Neutral Citation Number: [2022] EWHC 1605 (Ch)

Appeal Reference: CH-2021-000188

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY APPEALS (ChD)
On appeal from the order of Deputy Master Marsh dated 5th August 2021 ([2021] EWHC 2099 (Ch) Case No. BL-2020-000671)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

Date: 22nd June 2022

Before :

THE HONOURABLE MR JUSTICE EDWIN JOHNSON

- -

Between :

NATALIYA GOLUBOVICH	**Claimant**
and	
ALEXEY GOLUBOVICH	**Defendant/Part 20 Claimant**
and	
OLGA MIRIMSKAYA	**Part 20 Defendant**

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Laurence Emmett QC and Thomas Pausey (instructed by Enyo Law LLP) for the Appellant/Part 20 Defendant
Rupert D'Cruz QC and Douglas James (instructed by Withers LLP) for the Respondent/Defendant/Part 20 Claimant

Hearing date: 13th May 2022

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APPROVED JUDGMENT

This judgment will be handed down by the judge remotely, by circulation to the parties' representatives by email and to the National Archives. The date and time for hand-down will be deemed to be 10.30 am on 22nd June 2022.

Mr Justice Edwin Johnson:

Introduction

1. This is my reserved judgment on the hearing of an application, made by Olga Mirimskaya, for permission to appeal against an order of Deputy Master (formerly Chief Master) Marsh dated 5th August 2021. By that order the Deputy Master dismissed the application of Ms Mirimskaya disputing the jurisdiction of the court and seeking to set aside the relevant part of an earlier order of Deputy Master Lloyd, dated 21st July 2020. By that earlier order Deputy Master Lloyd granted permission to Alexey Golubovich to serve on Ms Mirimskaya, out of the jurisdiction, an additional claim in these proceedings.

2. The Deputy Master made his order of 5th August 2021 ("the Marsh Order") pursuant to his judgment on the application, which he handed down on 30th July 2021. In that judgment ("the Marsh Judgment") the Deputy Master explained his reasons for dismissing the application challenging jurisdiction. By a separate judgment handed down on 5th August 2021 ("the Consequential Judgment") the Deputy Master dealt with matters consequential upon his decision in the Marsh Judgment.

3. It is convenient to refer to the parties to these proceedings, in this judgment, by their given names. It will be understood that I intend no disrespect by this form of reference. I shall refer to the Claimant in these proceedings, Nataliya Golubovich, as Nataliya. I shall refer to the Defendant/Part 20 Claimant in these proceedings, Alexey Golubovich, as Alexey. I shall refer to the Part 20 Defendant (subject to her outstanding challenge to jurisdiction) in these proceedings, Olga Mirimskaya, as Olga.

4. The original application challenging jurisdiction ("the Jurisdiction Application") was made by Olga, by application notice dated 6th November 2020. Alexey was the respondent to the Jurisdiction Application. It is Olga who is the appellant in the appeal, against the dismissal of the Jurisdiction Application, for which permission is sought. It is Alexey who is the respondent to the application for permission to appeal. Nataliya was not involved in the hearing of the Jurisdiction Application and is not involved in the application for permission to appeal.

5. Permission to appeal was refused by the Deputy Master, for the reasons set out in the Consequential Judgment. The renewed application for permission to appeal ("the PTA Application") came before me, in the usual way, on a paper application. I decided that the PTA Application would benefit from further submissions from both parties and, in the result, I made an order on 10th November 2021 of the kind which is sometimes referred to as a rolled-up order. My order provided for the PTA Application to be listed for a hearing, with the hearing of the appeal (subject to the question of permission) to follow.

6. At this hearing Olga has been represented by Laurence Emmett QC and Thomas Pausey. Alexey has been represented by Rupert D'Cruz QC (assisted by Douglas James in relation to the preparation of Alexey's skeleton argument for this hearing). I am most grateful to all counsel for their helpful submissions.

7. As is often the case in hearings of this kind, I heard all the arguments relevant to both the PTA Application and (subject to the question of permission) the substantive appeal. It is convenient, in this judgment, to deal with all the arguments before coming to my decision on the PTA Application and, subject to that decision, to the question of what is to happen in relation to the substantive appeal. For ease of reference I will refer to the substantive appeal as "the Appeal", but the use of this form of reference is of course subject to the question of permission.

8. The bundle of documents which was prepared for this hearing was substantial, running to 673 pages. I was also provided with a bundle of authorities, which ran to 40 items, and to which extensive reference was made in the course of the written and oral submissions. I mention this not by way of criticism, but rather to record that it has neither been possible nor necessary to make reference, in this judgment, to all of the material to which I was taken in the submissions. It has all been taken into account, whether or not the subject of express reference in this judgment.

The parties

9. Alexey and Olga are Russian citizens. They were married in 1985 in Moscow, separated in 2009, and were divorced in 2012, upon an order of the Presnenskiy District Court in Moscow. Nataliya is their daughter. She is also a Russian citizen.

10. When in England, Nataliya resides at 28 Upper Mall, Hammersmith, London W6 9TA ("the Property"). The Property was originally purchased in 2004 as the family home. In 2017 the legal title to the Property was transferred to Nataliya.

11. The dispute which is the subject of these proceedings relates to the ownership of a valuable collection of artworks and antiques which, putting it neutrally, were accumulated during Alexey's and Olga's marriage, prior to their separation in 2009. I will use the expression "the Collection" to refer generally to the entirety of this collection. As will become apparent, it is necessary to use a bewildering variety of definitions to refer to different parts of the Collection.

The English Proceedings

12. Nataliya commenced these proceedings ("the English Proceedings") in April 2020. In her Particulars of Claim Nataliya alleges that between 2012 and 2016 Alexey systematically removed a substantial part of the Collection from the Property. The alleged missing items ("the Missing Items") are set out in an Appendix A to the Particulars of Claim. Nataliya claims that the Collection was legally and beneficially owned by Olga. As such, Nataliya alleges that the removal of the Missing Items from the Property constituted an unlawful interference with Olga's rights of ownership.

13. Nataliya's title to the Missing Items and to the right to sue in respect of their alleged unlawful removal by Alexey is said to derive from a Deed of Gift executed between Olga and Nataliya on 30th September 2019 ("the Deed of Gift"). By the Deed of Gift Olga gifted to Nataliya all her legal and beneficial interest in the Missing Items. On the basis of the Deed of Gift, Nataliya claims now to be the sole legal and beneficial owner of the Missing Items. Nataliya claims an order for the delivery up of the Missing Items and damages on the basis that Alexey has unlawfully interfered with and/or converted the Missing Items.

14. The Particulars of Claim anticipated part of Alexey's case in response to these claims, by making reference to a document entitled Deed of Settlement which is dated 27th September 2013 ("the Deed of Settlement"). The Deed of Settlement purports to have been made between Alexey and Olga and purports to provide for the transfer of artworks and antiques to Alexey by Olga, and for the transfer of jewellery to Olga by Alexey. Paragraph 17 of the Particulars of Claim summarises the principal terms of the Deed of Settlement. Paragraphs 18 and 19 of the Particulars of Claim then contend as follows (italics have been added to all quotations in this judgment):

> *"18. In fact, the Deed of Settlement is a forgery. Olga has confirmed that she did not sign it and that she had never seen it before or soon after its production on 9 June 2016.*
>
> *19. As a result, the Deed of Settlement was ineffective to transfer the various artworks and antiques described in the appendices from Olga to Mr Golubovich."*

15. Alexey did not dispute jurisdiction in the English Proceedings, and has served a Defence and Counterclaim. In the Defence and Counterclaim Alexey claims to have funded the acquisition of the Collection himself, and claims sole or part ownership of the Collection on the following four bases:
    (1) Alexey claims ownership of the Collection pursuant to the Deed of Settlement, which he says is not a forgery, and effected a valid transfer of the artworks and antiques which were expressed to be the subject of a transfer by Olga.
    (2) Alexey claims equal ownership of the Collection with Olga pursuant to certain provisions of Russian matrimonial law.
    (3) Alexey claims equal ownership of the Collection with Olga pursuant to a common intention constructive trust.
    (4) Alexey claims sole ownership of the Collection pursuant to a purchase money resulting trust.

16. On this basis Alexey claims that the Deed of Gift had no legal effect, because Olga had no title to the Collection or because, as a matter of Russian matrimonial law, Olga could not make a transfer of part owned matrimonial property without the consent of Alexey. Alternatively, and if the alleged constructive trust governs the position, Alexey claims that Olga had the ability, at most, to make a transfer by the Deed of Gift of a 50% beneficial interest in the Missing Items to Nataliya.

17. By the Counterclaim Alexey seeks the following declaratory relief:
    (1) A declaration that the Deed of Settlement is valid and resulted in a valid transfer by Olga of such interest as Olga might have had in the artwork

and antiques which were the subject of this transfer ("the Deed of Settlement Artwork").

(2) A declaration that Alexey has an equal share in the Collection by virtue of Russian matrimonial law.

(3) A declaration that Alexey and Olga are equal beneficial owners of the Collection pursuant to a constructive trust.

(4) A declaration that Alexey is the sole beneficial owner of the Collection pursuant to a resulting trust.

18. Alexey also counterclaims for an order for delivery up of "the Retained Items", which is a reference to items from the Collection which Nataliya is said to be retaining unlawfully at the Property, with an alternative claim for damages equivalent to the value of the Retained Items. I will adopt the same expression to refer to these alleged Retained Items.

19. At the same time as serving his Defence and Counterclaim, Alexey made an additional claim against Olga. I will refer to this additional claim, which I assume to have been made pursuant to CPR 20.7, as "the Additional Claim". I will refer to the main claim made by Nataliya as "the Main Claim". In his Particulars of Claim in the Additional Claim Alexey repeated the claims to sole or part ownership of the Collection which he had made by his Defence and Counterclaim in the Main Claim, on the same bases as in the Main Claim. Alexey also made a claim for wrongful interference with and/or conversion of "the Remaining Items", which referred to a number of items in the Collection which it was alleged were retained by Olga. I will adopt the same expression to refer to these alleged Remaining Items. Alexey also made a claim for delivery up of certain items from the Collection which, so he alleged, Olga had agreed to deliver up pursuant to the terms of the Deed of Settlement, but had failed to do so. Alexey also made claims, as part of his claims for declaratory relief, to ownership or part ownership of the jewellery which was alleged to have been subject to the Deed of Settlement. Alexey also sought certain consequential relief in relation to this jewellery.

20. In terms of the ownership of the Collection Alexey sought declaratory relief against Olga which effectively mirrored the declaratory relief which he had counterclaimed against Nataliya.

21. I have already noted that there is a bewildering variety of definitions, relating to the artworks and antiques which are the subject of the English Proceedings. I also note that it is said that there is a substantial, but not a total overlap between the items covered by the Main Claim, the items alleged to be subject to the Deed of Settlement, and the items to which the counterclaim and the Additional Claim relate. I do not think that this absence of complete identity is material to the questions I have to consider. The relevant point is that the overlap is accepted to be substantial.

22. Olga is resident in Russia. Accordingly, Alexey required the permission of the court to serve the Additional Claim on Olga out of the jurisdiction. Alexey made an application for such permission pursuant to CPR 6.36 by application notice dated 16th June 2020. Permission to serve out of the jurisdiction was granted by

Deputy Master Lloyd by his order of 21st July 2020 ("the Lloyd Order"). The Additional Claim was deemed served on Olga on 30th July 2020.

The Russian Proceedings

23. Following deemed service on her of the Additional Claim, Olga commenced proceedings against Alexey, on 18th August 2020, in the Presnenskiy District Court of Moscow ("the Russian Proceedings"). In the Russian Proceedings Olga sought a declaration that the Deed of Settlement was a forgery. On 23rd December 2020 the Presnenskiy District Court ruled that Olga did not sign the Deed of Settlement, with the consequence that it was invalid. On 23rd April 2021 an appeal court in Moscow upheld this decision of the Presnenskiy District Court.

The ASI Application

24. By application notice dated 28th September 2020 Alexey applied for an anti-suit injunction against Olga, seeking to restrain Olga from pursuing any proceedings in Russia in respect of the Deed of Settlement or ownership of the Collection, including the Russian Proceedings. The width of the relief sought on this application ("the ASI Application") was stressed by Mr Emmett and, for this reason, I set out in full the terms of the relief sought:

> *"The Defendant applies for an Order pursuant to section 37 of the Senior Courts Act 1981, restraining the Third Party until further order from commencing, prosecuting, continuing, taking any steps in or otherwise participating in any claims and/or proceedings against the Defendant in respect of any dispute arising out of or in connection with the Deed of Settlement or ownership of the Collection (as defined in the Second Witness Statement of Tatiana Menshenina attached to this application) in proceedings in any court or tribunal in Russia, or in any other court or tribunal other than by litigation before the courts of England and Wales, including (but not limited to) the proceedings filed by the Third Party, Case No. 02-5486/2020 ~ M-5266/2020, before the Moscow Presnenskiy court in Russia."*

25. The ASI Application came on for hearing before Mr Charles Morrison ("the Deputy Judge"), sitting as a Deputy Judge of the High Court, on 27th October 2020. In a judgment ("the ASI Judgment") which I understand to have been handed down on 3rd November 2020, the Deputy Judge refused to grant an anti-suit injunction and dismissed the ASI Application. I will need to come back to the terms of the ASI Judgment in detail later in this judgment. For present purposes it is sufficient to note that the failure of the ASI Application allowed Olga to continue her pursuit of the Russian Proceedings to their conclusion.

The Marsh Judgment

26. Unless otherwise indicated I will refer to the paragraphs of the Marsh Judgment as **[1]**, to mean paragraph 1 of the Marsh Judgment, and so on. In this section of this judgment my intention is only to give a very general description of the Marsh Judgment, by way of introduction to the grounds of appeal. I will return to the Marsh Judgment, in more detail, in my discussion of the arguments in support of the PTA Application and the Appeal.

