf of the defendants, it is true to say that significant portions of Little 1 echo very closely, and were admittedly derived from (i.e. drafted by reference to), portions of the 2017 DoJ Complaint. It may be (I do not need to decide) that in many of its details, the 2017 DoJ Complaint was a sufficient basis on its own for it to be proper to allege in this court many of the matters of fact asserted in it (given, for example, what Lord Bingham said about such things in *Medcalf v Mardell* [2003] 1 AC 120 at [22]). But the view taken by Mr Thomas was still a reasonable one, namely that he should not authorise the making and pursuit of such allegations without the claimants being in possession of cogent, primary evidence by which (he believed) they had verified and could establish what was said in that Complaint.

156. On the reasonable approach adopted by the claimants, as I find it to have been, it was never going to be but a few weeks from Mr Najib leaving office to the bringing of this Claim. That would have been so even if there was substantial continuity within 1MDB and MOFI, Mr Najib aside, as between the BTS, Arbitration 1, the Deeds and the Consent Award, on the one hand, and the period immediately following Mr Najib's departure when for the first time the 1MDB affair could be investigated free from his influence, and the possibility of a challenge to the Consent Award could sensibly be considered. That was all the more so, as Mr Landau QC emphasised, since Mr Thomas inherited no meaningful prior work product, the only previous and supposedly independent investigation in Malaysia (by Mr Thomas' now discredited predecessor) had cleared Mr Najib of wrongdoing, and 1MDB was an empty shell.

157. In the event, over and above the general point just made that on any view this Claim was going to be at least several months in the making following the transition to the

Mahathir administration in Malaysia, important parts of the evidence that Mr Thomas felt, in my view reasonably, needed to be obtained and reviewed before the Claim could be authorised, were only obtained late on. Thus:

(a) Financial records documenting relevant fund transfers were received only in September and October 2018.

(b) The minutes of the 1MDB Board meeting on 13 April 2017 evidencing that Mr Najib was or may have been overriding the Board's judgment that settlement on the terms of the Deeds was not in 1MDB's best interests were obtained only in late August 2018.

(c) Messrs Amhari and Najib were questioned as regards matters related to the Deeds and the Consent Award in October 2018.

(d) Mr Kanda likewise provided evidence only in late September and early October 2018. He had been questioned initially by the then Minister of Finance in May 2018, but only came forward, through an intermediary, to offer assistance more generally, enabling full questioning, towards the end of September.

158. I turn to the particular criticisms advanced on behalf of the defendants.

159. Firstly, it was said that there was in fact enough material immediately available to the claimants in May 2018 to make it proper to advance the claim now brought. In my judgment, that is not right, since the material relied on by the defendants would not have enabled any case to be pleaded in respect of the BTS, the Deeds and the Consent Award, even if it might have provided a proper basis to plead an account of the main stages of the underlying fraud, as alleged. The criticism in any event falls away given my conclusion that it was reasonable of the claimants to adopt the approach they adopted of being rather more thorough than merely asking whether there was some (bare minimum) basis enabling a case to be pleaded.

160. Secondly, it was said that the bringing of criminal charges against Mr Najib in July 2018, and again in September 2018, showed that this Claim could (and it was said, should) have been commenced sooner. That only repeats, or at all events adds nothing to, the point I have already made that the post-Najib investigation into the 1MDB affair was pursued as a coherent whole, with main actions, such as criminal charges and eventually this Claim, being commenced in a sequence broadly following the chronology of the underlying fraud, as alleged. Thus, the criminal charges in July 2018 related to SRC International Sdn Bhd, previously a subsidiary of 1MDB, and events prior to what I identified above as the first phase of alleged dishonesty that led eventually to the Consent Award. The charges in September related to the main phases of the underlying fraud, as alleged, up to and including the DB Loans. The charges brought against Mr Najib that related to the Deeds and the Consent Award, which to be more specific alleged a criminal breach of trust in respect of government property by reason of payments made to IPIC pursuant to the Settlement Deed and Consent Award, were those brought at materially the same time as (just a few days before) this Claim was issued.

