Neutral Citation Number: [2023] EWHC 2302 (Comm)

Case No: CL-2021-000412

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

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

Date: 20/09/2023

**Before** :

**STEPHEN HOUSEMAN KC**
**SITTING AS A JUDGE OF THE HIGH COURT**

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**Between :**

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| **INVEST BANK P.S.C.** | **Claimant** |
| **- and -** | |
| **(1) AHMAD MOHAMMED EL-HUSSEINI** | |
| **(6) JOAN EVA HENRY** | |
| **AND OTHERS** | **Defendants** |

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**Tim Penny KC** and **Marc Delehanty** (instructed by **PCB Byrne LLP**) for the **Claimant**
**Niranjan Venkatesan** and **Matthew Barry** (instructed by **Debenhams Ottaway LLP**) for the **Sixth Defendant**

Hearing dates: 12-14 September 2023

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# Approved Judgment

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

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STEPHEN HOUSEMAN KC

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Wednesday 20 September 2023 at 12.00pm.

## STEPHEN HOUSEMAN KC:

## INTRODUCTION

1. These proceedings were commenced in July 2021. A four week trial is contingently set down for next summer. This judgment deals with one application and two preliminary issues directed to be heard and determined together over a three day hearing, pursuant to the Order of HHJ Pelling KC (sitting as a Judge of the High Court) on 24 April 2023.

2. The purpose of the present hearing is to establish whether the claimant ("Bank") has statutory capacity to pursue claims against the first defendant / judgment debtor (D1) and any or all of the second to eighth defendants (D2 to D8, respectively) pursuant to ss.423-425 of the Insolvency Act 1986. No distinction is drawn between D2-D8 for these purposes. Their common position was, in effect, advanced by D6 at this hearing. D6 is the former wife of D1. D2-D5 are their four adult sons.

3. The Bank contends that it is a "*victim*" - within the meaning of s.423(5) - of various identified transactions whereby D1 (as primary debtor / transferor) transferred certain assets, including properties located in this jurisdiction, to one or more of D2-D8 for nil or insufficient consideration. The merits of such claims and any defences to them (including limitation) or remedies available under s.425 are all matters for trial next year, if permitted to proceed; as are the Bank's distinct declaratory claims as to trusteeship over two properties, predicated on D1 being their beneficial owner.

4. The underlying source of D1's alleged liability to the Bank is or was found in two personal guarantees (together, "Guarantees") which he gave during 2016 in respect of credit facilities granted by the Bank to UAE-registered companies called Commodore Contracting Co. LLC and Al Tadamun Glass & Aluminium Co. LLC, respectively. The names of "Commodore" and "Tadamun" are used to denote each facility, its corresponding guarantee and related judgments in the Courts of Abu Dhabi, UAE.

5. The Bank obtained final judgments against D1, following various appeals in Abu Dhabi, for specific amounts under both Guarantees. Some £19.6m odd remained outstanding on those two judgment debts by July 2021. I refer to these final monetary judgments together as the "UAE Monetary Judgments" although strictly speaking they are judgments or decisions of the non-federal courts of Abu Dhabi.

6. 18 months or so after commencing these proceedings, the Bank obtained a default judgment against D1 for the outstanding debt (plus further interest) referred to above ("Default Judgment"). The Default Judgment was entered pursuant to a request made under CPR 12.4. The stated basis of such request was D1's liability pursuant to the UAE Monetary Judgments; the Bank expressly abandoned its alternative basis for D1's liability under the Guarantees. It did not abandon its claims for declaratory relief as against or affecting D1 relating to the statutory or equitable claims.

7. An application was made by D5, D6 & D8 (then jointly represented) on 3 April 2023 to set aside the Default Judgment ("Set Aside Application"). This falls for determination at the present hearing. The application is heavily contested by the Bank, including on the basis that none of the applicants has sufficient standing to set aside a default judgment entered against their co-defendant, D1.

8. If this was all that had occurred, the parties would not (but should not come what may) have cited 150+ authorities or been permitted to adduce extensive evidence as to UAE law (including almost 70 court decisions in that jurisdiction). It is doubtful that the Set Aside Application would have been made in such circumstances.

9. What happened to generate such complexity and necessitate a trial of preliminary issues as a gateway to the statutory claims? The short answer is: a material change in UAE law. A legislative amendment took effect on 2 January 2023, some 11 days before the Default Judgment, the effect of which has been held to prevent or prohibit enforcement of the UAE Monetary Judgments in Abu Dhabi. The statutory provision in question is Article 121 *bis* of UAE Federal Decree Law No.14 of 2018 regarding the Central Bank and Organisation of Financial Institutions and Activities ("2018 Law") as inserted by UAE Federal Decree Law No.23 of 2022 in September 2022. I refer to this provision as "Article 121b" for convenience.

10. The UAE Monetary Judgments are, therefore, unenforceable in their jurisdiction of origin, Abu Dhabi. Such enforcement was expressly refused during March-May 2023. This supervening legal state of affairs has generated much complexity. It is something of a juridical fortuity for D2-D8. They have sought to exploit it in order to extinguish the springwell of their own potential liability for D1's undeniable default.

11. I received evidence from UAE law experts, namely Ms Reema Ali on behalf of D6 and Mr Ali Ismael Al Zarouni on behalf of the Bank. Their evidence covered in broad terms the doctrine of *res judicata* in UAE law, the scope of Article 121b, the relevance of judicial circulars to statutory interpretation and the constitutionality of retrospective legislation in the UAE. I am grateful to both experts for their diligence and assistance. I am also grateful to both legal teams, including lead advocates, for their thorough analysis and courteous conduct. I am far less grateful for, and justifiably concerned by, the citation of so many authorities at this hearing: see post-script below.

## RELEVANT BACKGROUND

12. There is a great deal of procedural background in this dispute. The Bank has been seeking enforcement of the Guarantees against D1 for a number of years. The main focus of this trial concerns the effect of various judgments rendered in Abu Dhabi.

13. The UAE has a federal court system. Abu Dhabi, like other Emirates, has a three-tier structure for civil commercial matters: a first instance commercial court ("CFI"), commercial court of appeal ("CA") and court of cassation ("CC"). The Federal Supreme Court ("FSC") of the UAE is the apex court for federal as distinct from local matters. It can determine, for example, whether a statutory provision is valid by reference to the Constitution of the UAE.

14. The UAE judiciary does not operate a system of precedent. Judgments of the higher courts are not binding on the lower courts, although they may have persuasive effect where appropriate. All courts adopt a dual system of civil and Sharia laws. Federal laws have supremacy over local laws.

15. Determination of a dispute and execution of a judgment once entered are separate phases in civil proceedings, as reflected in the distinct sections of UAE Civil Procedure Law No.42 of 2022. The execution phase is commenced when or after a writ of

execution is issued by an execution judge in respect of a final and binding judgment confirming that the defendant owes an amount of money to the claimant. There is no appeal to the CC in the execution phase of civil proceedings, only an appeal to the CA in its execution capacity.