27. The jurisdictional gateway relied upon by Alexey, in seeking permission to serve the Additional Claim out of the jurisdiction, was that contained in paragraph 3.1(4) of CPR PD 6B, which permits service out of the jurisdiction, in the following circumstances:

> *"(4) A claim is an additional claim under Part 20 and the person to be served is a necessary or proper party to the claim or additional claim."*

28. It was common ground before the Deputy Master that the core tests to be applied, on an application for permission to serve out of the jurisdiction were those identified by Lord Collins in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 [2012] 1 WLR 1804, at [71], in the following terms:

> *"71. On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements: Seaconsar Far East Ltd. v Bank Markazi Jomhouri Islami Iran [1994] 1 AC 438 , 453–457. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e.g. Carvill America Inc v Camperdown UK Ltd [2005] EWCA Civ 645, [2005] 2 Lloyd's Rep 457 , at [24]. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other: see Canada Trust Co v Stolzenberg (No 2) [1998] 1 WLR 547 , 555–7 per Waller LJ, affd [2002] 1 AC 1; Bols Distilleries BV v Superior Yacht Services [2006] UKPC 45, [2007] 1 WLR 12 , [26]-[28]. Third, the claimant must satisfy the court that in all the circumstances the Isle of Man is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."*

29. At **[5]** the Deputy Master summarised the matters on which he had to be satisfied, if the permission to serve out of the jurisdiction was to be upheld, in the following terms:

> *"There is no dispute between the parties that the core tests to be applied on an application for permission to serve out of the jurisdiction are those derived from the decision of the Privy Council in Altimo Holdings v Kyrgyz Mobile Tel Ltd [2011] UKPC 7 delivered by Lord Collins at [71]. For the English court to take jurisdiction and give permission to serve out in the circumstances of this case where Alexey relies on ground set out at paragraph 3.1(4) of Practice Direction 6B ("Gateway 4") it must be satisfied that:*
>
> *(1) There is a serious issue to be tried on the merits applying the same test as the first limb of CPR rule 24.2;*
>
> *(2) Alexey has made out a good arguable case that Olga is a necessary or proper party to the claim or the additional claim;*

> (3) *England is clearly or distinctly the most appropriate forum for the trial of the claim and that in all the circumstances the court ought to exercise its jurisdiction to permit service out of the jurisdiction."*

30. There was no suggestion that the Deputy Master had gone wrong in the above summary of the matters on which the court needed to be satisfied, in deciding whether permission to serve out of the jurisdiction should have been granted by the Lloyd Order. In the interests of strict accuracy, it should be noted that the Deputy Master, in his formulation of the last part of the third question, referred to the exercise of the court's *"jurisdiction"*. The word used in *Altimo* in this context was *"discretion"*, not *"jurisdiction"*, but I do not think that this change of wording was material.

31. In common with the parties the Deputy Master took the first two questions (serious issue to be tried/necessary or proper party) together, at **[39]** to **[56]**. For the reasons set out in that section of the Marsh Judgment the Deputy Master concluded (i) that overall the Additional Claim had been shown to have a real prospect of success, and (ii) that Olga was a proper party to the Additional Claim.

32. The Deputy Master then went on, at **[57]** to **[70]**, to consider the third of his questions; namely whether England was clearly or distinctly the most appropriate forum for the trial of the claim and whether, in all the circumstances, the court ought to exercise its jurisdiction to permit service out of the jurisdiction. Strictly speaking, this third question engaged two questions; namely (i) whether England was clearly or distinctly the most appropriate forum for the trial of the claim and (ii) whether, in all the circumstances, the court ought to exercise its discretion (or *"jurisdiction"* as the Deputy Master put it) to permit service out of the jurisdiction. I will refer to the first of these two questions within the third question as "the Forum Question". For the reasons set out at **[57]** to **[70]**, the Deputy Master concluded that England was clearly or distinctly the most appropriate jurisdiction in which the claims in the Additional Claim should be determined.

33. In the result the Deputy Master declined to set aside the Lloyd Order, and dismissed the Jurisdiction Application.

<u>The Consequential Judgment</u>

34. The parties were agreed that it was not necessary to have a further hearing to deal with matters consequential upon the Marsh Judgment. Instead, the parties made written submissions, and the Deputy Master handed down the Consequential Judgment on 5th August 2021.

35. The Deputy Master had three matters to deal with in the Consequential Judgment. The first matter was Olga's application for permission to appeal, which the Deputy Master refused. The second matter was Olga's application for an extension of time for filing and serving her Defence to the Additional Claim, pending renewal of her application for permission to appeal and pending an appeal if permission to appeal was granted. This application was also refused. The third matter was costs. Olga did not dispute the principle that she should pay Alexey's costs of the Jurisdiction Application. She did however dispute the quantum of those costs. For the reasons set out in the Consequential Judgment

the Deputy Master made a summary assessment of Alexey's costs in the sum of £150,000, as against a final costs schedule submitted by Alexey in the sum of £190,260.50.

36. For the purposes of the final ground of appeal relied upon by Olga it is necessary to say a little more about the chronology of the Deputy Master's decision on costs. The Marsh Judgment was circulated to the parties in draft on 22nd July 2021. The parties then agreed with each other that consequential matters would be dealt with on paper by the Deputy Master following two rounds of written submissions. Primary submissions were to be filed and served by 4.00pm on 3rd August 2021, with submissions in response by 4.00pm on 5th August 2021. The Deputy Master was informed of this agreement by Olga's solicitors in an email sent on 29th July 2021. The Deputy Master responded on 30th July 2021 stating that *"I agree the proposal put forward by the parties concerning consequential issues."*.

37. Prior to the filing of their primary submissions, the parties exchanged draft costs statements. Alexey's draft costs schedule, dated 14th June 2021, stated costs totalling £169,617.13. This figure was very close to the figure in Olga's costs schedule, which was £170,038.08. When however Alexey filed the final and formal version of his costs schedule, with his first round of written submissions, the figure claimed as his costs had increased to £190,260.50.

38. This was the first time that Olga had been provided with these revised figures. There was however the second round of written submissions, as agreed between the parties, in which Olga could make the points she wished to make on the revised figures. In the event however the Deputy Master handed down the Consequential Judgment on the morning of 5th August 2021, before exchange of the second round of submissions. As I have already noted, the Deputy Master assessed Alexey's costs in the sum of £150,000, as against the figure of £190,260.50 in the final version of his costs statement.

39. Olga's solicitors emailed the Deputy Master that same day, requesting that the decision on costs be reconsidered, and drawing the attention of the Deputy Master to the submissions which Olga wished to make on the revised figures. The Deputy Master responded by email later that day stating as follows:

> *"Thanks, but I don't need reply submissions. I have handed down the judgment. The decision is made and is final."*

<u>The grounds of appeal</u>

40. The Appeal falls into two parts. First, and principally, there is the challenge to the decision of the Deputy Master, in the Marsh Judgment, to dismiss the Jurisdiction Application ("the Jurisdiction Appeal"). Second, there is a challenge to the decision of the Deputy Master, in the Consequential Judgment, to assess Alexey's costs in the sum of £150,000 ("the Costs Appeal"). I will take each part of the Appeal in turn, starting with the challenge to the decision in the Marsh Judgment (the Jurisdiction Appeal).

41. Olga does not challenge the decision of the Deputy Master (i) that overall the Additional Claim had been shown to have a real prospect of success, and (ii) that Olga was a proper party to the Additional Claim. The challenge is confined to

the third part of the decision of the Deputy Master; namely his conclusion that England was clearly or distinctly the most appropriate jurisdiction in which the claims in the Additional Claim should be determined. More simply, the challenge is confined to the decision of the Deputy Master on the Forum Question. As I understood the position, if it is assumed that the Deputy Master was right on the Forum Question, Olga does not argue that the Deputy Master should have gone on, notwithstanding this decision, to decide that in all the circumstances the court ought to have exercised its discretion to refuse permission to serve out of the jurisdiction.

42. The grounds of appeal in support of the Jurisdiction Appeal, as they were set out in the grounds of appeal attached to Olga's appellant's notice, and as they were developed in the written and oral submissions made on behalf of Olga, can be summarised as follows.

    (1) The Deputy Master should have found that it was an abuse of process for Alexey to argue, in the Jurisdiction Application, that England was the natural forum for the Additional Claim. This was because the Deputy Judge had already decided, in the ASI Judgment, that England was not the natural forum for the Additional Claim, rendering it an abuse of process for Alexey to try to re-argue this question in the Jurisdiction Application. I will refer to this ground of appeal as "the Abuse Point".

    (2) The Deputy Master misdirected himself in his approach to the Forum Question because he attached excessive weight to what was said by Cooke J in *Credit Agricole Indosuez v Unicof* [2003] EWHC 2676 (Comm) at [19]; namely (as Mr Emmett characterised what was said by Cooke J) that where a party is able to satisfy the necessary or proper party test, the question of the natural forum is thereby virtually concluded. By adopting this approach to his evaluation of the factors relevant to the forum question, the Deputy Master, in Mr Emmett's memorable phrase, *"placed his hands on the scales in advance"*. Olga's case is that what was said by Cooke J in *Credit Agricole* is not the law, and is contrary to what was said by Lord Collins in *Altimo*, at [73]. I will refer to this ground of appeal as "the Misdirection Point".

    (3) In his evaluation of the factors relevant to the Forum Question, at **[68]-[70]**, the Deputy Master also went wrong, independent of the Misdirection Point, in that he failed to give sufficient regard to the factors which indicated that Russia, as opposed to England, was clearly and distinctly the most appropriate forum for the trial of the Additional Claim. I will refer to this ground of appeal as "the Evaluation Point".

43. Turning to the second part of the Appeal (the Costs Appeal), Olga's case is that the Deputy Master's summary assessment of Alexey's costs was unjust because of a serious procedural irregularity. The Deputy Master failed to await the agreed second round of written submissions before making his decision on consequential matters, including his summary assessment of Alexey's costs. The result of this was that Olga was deprived of the opportunity to make submissions on the reasonableness of the increased costs set out in the final version of Alexey's costs Schedule, which those acting for Olga only saw when they received Alexey's primary submissions on consequential matters. There were submissions which Olga wished to make on the increased costs, which the Deputy Master

disregarded when they were drawn to his attention following the handing down of the Consequential Judgment. If the Deputy Master had taken the further submissions properly into account, so it is said, he would have reduced the sum which Olga was required to pay by a further £10,000-£15,000. I will refer to this ground of appeal as "the Costs Assessment Point".

The nature of my jurisdiction on the hearing of the Jurisdiction Appeal

44. There was some debate before me as to the nature of the exercise of the Deputy Master was undertaking, in his decision on the Forum Question, and, following on from this, the nature of the review of the Deputy Master's decision which I am undertaking in relation to the Jurisdiction Appeal.

45. A number of authorities were cited to me in the course of this debate. I do not think that it is necessary to make reference to all of them. The principal authority in this context seems to me to be the decision of the Supreme Court in *VTB Capital plc v Nutritek International Corpn and others* [2013] UKSC 5 [2013] 2 AC 337. In this case the Supreme Court considered the extent of the ability of an appeal court to interfere with the decision of the first instance court on the question of forum. At [96] and [97] Lord Neuberger said this:

> *"96 Lord Mance JSC in paras 41 and 42 of his judgment has set out the passages in the judgments of Arnold J and the Court of Appeal respectively, which contain the centrally relevant reasoning of those tribunals on the first question which we have to decide. At least on the face of it, those passages each involve a classical interlocutory weighing up exercise with which an appellate court should be slow to interfere. Of course, that does not detract from the point that the Court of Appeal will consider any argument that the judge took into account any irrelevant or mistaken material, or omitted some relevant material, which could well have influenced the conclusion reached, or that the case is one of those even more unusual cases where the judge's conclusion was one that no reasonable judge could have reached.*
>
> *97 It is worth emphasising that, as Lord Wilson JSC says, the exercise carried out by the judge and by the Court of Appeal on the first question was not the exercise of a discretion but an evaluative, or a balancing, exercise, with which, as Lord Goff said in The Spiliada at p 465, an "appellate court should be slow to interfere" (also reflected in Lord Bingham's observation in Lubbe quoted in para 92 above)."*

46. To much the same effect Lord Wilson said, at [156]:

> *"The forum issue required Arnold J not (in my view) to exercise a discretion but, rather, to reach an evaluative judgment upon whether, in the light of these and the many other points pressed upon him by each side, England was clearly the more appropriate forum. "The appellate court should be slow to interfere" (Lord Goff in The Spiliada [1987] AC 460, 465); and I agree with Lord Mance JSC at para 68 and with Lord Neuberger PSC at para 98 that the errors which the Court of Appeal identified in the judgment of Arnold J (in particular his adoption of the two-part test apt to an application for stay) were, on analysis, of materiality insufficient to justify a re-evaluation of its own."*

47. Lord Clarke dissented from the decision of the majority to uphold the decision of the courts below. He considered that the courts below had gone wrong in their substantive decisions on the question of forum. In terms however of the approach to the question of whether the lower courts had gone wrong, Lord Clarke was in agreement with Lord Neuberger. As Lord Clarke explained, at [229]:

> *"I entirely agree with Lord Neuberger PSC that, where a judge has made no error of principle and the only challenge that can be advanced against his or her decision depends upon persuading an appellate court to balance the various factors differently, an appellate court should not interfere unless the balance struck by the judge can be shown to be plainly wrong. The question is whether this is such a case or whether this is a case in which, as VTB says, both the judge and the Court of Appeal made errors of principle and that, permission to appeal to this court having been granted, it becomes its responsibility to strike the balance. In my opinion, this case is in the second category."*

48. In the other dissenting judgment in the Supreme Court Lord Reed, while also not quarrelling with what had been said as to the nature of the exercise carried out by the courts below, did consider that the courts below had gone wrong in the carrying out of this exercise. As Lord Reed explained, at [240] and [241]:

> *"240 In relation to the first question in this appeal, namely whether the permission granted ex parte to VTB to serve the proceedings out of the jurisdiction should be set aside, I have reached the same conclusion as Lord Clarke of Stone-cum-Ebony JSC. I do not question the general points made by Lord Neuberger of Abbotsbury PSC at paras 79—93 of his judgment. Nevertheless, it appears to me that the courts below erred in law in their approach to this question. In particular, as explained by Lord Clarke JSC, they erred (i) in concluding that the applicable law was Russian law rather than English law and (ii) in failing to attach appropriate weight to the fact that the alleged tort was committed in England, in accordance with the line of authority including The Albaforth [1984] 2 Lloyd's Rep 91 and Berezovsky v Michaels [2000] 1 WLR 1004.*
>
> *241 These errors, particularly when considered cumulatively, appear to me to have been material. I recognise that the Court of Appeal stated (para 166) that, even if it had concluded that the applicable law was English law, this would not have been a factor that would weigh heavily, "precisely because if the defendants wished to allege and plead that the applicable law was Russian law, both sides would have had to prepare for a trial on that basis". The fact of the matter is however that the defendants have not pleaded, or indicated any intention to plead, that the applicable law is Russian law. Since the approach of the courts below was flawed in principle, it appears to me that this court has no alternative but to reconsider the question on a proper basis."*

49. Mr Emmett also referred me to *Trust Risk Group SA v AmTrust Europe Ltd* [2015] EWCA Civ 437, which was concerned with a dispute over jurisdiction between insurance companies. The principal judgment in the Court of Appeal was given

by Beatson LJ, with whom Christopher Clarke LJ (who gave a short judgment of his own) and Elias LJ agreed. Beatson LJ devoted a section of his judgment to a discussion of the correct approach of an appellate court when hearing an appeal from a judge who has ruled at the interlocutory stage on a jurisdiction challenge. The discussion is a wide ranging one and, it is important to note, occurred in a context of a case where the dispute on jurisdiction turned on the construction of two contracts between the parties which contained apparently conflicting jurisdiction provisions. The present case is not one where there is a jurisdiction clause to construe. Subject to that point, Beatson LJ's discussion of the appellate jurisdiction in this context repays study.