161. Thirdly, the claimants were criticised because (i) Mr Thomas was only appointed a month after Mr Najib left office, in part because of a delay in the approval of his

nomination caused by an initial reluctance on the part of the then King of Malaysia on racial and religious grounds, and (ii) nothing was done about the Consent Award, or to begin any investigation into its circumstances or the availability of any challenge to it, during those few initial weeks by or at the behest of the Solicitors General (there were two of them). I think it is fair to scrutinise the preparation and prosecution of the Claim by reference to the activities of the Attorney General's function, given that the claimants found the application for an extension of time upon the fact that realistically the matter needed to be handled by the senior law officers of the Malaysian state and 1MDB was not an active entity. It is unrealistic, in my view, to criticise as unreasonable the fact that decisions as to what matters should be investigated, how and by whom, awaited the arrival of a new, independent Attorney General, in the event Mr Thomas. It is inescapable, however, that Mr Thomas ought to have been confirmed in post sooner and it was unreasonable that the commencement of work was instead effectively stalled for a short time because of racial and religious discrimination against him.

162. Fourthly, a fair criticism is made that some time may have been wasted by instructing Mohanadass Partnership when it should have been apparent immediately, without any disrespect to Mr Mohanadass, that English legal counsel would need to be engaged to review and advise.

163. Fifthly, then, as regards English counsel, the claimants were criticised for failing to turn to Weil Gotshal and/or Macfarlanes for the necessary review and advice. The claimants do not allege that either firm behaved dishonestly or otherwise improperly in relation to the Deeds or the Consent Award; nor on the evidence before the court does there appear to have been any positive reason for thinking they may have done. However, the nature, depth and scale of the 1MDB scandal rendered it entirely understandable, and in my view reasonable, that any investigation of or advice on remedies in respect of what had happened should not be entrusted to any official or adviser involved at the time. Indeed I think it would be surprising if a different approach had been taken.

164. Sixthly, Mr Thomas was criticised for taking what may have been nearly two weeks (from 17 July until 'shortly before the end of July') between receipt of English counsel's opinion and instructions to begin preparing this Claim. I do not have much detail about that. Mr Thomas says that "*Consideration was given to [the English legal] opinion. Although all legal decisions on behalf of the Federal Government in important matters were left to me, in this matter, I kept the Prime Minister informed because of the potential effect of the case on bilateral ties with Abu Dhabi.*" That does not explain why it took as long as it did. In the absence of more specific explanatory evidence, my conclusion is that there was unjustified delay here. Considering the opinion and taking the decision to instruct English counsel to begin preparing this Claim should not have taken more than a working day or two following receipt of the opinion, given the high priority rightly being attached to this matter. However, given the scale of the task involved and the importance reasonably attached to the gathering and review of a reasonably comprehensive collection of relevant documentary material, it seems to me unlikely that this delay of (say) 10 days or so before English counsel were instructed to start drafting will have made any difference to when the Claim was ultimately issued.

165. Seventhly, the claimants were criticised that after Mr Thomas' appointment on 6 June 2018, it took until 19 June before a preliminary set of documents was provided to him, and then a further 10 days before Weil Gotshal were asked on 29 June 2018, by PwC on behalf of 1MDB, to retrieve and provide copies of documents held by them (by

contrast, MOFI made the equivalent request of Macfarlanes on 21 June). Again, there is no specific explanation of that delay in Mr Thomas' evidence. He merely reports the dates as facts. It seems to me that it should not have taken nearly two weeks to provide Mr Thomas with the initial set of documents and Weil Gotshal should have been asked to retrieve and provide documents (say) a week earlier than in fact they were.

166. Finally, there was criticism that the material criminal investigation interviews were only in October 2018. That seems to me not to be a separate point, but a by-product of the broadly chronological nature of the investigation and review of the case that was conducted (see paragraph 160 above).

167. The major point here, as it seems to me, is that on which I am in the claimants' favour. The defendants said it was unreasonable that this Claim was not issued more or less straight away, and in any event within just a few weeks, of Mr Najib's departure. In my judgment however, it was reasonable to adopt the approach that Mr Thomas and therefore the claimants adopted. That approach having been adopted, it is unrealistic to propose that it should have taken less than several months at least to investigate, prepare and properly evidence the challenge to the Consent Award now brought.