16. By way of summary of the UAE Monetary Judgments:

(a) As regards Tadamun: the Bank obtained a judgment in the sum of AED 45,849,888.27 plus interest against D1 and the corporate borrowers as joint debtors in the Abu Dhabi CFI on 20 September 2020; this was upheld by the Abu Dhabi CA on 9 February 2021 with a variation as to additional interest on part of the awarded sum. A total amount of AED 56,581,754.56 (equivalent to £11,834,978.09) is said to have been outstanding on such final monetary judgment as at 1 July 2021.

(b) As regards Commodore: the Bank obtained a judgment in the sum of AED 39,313,853.69 against D1 and the corporate borrowers as joint debtors in the Abu Dhabi CFI on 24 January 2021; this was upheld by the Abu Dhabi CA on 23 March 2021; a further appeal was dismissed by the Abu Dhabi CC on 1 July 2021. A total amount of AED 39,312,663.38 (equivalent to £7,823,587.38) is said to have been outstanding on such final monetary judgment as at 1 July 2021.

17. Writs of Execution were issued in Abu Dhabi in favour of the Bank in respect of the UAE Monetary Judgments and the Bank applied in each case to open an execution file, thus engaging the execution jurisdiction of the local civil courts. Various attachments were made by the local execution court. A travel ban was imposed upon D1 who is or says he is a resident in St. Kitts & Nevis. In the meantime, the Bank commenced the present proceedings on 9 July 2021 – a week or so after the final appeal decision in Abu Dhabi, as summarised above.

18. Article 121b was enacted by (Article 161 *bis* of) Federal Decree Law No.23 of 2022 on 26 September 2022. It was introduced by the UAE Government in order to help alleviate a systemic socio-economic concern in the Emirates caused by unsecured lending to individuals or their private joint stock companies. It protects such borrowers from recourse against their general assets or other forms of personal execution measures such as arrest warrants or travel bans. The provision prevents enforcement in court of a credit facility save to the extent of any *in specie* or 'in-kind' security provided to support such borrowing. A personal guarantee is not such security.

19. Article 121b came into effect, forming part of Chapter 6 ("*Consumer Protection*") of the 2018 Law, on 2 January 2023. It provides in translation as follows:

*Guarantees of Credit Facilities*

*1- The Licensed Financial Institutions shall obtain sufficient guarantees for all kinds of facilities provided to customers among physical persons as well as the private individual enterprises, according to the income of the consumers, or the guarantee – if any – as well as in accordance with the amount of the required facilities, as determined by the Central Bank.*

> *2- No claim, lawsuit or defence may be accepted before the Competent Judicial Authority or the arbitration bodies, in case filed by any licensed financial institution concerning any credit facility provided to a physical person or a private individual enterprise, in case of not obtaining the guarantees mentioned in Clause (1) of this Article.*
>
> *3- The Central Bank may impose the adequate financial and administrative sanctions on the licensed financial institution violating Clause (1) of this Article, according to Article (137) of this Decree-Law.*"

20. The references to "*guarantees*" and "*the guarantee*" in sub-sections (1) and (2) are to security provided in respect of the relevant consumer borrowing. The original word is "*damanat*". This means *in specie* or in-kind security, rather than a personal guarantee or covenant of the borrower or another individual or entity ("*keffella*").

21. The phrase "*private individual enterprise[s]*" (also translated as "*institution[s]*" in some instances) in sub-sections (1) and (2) also translates as "*sole enterprise*". It refers to private joint stock companies under UAE law, corresponding to sole trader entities, as may be expected in the context of consumer protection. Neither or none of the borrowers under each credit facility was a "*private individual enterprise*" or "*sole enterprise*" (or "*institution*"). They are both or all limited liability companies. They are or were commercial corporate entities.

22. Sub-section (2) is particularly important in the present case. It prohibits any local court or arbitral tribunal from accepting any "*claim, lawsuit or defence … in a case filed by any licensed financial institution*" save to the extent of in-kind security. The Bank is a licensed financial institution. It granted credit facilities during 2016 which D1 personally guaranteed. This was unsecured borrowing in the sense that there was no in-kind security. As the above chronology makes clear, however, the Bank did not file any claim or lawsuit (still less a defence) in respect of the relevant corporate borrowing on/after 2 January 2023. The Bank had already obtained the UAE Monetary Judgments on a final basis during 2021. It had engaged the execution jurisdiction of the Abu Dhabi courts in the meantime. A question therefore arises as a matter of UAE law as to whether Article 121b, properly construed and applied, renders the UAE Monetary Judgments unenforceable in Abu Dhabi or (if relevant) elsewhere in the UAE.

23. D1 took advantage of Article 121b coming into force in early January 2023 to seek orders from the execution courts in Abu Dhabi prohibiting the Bank from executing the UAE Monetary Judgments against him or the corporate debtors. In this regard, D1 took advantage of the circular advice given by the Head of Judiciary Council of the Judicial Department in Abu Dhabi in Judicial Council Circulars No.8 & No.9 of 2022 and Explanatory Circular No.3 of 2023 (together, "Judicial Circulars").

24. The Execution Department of the Abu Dhabi CFI acceded to D1's requests in judgments dated 10 March 2023 (Commodore: Case No.17/2023) and 14 March 2023 (Tadamun). It held, in effect, that execution of the UAE Monetary Judgments was prevented by Article 121b as confirmed by the Judicial Circulars. The attachments and travel ban were lifted. This first instance execution decision in Commodore was upheld by the Abu Dhabi CA on 4 April 2023. (There was no appeal in Tadamun.) An attempted second appeal to the Abu Dhabi CC was rejected as inadmissible on 23 May 2023. I refer to these decisions of the local execution courts together as the "UAE

Execution Judgments" although strictly speaking they are judgments or decisions of the non-federal courts of Abu Dhabi.

25. In the meantime the Bank sought default judgment against D1 in these proceedings during November 2022. It obtained the Default Judgment on 13 January 2023. A copy was served on all defendants six days later. The default in question was D1's failure to file a defence by 28 October 2022 as required following his further acknowledgement of service after the failure of his jurisdiction challenge. This was D1's decision. It signals his withdrawal from and non-participation in these proceedings. It constituted a fundamental non-compliance with the rules of court. There is no justification offered for it by D1. He has not applied to set aside the Default Judgment.

26. As noted above, when seeking default judgment by request under CPR 12.4(1)/(4) the Bank expressly abandoned its alternative basis, i.e. liability under the Guarantees, for seeking monetary relief against D1. This was done by separate letter to the Commercial Court Listing Office rather than in the request itself. The Bank did not, however, abandon its other non-monetary claims against or affecting D1 comprising declaratory relief on the ss.423-425 claims and specific trusteeship claims.