50. At [31] Beatson LJ identified the argument that the appellate court should proceed with circumspection:

> *"Mr Samek's response to ATEL's argument (see [6] above) that the authorities establish that an appellate court should be slow to interfere with a first instance judge's assessment of the merits at the interlocutory stage of a jurisdictional challenge is that the cases from The Spiliada [1987] AC 460 to VTB Capital v Nutritek International upon which Mr Downes relied concerned forum non conveniens. They have, he submitted, no application where the issue of jurisdiction is determined by the proper construction of the contractual arrangements, here the Framework Agreement, and not by the evaluation of competing factors in favour of rival jurisdictions in determining which jurisdiction is the appropriate forum. This is because the question of construction is a question of law which an appellate court is well able to determine. Moreover, in these cases the evidence will all be documentary and in principle the appellate court will be in as good a position as the judge to assess it."*

51. Beatson LJ then identified the justifications for showing such circumspection. As he explained, at [33]:

> *"The first justification is that, where the issue is forum non conveniens or where the documentary evidence contains a sharp clash of evidence about the facts, the exercise carried out by the judge is an evaluative one, sometimes with a 'predictive' element, and with more than one possible 'right' answer. The evaluation of the factors relevant to the determination of the appropriate forum and of disputed evidence is very much the province of the first instance judge: Cherney v Deripaska [2009] EWCA Civ 849; [2009] 2 CLC 408 at [10] and [59]. In such cases an appellate court should only interfere where it is clear that an error of principle has been made or that the result falls outside the range of potentially 'right' answers."*

52. At [36] Beatson LJ then identified a second justification for showing circumspection:

> *"The second justification given for circumspection by appellate courts is more general and has to do with the nature of the appellate function and the role of an appellate court. The basis of our system is that not every issue determined at first instance should be revisited by an appeal court. In EI Dupont de Nemours & Co v ST Dupont (Note) [2003] EWCA Civ 1368; [2006] 1 WLR 2793 at [94], May LJ discussed the requirement in CPR 52.11(1) that, subject to exceptions, every appeal is limited to a review of*

the decision of the lower court. He stated that the concept of review in this context engages the merits, but accords appropriate respect to the decision of the lower court, and that there is a spectrum of appropriate respect, depending on the nature of the decision of the lower court. At one end of the spectrum are decisions of primary fact reached after an evaluation of oral evidence and purely discretionary decisions. What May LJ described as 'multi-factorial decisions often dependent on inferences and analysis of documentary material' are further along the spectrum. May LJ observed that CPR 52.11(4) expressly empowers the appeal court to draw any inference of fact which it considers justified on the evidence. Questions of law lie at the other end of the spectrum."

53. Mr Emmett emphasized to me what was said by Beatson LJ at [41] and [42]:

"41. In a jurisdiction challenge there is an important factor pointing against circumspection. It is the factor identified by Christopher Clarke J in Cherney v Deripaska that in such cases the issue is whether a defendant not ordinarily subject to the jurisdiction of the English court and who does not accept jurisdiction should be compulsorily brought here as a defendant. For that reason, the court in either granting permission to serve out of the jurisdiction or refusing to set aside service out is exercising an exorbitant jurisdiction over those not within its ordinary reach. Although the discussion in that case was about the justification for the 'much the better of the argument' requirement, what Christopher Clarke J stated in that context is also of relevance in considering the appellate role.

42. To conclude, the requirements for service out of the jurisdiction in CPR r 6.30 and the jurisdiction of the English court provide for an evaluation, not a finding. The fact that the nature of the issue upon which jurisdiction depends in this case is one to which there is a single 'right' answer taken together with the fact that the court would be exercising an exorbitant jurisdiction over a party which contends that it is not within the ordinary reach of the English court suggest that an appeal court should show less circumspection to the first instance decision than in a forum non conveniens case. But the decision of this court in Aldi Stores Ltd v WSP Group plc shows that some circumspection is needed even where the decision is one to which there can only be one correct answer."

54. *Aldi Stores Ltd v WSP Group plc* [2007] EWCA Civ 1260 was concerned with an appeal against the decision of the first instance judge to strike out a claim on the basis that it was an abuse of process. The judge decided that the claim could and should have been brought in previous litigation. The Court of Appeal overturned this decision, on the basis that the judge had taken into account factors which he should not have done, and had omitted to consider relevant factors. The principal judgment in the Court of Appeal was given by Thomas LJ, with whom Wall and Longmore LJJ agreed. In setting out his conclusions Thomas LJ set out the correct approach to determining whether the judge had gone wrong in the following terms, at [16]:

> *"In considering the approach to be taken by this court to the decision of the judge, it was rightly accepted by Aspinwall that the decision to be made is not the exercise of a discretion; WSP were wrong in contending otherwise. It was a decision involving the assessment of a large number of factors to which there can, in such a case, only be one correct answer to whether there is or is not an abuse of process. None the less an appellate court will be reluctant to interfere with the decision of the judge where the decision rests upon balancing such a number of factors; see the discussion in Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2003] 1 WLR 577 and the cases cited in that decision and Mersey Care NHS Trust v Ackroyd (No 2) [2007] HRLR 580, para 35. The types of case where a judge has to balance factors are very varied and the judgments of the courts as to the tests to be applied are expressed in different terms. However, it is sufficient for the purposes of this appeal to state that an appellate court will be reluctant to interfere with the decision of the judge in the judgment he reaches on abuse of process by the balance of the factors; it will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him. In this case, I consider that the judge, despite the weight that must be accorded his view given his great experience in this type of litigation and the conspicuous success with which he has managed the TCC, reached a decision which was impermissible by taking into account factors which he should not have done and omitting factors which he should have taken into account."*

55. For his part Mr D'Cruz laid particular stress on what was said by Thomas LJ in *Aldi*, in the extract from the judgment of Thomas LJ which I have just quoted, and stressed that the present case was one where the Deputy Master, in his evaluation of the factors relevant to the Forum Question, was considering a question to which there was more than one right answer.

56. Mr D'Cruz also referred me to *Piglowska v Piglowski* [1999] 1 WLR 1360. The case was concerned with a dispute over the distribution of matrimonial assets. The issue was not a jurisdictional one, but rather a dispute over what percentage of the matrimonial assets the husband and wife should each be entitled to on divorce. More specifically, so far as the appellate courts were concerned, the question was whether the district judge who heard the case had gone wrong in the exercise of his discretion. Mr D'Cruz referred me to the following extract from the speech of Lord Hoffmann, at 1372B-C:

> *"In G v. G (Minors: Custody Appeal) [1985] 1 W.L.R. 647, 651-652, this House, in the speech of Lord Fraser of Tullybelton, approved the following statement of principle by Asquith L.J. in Bellenden (formerly Satterthwaite) v. Satterthwaite [1948] 1 All E.R. 343, 345, which concerned an order for maintenance for a divorced wife: "It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable*

disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

57. Mr. D'Cruz also referred me to what Lord Hoffmann said shortly after the above extract, at 1372G-H:

> *"The second point follows from the first. The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the district judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."*

58. Turning to the application (in the present case) of the authorities cited to me in this context, I think that it is necessary to separate out the Abuse Point from the Misdirection Point and the Evaluation Point. As I shall explain, when I come to consider the Abuse Point, the arguments within the Abuse Point seem to me essentially to be concerned with issues of law, where it seems to me that the question is whether the Deputy Master was right or wrong in the relevant part of his decision. I shall therefore deal with the question of the correct approach to the Abuse Point when I come to consider the Abuse Point.

59. This leaves the Misdirection Point and the Evaluation Point. In relation to these Points I derive the following guidance from the authorities cited to me, both in relation to the nature of the exercise which the Deputy Master was carrying out in his decision on the Forum Question, and in relation to my review of the decision of the Deputy Master on the Forum Question:

    (1) In considering and weighing up the factors relevant to the Forum Question, the Deputy Master was not exercising a discretion, but was carrying out an evaluative or balancing exercise, at an interlocutory stage. The exercise can also be described as an interlocutory weighing up exercise.

    (2) I should be slow to interfere with the decision of the Deputy Master unless it can be demonstrated that the Deputy Master took into account irrelevant or mistaken material, or omitted to take into account relevant material which could have influenced the decision which he reached, or made some error of principle, or simply reached a decision which no reasonable judge could have reached (which I take to mean a decision which was plainly wrong).

    (3) I do not think that the present case is on all fours with the *AmTrust* case, because the present case does not involve the construction of contractual jurisdiction provisions, but rather the weighing of a number of competing factors. That said, one particular point which I do take from Beatson LJ's discussion of the appellate jurisdiction is the need for some circumspection even in a case where the relevant decision is one to which there can only be one correct answer.

(4) Even in a case where the decision is one to which there can only be one correct answer, an appellate court should still be reluctant to interfere where the decision of the first instance judge rests upon balancing a number of factors, unless (to repeat what I have said in (2) above) the Deputy Master took into account irrelevant or mistaken material, or omitted to take into account relevant material which could have influenced the decision which he reached, or made some error of principle, or simply reached a decision which no reasonable judge could have reached.

60. I do not think that *Piglowska* is directly relevant in the present case. The case was concerned with the review of a discretion by the district judge, thereby engaging the classic statement of the court's approach to the review of an exercise of discretion, in the well-known extract from the speech of Lord Fraser in *G v G*. As the other authorities cited to me in this context make clear, the evaluative exercise carried out by the Deputy Master in relation to the Forum Question was not the same as an exercise of discretion, and does not fall to be reviewed as an exercise of discretion.

61. To be fair to Mr D'Cruz, I understood him to refer to *Piglowska* principally to make the point, derived from what Lord Hoffmann said at 1372G-H, that I should assume that the Deputy Master knew what he was doing, in terms of his approach to the evaluation exercise, even if there might be some obscurity in his reasoning. I accept, of course, the principle of what was stated by Lord Hoffmann. I think however that there is a need for some caution in its application in the present case. The Forum Question is not concerned with the application of a discretion as to the division of matrimonial assets. The Forum Question is concerned with whether England is clearly and distinctly the most appropriate forum for the trial of the Additional Claim. In considering whether the Deputy Master went wrong in his decision on the Forum Question, it seems to me that it is necessary to look at the reasoning of the Deputy Master in the Marsh Judgment and decide whether the Deputy Master made an error of kind which permits the setting aside of his decision on the Forum Question. I have no difficulty in accepting that the Deputy Master knew well how to perform his functions. I would not have the temerity to suggest otherwise. I do not think however that it follows from this that I can either supply reasoning which is missing from the Marsh Judgment, or treat reasoning as correct which seems to me to be incorrect (assuming that either of these situations does arise).

<u>Principles of law relevant to the Jurisdiction Application</u>

62. Before coming to my consideration of the individual Points in the Jurisdiction Appeal, there are two relevant and related principles of law which can usefully be stated at the outset.

63. The first principle was identified by the Deputy Master, at **[12]**. An applicant who seeks to set aside an order giving permission to serve out of the jurisdiction is not subject to a burden that requires the applicant to establish that the order was wrongly made. On the contrary, the court should decide the matter afresh. It is for the party seeking permission to serve out of the jurisdiction to satisfy the court that the order granting permission to serve out was correctly made, although the court might reach the same conclusion as the previous court by a different route.

This first principle was explained in the following terms by Marcus Smith J in *Microsoft Mobile OY (Ltd) v Sony Europe Limited* [2017] EWHC 374 (Ch), at [91].

> *"If a party served pursuant to such an order is minded to challenge it, this will be done on the inter partes return date of the applicant's original ex parte application for permission to serve out of the jurisdiction. At this point, the court will reconsider, and decide de novo, by way of rehearing, whether permission to serve out should be given. It is for the party seeking to serve out – Microsoft Mobile – to demonstrate that this is a proper case for service out. The position is clearly explained in Briggs, Civil Jurisdiction and Judgments, 6th ed. (2015) (hereafter "Briggs") at p.460:"*

64. So, in the present case, the burden was upon Alexey, before the Deputy Master, to establish that England was clearly or distinctly the most appropriate forum for the trial of the Additional Claim.

65. The second principle is that, as a general rule, the court which hears the application to set aside the original order granting permission to serve out of the jurisdiction is only entitled to have regard to events occurring after the date when the original order was made, if and in so far as they may shed light upon considerations which were relevant at the time when the original order was made. As a general rule, the application to set aside should be determined by reference to the circumstances which existed when the original order was made. This second principle derives from the judgment of Hoffmann J (as he then was) in *ISC Technologies Ltd v Guerin* [1992] 2 Lloyd's Rep 430, at 434 (column 2):

> *"The application is under R.S.C., O. 12 r. 8(1)(c) to discharge the Master's order giving leave to serve out. The question is therefore whether that order was rightly made at the time it was made. Of course the Court can receive evidence which was not before the Master and subsequent events may throw light upon what should have been relevant considerations at the time. But I do not think that leave which was rightly given should be discharged simply because circumstances have changed. That would mean that different answers could be given depending upon how long it took before the application came on to be heard."*

66. This second principle was further explained by Morgan J in *Satfinance Investment Limited v Athena Art Finance Corp* [2020] EWHC 3527 (Ch), at [41] to [43]:

> *"41. It is clearly established that, on an application to set aside the grant of permission to serve out of the jurisdiction, the court decides the issues arising by reference to the position at the time that the permission was originally granted and not by reference to the position at the time the application to set aside is heard. In Erste Group Bank AG v JSC 'VMZ Red October' [2015] 1 CLC 706 at [44] Gloster LJ in giving the judgment of the court said: "The parties did not dispute the proposition that an application to set aside permission to serve out of the jurisdiction falls to be determined by reference to the position at the time permission is granted, not by reference to circumstances at the time the application to set aside is heard: see per Hoffmann J (as he then was) in ISC Technologies v Guerin [1992] 2 Ll Rep 430 at 434-435."*

> 42. *Gloster LJ then cited a number of authorities which applied this proposition. The proposition applies to all aspects of an application for permission to serve out of the jurisdiction, not just forum conveniens. In Erste Group Bank, Gloster LJ went on to say at [45] that:*
>
> > *"…permission which was rightly granted will not be discharged simply because circumstances have changed, although, as Hoffmann J observed in ISC Technologies, subsequent events may throw light upon considerations which were relevant at that time."*
>
> 43. *In a typical case, the grant of permission to serve out of the jurisdiction will have been granted at an ex parte hearing on the basis of the evidence adduced by the claimant alone but when the court considers an application to set aside the original grant of permission, the matter will be considered at an inter partes hearing on the basis of evidence adduced by all relevant parties. Nonetheless, the further evidence must be directed at the situation at the date when permission was originally granted: see Mohammed v Bank of Kuwait [1994] 1 WLR 1483 at 1492 per Evans LJ and Microsoft Mobile OY v Sony Europe [2018] 1 All ER (Comm) 419 at [93] per Marcus Smith J. In the present case, the relevant date is 1 November 2019, when permission to serve out was granted by Roth J."*

67. This second principle is of particular importance in the context of the Abuse Point. For ease of reference I will refer to this second principle as "the Original Date Principle".