168. That means, considering the matter sensibly, that any claim such as the claim now made was always going to be brought (if at all) only long after the expiry of the normal, and normally strict, 28-day limit, but reasonably so, and in the event was never likely to be brought less than 15 or 16 months after the Consent Award.

169. The Claim was brought in fact a week under 18 months after the Consent Award. I have concluded that there is room to criticise the claimants, in point of detail, for:

(a) a seeming failure to single this Claim out as having a special urgency, because of the expired time limit for bringing it,

(b) the delay in Mr Thomas' appointment being approved so that work could get going;

(c) some initial delay in the early stages of that work, once it did get going.

170. It is not possible to be scientific or precise about the impact those matters had. Certainly, it is not as simple as saying that if Mr Thomas had been appointed (say) two weeks earlier, the Claim would have been issued two weeks (or at all) earlier than it was, or if the initial file of materials had been provided to him (say) a week earlier, the Claim would have been issued a week earlier, and so on. It is also important not to treat the individual points of possible criticism as simply cumulative, and not to double-count (thus (a) and (b)/(c) above go hand in hand to some extent rather than being entirely independent criticisms). Finally, although the critical allegation to be made would necessarily concern only the decisions to settle on the terms of the Deeds and obtain the Consent Award at the end of the story, any claim that those decisions were part and parcel of the underlying fraud, its continuation or its concealment, could only properly be assessed and presented in the context of the full story, which the claimants could not assume would be admitted so as not to require proof.

171. In my judgment, the fair conclusion to reach is that, even having accepted the claimants' approach as reasonable, and fully conscious of the scale of the task and of the

extraordinary nature of that task and of what was happening in Malaysia, the claimants ought reasonably to have issued the Claim two months or so sooner than they did. That conclusion assumes against the claimants that it is legitimate to assess things in that way in a case of this type. It will not be necessary to decide whether that assumption is well founded (*cf* paragraph 125(a) above).

172. Had the Claim been issued at the end of August 2018, there is no basis for thinking that matters would have taken any different course than in fact they did. The substance would have been the same, and no doubt the reactions would have been the same – Arbitration 2 and the cross-applications for a stay and for an injunction that in the event occupied many months, followed by unsuccessful efforts at settlement taking up over a year. That it will be 3½ years since the Consent Award was issued before initial case management directions are now set for a future determination of the s.68 challenge on its merits, if the extension of time sought is granted, is not because the Claim was issued when it was rather than a couple of months earlier.

Respondents' / Tribunal's Conduct

173. This was not relied on as a separate factor in the present case. That said, the defendants' conduct lies at the heart of the complaint about how the Consent Award came to be issued *and* that conduct involved, if the complaint is well-founded, the inevitable consequence that any s.68 challenge was not going to be attempted until very long after the 28-day statutory period had expired; but I have taken that into account already as part of considering the first two factors.

Prejudice to Respondents

174. There is no irremediable prejudice beyond the basic fact of defending a challenge to an award brought later than the Act *prima facie* requires.

175. The defendants contended otherwise (at least in writing – in oral argument, Mr Rabinowitz QC said he did not press the point), suggesting that there will be prejudice in:

(a) the finality of the Consent Award being undermined long after it was issued – but that is just a statement of the nature of a s.68 challenge allowed to be brought substantially out of time, not any *additional* prejudice caused by the delay;

(b) having matters aired in public in respect of what was a confidential arbitration process – but if, which is not for decision now, any trial in this Claim will be in public, that will be because a decision is made that justice demands a public trial notwithstanding that this is an arbitration claim, and in any event that will not be any consequence of the delay;

(c) the fact that the defendants "*will be put to the considerable time and expense of defending the Claim, in circumstances where there is another forum in which Cs allegations can be determined (in arbitration pursuant to the Deeds) and to which the parties are likely to have to resort in any event, ultimately, to determine the validity of the Deeds*" (original emphasis).