27. D6 applied on 3 April 2023 to set aside the Default Judgment. This was 74 days after she is treated as having become aware of the Default Judgment.

## OUTLINE OF THE ISSUES

28. Broadly speaking, there are three (sets of) issues that require determination:

    (1) First, whether D1 is liable to the Bank by reason of the UAE Monetary Judgments (as a matter of English law in light of Abu Dhabi law) or the Guarantees (as a matter of UAE law) such that the Bank can enforce such debt against him in this jurisdiction – referred to as the "Enforceable Debt Issue".

    (2) Secondly and irrespective of - but necessarily contextualised by - the answer to (1) above, whether the Default Judgment should be set aside at the behest of D6.

    (3) Thirdly, whether the Bank has a sustainable basis for contending that it is a "*victim*" for the purposes of the ss.423-425 claims *even if* it loses on (1) and (2) above – referred to as the "Victim Issue".

29. It is accepted by D6 that if the Bank succeeds on either (1) or (2) above, it must have capacity to pursue the ss.423-425 claims to trial. In either event, the Bank will have (in effect) an enforceable monetary judgment against D1 to which its statutory and equitable claims relate. The Bank says it can pursue both claims come what may due to a potential indebtedness on the part of D1 in the event that the Canadian courts were to recognise (and enforce) the UAE Monetary Judgments, i.e. assuming that there is a difference of approach to recognition (and enforcement) of such foreign judgments in Canada than here on this double negative premise.

30. The parties differed as to the sequence in which they insisted on analysing these three sets of issues. I have approached them in what I regard as a sensible order, although it

involves interposing the Set Aside Application between the first and second preliminary issues as formally ordered for trial at this hearing.

## ANALYSIS OF THE ISSUES

31. My analysis of the issues is inevitably less detailed than how the parties chose to analyse and advance them at the hearing. I do not deal with every authority cited, nor could I be expected to in the circumstances. I take the view that this hearing, although finally determining two preliminary issues by reference to foreign law expert evidence, was conceived as a gateway for the substantive trial – effectively determining a question of capacity to pursue statutory claims. It is better that the parties know that trial remains on foot without undue delay to the timetable. I intend no discourtesy to counsel for not reflecting all of their many points and sub-points.

### (1) Enforceable Debt Issue

32. There are two alternative bases for the existence of an indebtedness on the part of D1 to the Bank: (a) the UAE Monetary Judgments, alternatively (b) the Guarantees. They involve different systems of law and are addressed separately.

(a) Recognition and Enforcement of the UAE Monetary Judgments

33. D6 contends that the UAE Monetary Judgments are not capable of enforcement in this jurisdiction, because (i) they no longer have *res judicata* effect in Abu Dhabi in light of Article 121b and/or the UAE Execution Judgments, alternatively (ii) they are not enforceable in Abu Dhabi and therefore cannot be enforced here as a matter of English private international law. I reject both contentions.

*(i) Are the UAE Monetary Judgments* res judicata *in Abu Dhabi?*

34. I am satisfied that as a matter of UAE law, which represents the law of Abu Dhabi for this purpose, both of the UAE Monetary Judgments have at all material times had *res judicata* effect; and this remains so notwithstanding the enactment of Article 121b and its subsequent application to the Guarantees and such final monetary judgments in or through the UAE Execution Judgments.

35. D6's expert, Ms Ali, accepted this basic proposition in cross-examination. Her attempt to suggest that such *res judicata* effect could be terminable (other than by a successful appeal) or otherwise time-limited is not supported by any authoritative decision or statutory provision, and is contradicted by the evidence of Mr Al Zarouni which I prefer on this issue. The raising of substantive objections in the execution phase of civil proceedings does not alter the final and binding status of a monetary judgment. It remains conclusive proof of the relevant indebtedness in accordance with Article 87 of UAE Evidence Law No.35 of 2022 applicable to civil and commercial transactions.

36. The fact that *res judicata* operates on the basis of what has been decided by the court is trite. Subsequent legal events do not affect such status. So far as relevant, this reflects the position in English law: see summary in *Zuckerman on Civil Procedure* (4th ed. 2021) at 26.91 - 26.94.

37. The UAE Execution Judgments are procedural in nature. They do not themselves create *res judicata* or other preclusive effect, leaving aside the fact that they post-date the

Default Judgment in this jurisdiction. Being decisions of a civil court within its execution jurisdiction, such decisions are not (by definition) final and conclusive: a judgment creditor may seek execution of their judgment debt in more than one way and on more than one occasion. Ms Ali accepted that there is no impediment in UAE law to the UAE Monetary Judgments being enforced elsewhere in the world. It is not, therefore, contrary to public policy in UAE to recognise (or enforce) such final monetary judgments in this jurisdiction.

38. Moreover, the first instance execution decision dated 10 March 2023 makes clear that D1's liability under the Commodore final monetary judgment remains live: "*…Whereas the subject of the indebtedness that is being executed … is a credit facility.*" This execution judgment rehearses the two distinct roles of a court in a civil claim, namely "*proving the right*" (i.e. establishing a final and binding liability to pay a specific amount) and "*receiving that right*" (i.e. enforcing or executing such debt). Ms Ali accepted this important distinction during cross-examination. As noted above, she also accepted the fundamental position that the UAE Monetary Judgments have *res judicata* effect in UAE law. I find that this is the position under Abu Dhabi law, being the law of the jurisdiction of origin of those final monetary judgments.

39. The UAE Monetary Judgments are, therefore, capable of recognition in this jurisdiction. This leads to the question of whether they are also enforceable.

*(ii) Are the UAE Monetary Judgments enforceable in this jurisdiction?*

40. D6 contends that as, a matter of English private international law, a foreign judgment with *res judicata* effect in its jurisdiction of origin cannot or should not be enforced here if - or for so long as and/or to the extent that - it is unenforceable in the foreign jurisdiction itself. This is said to be the position at common law in this jurisdiction, as reflected in the proviso to s.2(1) of the Foreign Judgments (Reciprocal Enforcement) Act 1933 ("1933 Act"), i.e. where a foreign judgment "*could not be enforced by execution in the country of the original court*": see s.2(1)(b).

41. However, there is no safe basis for inferring or assuming that s.2(1)(b) of the 1933 Act was intended to reflect or codify the common law position at the time of its enactment. It is not evidence of the common law position at such time, still less in the meantime: see: *Strategic Technologies Pte Ltd v. Procurement Bureau of the Republic of China Ministry of Defence* [2020] EWCA Civ 1604; [2021] QB 99 *per* Males LJ at [47].