<u>The Abuse Point – discussion</u>

68. There are essentially two arguments in the Abuse Point. The first argument, advanced by Mr D'Cruz, is that the Abuse Point is not in fact open to Olga, because it is based upon an event, namely the ASI Judgment, which occurred after the date of the Lloyd Order. As such, this event cannot be taken into account because to do so would infringe the Original Date Principle. The second argument, assuming that Mr D'Cruz is wrong in this argument, is Mr Emmett's argument that it is an abuse of the process of the court for Alexey to argue, in the Jurisdiction Application, that England is the natural forum for the Additional Claim. The Deputy Judge had already decided, in the ASI Judgment, that England was not the natural forum for the Additional Claim, rendering it an abuse of process for Alexey to try to re-argue this question in the Jurisdiction Application.

69. I will take each of these arguments in turn but, before doing so, I should briefly revisit the question of the correct approach to take to this part of the Deputy's Master's decision, which I reserved out of my previous discussion of my appellate jurisdiction. It seems to me, as I have said, that the arguments in the Abuse Point are essentially arguments of law. They do not depend upon disputed facts. Nor do they seem to me to depend upon the balancing of different factors. As such, I approach the Abuse Point on the basis that my task is simply to decide whether the Deputy Master was right or wrong in his rejection of Olga's argument that it

was an abuse of process for Alexey to argue that England was the natural forum for the Additional Claim.

70. I therefore start with the argument that it was not open to the Deputy Master to take the ASI Judgment into account by reason of the Original Date Principle. Olga's grounds of appeal are framed, at paragraph 2(2) on the basis that the Deputy Master was incorrect *"So far as the Deputy Master's reasoning in relation to the question of issue estoppel/abuse of process turned on the fact that the ASI Judgment was handed down after [the Lloyd Order]"*. For his part Alexey filed a respondent's notice in response to the PTA Application, which advanced the argument that the Deputy Master should have treated the ASI Judgment as irrelevant, by reason of the Original Date principle.

71. It is not entirely clear to me that the Deputy Master did decide that the ASI Judgment could not be taken into account by reason of the Original Date Principle. At **[15]** the Deputy Master said this:

> *"The position about the decision of the Deputy Judge on the application for anti-suit injunction application is different, not least because it was a step taken by Alexey. That difference is material although it is of limited impact. I do not accept that the decision of the Deputy High Court judge bears the analysis that Olga places upon it on the subject of forum conveniens, for reasons I will explain later in this judgment, but even if it does, it is not open to Olga to rely upon an issue estoppel or an abuse of process argument. It is appropriate, however, to have regard to the Deputy Judge's analysis of the issue of forum conveniens to the extent it may shed light upon that issue."*

72. When the Deputy Master reached his discussion of the Forum Question, he returned to the ASI Judgment, at **[57]**, in the following terms:

> *"I start by considering the judgment of the Deputy Judge who dismissed Alexey's application for an anti-suit injunction. For the reasons I have already given, I reject the notion that it is abusive for Alexey to maintain that England is clearly or distinctly the correct forum for the issues raised in the additional claim to be litigated. It is right however to have regard to the views formed by the Deputy Judge on that subject because they are capable of shedding light (I put it no higher than that) upon the circumstances present at the date when Deputy Master Lloyd made his decision and, in any event, it is appropriate to do so as a matter of judicial comity."*

73. The Deputy Master then proceeded to consider the ASI Judgment in more detail, at **[58]** to **[62]**, before coming to the following conclusions, at **[63]** and **[64]**:

> *"63. In summary:*
>
> *(1) The decision of the Deputy Judge did not determine the same issue of forum that is before me. Olga's application to set aside Deputy Master Lloyd's order had not been made when the application for an anti-suit injunction was considered.*
>
> *(2) The issue about forum before the Deputy Judge was narrower than the issue before this court.*

> 64. *I do not consider that the decision of the Deputy Judge and the reasons for it shed any light on the circumstances at the date Deputy Master Lloyd made his order."*

74. So far as the question of the application of the Original Date Principle was concerned, and if I may respectfully say so, I find the reasoning of the Deputy Master unclear. If one looks at the reasoning in **[58]** to **[62]**, the Deputy Master was clearly considering the question of whether it was an abuse of process for Alexey to argue the Forum Question, given what had been decided by the Deputy Judge in the ASI Judgment. It is also clear that the Deputy Master decided at **[63]**, for the reasons which he gave in **[58]** to **[62]**, that the terms of the ASI Judgment did not render it an abuse of process for Alexey to argue the Forum Question before the Deputy Master. What is less clear is whether the Deputy Master considered that the ASI Judgment was caught by the Original Date Principle. His conclusion, at **[64]**, might be thought to indicate that he did consider the ASI Judgment to be caught by the Original Date Principle, so that it would only be admissible if it shed light on the circumstances existing at the date of the Lloyd Order. What the Deputy Master said at **[15]** and **[57]** might be said to indicate the same view. As against that, the discussion of the effect of the ASI Judgment in **[58]** to **[63]** proceeds on the footing that the ASI Judgment was, depending upon its terms, capable of rendering it an abuse of process for Alexey to argue the Forum Question.

75. As I analyse the reasoning of the Deputy Master, he did consider and make a decision on each of the arguments which I have identified within the Abuse Point. The Deputy Master does appear to have concluded, by reference to what he said at **[15]**, **[57]**, and **[64]**, that the ASI Judgment was caught by the Original Date Principle, and could thus only be considered if and in so far as it shed light on the circumstances existing at the date of the Lloyd Order. This analysis appears to be supported by what the Deputy Master said in paragraph 3(1) of the Consequential Judgment, which is framed on the basis that the Original Date Principle did apply to the ASI Judgment. The Deputy Master did however also consider, at **[58]** to **[63]**, whether the terms of the ASI Judgment rendered it an abuse of process for Alexey to argue the Forum Question in the Jurisdiction Application. As I read this section of the Marsh Judgment the Deputy Master concluded, at **[63]**, that the terms of the ASI Judgment did not render it an abuse of process for Alexey to argue the Forum Question.

76. Whether my analysis of the reasoning of the Deputy Master is right or wrong, the question remains whether the ASI Judgment was disqualified from consideration by reason of the Original Date Principle. Mr D'Cruz submitted that this was the case. He submitted that the ASI Judgment contained the Deputy Judge's view of forum at the date of the ASI Application, which was irrelevant because it postdated the Lloyd Order. The Deputy Judge's analysis of the forum position was not a relevant post-permission event, because it was not evidence obtained after the Lloyd Order which enlightened the forum position at the date of the Lloyd Order. This was, submitted Mr D'Cruz, a complete answer to the abuse of process argument.

77. The question of whether the ASI Judgment was disqualified from consideration by reason of the Original Date Principle has proved surprisingly difficult to answer. Neither counsel was able to direct me to any authority on this question. I have therefore had to approach this question by deriving what assistance I can from the statements of the Original Date Principle which appear in the authorities cited to me, and by the application of first principles.

78. There is a certain logical attraction in the argument that the ASI Judgment was disqualified from consideration by the Original Date Principle. As Hoffmann J explained in *ISC Technologies*, the object of the Original Date Principle is to avoid a situation where different answers could be given to the question of whether a permission to serve out of the jurisdiction should have been granted, depending upon when the application for discharge was heard. Subsequent events should only be considered to the extent that they throw light on what should have been relevant considerations at the time when the original permission was granted. The ASI Judgment was a subsequent event, and I agree with Mr D'Cruz that it is not evidence, and is not properly characterised as a subsequent event throwing light on what were or should have been relevant considerations when the Lloyd Order was made.

79. The argument might be said to be strengthened further by the fact that the Russian Proceedings were excluded from consideration in the Jurisdiction Application by the Original Date Principle. The ASI Judgment was however concerned with the Russian Proceedings. If the effect of the ASI Judgment can be considered in the Jurisdiction Application, one might take the view that this effectively amounts to allowing the Russian Proceedings back in, through the illegitimate back door created by exempting the ASI Judgment from the Original Date Principle.

80. There is however in my view a flaw in these and similar arguments. The flaw seems to me to lie in the points (i) that the ASI Judgment is not evidence obtained after the date of the Lloyd Order, and (ii) that the ASI Judgment is not capable of throwing any light on the circumstances as they existed at the date of the Lloyd Order. I agree with both of these points. The ASI Judgment is not evidence. The ASI Judgment does not throw any light on the circumstances as they existed at the date of the Lloyd Order. Rather it is a judgment of the Deputy Judge, sitting in his capacity as a deputy judge of the High Court.

81. As a decision of the High Court, I would normally expect to follow the decision in the ASI Judgment, if and in so far as it is relevant to what I have to decide, and if and in so far as it is not distinguishable. In the present case the ASI Judgment is said to have rendered Alexey's arguments on the Forum Question in the Jurisdiction Application an abuse of the process of the court. It seems to me that it would be very odd if I was required to ignore the content of the ASI Judgment simply because it postdated the Lloyd Order. Equally, it seems to me that it would be very odd if an argument of abuse of process could not be advanced simply because the decision of the High Court which was said to give rise to the abuse of process postdated the Lloyd Order.

82. Put more simply, Olga's case is that there is a decision of the High Court which has settled the Forum Question, and renders it an abuse of process for Alexey to

re-argue the Forum Question in the Jurisdiction Application. If Alexey is right, this decision has to be ignored. In the case of a court decision such as the ASI Judgment I do not think that this can be right. I do not think that Hoffmann J had in mind an exclusion of this kind, when he framed the Original Date Principle in *ISC Technologies*. Nor do I read any of the subsequent statements of the Original Date Principle in the authorities as extending to an exclusion of this kind.

83. I did not understand Mr D'Cruz to argue that the Original Date Principle could have operated, in the present case, to exclude from consideration a legal authority on the Forum Question which came into existence after the date of the Lloyd Order. In my view, and by analogy, the effect of the ASI Judgment on the ability of Alexey to argue the Forum Question is not excluded from consideration.

84. I therefore conclude that the Original Date Principle does not operate as a complete, or any answer to the abuse of process argument. I do not think that the ASI Judgment was excluded from consideration by the Original Date Principle. To the extent that the Deputy Master decided that the ASI Judgment was so excluded from consideration, I think that the Deputy Master was wrong.

85. This clears the way for consideration for Olga's argument in the Abuse Point, which is that it was, by reason of the ASI Judgment, an abuse of process for Alexey to argue, in the Jurisdiction Application, that England was clearly or distinctly the most appropriate forum for the trial of Additional Claim.

86. In relation to Olga's argument, the starting point is to identify the basis on which Olga argues that an abuse of process has arisen. A summary of the principles governing the ability of a party to relitigate an issue (res judicata if the Latin term is used) was set out by Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46 [2014] AC 160. At [17] Lord Sumption summarised the position in the following terms:

> *"17 Res judicata is a portmanteau term which is used to describe a number of different legal principles with different juridical origins. As with other such expressions, the label tends to distract attention from the contents of the bottle. The first principle is that once a cause of action has been held to exist or not to exist, that outcome may not be challenged by either party in subsequent proceedings. This is "cause of action estoppel". It is properly described as a form of estoppel precluding a party from challenging the same cause of action in subsequent proceedings. Secondly, there is the principle, which is not easily described as a species of estoppel, that where the claimant succeeded in the first action and does not challenge the outcome, he may not bring a second action on the same cause of action, for example to recover further damages: see Conquer v Boot [1928] 2 KB 336. Third, there is the doctrine of merger, which treats a cause of action as extinguished once judgment has been given on it, and the claimant's sole right as being a right on the judgment. Although this produces the same effect as the second principle, it is in reality a substantive rule about the legal effect of an English judgment, which is regarded as "of a higher nature" and therefore as superseding the underlying cause of action: see King v Hoare (1844) 13 M & W 494, 504 (Parke B). At common law, it did not apply to foreign judgments, although every other principle of res*

> *judicata does. However, a corresponding rule has applied by statute to foreign judgments since 1982: see section 34 of the Civil Jurisdiction and Judgments Act 1982. Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties: Duchess of Kingston's Case (1776) 20 State Tr 355. "Issue estoppel" was the expression devised to describe this principle by Higgins J in Hoysted v Federal Commissioner of Taxation (1921) 29 CLR 537, 561 and adopted by Diplock LJ in Thoday v Thoday [1964] P 181, 197—198. Fifth, there is the principle first formulated by Wigram V-C in Henderson v Henderson (1843) 3 Hare 100, 115, which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones. Finally, there is the more general procedural rule against abusive proceedings, which may be regarded as the policy underlying all of the above principles with the possible exception of the doctrine of merger."*

87. Given the interlocutory nature of the ASI Judgment, Mr Emmett did not rely upon issue estoppel, as identified by Lord Sumption in this extract. Rather, he relied upon the general rule against abusive proceedings, also as identified by Lord Sumption in this extract. As however Mr Emmett also submitted, there is a close relationship between issue estoppel and abuse of process, where the abuse of process is said to arise from re-arguing an issue which has already been determined. Mr Emmett was plainly right in this submission. As Lord Sumption went on to say, at [25]:

> *"It was clearly not the view of Lord Millett in Johnson v Gore-Wood that because the principle in Henderson v Henderson was concerned with abuse of process it could not also be part of the law of res judicata. Nor is there anything to support that idea in the speech of Lord Bingham. The focus in Johnson v Gore-Wood was inevitably on abuse of process because the parties to the two actions were different, and neither issue estoppel nor cause of action estoppel could therefore run (Mr Johnson's counsel conceded that he and his company were privies, but Lord Millett seems to have doubted the correctness of the concession at p 60D—E, and so do I). Res judicata and abuse of process are juridically very different. Res judicata is a rule of substantive law, while abuse of process is a concept which informs the exercise of the court's procedural powers. In my view, they are distinct although overlapping legal principles with the common underlying purpose of limiting abusive and duplicative litigation. That purpose makes it necessary to qualify the absolute character of both cause of action estoppel and issue estoppel where the conduct is not abusive. As Lord Keith put it in Arnold v National Westminster Bank plc [1991] 2 AC 93, 110G, "estoppel per rem judicatam, whether cause of action estoppel or issue estoppel, is essentially concerned with preventing abuse of process".*