176. That final suggestion evolved during the life of this application. Before Robin Knowles J, the argument was just that it was irremediable prejudice due to delay that the defendants would be put to the considerable time and expense of defending the Claim. The claimants' answer to that, plainly correct, was that the defendants would have been put to that time and expense if the Claim had been brought within time. As it was put on behalf of the claimants, "*"Avoiding time and expense" is thus not a point in Ds' favour.*"

177. The revised submission before me was that it made a difference that Arbitration 2 had been commenced and was, in principle, an available forum in which to have the merits of the matters said to engage s.68(2)(g) considered and determined. However, firstly, that is still not a consequence of the delay – Arbitration 2 was commenced in response to the fact and nature of this Claim and would no doubt have been commenced if the Claim had been timely. Secondly, the revised submission does not sit comfortably with the conclusion of the Court of Appeal that it is vexatious and oppressive to seek to use the existence of Arbitration 2 as a reason to suppress this court's consideration of the merits of the claimants' allegations pursuant to its s.68 jurisdiction. Thirdly, I could not say that it is likely the parties will have to resort to the Arbitration 2 tribunal in any event, because of the point I identified at the outset about the relationship between the Deeds and the Consent Award (paragraph 13 above). I am not in a position today to decide, and do not claim to be deciding, that after a determination by the court of this s.68 challenge, no (further) point as to the validity of the Deeds could remain undecided between the parties so as to be capable of being determined in Arbitration 2. But plainly there could be no revisiting, in Arbitration 2, points decided between the parties as part of determining this Claim, and whether Arbitration 2 would resume at all would no doubt depend on the outcome of this Claim and the basis upon which that outcome were reached by the court.

Impact on Arbitration 1

178. This *Kalmneft* factor is not engaged. Arbitration 1 was terminated by the Consent Award; this *Kalmneft* factor asks whether the subject arbitration reference continued during the period of delay (and if it did, what might be the impact on progress or costs in that reference were the extension of time granted).

179. In *Daewoo*, *supra*, at [91], Bryan J commented that in a case where what is challenged is the final award bringing the subject arbitration to a close, the principle of finality is engaged instead, but on analysis that adds nothing. The principle of the finality of awards underpins the existence of the short, primary time period for the bringing of any challenge, and will inform any assessment of (at least) the first, second and final *Kalmneft* factors (the length of delay, the reasonableness of the applicants' conduct, and the overall fairness of granting or refusing an extension). It would be double-counting against applicants to say that where there is nothing to put into the scales at this stage (i.e. there has not been any continuation of the subject arbitration following the award that might be undermined or disturbed by allowing a late challenge to be brought), the principle of finality counts against the grant of an extension as part of assessing this *Kalmneft* factor; and I do not envisage that to have been the intention of Bryan J's comment.

Merits

180. I gave the merits such provisional consideration as is possible or appropriate at this stage before I turned to the *Kalmneft* factors. My conclusion (paragraph 123 above) was that the claim is properly arguable and that it cannot be said at this stage either in the claimants' favour that it appears to be a very strong one or in the defendants' favour that it appears to be very weak.

181. I agree with the approach of Popplewell J (as he was then) in *Terna Bahrain*, *supra*, at [31], namely that if a claim appears provisionally to be particularly strong or particularly weak, that can respectively support or detract materially from the strength of the case for an extension, but otherwise the substantive merits should be regarded as of marginal relevance. In *State A v Party B* [2019] EWHC 799 (Comm), Sir Michael Burton, sitting as a High Court judge, took the view that where there had been a very long delay, the apparent merits of the substantive claim "*must be one of the primary factors*". But he said that in a case where there had been "*colossal*" delay of over 2½ years and he considered that there was material prejudice beyond that of delay, so that an orthodox application of the *Kalmneft* guidelines, adopting the approach of Popplewell J as to the relevance of the substantive merits, would have led to the refusal of the application.