42. As Professor Briggs says in *Civil Jurisdiction & Judgments* (7th ed. 2021) at 34.22 (p.798):

"*So far as concerns matters which arise after the trial, it is no defence to recognition or enforcement in the fact that the foreign judgment is not, or not yet, enforceable under the law of the foreign court which gave it. The enforceability of the foreign judgment under the law of the court which gave it may well be relevant in relation to those schemes for registration of a foreign judgment, where it is the foreign judgment itself which is given direct effect in England. As the common law does not enforce the judgment as such, as distinct from the obligations which arise from the adjudication, whether the foreign judgment is enforceable under the law which gave it is a matter of foreign procedure, not relevant to a court in England.*"

43. There is no rule of common law that a foreign judgment with *res judicata* effect in its jurisdiction of origin cannot or should not be enforced here just because it is not presently or fully enforceable in the foreign jurisdiction itself. If such a rule existed, it would have been identified as such and its parameters discussed in authoritative practitioner or academic works on private international law such as *Dicey, Morris & Collins: The Conflict of Laws* (16th ed. 2022) ("*Dicey*"), *Cheshire, North & Fawcett: Private International Law* (15th ed. 2017) ("*Cheshire*") or either of the current published works of Professor Adrian Briggs. It is not. In fact, the contrary is said by Professor Briggs in the final sentence of the quotation set out above.

44. In so far as there may be cases where the foreign judgment lacks the essential qualities of finality and/or conclusiveness, that is a different matter. However, the mere fact that the local courts have declined to enforce such judgment does not deprive a final monetary judgment of such qualities. Nor does the enactment of legislation in the relevant foreign jurisdiction which prohibits or suspends or curtails enforcement of such a judgment within that jurisdiction, even where such legislative protection pre-dates the entering of the relevant liability judgment.

45. This is illustrated by *Merchant International Co Ltd v. Natsionalna Aktsionerna Kompaniia Naftogaz Ukrainy* [2012] EWCA Civ 196; [2012] 1 WLR 3036. In that case the claimant obtained a final monetary judgment against the defendant in Ukraine during 2006 which was affirmed on appeal. Such judgment(s) could not be enforced against the defendant in Ukraine because a new law had been enacted the previous year suspending execution of judgments against energy companies in that jurisdiction: see [11]. The appeal from David Steel J concerned a refusal to set aside default judgment entered against the defendant on the basis of the 2006 judgment(s) in Ukraine. The defendant impugned such judgment(s) by reference to a 2011 judgment of the Supreme Commercial Court in Ukraine which had repealed the 2006 judgment(s). The issue to be determined was whether the 2011 nullification judgment was itself capable of recognition in this jurisdiction. The judge held that it was not, so refused to set aside default judgment. This was upheld in the Court of Appeal, but on the narrower basis of a discretionary refusal to set aside default judgment in circumstances where there was a powerful case for concluding that the 2011 judgment involved a denial of legal certainty and fair process such as to be contrary to English public policy and in breach of the claimant's ECHR article 6 rights.

46. The focus was, therefore, upon the recognisability here of the 2011 nullification judgment in Ukraine and its impact upon the recognition and enforcement of the 2006 judgment(s). However, the essential premise for that analysis involved knowing whether there existed any independent defence to recognition or enforcement of the 2006 judgment(s). The Court of Appeal unanimously held that no such defence existed: see Toulson LJ (as he then was) at [65]-[66] as reflected in the opening part of the headnote finding in the law report. The fact that the foreign liability judgment was not capable of enforcement in its jurisdiction of origin by reason of a local statutory provision was not an impediment to its recognition or enforcement in this jurisdiction. It was still a final and conclusive judgment in the eyes of the common law.

47. The proposition contended for by D6 is, therefore, contrary to Court of Appeal authority. It is true that no point was apparently taken on behalf of the defendant/appellant in that case as to the effect of the Ukrainian statute; but this does not alter the fact that there was found to be no independent defence at common law to

enforcement in circumstances where a local statute prevented enforcement of the final monetary judgment. Such finding was the basis for the Court of Appeal's primary analysis as to the effect of the 2011 Ukrainian judgment. The fact that no such point was specifically taken in this regard may reflect the fact that it has no grounding in common law, as evidenced by its conspicuous omission from the likes of *Dicey* and *Cheshire* as noted above. This may be speculative, but it is also superfluous.

48. D6 identified two lines or pockets of authority said to prove the existence of this common law impediment to enforcement of a foreign judgment. The first category concerns cases where the foreign order itself is not final and conclusive due to some inherent conditionality or vulnerability imposed by its own terms or some power of the court which made it (which I will call 'inherent conditionality' cases). The second category concerns cases where the foreign order has been subject to a stay of execution pending appeal in the local court system (which I will call 'appeal stay' cases). Both categories are said by D6 to illustrate or explain the existence of a distinct common law defence or impediment to enforcement of a foreign judgment which is not itself presently or fully enforceable in its jurisdiction of origin.

49. The rationale for such defence is said to rest on the theory of obligation that underpins the common law's willingness to enforce a foreign judgment that is final and conclusive in the local jurisdiction: if the judgment debtor has no current obligation to perform (i.e. pay the judgment) in the jurisdiction of origin, how could they owe a greater obligation in a foreign jurisdiction? Flipping this around to the perspective of a judgment creditor, why should they get a greater benefit here than where they got their judgment? This invokes notions of legitimate expectation, economic morality and international comity.

50. As bare rationales these are not devoid of plausibility or palatability. But they do not translate into the discrete defence or impediment at common law contended for by D6. They find expression within the fundamental requirement that a foreign judgment must be final and conclusive in its jurisdiction of origin. That is what the common law requires to be established.

51. Cases involving a stay of execution pending appeal are circumstantial. They reflect the fact that the deemed finality of the relevant decision is vulnerable to being extinguished by a successful appeal. An appellate court can alter or extinguish the substance of the decision being appealed. This feature may preclude the characterisation of 'final and conclusive' in the meantime, as a departure from the ordinary position that a pending appeal *per se* does not have such effect: see e.g. *Colt Industries Inc v. Sarlie (No.2)* [1966] 1 WLR 1287; and the discussion of such circumstances in the originating court system as a "*proviso*" to Clause (1) of Rule 46 in *Dicey* at 14-030 - 14-031.

52. Not all 'appeal stay' cases involve a foreign monetary judgment. For example, *Enercon GmbH v. Enercon (India) Ltd* [2012] EWHC 689 (Comm); [2012] 1 Lloyd's Rep. 519 involved an Indian court's anti-suit order in favour of arbitration. A stay of execution had been imposed in India. Eder J refused to enforce the foreign coercive order in this jurisdiction: the stay of execution of an injunction negated its finality and conclusiveness in the local jurisdiction. Put simply, there was no obligation upon the defendant to do anything. There was, therefore, nothing capable of recognition or enforcement in England.