88. In terms of a general description of the court's abuse of process jurisdiction I was referred to what Lord Diplock said in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, at 536C-D:

"My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

89. There is no doubt that the abuse of process jurisdiction applies to interlocutory decisions and applications; see *Koza v Koza* [2020] EWCA Civ 1018 [2021] 1 WLR 170 at [41] to [42]. As Popplewell LJ explained in *Koza*, at [42]:

"In my judgement the tension is more apparent than real. The Henderson and Hunter principles apply to interlocutory hearings as much as to final hearings. Many interlocutory hearings acutely engage the court's duty to ensure efficient case management and the public interest in the best use of court resources. Therefore the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered at the time of the first hearing. This is not a departure from the principle in Johnson v Gore Wood & Co [2002] 2 AC 1 that it is not sufficient to establish that a point could have been taken on an earlier occasion, but a recognition that where it should have been taken then, a significant change of circumstances or new facts will be required if raising it on a subsequent application is not to be abusive. The dictum in Woodhouse v Consignia plc [2002] 1 WLR 2558 that the principle should be applied less strictly in interlocutory cases is best understood as a recognition that because interlocutory decisions may involve less use of court time and expense to the parties, and a lower risk of prejudice from irreconcilable judgments, than final hearings, it may sometimes be harder for a respondent in an interlocutory hearing to persuade the court that the raising of the point in a subsequent application is abusive as offending the public interest in finality in litigation and efficient use of court resources, and fairness to the respondent in protecting it from vexation and harassment. The court will also have its own interest in interlocutory orders made to ensure efficient preparations for an orderly trial irrespective of the past conduct of one of the parties, which may justify revisiting a procedural issue one party ought to have raised on an earlier occasion. There is, however, no general principle that the applicant in interlocutory hearings is entitled to greater indulgence; nor is there a different test to be applied to interlocutory hearings. In every case the principles are those identified in paras 30—40 above, the application of which will reflect that within a single set of proceedings, a party should generally bring forward in argument all points

reasonably available to him at the first opportunity, and that to allow him to take them serially in subsequent applications would generally permit abuse in the form of unfair harassment of the other party and obstruction of the efficacy of the judicial process by undermining the necessary finality of unappealed interlocutory decisions."

90. For a specific instance of the application of the doctrine of abuse of process I was referred to *Chanel Limited v Woolworth* [1981] 1 WLR 485. The question in that case was whether the second defendants to the action could be discharged from undertakings which they had given, as part of a consent order standing over a motion for interlocutory relief until trial. The second defendants argued that a subsequent decision of the Court of Appeal and recently obtained evidence meant that the plaintiffs had no prospect, at trial, of obtaining relief in the nature of what was provided for by their undertakings, with the consequence that the second defendants should be discharged from their undertakings. At first instance Foster J refused to release the second defendants from their undertakings. The matter came before the Court of Appeal on an application for leave to appeal against this decision. Leave to appeal was refused. In giving judgment on the application for leave to appeal Buckley LJ, with whose judgment the other members of the Court of Appeal agreed, said this at 492H-493A:

> *"The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adequate adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter. The fact that he capitulated at the first encounter cannot improve a party's position. The Revlon point was open to the defendants in April 1979, notwithstanding that this court had not then decided that case. Some at least of the new evidence was readily available to them at that time."*

91. Before leaving *Chanel* I should mention that both counsel placed considerable reliance upon this authority, in their written and oral submissions. In an Appellant's Note, filed after the skeleton arguments in the PTA Application, Mr Emmett sought to argue that a point made by Mr D'Cruz, based upon *Chanel*, was not open to him because it had not featured in the respondent's notice filed by Alexey. I did not understand Mr Emmett to press this point in his oral submissions, and it seems wrong to me. The relevant point on *Chanel* made by Mr D'Cruz in his skeleton argument seems to me to have been no more than the legitimate raising of a counter-argument to Mr Emmett's reliance upon *Chanel* in his skeleton argument in support of the PTA Application. I do not think that the point required a respondent's notice.

92. Turning to the question of how one identifies when a situation arises which engages an issue estoppel or an abuse of process, I was referred to what Lord Keith said in *Arnold v Westminster Bank plc* [1991] 2 AC 93, at 105E:

> *"Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in*

subsequent proceedings between the same parties involving a different p cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

93. I was also referred to *Carl Zeiss Stiftung v Rayner and Keeler Limited (No. 2)* [1967] 1 AC 853. At 964G-965E Lord Wilberforce put forward the following formulation of what constitutes a necessary ingredient in the relevant cause of action which has already been litigated and decided:

"The doctrine of issue estoppel generally is not a new one. It can certainly be found in the opinion of the judges delivered by De Grey C.J. in The Duchess of Kingston's Case, a passage from which has been quoted by my noble and learned friend, Lord Reid, and an accepted re-statement of it was given by Coleridge J. in Reg. v. Inhabitants of the Township of Hartington Middle Quarter, which is also quoted by my noble and learned friend. Mr. Spencer Bower, in his work on Res Judicata states the principle as being " that the judicial decision was, or involved a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised" (Res Judicata, p. 9)—a formulation which invites the inquiry how what is " involved " in a decision is to be ascertained. One way of answering this is to say that any determination is involved in a decision if it is a " necessary step " to the decision or a " matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision" (Reg. v. Inhabitants of Hartington Middle Quarter Township). And from this it follows that it is permissible to look not merely at the record of the judgment relied on, but at the reasons for it, the pleadings, the evidence (Brunsden v. Humphrey) and if necessary other material to show what was the issue decided (Flitters v. Allfrey). The fact that the pleadings and the evidence may be referred to, suggests that the task of the court in the subsequent proceeding must include that of satisfying itself that the party against whom the estoppel is set up did actually raise the critical issue, or possibly, though I do not think that this point has yet been decided, that he had a fair opportunity, or that he ought, to have raised it."

94. As Mr Emmett submitted, the principle of abuse of process is not confined to points decided in previous proceedings, but is also capable to applying to points which were abandoned in previous proceedings, and to points which could and should have been raised in previous proceedings, but were not.

95. With the above guidance in mind, and with all the submissions of counsel on the operation of issue estoppel and abuse of process in mind, I turn to the present case. Was it an abuse of process for Alexey to argue, in the Jurisdiction Application, that England was clearly or distinctly the most appropriate forum for the trial of the Additional Claim? The Deputy Master decided that this was not an abuse of process. Was he correct so to decide?

96. The starting point is to identify what it was that the Deputy Judge decided in the ASI Judgment. I will refer to the paragraphs of the ASI Judgment as **[ASI/1]**, and so on. The Deputy Judge commenced his discussion of the competing arguments at the hearing of the ASI Application, at **[ASI/25&26]**, in the following terms:

> *"25. To my mind Mr Emmet's submissions set out in his skeleton are correct inasmuch as he contends that the principles that I have referred to, lead to the firm conclusion that there must be good reason why a decision to stop foreign proceedings should be made by an English judge rather than by a foreign judge; and that the cases where justice requires the English court to intervene will be exceptional. I agree with him that the power to grant anti-suit injunctions should be exercised with caution.*
>
> *26. This is of course an unusual matter as Mr D'Cruz quite properly submits. This is a situation where it is not Mr Golubovich who is the underlying claimant and seeks to restrain the defendant from litigating elsewhere. He is the Defendant. But he wants a substantial element of his Additional Claim decided in the proceedings which he has been forced to defend in England."*

97. The Deputy Judge then went on to set out the two crucial questions which, in his view, Alexey had to answer if the ASI Application was to succeed, as follows at **[ASI/27]**:

> *"There are two crucial questions which in my judgment must be answered by Mr Golubovich in order for him to succeed on his application. The first is whether England is the "natural forum" for the determination of the matters raised in the Presnenskiy Declaration Proceedings; the second is whether the prosecution of those proceedings in parallel is something that this court should act to prevent."*

98. So far as the first of these two questions was concerned, the Deputy Judge added the following points, at **[ASI/28-31]**:

> *"28. I pose the first question because it seems to me that embarking upon the enquiry as to whether the Presnenskiy Declaration Proceedings are vexatious or an interference, ultimately leads to the same point: should Ms Mirimskaya be restrained from proceeding in Moscow because England is the proper and natural forum for the determination of the matters in issue?*
>
> *29. The dispute which Ms Mirimskaya seeks to have resolved in Russia relates to a matter which, as Mr Emmet points out, has already involved the Russian Courts and legal system for many years. To see the matter determined in England will involve moving one aspect of the divorce litigation from the forum which has had the conduct of all the relevant matrimonial litigation hitherto. In effect it would be the English Court and not the Russian that would be resolving questions of ownership of matrimonial assets.*
>
> *30. In my judgment it is right to say that the dispute between Mr Golubovich and Ms Mirimskaya arises out of their rights and obligations as spouses, not out of a commercial relationship. It is one thing to prevent a business from litigating a commercial dispute in its forum of preference; it is another to deprive a Russian citizen of her right to submit disputes relating to the consequences of her Russian divorce to the Russian court that has had for some time, the conduct of proceedings relating to that divorce.*

> *31. It is not clear to me the basis upon which on 21 July 2020, Deputy Master Lloyd ordered that there be permission to serve the Additional Claim Proceedings out of the jurisdiction. What can be said is that (through no fault of anyone participating) the matter was not properly argued before the learned Deputy Master with Ms Mirimskaya taking no part in the proceedings. I doubt that the Deputy Master had the benefit of all of the materials that have been put before me by Counsel on a fully contested ASI application. At any rate I don't consider this court's hands to be tied by virtue of the procedural order made."*

99. The Deputy Judge decided that the answer to the first question was in the negative. He explained his reasons at **[ASI/32&33]**:

> *"32. As to whether England is the natural forum the following factors relating to the Deed of Settlement appear to me to be relevant:*
>
> *a) it was allegedly signed in Russia and says so on its face;*
>
> *b) it was purportedly made pursuant to Art. 38 of the Russian family code;*
>
> *c) it was allegedly prepared by a Russian lawyer;*
>
> *d) it was intended to be governed by Russian law;*
>
> *e) it was written in Russian and not translated;*
>
> *f) it related to divorce proceedings in Russia under Russian law, which were, I am told, ongoing at the time the Deed of Settlement was allegedly signed;*
>
> *g) the marriage to which the divorce proceedings related was concluded in Russia and subject to Russian law;*
>
> *h) the parties were Russian citizens at the time of marriage, at the time of divorce, at the time of the alleged entry into the Deed of Settlement, and are still Russian citizens now; and*
>
> *i) the witnesses to whom the Defence refers are it seems all Russian.*
>
> *33. The response of Mr Golubovich to all of this is encapsulated in the submission that because there are ongoing, pre-existing proceedings in England, ipso facto, England is the natural forum. From these extant proceedings the so-called common thread weaves its path and binds the parties to the English jurisdiction. This argument appears to me to be patently circular and self-supporting. It does not address the relevant factors that I have just recited."*

100. The Deputy Judge then turned to the second question, and decided that it should also be answered in the negative; see **[ASI/34]**. In support of that answer, the Deputy Judge added the following discussion, at **[ASI/35-38]**:

> *"35. It must also be right to take into account the self-evident benefit of having a Russian Court oversee a dispute concerning a Russian language Deed of Settlement purportedly dividing up assets acquired during a Russian marriage which has been brought to an end by a Russian court. It is difficult to see the material disadvantage to Mr Golubovich, who is of course Russian and is already embroiled in Russian litigation with Ms Mirimskaya, litigation to which I will turn to shortly. The benefits to Ms Mirimiskaya in the choice of forum,*

from which she is not to be deprived absent good reason, are to me equally self-evident.

36. I must take into account the obvious fact that the Presnenskiy Declaration Proceedings concern just one of the issues that arise in the English dispute. One consequence of not interfering with the Presnenskiy Declaration Proceedings would be that the question of the authenticity of the Deed of Settlement might perhaps be resolved in Moscow. In that event, there is the danger that Mr D'Cruz pointed to of there being an argument as to whether the Russian judgment gives rise to an issue estoppel. Whilst I see this point, I do not consider that it is anything other than a factor to weigh in the scales when arriving at a view overall on the competing merits.

37. What must be taken into account in my judgment is the submission that this is not a case where there is a wholesale overlap of issues between two complex pieces of litigation. The parallel proceedings concern only the resolution of one, narrowly contained, factual issue.

38. It also seems to me to be pertinent to consider the contents of paragraph nine of the second witness statement of the English Solicitor acting on behalf of Mr Golubovich. That evidence makes it plan that Mr Golubovich and Ms Mirimskaya are "currently involved in a number of legal disputes in the Russian Federation…including a claim relating to allegedly undivided joint marital property"."

101. The Deputy Judge then came to his conclusions. At **[ASI/40&41]** the Deputy Judge said this:

"40. To grant an anti-suit injunction in the circumstances of this case would in my judgment be contrary to the interests of justice. I am far from persuaded that England is the proper, let alone natural forum for the determination of the dispute surrounding the Deed of Settlement.

41. I accept that it is undesirable for there to be parallel proceedings in the shape of the Presnenskiy Declaration Proceedings but against the factual matrix that I have outlined, I do not consider them to be vexatious or oppressive, at any rate not such as would swing the balance as far as I believe it needs to go in order to persuade me to intervene. In approaching this question, I have had very much in mind the position adopted by Toulson LJ in his Proposition 6."

102. The Deputy Judge added the following points, at **[ASI/44-46]**:

"44. It seems to me that whilst the application before me is framed as an ASI, it is in reality a dispute about where the question of ownership of the matrimonial assets should be determined. Given the procedural history of that divorce it is not easy to conceive of the argument that suggests that England is the natural forum for the resolution of any questions as to who should be entitled to assets acquired during the marriage.

45. There were arguments made before me about who really controls the Underlying Proceedings in England on the one hand, and why if Ms Mirimskaya is running shy of the London Court, she did not begin (if she is indeed the domina litis) the Underlying Proceedings (that she

is alleged to have procured her daughter to commence) in Russia in the first place, on the other. In my judgment these issues are not for me. The issues I must resolve are altogether of more substance and turn on the guidance offered by the Court of Appeal in Deutsche Bank: the first question being whether England is the natural forum and I have found that it is not.

46. It might be said that the commencement of the Presnenskiy Declaration Proceedings has somewhat contrived an advantage in Ms Mirimskaya's favour but it is hardly a surprising event given that the parties who dispute ownership are both Russian, live in Russia, and that as Mr D'Cruz accepted, some at least of the Disputed Assets might very well be in Russia, and the disputing parties are already embroiled in not unrelated asset division proceedings in Russia. The Court cannot ignore that this is in essence a family dispute. In my judgment that has an important bearing on the exercise of the court's discretion."