182. Following Popplewell J's approach, which I prefer, the substantive merits here are of marginal relevance, the claim being (on the face of things, assessed provisionally) neither particularly strong nor particularly weak. That is to say, the strength of the claim on its merits is not itself a weighty factor either way. This is separate to the point that the nature of the claims made, so long as they are properly arguable, may be a weighty factor as regards overall fairness, the issue to which I now finally turn (see paragraph 125(c) above).

Overall Fairness

183. Stepping back, this is a case in which:

(a) serious allegations are made that are properly arguable on their merits to the effect that the defendants were complicit in the dishonesty of Mr Najib, as alleged, in such a way as to have made it a fraud, or contrary to public policy, that the Consent Award was issued;

(b) it was inevitable that any challenge to the Consent Award raising that issue would not be brought within time, indeed would not be brought at all unless and until Mr Najib was removed from his position of control over 1MDB and MOFI;

(c) it was thus inevitable that, as events transpired, any claim such as this Claim, if brought, would only be brought at least a year out of time;

(d) considering what was required by the CPR, and my conclusion as to the reasonableness of the approach that was taken on behalf of the claimants to the consideration and preparation of this Claim, it was on any view reasonable (whether or not inevitable) that this Claim was not commenced any sooner in the event than 15-16 months after the Consent Award;

(e) assuming against the claimants that it is appropriate to treat such matters as criticisms in a case such as this, there was a failure to single this Claim out as having a special urgency, because of the long-expired statutory time period, which, coupled with some unreasonable specific delays in getting matters moving, resulted in the Claim being commenced closer to 18 months after the Consent Award;

(f) that culpable delay (if that is what it was, continuing the assumption) has caused no prejudice to the defendants, let alone irremediable prejudice;

(g) indeed, that delay has had no impact at all on the parties or on the administration of justice, and it pales into utter insignificance within what is now a period of 3½ years to get from Consent Award to case management directions for a trial of the Claim and what is likely to be a period of 5 years from Consent Award to determination of the Claim, unless there is an amicable resolution in the meantime or there is some significant streamlining possible as a matter of case management to allow any trial to occur sooner than Q2 2023.

184. I have no real hesitation in those circumstances in concluding overall that it would be unfair to the claimants, and an injustice, to deny them the opportunity of advancing their s.68(2)(g) claim, and that the extension of time they require in order to do so, very lengthy though it is, should be granted.

185. The defendants submitted that the claimants' failure to act reasonably to ensure that the Claim was issued expeditiously in the period after May 2018, i.e. after Mr Najib was removed from power, when the statutory 28-day period had already long expired, should go against the application. I have taken that aspect into account, to the extent I was persuaded of it on the facts, but in the circumstances of this case I do not regard it as a weighty factor. Certainly, it does not outweigh the unfairness to the claimants, and the *prima facie* affront to justice, involved in declining to consider their properly arguable complaints on their merits.

186. The defendants additionally submitted that:

(a) granting an exceptional extension of 511 days "*would severely undermine the [28-day] statutory period and the finality of English arbitral awards, to the detriment of London's position as a leading centre for international arbitration*";

(b) any unfairness to the claimants was diminished by the fact that "*Cs will still be able to pursue their allegations concerning the Settlement in the 2018 Arbitrations [i.e. Arbitration 2]*", and indeed it was something of an overarching submission for the defendants that "*Cs will not … suffer any substantial unfairness if they are not granted an extension of time. They can, and should, pursue their complaints in the appropriate forum, namely the 2018 Arbitrations.*"

187. I reject the submission that an extension granted in this case would undermine the statutory scheme and do damage to London's position as a leading venue for international arbitration. The statutory scheme is for challenges to awards to be brought promptly wherever possible, but it is not absolute and provides for the possibility of

extension. The principles on which the grant of an extension will be considered are well established and the defendants provided no evidence that they had done any damage to London's relevant reputation. The statute does not include any strict upper bound upon the extensions that may be granted. A decision in this case that an extension of nearly 17 months is merited should be seen for what it is, an exceptional decision to meet the justice of an exceptional case.