53. In the more usual case of foreign monetary judgments which have been stayed by the local court, issues may arise as to the running of time for limitation purposes under s.24 of the Limitation Act 1980: see e.g. *Berliner Industriebank v. Jost* [1971] 2 QB 463. This, in my view, explains the passage at p.356 of *Briggs: Private International Law in English Courts* (2nd ed. 2023): "*There appears to be no provision for time to be suspended during an appeal against the foreign judgment, though if the foreign judgment is, under the law of the state of origin, not enforceable pending determination of the appeal, no obligation can be said to have arisen until the appeal has been dealt with…*" (emphasis added). This is about suspension of time for limitation, nothing else. No authority is cited for the proposition. Notably, it does not (re-)appear in the discussion about the test for recognition and enforcement of a foreign judgment. It may also be observed that suspending time for limitation presupposes that the relevant foreign judgment is enforceable at common law: why else does limitation matter?

54. Professor Briggs gives his clear view about the irrelevance of local non-enforceability at English common law elsewhere: see paragraph 42 above. In keeping with the fundamental distinction between matters of substance and procedure underpinning that summary of the common law, Professor Briggs deals further down p.356 and onto the top of p.357 of his more recent book with situations in which the local court has ordered when (or by when) the judgment debtor must pay the adjudicated sum: "*… the judgment may be enforced as to quantum, and the timetable for payment disregarded as being a procedural matter on which the English court will apply its own law and give its own answer*". This arguably illustrates a case in which the judgment creditor gets a greater benefit (i.e. earlier payment) than they are entitled to in the jurisdiction of origin. This can happen where the differential in enforceability is explained by a procedural impediment or condition in the legal system where the judgment was given.

55. The 'appeal stay' cases are different in principle from a situation in which a monetary judgment is final and conclusive in its jurisdiction of origin but not (fully or presently) enforceable against the judgment debtor in that place. In the latter situation, the local impediment to current enforceability does not strike down its characterisation as final and conclusive. The UAE Execution Judgments themselves acknowledge the "*indebtedness*" as a matter of binding substantive position, as noted above. The refusal to enforce the judgment debt is practical and procedural albeit mandatory on a presumed (albeit disputed) application of Article 121b. Local non-enforceability does not alter the *res judicata* status or effect of the final monetary judgment, nor render its enforcement in another jurisdiction contrary to public policy in Abu Dhabi (see paragraph 37 above). It is irrelevant to recognition and enforcement in this jurisdiction.

56. The 'appeal stay' cases illustrate a category of instances where the foreign judgment is not regarded as final and conclusive in its jurisdiction of origin. They do not prove the existence of a broader defence to enforcement. The same can be said of the 'inherent conditionality' cases on proper analysis. These cases invariably involve foreign maintenance orders made in matrimonial proceedings where the court retains power to vary or revoke its own order: see e.g. *Cheshire* at pp.549-550; *Dicey* at 14-030.

57. The case of *Merrifield, Ziegler & Co v. Liverpool Cotton Association Ltd* (1911) 105 LT 97 appears to have influenced this line of cases about foreign maintenance orders. It concerned a German arbitral award which was not enforceable in Germany due to the absence of further legal conditions in that jurisdiction. In so far as it concerns

enforcement of a foreign arbitral award pure and simple, it has been disapproved: see *Dalmia Dairy Industries Ltd v. National Bank of Pakistan* [1978] 2 Lloyd's Rep. 627.

58. However, Eve J in *Merrifield* also refused to enforce the arbitral award as a foreign judgment on the basis that it was not without more enforceable in Germany: "*for all practical purposes it is still-born until vitality is infused into it by the [German] court*" (see p.97). No authority was cited for this proposition at common law, save that the position was contrasted with *Nouvian v. Freeman* (1889) 15 App. Cas. 1. The basis for Eve J's alternative ground for refusing enforcement, if correctly seen as alternative or distinct, is not clear from the very short judgment. I am not bound by it as first instance authority, irrespective of the extent to which it has since been discredited.

59. *Merrifield* was cited by Sankey J in *Harrop v. Harrop* [1920] 3 KB 386 at 399 for the proposition that a foreign judgment or order cannot be said to be final and conclusive if "*an order has to be obtained for its enforcement, and … on application for such an order the original judgment is liable to be abrogated or varied*". Enforcement was refused of a magistrate's maintenance order against a husband made in the State of Perak, in what was then the Federated Malay States, because such order was itself susceptible to being revised or revoked on subsequent application by the husband or interested party. As such, the original order "*laid on the defendant no present duty to pay the sum now claimed*" and its enforcement in this jurisdiction "*would enable the plaintiff to obtain in this country a greater benefit from it than she could obtain from it in Perak*" (p.401). The only authority cited for this proposition was Professor Westlake's latest (and last) edition of his 1858 treatise on *Private International Law* (5th ed. 1912) at 314 (p.398). (Professor John Westlake passed away on 14 April 1913.) The "*present duty to pay*" formulation appears in that paragraph of his book, with various nineteenth century authorities including *Nouvion* (above) cited for that or other propositions, but not *Merrifield*. (None of those identified cases featured amongst the authorities cited at the present hearing, save for *Nouvion* itself.)

60. *Harrop* was cited by the Court of Appeal in *Beatty v. Beatty* [1924] 1 KB 807 which was another foreign maintenance order case involving New York. Bankes LJ at p.813 approved the headnote of *Harrop* to the effect that a foreign judgment is not final and conclusive if an order has to be obtained in the court of origin for its enforcement. It is doubtful whether that headnote captures the *ratio* of *Harrop* or *Merrifield* in so far as ascertainable. Come what may, if these cases illustrate situations in which some legal conditionality affects the characterisation or status of a local judgment as final and conclusive in its jurisdiction of origin, they are no more than illustrations of the established position at common law exemplified by *Nouvion* itself. They do not illustrate the existence of some defence to enforcement based on the local non-enforceability of an otherwise final and conclusive judgment or order. As already noted, the present case cannot be aligned with an 'inherent conditionality' situation any more than an 'appeal stay' situation. The UAE Monetary Judgments have final and conclusive effect in their jurisdiction of origin; they just happen not to be enforceable against D1 in Abu Dhabi.

61. I conclude, therefore, that there is no impediment to enforcement of the UAE Monetary Judgments in this jurisdiction. This is so notwithstanding the subsequent enactment of Article 121b and the effect of the UAE Execution Judgments within Abu Dhabi.

62. This conclusion means that the Enforceable Debt Issue is answered in favour of the Bank on the primary ground. It obviates the need to consider the secondary ground, i.e. D1's liability under the Guarantees. It also makes the fate of the Set Aside Application non-critical to the determination of the Victim Issue. In short, the Bank has capacity to pursue its statutory and equitable claims against D1-D8.

(b) D1's liability under the Guarantees

63. The question here is whether the Guarantees remain valid and enforceable as a matter of UAE law, which is the law by which they are governed. This is not the same thing as the law of Abu Dhabi. The two may not be the same on this substantive issue.