103. At **[ASI/48]** the Deputy Judge formally concluded, for the reasons set out in the ASI Judgment, that the ASI Application should be dismissed.

104. I have quoted at very considerable length from the ASI Judgment because it seems to me essentially to determine what it was that the Deputy Judge did and did not actually decide in the ASI Judgment. In strictly formal terms the Deputy Judge decided that the ASI Application should be dismissed. There were, essentially, two underlying reasons for that decision. The first reason was the fact that the Deputy Judge was *"far from persuaded that England was the proper, let alone natural forum for determination of the dispute surrounding the Deed of Settlement"* **[ASI/40]**. On the reasoning of the Deputy Judge, Alexey needed a positive answer to that question, as a first pre-condition of success in the ASI Application. Alexey failed to achieve a positive answer. The second reason was the Deputy Judge's conclusion that the existence of more than one set of proceedings, namely the English Proceedings and the Russian Proceedings, was not inherently vexatious or oppressive and was not something that the Deputy Judge should act to prevent.

105. It is clear that the decision of the Deputy Judge was directed to the subject matter of the Russian Proceedings; namely Olga's claim for a declaration that the Deed of Settlement was a forgery. That was the dispute to which the Deputy Judge made reference in **[ASI/40]**, and that was the dispute in respect of which the Deputy Judge was *"far from persuaded that England is the proper, let alone natural forum for the determination of the dispute surrounding the Deed of Settlement"*. I agree with Mr D'Cruz that, when the Deputy Judge referred, at **[ASI/45]**, to his finding that England was not the natural forum, he was referring back to his finding at **[ASI/40]**, which I have already quoted.

106. In summary therefore, it seems to me that the only finding which the Deputy Judge made in the ASI Judgment, so far as the question of the appropriate forum was concerned, was his finding that England was not the natural forum for the determination of the dispute in the Russian Proceedings concerning the Deed of Settlement; namely whether it was a forgery. I should also point out that this may

in itself be said to overstate the finding made by the Deputy Judge in this respect. Although the Deputy Judge did say that he had made this finding, at **[ASI/45]**, his actual finding at **[ASI/40]** was that he was *"far from persuaded"* that England was the proper, let alone natural forum for determination of the dispute over the Deed of Settlement.

107. It is perfectly true that the Deputy Judge expressed doubts as to the correctness of the Lloyd Order; see **[ASI/31]**. As the Deputy Judge noted however, all he was deciding in this context was that his own hands were not tied by the Lloyd Order, which was plainly correct. It is also true that some of the comments made by the Deputy Judge on the question of forum are supportive, it may be said strongly supportive of Olga's argument that England is not the natural forum for any part of the Additional Claim. I have in mind, in particular, what the Deputy Judge said at **[ASI/44]**. The Deputy Judge was however careful to confine his actual findings and his actual decision to the dispute in the Russian Proceedings which he described at **[ASI/37]**, quite correctly, as a set of proceedings concerning *"only the resolution of one, narrowly contained, factual issue"*.

108. This analysis is also consistent with the way in which the Deputy Judge characterised what it was he had to decide, right at the outset of his judgment, at **[ASI/1]**, which was in the following terms:

> *"The Applicant (Mr Golubovich) in this matter has come to the court seeking what is known as an anti-suit injunction (ASI). The court is asked to make an order restraining the Third Party (Ms Mirimskaya (formerly Mrs Golubovich)) from continuing the claim she has commenced in the Moscow Presnenskiy Court (the Presnenskiy Declaration Proceedings) in connection with an alleged Deed of Settlement which purportedly addresses the ownership, as between the parties, of a collection of valuable artwork accumulated during their marriage."*

109. I therefore conclude that the Deputy Judge did not decide, in the ASI Judgment, the Forum Question. The Deputy Judge did not decide that England was not the appropriate forum for the Additional Claim, either by way of a necessary step to his own decision or otherwise. The Deputy Judge, very sensibly if I may respectfully say so, made it clear that he was not deciding the Forum Question. As such, I do not think that it can be said that the Deputy Judge had already decided, in the ASI Judgment, any of the issues which arose in the Jurisdiction Application, either in relation to the Forum Question or more widely.

110. In his submissions Mr Emmett drew my attention to the width of the relief which was sought by Alexey in the ASI Application. I have already set out the wide terms of the relief sought by Alexey in the application notice by which the ASI Application was made. The same width of relief which was sought in the ASI Application can be seen in the evidence in support of the ASI Application, and in Alexey's skeleton argument for the hearing of the ASI Application. I agree with Mr Emmett that what Alexey was trying to achieve, by the terms of the relief which he sought in the ASI Application, was a prohibition on Olga being able to prosecute in Russia, or in any other jurisdiction outside England and Wales for that matter, any proceedings relating to the Deed of Settlement and/or the Collection.

111. I do not think however that, in the Jurisdiction Application, this rendered Alexey's arguments on the Forum Question an abuse of process. Whatever the width of the ASI Application, the Deputy Judge confined himself to deciding, and made it clear that he was confining himself to deciding, whether Alexey was entitled to an injunction to prevent Olga's pursuit of the Russian Proceedings.

112. I can see that the position would be different if it could be said, within the terms of the formulation of Lord Wilberforce in *Carl Zeiss Stiftung*, that Alexey's arguments on the Forum Question could and should have been raised in the hearing of the ASI Application. That however is not what happened. What happened was that the Deputy Judge, notwithstanding the breadth of the arguments which appear to have been addressed to him on Alexey's behalf, confined himself to consideration of whether an injunction should be granted to prevent the further prosecution of the Russian Proceedings, as noted in my previous paragraph.

113. This point leads into what I regard as a related difficulty with the contention that Alexey's arguments on the Forum Question are an abuse of process. The related difficulty is that, in my view, there is a material difference between the ASI Application and the Jurisdiction Application. As the decision in *Chanel* demonstrates, it is not open to a party, even on an interlocutory application, to have a second go at an application on which they have already failed or, as occurred in *Chanel*, on which they have previously capitulated, unless that party can point to a significant change of circumstances or to material new evidence not previously available. The public policy behind this principle is that parties should not be permitted to relitigate matters which have already been decided against them or which could and should have been raised in previous proceedings.

114. All this assumes however a sufficient degree of equivalence between the relevant matters which are the subject of the original proceedings and the later proceedings. In the present case it seems to me that the required degree of equivalence does not exist. In the ASI Application Alexey was seeking to prevent Olga from commencing proceedings in other jurisdictions relating to the Collection and the Deed of Settlement. I accept what I understand to be Mr Emmett's point that this effectively included an attempt to prevent Olga from prosecuting any of the issues in the Additional Claim in other jurisdictions. As I have said however, the attempt failed, because the Deputy Judge dealt with the ASI Application on a much narrower basis.

115. In the Jurisdiction Application Olga is seeking to prevent Alexey from being able to pursue the Additional Claim in this jurisdiction. I find it very difficult to understand how Alexey is prevented, either by the fact of his having made the ASI Application or as a result of anything which happened in the ASI Application (including the ASI Judgment), from defending his ability to continue to pursue the Additional Claim in this jurisdiction. The situation does not seem to me to be analogous to the situation in *Chanel*, or to offend against the principles explained by Popplewell LJ in *Koza*. If and to the extent that Alexey was having a second go, in the Jurisdiction Application, at arguments which he ran in the ASI Application, it seems to me that those arguments had not been ruled upon in the

ASI Application, and were not arguments which Alexey had either abandoned or conceded in the ASI Application.

116. In my view therefore, and drawing together all of the above discussion, it was not an abuse of process for Alexey to argue, before the Deputy Master, that England was clearly or distinctly the most appropriate forum for the trial of the Additional Claim.

117. Turning to the decision of the Deputy Master on the abuse of process argument, the Deputy Master dealt with the argument, at **[58]** to **[63]**, with commendably more brevity than I have achieved. The Deputy Master analysed the ASI Judgment in much the same way as I have done, and concluded, at **[63]**, that the ASI Judgment did not determine the same issue of forum as that before the Deputy Master, and that the issue about forum before the Deputy Judge was a narrower one. For the reasons which I have set out, it seems to me that the Deputy Master was correct in these conclusions.

118. For the reasons which I have also given, I do not think that the Deputy Master was right to rely on his conclusions at **[63]** for the further conclusion, at **[64]**, that the ASI Judgment did not shed any light on the circumstances which existed at the date of the Lloyd Order. This however is a separate point. As I have explained, I do not think that the ASI Judgment was subject to the Original Date Principle. I do not think that the Deputy Master's ability to consider the ASI Judgment depended upon whether it did or did not shed light on the circumstances which existed at the date of the Lloyd Order. I do not think however that this error in the Deputy Master's reasoning vitiated his conclusions at **[63]**, which were sufficient to dispose of the abuse of process argument.

119. I therefore conclude that the Deputy Master was correct to reject the argument of abuse of process advanced by Olga. My own reasoning on this argument is not quite the same as that of the Deputy Master, but it seems to me that the Deputy Master reached the correct conclusion at **[63]**. I do not therefore think that the Deputy Master's decision to dismiss the Jurisdiction Application can be set aside on the basis of the Abuse Point.

The Misdirection Point – discussion

120. The essence of the Misdirection Point is that the Deputy Master allowed his conclusion that Olga was a proper party to the Additional Claim to govern his conclusion on the Forum Question. To repeat Mr. Emmett's memorable phrase, the essence of the argument is that the Deputy Master put his hands on the scales in advance.

121. Mr Emmett contended that the Deputy Master wrongly allowed himself to be guided by what was said by Cooke J in *Credit Agricole Indosuez v Unicof* [2003] EWHC 2676 (Comm) at [19], where the judge said this:

> *"Langley J held, in granting permission to serve out, having been informed of potential arguments in favour of Kenyan jurisdiction, that he was satisfied that England was the proper place to bring the claims against SDV in accordance with 6.21(2A). The forum conveniens issue was effectively resolved by the necessary or proper party issue and the question of*

discretion under CPR 6.21. Although the burden is on a claimant to show, when seeking leave to serve out of the jurisdiction, that England is the appropriate forum where the case can most suitably be tried for the interests of all the parties and the ends of justice, the fact of continuing proceedings in England against other defendants on the same or closely allied issues virtually concludes the question, since all courts recognise the undesirability of duplication of proceedings and the lis alibi pendens cases make this clear. Although there are connecting factors with Kenya to which I refer later in this judgment, if proceedings are going on in this jurisdiction on the self–same or linked issues, this is clearly the most appropriate forum for those common and connected issues to be tried between all relevant parties."

122. Mr Emmett submitted that what was said by Cooke J, in this extract from his judgment in *Credit Agricole*, should not be taken as a statement of general principle and that, if this was intended to be a general statement of law, it was wrong. Mr Emmett stressed the importance of separating out the Forum Question from the necessary or proper party test. As he put it, the grounds of jurisdiction are analytically distinct from the discretion provided by the natural forum question. He cited to me what Lord Collins said in this context in *Altimo*, at [73]:

"The necessary or proper party head of jurisdiction is anomalous, in that, by contrast with the other heads, it is not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English courts: Tyne Improvement Comrs v Armement Anversois SA (The Brabo) [1949] AC 326, 338, per Lord Porter. Piggott, Foreign Judgments and Jurisdiction, 3rd ed (1910), Pt III, p 238, said: "This is perhaps the most important of the sub-rules, for it throws the net of jurisdiction over a wider area; and the principle of considering the nature of the cause of action which pervades the whole subject, appears here to be ignored." Consequently as Lloyd LJ said in Golden Ocean Assurance Ltd v Martin (The Goldean Mariner) [1990] 2 Lloyd's Rep 215, 222:

> *"I agree . . . that caution must always be exercised in bringing foreign defendants within our jurisdiction under Ord 11, r 1(1)(c). It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction."*

123. Mr Emmett also cited, in his skeleton argument, what Lord Sumption said in *Four Seasons Holdings Incorporated v Brownlie* [2017] UKSC 80 [2018] 1 WLR 192 ("*Brownlie I*"), at [31]:

"The jurisdictional gateways and the discretion as to forum conveniens serve completely different purposes. The gateways identify relevant connections with England, which define the maximum extent of the jurisdiction which the English court is permitted to exercise. Their ambit is a question of law. The discretion as to forum conveniens authorises the court to decline a jurisdiction which it possesses as a matter of law, because the dispute, although sufficiently connected with England to permit the exercise of jurisdiction, could be more appropriately resolved elsewhere. The main determining factor in the exercise of the discretion on forum

conveniens grounds is not the relationship between the cause of action and England but the practicalities of litigation."

124. Following the filing of Olga's skeleton argument in support of the PTA Application, the judgment of the Supreme Court was handed down in *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45 [2021] 3 WLR 1011 ("*Brownlie II*"). In the subsequent Appellant's Note filed on behalf of Olga it was explained that the judgment supersedes some of the analysis in *Brownlie I*. In *Brownlie II* Lord Lloyd-Jones commented on the reasoning of Lord Sumption in the following terms, at [78]:

> *"In Brownlie I Lord Sumption JSC suggested (at para 31) that the main determining factor in the exercise of discretion on forum non conveniens grounds is not the relationship between the cause of action and England but the practicalities of litigation. While it is correct that practical issues can feature large in the exercise of the discretion, the discretion is not so limited. As Lord Wilson JSC pointed out in Brownlie I (at para 66) the Spiliada criteria are not limited to matters of mere practical convenience. On the contrary, Lord Goff made clear in The Spiliada [1987] AC 460 (at p 474) that the Latin tag is something of a misnomer:*
>
> > *"I feel bound to say that I doubt whether the Latin tag forum non conveniens is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction. However, the Latin tag (sometimes expressed as forum non conveniens and sometimes as forum conveniens) is so widely used to describe the principle, not only in England and Scotland, but in other Commonwealth jurisdictions and in the United States, that it is probably sensible to retain it. But it is most important not to allow it to mislead us into thinking that the question at issue is one of "mere practical convenience"."*
>
> *Having considered the leading Scottish authorities he concluded (at p 475):*
>
> > *"In the light of these authoritative statements of the Scottish doctrine, I cannot help thinking that it is wiser to avoid use of the word "convenience" and to refer rather, as Lord Dunedin did [in Societe du Gaz de Paris v Societe Anonyme de Navigation "Les Armateurs Francais" 1926 SC (HL) 13, 18] to the appropriate forum." (Original emphasis.)*
>
> *In applying the principle, the ultimate objective is "to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice" (per Lord Goff at p 480G)."*

125. I also take note of what Lord Lloyd-Jones said as to the nature of this discretion, at [79]:

> *"The discretionary test of forum non conveniens, well established in our law, is an appropriate and effective mechanism which can be trusted to prevent the acceptance of jurisdiction in situations where there is merely a casual or adventitious link between the claim and England. Where a claim passes through a qualifying gateway, there remains a burden on the claimant to persuade the court that England and Wales is the proper place in which to bring the claim. Unless that is established, permission to serve out of the jurisdiction will be refused (CPR r 6.37(3)). In addition - and this*

is a point to which I attach particular importance - the forum non conveniens principle is not a mere general discretion, the application of which may vary according to the differing subjective views of different judges creating a danger of legal uncertainty. On the contrary, the principle applies a structured discretion, the details of which have been refined in the decided cases, in a readily predictable manner."