188. Whilst equally there is no evidence for this either, I would suggest that it is far more likely to bring London into disrepute for it to be thought that a party might connive in the dishonesty of the principal of its counter-party, harming the counter-party and the integrity of the system, and then thwart the counter-party, when it has been later freed from the control of the dishonest principal, from raising that with the court as guardian of that integrity, by relying on the fact that the s.68 claim is only brought long after the award in question was dishonestly procured where that is substantially the consequence of the fact that the dishonest principal remained in control for a long time after the award.

189. It will be appreciated that I am not deciding at this stage that this *is* a case of dishonest connivance by the defendants in Mr Najib's dishonesty, as alleged. That is the issue, expressing it in general terms, for a trial; but the claim to that effect is properly arguable and engages the strong public interest in the court acting and being seen to act to investigate serious allegations that the dispute resolution system of London arbitration it oversees has been abused. It will also be appreciated that I am not deciding that if the type of allegation made here is made, and is properly arguable, then nothing else matters and whatever extension of time the applicant requires in the event should always be granted. The *Kalmneft* factors will still be a fair and reliable guide through the problem of whether justice demands that the required extension be granted. The present case, in substance, comes down to whether justice does so demand even if it can be said that the claimants could and should have put themselves in a position to issue the Claim perhaps as much as two months sooner. Weighing everything in the balance, I think it does.

190. The submission concerning the 2018 Arbitration was akin to, but is not the same as, the contention that the defendants will suffer prejudice by having this Claim determined in court (see paragraph 177 above). The conclusion that there will not be any relevant prejudice to the defendants does not decide that the same feature of the facts cannot diminish the unfairness to the claimants if an extension be refused. The submission at this stage was developed in these stages:

    (a) Arbitration 2 is the contractually agreed forum for resolving any dispute as to the validity of the Deeds.

    (b) Having matters resolved in Arbitration 2 offers distinct advantages to the claimants, in that:

        (i) Arbitration 2 "*will determine the validity of the Deeds and the obligations assumed thereunder, which are at the heart of Cs' complaints. By contrast, the present claim only relates to the Consent Award, which emanates from the Deeds*";

(ii) the claimants can seek, and have sought, to pursue their claim for compensation in respect of the US$3.5 billion allegedly misappropriated from 1MDB, in Arbitration 2;

(iii) Arbitration 2 is "*much further progressed than this Claim. Lengthy statement[s] of case and document production requests had already been served before the arbitrations were enjoined in favour of this Claim. … [A] tight timetable had been set which would have led to a substantive hearing in September 2020 had the Court of Appeal not granted the injunction sought by Cs. In contrast, the Claim remains at the very earliest stage, without even pleadings having been prepared.*"

191. Developed thus, the submission is in substance a fairly brazen collateral attack on the Court of Appeal decision that the defendants' pursuit of Arbitration 2 in the face of this Claim was vexatious and oppressive such that justice required it to be restrained by injunction. It is perhaps unnecessary to say more, but for completeness, tracking the steps in the argument:

(a) Arbitration 2 may or may not be a contractually agreed forum for resolving disputes as to the validity of the Deeds, depending on the nature of those disputes and whether they are well-founded. But the court is the only proper forum for resolving the dispute between the parties as to whether the Consent Award was obtained by fraud or in a way that is contrary to public policy. That cannot be trumped by the fact that, as it happens, the attack on the Award is dependent upon an attack upon the Deeds, so that the court will have to consider, and it may well be determine, the latter when trying the former.

(b) As regards the supposed advantages to the claimants of having matters determined in Arbitration 2 rather than in this Claim:

(i) The fact that the Consent Award emanated from the Deeds means, I repeat, that this Claim cannot be determined without considering the claimants' complaint about the Deeds. This Claim logically cannot be, and will not be, confined to an exploration of the Consent Award in isolation.

(ii) It is true that, if Arbitration 2 has jurisdictional competence (something the claimants' claim questions), the claimants could seek in Arbitration 2, as they have sought (in the alternative, without prejudice to their challenge to jurisdiction), relief in respect of the US$3.5 billion allegedly misappropriated from 1MDB. But if the claimants are right, they should not be being put to doing that but should have Arbitration 1 restored as the proper venue for any such claim.