64. This question turns on the correct meaning and effect of Article 121b. This issue further involves the role, if any, of the Judicial Circulars in Abu Dhabi in construing that statutory provision as a matter of UAE law. Two main issues arise:

(a) First, the applicability of Article 121b to a personal guarantee given as security for a credit facility provided by a licensed financial institution to a corporate borrower other than a so-called "*sole enterprise*" / "*private individual institution*" as explained in paragraph 21 above.

(b) Secondly, the applicability of Article 121b within the local court system in respect of financial arrangements entered into or local monetary judgments entered thereupon prior to the coming into force of the statutory provision on 2 January 2023, i.e. whether the provision has retrospective effect and, if so, to what extent: see paragraph 22 above.

These are both aspects of applicability: the former is substantive and the latter is temporal.

65. The court's role in this context is a predictive one: see *Byers & others v. Saudi National Bank* [2022] EWCA Civ 43; [2022] 4 WLR 22 at [103]. It must seek to ascertain on the balance of probabilities what the highest court in the United Arab Emirates - not any particular Emirate, such as Abu Dhabi - would declare Article 121b to mean, i.e. how the substantive and temporal applicability issues would be resolved, if the matter came before it for determination. The highest court is the FSC. It has not had cause to consider the meaning and effect of Article 121b, so far as I am aware. Whether it may ever do so in future is not material to my predictive task.

66. On its own plain language, as noted above, Article 121b is not applicable to either of the Guarantees. Each is a personal guarantee provided by D1 as security for borrowings by a limited liability company rather than a private sole enterprise. The Guarantees themselves are, of course, not credit facilities; they are a form of personal security for such corporate borrowing. The key point is the type of corporate borrower involved. This was not consumer borrowing.

67. Explanatory Circular No.3 of 2023 advised the judiciary in Abu Dhabi (amongst other things) that Article 121b applies to all credit facilities regardless of the date they were entered into (paragraph 1) and that a "*pure personal guarantee*" as distinct from "*an in-kind guarantee*" was insufficient security for the purposes of Article 121b (paragraph 2, third bullet point). This circular may also have advised that Article 121b applies to

borrowing by companies other than sole enterprises by the use of the phrase "*individual institutions and companies*" (emphasis added) in the first bullet point under paragraph 2. This last aspect is not clear from the translation of the circular. If suggesting that Article 121b applies to corporate as opposed to consumer borrowing, I see no basis for such an interpretation in the language of or rationale behind the statutory provision.

68. As already noted, the UAE Execution Judgments applied Article 121b to the Guarantees with express reliance upon the Judicial Circulars: see paragraph 23 above. These judgments, even if not themselves *res judicata* for recognition purposes under common law principles (as addressed above), may nevertheless comprise credible evidence of UAE law as to the applicability of Article 121b to the Guarantees. D6 submits that this is the position and asks me to make such finding of fact.

69. However, a recent decision of the highest court in Dubai, Court of Cassation Appeal No.995/2023, has found that Article 121b does not provide protection to a limited liability company which borrows money, and so upheld the lower courts' decision to allow enforcement against such borrower and its personal guarantor. The Dubai CC stated that circulars of the Judicial Council of another Emirate, such as Abu Dhabi, have no legal force in Dubai, with particular reference to the Judicial Circulars. This appellate decision is dated 29 August 2023. Its existence was discovered during trial on 12-14 September. The experts agreed both a translation and summary of the decision for which I am extremely grateful.

70. In addition, there are two Abu Dhabi CC decisions from earlier this year (Appeal No.102/2023 and Appeal No.111/2023) which appear to hold that Article 121b does not apply to a credit facility entered into before 2 January 2023. The UAE Execution Judgments make no reference to such decisions of the highest court in Abu Dhabi.

71. There is a real question whether Article 121b can have retroactive effect in light of Article 112 of the Constitution of the United Arab Emirates. It all depends on the legislative provision in question: retroactive effect is possible in non-criminal matters where it is necessary and the statute so provides. This issue may one day be considered by the FSC or it may never be. The decision of the FSC in Appeal No.4 of 2020 on 26 April 2021 may suggest that Article 121b would be found to have no retroactive effect. This is not *acte claire* as a matter of UAE law.

72. I am not convinced that Article 121b is intended to have retroactive effect in the fullest sense. It may prevent or limit enforcement steps before any UAE court irrespective of when such facility was concluded; at any rate, it does not say it applies only to credit facilities granted on/after 2 January 2023 and nor would this be a likely meaning given that the provision takes effect (i.e. instantly and prospectively) upon claims before the courts in any of the Emirates. The addressee of the provision is the local court system, which is prohibited from accepting certain claims/defences in "*in [a] case filed by*" a licensed lender in the UAE. This would presumably include pending cases.

73. However, enforcement is not the same as execution. Article 121b would be operating retroactively in the strict sense if it prevents execution of a judgment debt which pre-dates the inception of this statutory protection on 2 January 2023. Such retroactive effect would deprive a lender of its accrued property comprised in a final monetary judgment against the debtor or surety. It is far from clear how Article 121b should

prevent execution of an existing judgment. It does not say this and would presumably need to do so to achieve retroactivity by reference to Article 112 of the Constitution.

74. There must be some doubt, therefore, whether the UAE Execution Judgments represent UAE law in so far as they interpret Article 121b as preventing execution of a judgment debt created before 2 January 2023. This appears to be at odds with the two decisions of the Abu Dhabi CC earlier this year (see paragraph 70 above). It also appears to exceed the guidance as to temporal application of Article 121b in Explanatory Circular No.3 of 2023, as noted in paragraph 67 above. There is at least a serious possibility that the FSC would interpret Article 121b in the way that I have described. This issue engages deeper constitutional concerns around retroactive legislation, expropriation of accrued property and erosion of legal finality in judgments. Such matters are not easy for this court to predict with confidence.

75. However, I cannot find that the UAE Execution Judgments represent UAE law on the distinct issue of whether Article 121b applies to borrowing by limited liability companies such as Commodore and Tadamun. The Dubai CC has clearly held that Article 121b has no such application in a materially identical contractual matrix. Nor, therefore, can Article 121b provide protection to the personal guarantor of such corporate borrowing. This accords with the plain language of Article 121b itself as well as the consumer protection rationale and characterisation of such provision.

76. There is nothing explicit in Explanatory Circular No.3 of 2023 that deals with this, just a suggestion (as quoted above); and, in any event, such circulars have been held to have no legal status or influence in Dubai. Their status beyond the local court system of Abu Dhabi is at best uncertain. I am, in any event, satisfied that such local judicial circulars are not capable of altering the proper meaning of a federal statutory provision at the time of its enactment or inception as a matter of UAE law.

77. I conclude, therefore, that the proper meaning of Article 121b as a matter of UAE law is that it does not cover corporate borrowing or, therefore, personal guarantees in respect of such corporate borrowing. By this, I mean borrowing by a limited liability company as distinct from a sole enterprise or joint stock institution. If this specific point were to fall for determination by the highest court in the UAE, it is more probable than not that the plain wording of Article 121b - when considered by reference to its impetus and purpose as consumer protection - would be construed to mean what it says. That is my finding of fact as to foreign law.