126. In the skeleton argument filed on behalf of Alexey, reliance was placed upon what was said by Lord Sumption in *Brownlie I*, in support of the argument that the main determining factor in relation to the Forum Question was not the relationship between the cause of action and England but the practicalities of litigation. Mr Emmett submitted that the comments made in *Brownlie II* made it difficult to sustain this argument. It does seem to me, on the basis of what was said in *Brownlie II*, that the approach to the question of forum is more nuanced than was suggested by Lord Sumption in *Brownlie I*. Practical issues can feature large in the exercise of what Lord Lloyd-Jones referred to as the discretion, but the discretion is not so limited. In passing, I should mention that I take this reference to discretion to mean a limited discretion, as identified by Lord Lloyd-Jones in *Brownlie II* at [79]; that is to say a discretion in the sense of an evaluation, of the kind which was identified in *VTB* and the other cases to which I have referred earlier in this judgment. As Lord Lloyd-Jones noted, the ultimate objective is to identify the forum in which the case can suitably be tried for the interests of all the parties and the ends of justice. As such, the practicalities of litigation are not necessarily the main determining factor. They may feature large in the evaluation exercise, but all depends upon the circumstances of the particular case in which the question of forum arises.

127. Turning to the reasoning of the Deputy Master Mr Emmett pointed me specifically to **[65]** which, so he submitted, demonstrated the error into which the Deputy Master fell. **[65]** reads as follows:

"I have already determined that Olga is a proper party to the additional claim and that on the view expressed by Cooke J in Credit Agricole Indosuez v Unicof "virtually concludes" the issue of forum. It is significant that Nataliya with the assistance of Olga has brought the main claim in England. Although she resides at 28 Upper Mall, she also resides in Russia. He parents are both resident in Russia. Olga and Nataliya entered into the Deed of Gift and agreed that it would be subject to English law. Nataliya subsequently issued the main claim in England concerning chattels that are partly held in other jurisdictions. Nevertheless, Alexey has accepted the jurisdiction of the English Court. Having determined that Olga is a proper party to the additional claim it would be odd for the court to conclude that England is not obviously the proper forum for the additional claim given the choice of jurisdiction Nataliya, with Olga's support, has made."

128. As I read the judgment of Cooke J in *Credit Agricole*, and specifically what was said at [19], the judge did not there intend to state a general principle to the effect that the fact of continuing proceedings in England against other defendants on the same or closely allied issues virtually concludes the question of forum. Rather, the statement seems to me to have reflected the importance of this factor on the facts of the *Credit Agricole* case. I do not think that a general principle of this

kind could sit easily with the subsequent statements of the law in *Altimo* and in *Brownlie II*. As Cooke J pointed out in *Credit Agricole*, at [19], *"the burden is on a claimant to show, when seeking leave to serve out of the jurisdiction, that England is the most appropriate forum where the case can most suitably be tried for the interests of all the parties and the ends of justice"*.

129. It does not however follow from this that the Deputy Master did pre-load the scales of the evaluative exercise which he was required to carry out in respect of the Forum Question. Such pre-loading will only have occurred if the Deputy Master treated his conclusion that Olga was a proper party to the Additional Claim as virtually concluding the Forum Question.

130. On a fair reading of the Marsh Judgment I do not think that the Deputy Master did make any such pre-loading error. I highlight the following points:
   (1) At **[11]**, and immediately after citing *Credit Agricole*, the Deputy Master made quite clear his understanding of the need for separate consideration of the Forum Question, in the following terms:

      > *"I respectfully adopt those observations noting, however, that "virtually concludes" does not obviate the need for the issue of forum to be considered. A determination that the additional party is a proper party to either the main claim or the additional claim is likely to be very influential on the subject of forum, but it is not conclusive."*

   (2) The Deputy Master had already reminded himself, at **[9]**, of the need for caution when bringing a party into this jurisdiction. In a footnote to **[9]** the Deputy Master made express reference *The Golden Mariner*, cited by Lord Collins in *Altimo* in the context of the need for caution.
   (3) At **[65]** itself the Deputy Master did not confine himself to his conclusion that Olga was a proper party to the Additional Claim, and stop there. He set out a list of factors relevant to the Forum Question. Most significantly, in the last sentence of **[65]** the Deputy Master did not say that his conclusion on the proper party test either concluded or virtually concluded the Forum Question. What he actually said was that having determined that Olga was a proper party to the Additional Claim, it would be *"odd"* for the court to conclude that England was not obviously the proper forum for the Additional Claim, *"given the choice of jurisdiction Nataliya, with Olga's support, has made."*.
   (4) The Deputy Master's evaluation of the factors relevant to the Forum Question did not stop at **[65]**. The Deputy Master continued the evaluation exercise at **[66]** to **[69]**.
   (5) The Deputy Master reached the conclusion to his evaluation exercise at **[70]**. For present purposes the relevant point in respect of this conclusion is that the Deputy Master's conclusion that Olga was a proper party to the Additional Claim was treated as *"a starting point"*. A starting point to an evaluation exercise is not, in my view, something which *"virtually concludes"* an evaluation exercise.

131. In summary I do not think that the Deputy Master did fall into error in his treatment of what was said by Cooke J in *Credit Agricole*. I do not think that the Deputy Master did pre-load the scales of the evaluation exercise. All that seems to me to have happened is that the Deputy Master, to adopt the language of Lord

Lloyd-Jones in *Brownlie II*, considered that Olga's status as a proper party to the Additional Claim should *"feature large"* in the evaluation exercise. This was not surprising. The Additional Claim, in its relevant parts, is the virtual mirror of Alexey's defence and counterclaim in the Main Claim. The Main Claim was enabled by the Deed of Gift, which was entered into between Olga and Nataliya, and had an English choice of law clause. It seems to me that the Deputy Master was right to observe, at **[55]**, that the circumstances were such that Olga had, *"as a minimum"* facilitated the Main Claim. It seems to me that the Deputy Master was also right to observe, at **[66]**, that the way in which Nataliya's claim was pleaded made it inevitable that there would be a counterclaim and an additional claim against Olga. It seems to me that an evaluation exercise which did not give weight to this factor would have been seriously flawed.

132. This analysis also seems to me to draw support, at least by analogy, from what was said by Floyd LJ in *Eurasia Sports Ltd v Tsai* [2018] EWCA Civ 1742 [2018] 1 WLR 6089. The case involved a claim by a company, which operated a betting agency, against a number of defendants who were resident in Peru. Some of the defendants made a challenge to jurisdiction. The judge at first instance found that the English courts did have jurisdiction. This decision was appealed by one of the defendants to the Court of Appeal. One of the issues in the case was the weight to be given, on the question of forum, to the fact that proceedings in England would be continuing in relation to other defendants. At [57] Floyd LJ said this:

> *"I would accept for the purposes of argument that the weight to be given to the fact that proceedings will continue in any event in this jurisdiction may be qualitatively different in cases where this court is compelled to accept jurisdiction on the basis of a defendant's domicile. Even where that is not the case, however, the fact that proceedings are very likely to continue here remains a factor which is entitled to weight. The amount of weight to be attached to it is a matter for the judge, always bearing in mind the caution it is necessary to exercise before bringing foreign defendants here on the ground that the only alternative requires more than one suit in more than one jurisdiction."*

133. This seems to me to bring out the point, at least by analogy, that the Deputy Master was quite entitled, when he came to the Forum Question, to attach weight both to his decision that Olga was a proper party to the Additional Claim, and to the reasoning which had supported that decision. As the Deputy Master noted, at **[55]**, Olga was not simply a proper party to the Additional Claim. She was also a proper party to the litigation commenced by her daughter against Olga's former husband. This reflected the relationship between the Main Claim and the Additional Claim, which are closely bound together. Given the fact that the Main Claim is proceeding to trial in this jurisdiction, and given the relationship between both parties and claims, as between the Main Claim and the Additional Claim, the present case was clearly one where the Deputy Master was entitled to attach weight to his decision and reasoning on the proper party question. As Floyd LJ stated in *Eurasia*, the amount of this weight was a matter for the Deputy Master.

134. There is also this additional difficulty with the Misdirection Point. If, contrary to my view, the Deputy Master had treated his conclusion that Olga was a proper

party to the Additional Claim as concluding or virtually concluding his decision on the Forum Question, with no proper evaluation of the various competing factors, I think that the Deputy Master would thereby have fallen into an error of principle which would have justified setting aside his conclusion on the Forum Question. In that event I do not think that it would have been appropriate to remit the evaluation exercise back to the Deputy Master. Rather, it seems to me that it would have been necessary for me to make my own evaluation of the competing factors. For reasons however which I will briefly explain when I come to consider the Evaluation Point, my evaluation would not have differed in its conclusion from the conclusion of the Deputy Master. I would have concluded that the answer to the Forum Question was that England was clearly or distinctly the most appropriate forum for the trial of the Additional Claim. On this basis, I would not have been prepared to set aside the Deputy Master's dismissal of the Jurisdiction Application.

135. Drawing together all of the above discussion, I do not think that the Deputy Master's decision to dismiss the Jurisdiction Application can be set aside on the basis of the Misdirection Point.

<u>The Evaluation Point – discussion</u>

136. I can take the Evaluation Point more shortly. Mr Emmett's argument was that there were factors which pointed towards the convenience of litigating the issues raised in the Additional Claim in Russia, which powerfully outweighed any factors in favour of England. In his skeleton argument Mr Emmett outlined these factors as follows:

(1) Alexey and Olga are both Russian citizens and residents.

(2) Alexey and Olga's marriage was made and dissolved in Russia under Russian law.

(3) Alexey and Olga's divorce proceedings have been overseen exclusively by the Russian Courts throughout the past decade, in which numerous sets of proceedings have addressed the division of a wide range of marital assets.

(4) The Additional Claim is a fundamentally Russian dispute.

   (i) The artworks and antiques which form the subject of the dispute, are marital property acquired during a Russian marriage between two Russian citizens and residents.

   (ii) The Deed of Settlement, which Alexey puts at the centre of the Additional Claim, is a thoroughly Russian document.

   (iii) The bulk of the relief sought by Alexey depends on Russian family law.

137. I would question whether it is right to say that *"the bulk of the relief"* sought by Alexey, either in the counterclaim or in the Additional Claim, depends on Russian family law. The claims to the Collection based on resulting trust and constructive trust are claims in English law. The claim for delivery up of the Remaining Items or for damages depends upon an English statute and English law. This is however a minor point, and seems to me principally to illustrate the possibility of how different views may legitimately be taken as to the description of the division of Alexey's claims between Russian law and English law.

138. Subject to this point it seems to me that Mr Emmett is right to point to the above factors as factors in favour of litigating the Additional Claim in Russia.

139. The difficulty confronting Mr Emmett is however this. The Deputy Master took these factors into account. At **[68]** the Deputy Master said this:

> *"Both Alexei and Olga have provided lists of indicative factors that are relevant to the decision about forum. Olga points principally to the following factors:"*

140. The Deputy Master then set out the list of factors on which Olga placed principal reliance. The list of factors broadly coincides with the factors relied upon by Mr Emmett which I have set out above. The relevant, and obvious point is that the Deputy Master considered all these factors. Indeed I note that the Deputy Master did not appear, in contrast to my own view, to quarrel with the description of the Additional Claim as *"essentially a claim under Russian family law"*, in respect of which *"Most of the relief is sought under provisions of the Russian family code."*. The Deputy Master recited these assertions without, at least in express terms, quarrelling with their characterisation of the Additional Claim.

141. Mr Emmett submits that these factors powerfully outweighed the factors pointing in favour of England, which the Deputy Master listed at **[69]**. It seems to me however that this was a matter for the evaluation of the Deputy Master. The Deputy Master was required to carry out an evaluative or balancing exercise, of the kind referred to in *VTB*. The Deputy Master carried out that exercise, the conclusion to which was stated in **[70]**.

142. In the context of his submissions in support of the Evaluation Point I did not understand Mr Emmett to be contending that the Deputy Master left out of account something which he should have taken into account, or took into account something which he should have left out of account. The Deputy Master listed the competing factors at **[68]** and **[69]**.

143. Given the conclusion which I have reached in my discussion of the Misdirection Point, I cannot see that the Deputy Master made an error of principle in his evaluation of the competing factors which he listed. Nor can I see that the Deputy Master reached a decision, or came anywhere near reaching a decision which no reasonable judge could have reached on the Forum Question. In these circumstances I cannot see any basis on which I could or should set aside the conclusion which the Deputy Master reached on the evaluation exercise which he carried out.

144. For what it is worth I agree with the conclusion which the Deputy Master reached on the evaluation exercise. I say *"for what it is worth"* because, in the absence of an error of the kind identified in *VTB* and the other authorities cited to me in this context, it seems to me that I should not interfere with the conclusion of the Deputy Master, whether I agree or disagree with that conclusion. I will however briefly explain my reasons for saying this, not least because they are relevant to the final point which I made in my discussion of the Misdirection Point.

145. It seems to me that the decisive factor in the evaluation exercise required in the context of the Forum Question was the relationship between the Main Claim and the Additional Claim. As I have already pointed out, the Additional Claim, in its relevant parts, is the virtual mirror of Alexey's defence and counterclaim in the Main Claim. The Main Claim has been enabled by the Deed of Gift, which was executed by Olga, with an English choice of law clause. The Main Claim is to be heard in this jurisdiction. The Additional Claim is the inevitable consequence of the commencement of the Main Claim. So far as the Collection is concerned, the central issue in the Main Claim and the Additional Claim is the same; namely who, as between Alexey and Olga, owned the Collection. That will require, amongst other matters, an extensive inquiry into the matrimonial history of Alexey and Olga, and an extensive inquiry into the impact of both English and Russian law upon the ownership dispute.

146. While I accept, as the Deputy Master accepted at **[70]**, that there are factors pointing towards the Russian jurisdiction, it seems to me that it would be remarkable, in all the circumstances of the present case, if Alexey was to be prevented from prosecuting the Additional Claim in this jurisdiction, in tandem with Nataliya's prosecution of the Main Claim. In case management terms, given the overlap in issues, the separation of the two sets of proceedings would be a nonsense.