(c) Arbitration 2 is further advanced than this Claim only because the defendants pursued it when not restrained by injunction from doing so, the Court of Appeal's decision being, in substance, that they ought never to have done so. Given that decision, the 'advantage' of having Arbitration 2 embark upon an investigation into matters that were properly within the purview of this Claim, pursuant to s.68 of the Act, is an illegitimate advantage improperly procured by

the defendants. It would not be appropriate to allow that to be used to stifle this Claim through the refusal of an extension of time, if otherwise merited.

192. Thus, the particular submissions advanced by the defendants and not already assessed when considering the individual *Kalmneft* factors do not tell against the conclusion I expressed in paragraph 184 above. If anything they reinforce it. In this unusual case, there were in truth two points of possible substance raised by the defendants, the suggestion that the claim is particularly weak on the merits and the suggestion that the careful approach adopted by the claimants, through Mr Thomas, to the decision whether to bring the Claim, and to its preparation, was an unreasonable approach. I have not agreed with either of those points. The demand of justice here is that the claimants' properly arguable claim under s.68(2)(g) be determined on its merits, despite the fact that it was brought approaching 17 months out of time and although, but in the particular context of a claim that was always going to be well over a year late, it might be said that it could and should have been issued two months or so earlier than it was.

Conclusion

193. For the reasons given above, the proper course in this unusual and special case is to grant the extension of time required for the bringing of this Claim, even though that means allowing a s.68 challenge to be brought some 511 days late against a statutory requirement (absent the grant of an extension) to make such claims within 28 days. That is no doubt an exceptional length of extension to grant, but this is an exceptional case.

194. The parties must now cooperate closely to consider (i) what case management directions can and sensibly should be made within the Order to be drawn up on this judgment, in consequence (ii) when, for what purposes and for how long a hearing the parties should be directed to list any further case management hearing, and (iii) whether it is realistic to fix now a trial estimate and listing window for a final hearing of this Claim.

195. I envisage at a minimum that I shall wish to direct that:

(a) the claimants now have a short period of time within which to file and serve a final, fully particularised, pleading of their claim;

(b) with that pleading, the claimants must file and serve an edited version of Little 1, limiting it (by deletions) to the evidence of fact (if any beyond proving the documents exhibited) the claimants propose to adduce from Mr Little at trial, together with any application they may wish to make for permission to rely upon other evidence (either taken from the subsequent witness statements served to date in the various interlocutory applications, in which case taking care to be clear and specific in identifying the evidence in question, or yet further evidence not previously served);

(c) the defendants then have a sufficient period of time within which to file and serve a pleading by way of defence, together with any evidence they propose to adduce at trial;

(d) the claimants then have a short period of time within which, if so advised, to file and serve a pleading by way of reply, together with any application they may wish to make for permission to rely upon yet further evidence.

196. I would want consideration to be given to whether that initial timetable should allow for any additional evidence application at the first stage, served with the claimants' primary pleading, to be resolved, if it is not agreed, before the defendants have to put in their defence.

197. Whether there will be any need for disclosure and/or expert evidence in any field or fields of expertise, I envisage, will not be sensibly addressed prior to the exchange of pleadings and factual evidence I have described above; but if the parties think that is wrong, or identify any other additional directions that might usefully be given at this stage, I shall consider their submissions on that as part of drawing up an Order on this judgment, either on paper or (if the submissions merit this) at a short further hearing.

Appendix – Particularisation of Claim

1 The Award was procured by fraud or the way in which it was procured is contrary to public policy, such that there is a serious irregularity under section 68(2)(g) of the Act which has caused and/or will cause substantial injustice.

2 The Claimants do not repeat in this note the background to the Settlement Deeds and to the request for the Consent Award, namely the underlying fraud and the conclusion of the BTS, nor the Claimants' case regarding the invalidity of the BTS itself, though of course they maintain their reliance on them.