78. In light of such finding, I conclude that the Guarantees are valid and enforceable as a matter of UAE law.

79. It is not necessary, therefore, to consider the Bank’s alternative position to the effect that this court should refuse to recognise Article 121b on the grounds that it is contrary to English public policy and/or infringes the Bank’s fundamental rights in the property of its judgment debts. I would have struggled to reach that decision given the high threshold required to make such a finding, in particular given the socio-economic justifications for the introduction of this statutory provision in the UAE.

## (2) Set Aside Application

80. I decline to set aside the Default Judgment. Even if it could be shown that the Bank did not comply with a requirement to abandon its non-monetary claims when seeking default judgment by request pursuant to CPR 12.4(1)/(4), that would at most constitute "*some other good reason*" to engage the Court's discretionary power to set aside under CPR 13.3(1)(b)(i). The Default Judgment would still be regular in the sense that it could not be automatically set aside under CPR 13.2.

81. In so far as HHJ Coulson QC (as he then was) regarded the default judgment entered in *Intense Investments Ltd v. Development Ventures Ltd* [2005] EWHC 1726 (TCC) at [15]-[17] as "*irregular*" and therefore liable to be set aside automatically for non-compliance with CPR 12.4, that is not permitted under CPR 13 as it now stands. CPR 13.3 contains the relevant power for discretionary set aside of a default judgment entered after a defined default by the defendant. There was such a default by D1 in this case. In fact, his default was deliberate and terminal: see paragraph 25 above.

82. I am satisfied that D6 has sufficient interest to seek the setting aside of the Default Judgment. She is a co-defendant to the statutory and equitable claims against D1 and her substantive position depends upon the existence of D1's liability to the Bank. She is, therefore, both an original party to the same claim and, so far as needs to be shown by analogy or otherwise, she is "*directly affected*" by the Default Judgment within the meaning of CPR 40.9. To deny someone in her position any standing to apply would bring no credit to our legal system.

83. The decision of Mr David Rees QC (sitting as a Deputy Judge of the High Court) in *Tolmie & another v. Taylor & another* [2019] EWHC 3424 (Ch) does not, in my judgment, establish that a co-defendant to a ss.423-425 claim lacks standing to set aside a default judgment entered against the defendant with primary liability to the claimant. In that case, the husband was not a party to the action at the time of the default judgment against his wife; he was added later as a so-called *Chabra* defendant; and there was no pleaded claim for ss.423-425 relief against him at the relevant time. The position of D6 is materially different. She is a substantive co-defendant to a ss.423-425 claim made also against D1 qua primary debtor.

84. I do not regard the categories of who may seek to set aside a default judgment as closed. Any concern about legal finality is met by other requirements, including the need to obtain relief from sanctions under CPR 3.9 and justify the appropriateness of setting aside a default judgment in circumstances where the judgment debtor itself makes no such application. Standing is just standing.

85. In light of my conclusions on both aspects of the Enforceable Debt Issue, D1 has (by definition) zero prospect of success in defending the claim against him by the Bank for enforcement of the UAE Monetary Judgments; cf. CPR 13.3(1)(a). D1 never had any real prospect of doing so by the logic of my conclusions above. As I have said, however, any procedural deficiency by the Bank in failing to abandon other claims could be "*some other good reason*" under CPR 13.3(1)(b)(i) especially when read in light of or together with CPR 3.10. This is so even though it is not an explanation for D1's default. The categories of "*good reason*" are themselves not closed. CPR 13.3(1)(b) provides a non-merits gateway into a broad remedial discretion.

86. I decline to set aside the Default Judgment in the exercise of that discretion. This is for three reasons. They overlap in some ways.

87. First, because D6 has failed to meet the so-called *Denton* test for relief from sanctions applicable in this context:

    (a) An applicant to set aside default judgment must obtain relief from sanctions under CPR 3.9. This applies equally to someone like D6 who is not the defendant against whom default judgment has been entered: to allow a different defendant or directly-affected non-party to circumvent the need to obtain relief from sanctions would contradict the philosophy and compromise the efficacy of our civil procedure system and threaten the finality of judgments which have been regularly entered in civil proceedings: see *FXF v. English Karate Federation Ltd & another* [2023] EWCA Civ 891 at [50]-[51], [63]-[72]; *Gentry v. Miller & another: Practice Note* [2016] EWCA Civ 141; [2016] 1 WLR 2696 at [24], [36]-[37] (application by a co-defendant insurer). The leading judgment in both cases was given by Sir Geoffery Vos MR (as Vos LJ in the earlier decision) who also gave a joint judgment with Lord Dyson MR in *Denton* itself in mid-2014.

    (b) D6 is unable to discharge her burden to obtain relief from sanctions in circumstances where there is no justification, nor any offered, for D1's serious and terminal default in deciding not to serve a defence or participate further in these proceedings. There is nothing to suggest that D1 would have attempted to set aside the Default Judgment, or have been able to do so if he had applied promptly. On the contrary, it seems that D1 has withdrawn from these proceedings perhaps in order to avoid giving disclosure that may otherwise assist the Bank in its attempt to unwind or overcome his alleged execution-proofing activities. His true motives do not matter. The nature and severity of his default is what matters.

    (c) D6 can be in no better position. She may derive standing and impetus to make a set aside application from the direct impact of D1's judgment debt upon her potential statutory or equitable accountability, but her ability to remove that judgment as to primary liability is no better than her ability to remove the sanction imposed for D1's procedural default. She has such burden even if she has applied promptly after learning of the Default Judgment. The Default Judgment does not foreclose any intrinsic objections she may have to the statutory or equitable claims against D6. It simply determines that the Bank has capacity to pursue such claims.

88. Secondly, because any procedural irregularity on the part of the Bank when seeking default judgment by request was technical and did not materially prejudice D6:

    (a) CPR 12.4 is not the best drafted provision: it refers variously to "*the claim*", "*a claim*", "*claims a remedy*" and "*that claim*". It makes no provision for the effect of abandonment of any claim; cf. CPR 13.6 ("*the abandoned claim is restored when the default judgment is set aside*"). Claimants seeking default judgment by request may misinterpret CPR 12.4(4) in light of this terminology. It appears that this is what occurred in the present case, given how the Bank's solicitors

expressly abandoned the alternative basis for D1's liability when seeking default judgment on the primary basis for such liability: see paragraph 26 above.

(b) The statutory and equitable claims concern D1 (as alleged transferor / beneficial owner) as much as they concern the other defendants (as alleged transferees / trustees, as the case may be). Entering default judgment by request on the debt claim against D1 meant that there was no judicial scrutiny or management of those parasitic claims and non-monetary remedies. There has been since. I cannot discern any tactical or practical advantage obtained by the Bank as regards the future management of such claims in this way. It did not wish to abandon them and it did not do so. It wished to enter judgment against D1 for his indebtedness in circumstances where he did not wish to defend himself.

(c) Even if the Bank had sought default judgment by Part 23 application notice, pursuant to CPR 12.4(3), and assuming that contested application had been heard after the UAE Execution Judgments, it is probable that the outcome would have been the same. My conclusion above as to the enforceability at common law of the UAE Monetary Judgments would have stood in such circumstances, even if the enforceability of the Guarantees as a matter of UAE law might not have been decided in the same way at such earlier time. It is difficult to see how D1 could have been shown to have a real prospect of success as to the Enforceable Debt Issue in circumstances where he had decided not to file a defence and there is no impediment to enforcement at common law based upon Article 121b or the UAE Execution Judgments.

(d) With hindsight, and given the technicalities as to the applicable process for seeking default judgment in a case of mixed claims, the Bank should have sought summary judgment against D1 rather than default judgment. There is, however, no reason to think the outcome would have been any different given D1's deliberate choice not to file a defence.

89. My third and overarching reason is that setting aside the Default Judgment would achieve nothing of practical value in light of my finding on the Enforceable Debt Issue and the reason for D1's procedural default. D1 is liable to the Bank. That has been established. He is therefore susceptible to judgment being formally entered as a consequence of this judgment, and was always vulnerable to summary judgment in respect of such indebtedness, but for the Default Judgment. It therefore achieves nothing to set aside the Default Judgment, save for the deduction of eight months or so of post-judgment interest as compared with pre-judgment interest.

90. I refuse to set aside the Default Judgment. I am minded, however, to disallow any interest rate advantage otherwise obtained by the Bank between the date of the Default Judgment and the date of the order to be made consequential upon this judgment.

91. Although not strictly necessary to add, I emphasise that each case turns on its own circumstances. It may be possible for a non-defaulting defendant or directly-affected third party to discharge their procedural burdens under both CPR 13.3 and CPR 3.9 even where (by definition) the defaulting defendant itself has offered no explanation for such default or sought to discharge such burden for their own part. My conclusion above does not foreclose this possibility on different facts. It does not, therefore, denude such an applicant's standing of all practical value.

## (3) Victim Issue

92. The Bank has established its capacity to pursue the ss.423-425 claims. I need not address the Victim Issue on the contrary premise that D1 is not liable to the Bank, save to observe that this would be a challenging position for the Bank to maintain. In so far as it is said to then depend on the potential recognition and enforcement in Canada of the UAE Monetary Judgments or some other form of prejudice to the Bank notwithstanding the non-existence of current liability on the part of D1, that would have necessitated a close analysis of the Re-Re-Re-Re-Amended Particulars of Claim. Since this does not arise, I have no need to engage in that analysis of the pleaded claim or the parameters of standing under s.423 as a matter of statutory construction.

## DISPOSITION

93. For the reasons given above:

(1) The Enforceable Debt Issue (i.e. the first preliminary issue) is answered in favour of the Bank, because:

(a) D1 is liable under the UAE Monetary Judgments at common law by reference to their status as a matter of the law of Abu Dhabi; and

(b) D1 is liable under the Guarantees as a matter of UAE law.

(2) The Set Aside Application is legitimately made by D6, but dismissed as a matter of discretion under CPR 13.3.

(3) The Victim Issue (i.e. the second preliminary issue) is, accordingly, answered in favour of the Bank such that it has capacity to pursue the ss.423-425 claims. The Bank also has standing to seek declaratory and other relief on its equitable claims relating to two of the properties in this jurisdiction.

94. I will hear (junior) counsel at a short consequentials hearing to determine any matters not agreed in the meantime: see, for example, paragraph 90 above. I remind the parties and their legal teams of their responsibilities to cooperate to assist the Court in order to minimise the use of time and resources on matters capable of resolution.

95. If the conclusion summarised in (1)(a) above were dispositive of the conclusion in (3) above, I might be persuaded to grant permission to appeal on it. I can see the benefit of appellate exposition on this aspect of English common law given (i) the disputed status of the *Merrifield* decision from 111 years ago, (ii) the absence of a rationalised or unitary principle embracing 'inherent conditionality' situations and 'appeal stay' situations, (iii) the scope for tension between recognition/enforcement and running of time for limitation purposes, (iv) the application of the 'substance vs. procedure' distinction in the context of whether a foreign judgment/order is final and conclusive, and (v) the fact that the impact of local legislation upon enforcement of a judgment in the jurisdiction of origin was not specifically raised and contested before the Court of Appeal in the *Merchant International* case.

96. However, any such appeal would be academic in light of my separate and cumulative conclusions on (1)(b) and (2) above unless they too were both overturned. The validity of the Guarantees as a matter of UAE law turns on my finding of fact as trial judge as to the correct scope of Article 121b (see paragraph 77 above). My refusal to set aside the Default Judgment is an exercise of broad contextual discretion, albeit canalised through an interpretation of (the interplay between) CPR Parts 12 and 13: see paragraphs 85 to 91 above. I presently see no prospect of success on appeal on either, let alone both, of those conclusions. That being so, there would be no utility in giving permission to appeal on (1)(a) above. I will, however, hear any application that is made on behalf of D6.

Post-script: citation of authorities & hearing estimates

97. I wish to express concern at the proliferation of cited authorities in hearings in the Commercial Court. It is not reasonable to expect a judge in a three day hearing, whether or not involving cross-examination of expert witnesses on foreign law, to assimilate over 150 authorities. By way of isolated example, it is not necessary to cite *Denton & others v. TH White – Practice Note* [2014] EWCA Civ 906; [2014] 1 WLR 3926 (as well as Court of Appeal authorities considering its application) at a hearing taking place in mid-2023. Practitioners can assume that part-time and full-time judges are aware of these fundamental principles by now, intended as they were to "*change the culture of civil litigation*" in this jurisdiction: see *FXF* (above) at [68]. The principles are comprehensively discussed in the *2023 White Book* at Volume 1, pp.126-141.

98. Greater discipline is required by advocates to limit the citation of authority to what is strictly necessary and indeed permissible. This in turn involves an understanding on the part of court users and other practitioners. Time estimates are required to assume that the court will be taken through authorities relied upon during the hearing. I shudder to think how long that would have taken in this instance without my injunction to counsel to address me only on those authorities they felt were absolutely necessary for me to understand. I doubt the transcriber would have appreciated the speed at which it would have been done if covering any more of the cited authorities, or that I would have gained a meaningful understanding of each case during such forensic speed-dating exercise. Far too many authorities were cited.

99. I chose to allow this trial to go ahead and kept it within the agreed estimate. I could just as easily have adjourned it with adverse costs orders and directed it to be re-listed with a much longer hearing time next year, vacating the substantive trial and causing that to be re-listed in 2025. I have yet to determine the appropriate costs order.