3 During the BTS Arbitration, Mr Najib remained Prime Minister and Minister of Finance of Malaysia and was in control of both 1MDB and MOFI. By reason of that control, neither entity was able to advance a full or accurate defence to the claim under the BTS (despite that agreement being, on the Claimants' case, void and/or otherwise invalid). Advancing such a full defence would have depended upon 1MDB or MOFI pleading to the fraud of which Mr Najib was an integral part and major beneficiary and in which others close to him had participated / from which they had benefited. The Defendants were aware of this during the BTS Arbitration and exploited it.

4 At the time of the Settlement Deeds being negotiated and concluded, Mr Najib's personal interests conflicted with the interests of 1MDB and MOFI (and the Malaysian people) in whose interests he was legally and constitutionally bound to act. He had participated in and benefited from the underlying fraud, as had others close to him. He wished to protect his own position and, in particular, that of his stepson, who was also implicated in the fraud. For dishonest and illegitimate reasons, he sought to prevent the arbitration from proceeding. He was anxious to ensure that the Arbitration be settled no matter how unfavourable the terms given the potential consequences for him if the Arbitration continued, which could have included for example the defendants making allegations and providing evidence about the fraud, including potentially about matters not covered in the DOJ Complaint, and his being cross-examined in the arbitration. Further, in connection with the settlement of the arbitration, Mr Najib made requests which related to the position of his stepson.

5 The Defendants knew of Mr Najib's conflict of interest i.e. that he had been involved in the fraud and that he would exercise his control over MOFI and 1MDB in order to protect himself and those close to him rather than the best interests of either entity, as he was obliged to do. Indeed, the Defendants exploited this to agree the settlement, which was grossly one-sided. Further, IPIC and Aabar themselves wished to avoid allegations of fraud being aired before a tribunal. They wished to cover up the fraud and colluded with Mr Najib in order to do so via the purported Settlement.

6 The conclusion of the Settlement was a continuation of the fraud and the way in which the Award was procured was contrary to public policy.

7 The settlement negotiations were vitiated by the involvement in them (certainly on the Malaysian side) of various individuals who had been involved in, and substantially benefited from, the Underlying Fraud. In addition to Mr Najib himself, Mr Najib instructed Mr Amhari to conduct the negotiations on his behalf with those on the Abu Dhabi side and instructed Mr Amhari to liaise with Mr Low to obtain information for this purpose. Mr Low was one of the principal fraudsters.

8 The Board of 1MDB was of the view that the Arbitration should be defended. However, Mr Najib, who (as MOFI) was the sole shareholder of 1MDB and exercised de facto control over 1MDB, by letter dated 17 April 2017 instructed the Board to settle the Arbitration, despite its extremely disadvantageous terms. Mr Najib acted contrary to Malaysian law and/or the Constitution and also without authority or power. That instruction was invalid. 1MDB did not validly consent to the Settlement Deeds.

9 As for MOFI, Mr Najib procured that MOFI execute the settlement. Mr Najib signed the Settlement Deeds. In so doing, he acted contrary to Malaysian law and/or the Constitution and/or without authority or power. MOFI did not validly consent to the Settlement Deeds.

10 The Deeds upon which the Consent Award is based are void and, if not void, would be unenforceable.

11 In circumstances in which the underlying settlement is itself void and/or unenforceable, a "consent" award purportedly recording and giving effect to that settlement is equally affected and cannot stand.

12 In the circumstances the purported Consent Award was obtained by fraud or the award or the way in which it was procured was contrary to public policy.

13 Such serious irregularity has caused and/or will cause substantial injustice to the Claimants (and, as a consequence, to the Malaysian people) because it has resulted in the making of an award, purportedly by consent, to which in fact the parties have not consented. This inherently causes substantial injustice. Further and/or in the alternative, there is substantial injustice because it led to an award comprising grossly disadvantageous terms on behalf of the Claimants and provisions requiring payment of substantial sums to the Defendants, which are not justified on the merits of the claim and would not have been awarded had the matter been fairly determined on its true merits. Further and/or in the alternative, the effect of the Deeds is to deprive the Claimants of an opportunity to present their defence to the Defendants' claims in the BTS Arbitration which might well have led to a significantly different outcome.