147. To adopt again the language of Lord Lloyd-Jones in *Brownlie II*, it seems to me that the present case was always one where the practicalities of litigation would, legitimately, *"feature large"* in the evaluation exercise. Equally, and again to adopt the language of Lord Lloyd-Jones, the present case was always one where it could not be said that the link between the claims in the Additional Claim and England was no more than *"a casual or adventitious link"*. The link seems to me to be a compelling one in the present case.

148. It has to be kept in mind that the evaluation exercise in the present case fell to be carried out by reference to circumstances as they stood at the date of the Lloyd Order. The only exception to this, if my earlier decision on this point is correct, is the ASI Judgment. I am however doubtful that the Original Date Principle is much of a factor in the evaluation exercise in the present case. Whether or not one takes into account the Russian Proceedings, and whether or not one takes into account other proceedings between Alexey and Olga, whether past or potential, a balancing of the rival factors between England and Russia as the appropriate jurisdiction for the Additional Claim seems to me to come down clearly and decisively in favour of England as the most appropriate forum for the trial of the Additional Claim.

149. Drawing together all of the above discussion, I do not think that the Deputy Master's decision to dismiss the Jurisdiction Application can be set aside on the basis of the Evaluation Point.

The Supplementary Note filed on Alexey's behalf

150. This hearing took place on 13th May 2022. Following the conclusion of the hearing, and in the course of the final stages of my preparation of this reserved judgment, I received a supplementary note prepared by Mr D'Cruz on behalf of

Alexey. The purpose of the supplementary note was to draw my attention to a recent decision of Trower J which concerned a dispute over jurisdiction. The case in question is *Bourlakova v Bourlakov* [2022] EWHC 1269 (Ch). Trower J handed down his judgment on 26th May 2022.

151. The supplementary note drew my attention to what was said by Trower J at [178]-[179], in the following terms:

"178. At this stage, the burden remains on the claimants to establish that England is clearly the more appropriate forum (e.g., per Lawrence Collins J in Komanenemi v Rolls Royce Industrial Power India) Ltd [2002] 1 WLR 1269 at [175]). Whenever there is a challenge to jurisdiction on forum non conveniens grounds, whether that challenge arises on the application of the third stage in the test for permission to serve out of the jurisdiction or on an application for a stay, the challenger must identify some other forum which does have jurisdiction to determine the dispute and that jurisdiction must be the more appropriate forum: Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd [2020] UKSC 37 at [96]. In the present case, the Kazakov defendants and Mr Anufriev submitted that Monaco is the other more appropriate forum.

179. To enable the court to reach an informed conclusion on that aspect of the application, it is incumbent upon the party challenging jurisdiction, so far as possible, to identify the issues which he says should be tried in the other jurisdiction and to state as clearly as possible how they arise or may arise in the proceedings (VTB Capital plc v Nutritek International Corpn [2013] 2 AC 337 at [36] per Lord Mance JSC and [192] per Lord Clarke JSC)."

152. My attention was also drawn to what was said by Trower J at [189]:

"It is also important to appreciate that the court is concerned with the totality of the dispute, identifying the forum in which the case as a whole can suitably be tried for the interests of all the parties and for the ends of justice. This was a significant point in Vedanta in which Lord Briggs JSC emphasised (at [68]) that the court is looking for a single jurisdiction in which the claims against all the defendants may most suitably be tried, and rejected (at [73] and [74]) an argument that the court was only concerned with the issues as the arose between the claimants and the foreign defendants, rather than the case as a whole. When considering the totality of the dispute, the court is concerned not just with all of the parties to the dispute, but also where appropriate the defendants' answer to the claim (Shenzhen Senior Technology Material Co Ltd v Celgard LLC [2020] EWCA Civ 1293 at [71])."

153. Mr. D'Cruz relied upon these extracts from the judgment of Trower J in relation to the arguments between the parties (i) as to the risk of fragmentation of proceedings, if Alexey was unable to pursue the Additional Claim in England and (ii) as to the significance of this factor in the evaluation exercise which was required in relation to the Forum Question. Mr D'Cruz had essentially two points to make, as follows:

(1) The question of the appropriate forum involves comparing England with a specified alternative jurisdiction and deciding which of the two is the appropriate forum for the claim against the party challenging jurisdiction. In doing so, the court needs to consider the implications of that claim proceeding in the alternative jurisdiction (here Russia). This requires accepting the hypothesis of multiple proceedings, without having to analyse whether parallel proceedings would, in fact, be brought in the alternative jurisdiction if the English court declined to hear the claim. Mr D'Cruz thus claimed that Mr Emmett had been wrong to argue, in his reply submissions at the hearing, that the risk of multiple proceedings could be ignored because there was no evidence of an intention to bring the same claim in Russia, if the Jurisdiction Application succeeded.

(2) The statements made by Trower J in his judgment are yet another example of the court identifying the avoidance of multiple proceedings as the decisive factor in dismissing a jurisdiction challenge.

154. The filing of this supplementary note provoked a protest from Olga's solicitors, set out in an email to my clerk sent on 31st May 2022. Olga's solicitors complained that the passages relied upon by Mr D'Cruz from *Bourlakova* contained references to cases which were not new, and could have been referred to in the hearing. They complained that this was yet another attempt by Alexey's representatives to have the last word (a previous attempt having been made, so it was asserted, at the hearing itself) and that this needed to stop. Olga's solicitors also included some brief submissions in reply to the supplementary note in their email, while noting that they had been put in a difficult position by Alexey's representatives, given the desire of Olga's representatives not to take up the court's time yet further, while not wishing to give the impression that there was no answer to the supplementary note. Two points were then made by Olga's representatives, as follows:

(1) Neither *Bourlakova* nor any other decision supports the suggestion that in assessing the Forum Question the court must treat the possibility of multiple proceedings as some kind of hypothesis. On the contrary, the cases show that the court should consider what is realistically likely in view of the facts of the case; see Trower J in *Bourlakova* at [262] – [285] and, in particular, at [264].

(2) It is not Olga's case that the risk of multiple proceedings can be ignored because there is no evidence of an intention to bring proceedings in Russia in respect of the subject matter of the Additional Claim. Olga's case is that there is no reason to think that to decline jurisdiction would exacerbate, let alone create, a risk of multiple proceedings. It is therefore not a factor which weighs in favour of England in assessing the Forum Question.

155. I have three points to make on the supplementary note filed on Alexey's behalf and on *Bourlakova*.

156. First, I agree that it is, in principle, undesirable for parties, where a judgment is reserved, to try to secure the last word by further submissions which either repeat submissions already made, or add submissions which should have been made at the hearing. That said, I do not think that such criticism is justified in the present case. The judgment in *Bourlakova* was handed down after the hearing in this

case. It contains statements of the law by Trower J which are both helpful and relevant to the arguments which I have heard. I do not think that drawing my attention to *Bourlakova* constitutes an illegitimate attempt to have the last word, any more than Mr D'Cruz's brief final submission at the conclusion of the argument at the hearing.

157. Second, it will be noted that this section of my judgment follows my discussion of the Jurisdiction Appeal, as opposed to forming part of that discussion. This reflects the fact that I had formed my views on the Jurisdiction Appeal prior to my receipt of Mr D'Cruz's supplementary note. The supplementary note did not cause me to change any of the views which I had already formed in relation the Jurisdiction Appeal. It follows that this is not a case where a party has, by making a submission after the close of oral argument, caused the court to change its mind on the issues or any of them.

158. Third, it does seem to me that both the supplementary note and the response to the supplementary note somewhat miss the point in the present case. For his part Mr D'Cruz relies on *Bourlakova* to seek to establish that the risk of multiplicity of proceedings is the decisive factor in the present case. On Olga's side her representatives rely on *Bourlakova* to seek to establish that multiplicity of proceedings is only a factor to which weight can be given if there is evidence that declining jurisdiction will create a risk of multiplicity of proceedings. Olga's representatives say that in the present case there is no reason to think that declining jurisdiction would exacerbate, let alone create a risk of multiplicity of proceedings.

159. It is clear from *Bourlakova* that the desirability of avoiding a multiplicity of proceedings and minimising the risk of inconsistent judgments can be, and frequently is a decisive factor in identifying the appropriate forum; see Trower J at [262]. It is also clear that the weight to be given to this factor depends (in part) on the extent to which a court can safely reach a conclusion that there will be a multiplicity of proceedings, as between different jurisdictions; see Trower J at [264].

160. In the present case the concentration of the parties on the risk of multiple proceedings seems to me to be misconceived. It is true that the Deputy Master did take into account the risk of multiple proceedings (see **[67]**) but, as I read the Marsh Judgment, this was not the decisive factor in the mind of the Deputy Master. What weighed principally with the Deputy Master was the identity of issues, as between the Main Claim and the Additional Claim, the fact that the Main Claim rendered inevitable both the counterclaim and the Additional Claim, and the obvious and compelling case management advantages of having the Main Claim and the Additional Claim tried together; see, by way of example, the reasoning of the Deputy Master at **[65]**, **[66]**, and **[70]**. As I read the Marsh Judgment the Deputy Master saw the case, correctly in my view, as one where the practicalities of litigation *"featured large"*.

161. It seems to me that, as at the date of the Lloyd Order, there was an obvious potential, if the Additional Claim could not be pursued in this jurisdiction, of the Additional Claim ending up being the subject of proceedings in Russia, with a

consequential fragmentation of proceedings. I do not think that this was correctly viewed as the decisive factor in relation to the Forum Question. I do not think that this was a factor to which no weight could be attached in relation to the Forum Question. Both arguments seem to me to skew the evaluation exercise which was required in this case. It seems to me that this was a factor to which some weight could be given in the evaluation exercise. I do not think that it was either decisive or of no weight. It is for this reason that the supplementary submissions seem to me somewhat to miss the point in this case.

The Costs Assessment Point – discussion

162. The Deputy Master circulated the Marsh Judgment in draft on 22nd July 2021. On 29th July 2021 Olga's solicitors emailed the Deputy Master with their suggested corrections to the draft of the Marsh Judgment. The email then continued in the following terms:

> *"In addition to the above, the parties have been in correspondence in relation to consequential matters (correspondence attached). The latest proposal from Withers (with which we agree) is for the parties to provide written submissions on consequential matters in accordance with the timings below and that the consequential matters be decided on paper as this would be the most efficient and cost-effective way forward:*
>
> *1. The parties to file and serve their primary submissions by 4pm on Tuesday, 3 August 2021; and*
>
> *2. Response submissions be filed and served by 4pm on Thursday, 5 August 2021."*

163. The Deputy Master emailed the parties on 30th July 2021, attaching the Marsh Judgment, which was to be treated as formally handed down that day. The email then continued as follows:

> *"I agree the proposal put forward by the parties concerning consequential issues. Please will the parties file an agreed consent order for me to approve.*
>
> *All consequential issues, including permission to appeal, are treated as being adjourned for later disposal."*

164. It is therefore clear that the Deputy Master approved the proposal for written primary and response submissions on consequential matters, with primary submissions by 4.00pm on 3rd August 2021 and response submissions by 4.00pm on 5th August 2021.

165. The parties had exchanged draft costs schedules prior to the filing of their primary submissions. I believe that this exchange of draft costs schedules took place on 14th June 2021; that is to say the day before the hearing of the Jurisdiction Application. Alexey's draft costs schedule stated costs in the total sum of £169,617.13. I should mention that the description of these costs schedules as draft costs schedules comes from Mr Emmett's skeleton argument. Both costs schedules were signed and dated 14th June 2021.

166. Olga duly filed her primary submissions, by email to the Deputy Master, on 3rd August 2021. The email also attached the parties' costs schedules of 14th June 2021. So far as costs were concerned, Olga accepted the principle that Alexey

was entitled to his costs, to be summarily assessed, but took various points on the costs claimed by Alexey. The first point was that Alexey had originally argued, in relation to the Jurisdiction Application, that Olga was out of time to challenge service of the Additional Claim. It was said that Alexey had then abandoned this argument. Olga argued that this justified a reduction in Alexey's recoverable costs. The remaining points comprised various arguments that the costs shown in Alexey's costs schedule of 14th June 2021 were unreasonable in their amount.

167. Olga's submissions on costs proceeded on the basis that the costs claimed by Alexey were those shown in Alexey's costs schedule dated 14th June 2021.

168. Alexey also filed his primary submissions on 3rd August 2021. Alexey's primary submissions were however accompanied by a final cost schedule which increased the costs claimed to £190,260.50, which was an increase of £20,643.37 from the earlier draft schedule. My understanding is that the figure of £20,643.37 comprised additional costs said to have been incurred by Alexey after the hearing of the Jurisdiction Application on 15th June 2021.

169. The next event was the handing down by the Deputy Master of the Consequential Judgment on the morning of 5th August 2021. The Consequential Judgment was handed down prior to the parties filing their response submissions, and prior to the deadline for filing the response submissions (4.00pm on 5th August 2021).

170. The Deputy Master dealt with costs at paragraphs 8-15 of the Consequential Judgment. At paragraphs 8 and 9 of the Consequential Judgment the Deputy Master dealt with the argument that Alexey's costs should be reduced to reflect the abandonment of the argument that Olga's challenge to jurisdiction was out of time. The Deputy Master rejected this argument. The Deputy Master then turned to the reasonableness of the costs claimed in Alexey's revised costs schedule. It is easiest simply to set out the relevant paragraphs of the Consequential Judgment:

> *"10. Alexey has filed a costs statement that totals £190,260.50. Olga's costs statement totals £170,038.08. I have in mind the factors set out in CPR rule 44.4 and Mr D'Cruz's submissions about them.*
>
> *11. The summary assessment of costs in an impressionistic exercise rather than an exercise of calculation.*
>
> *12. Alexey's costs statement includes a schedule of work done on documents that has 164 entries and I accept Mr Emmett's submission that there are doubts about whether numerous items are recoverable in whole or in part on the standard basis because they suggest there has been double counting. Such doubts must be resolved in favour of Olga.*
>
> *13. I also consider that (a) there are doubts about the extent to which counsels' fees will be fully recoverable and (b) the costs statement claims for an excessive number of fee earners attending the hearing.*
>
> *14. I note that by letter dated 27 July 2021 Alexey offered to accept £150,000 in respect of his costs. Some additional costs have been incurred since that date.*
>
> *15. Both parties have adopted a broadly similar 'no holds barred' approach to the claim which forms part of a bitter family dispute. I consider that £150,000 is a reasonable and proportionate sum for*

Olga to pay. Payment must be made within 28 days from the date of this judgment."

171. The Deputy Master thus assessed Alexey's costs of the Jurisdiction Application in the sum of £150,000. This was a reduction of roughly 21% from the total sum of £190,260.50 which Alexey had claimed in his revised costs schedule.

172. At 11.57 (am) on 5th August 2021, and following their receipt of the Consequential Judgment, Olga's solicitors sent a lengthy email to the Deputy Master. The email made reference to the agreed timetable for filing the primary and response submissions, as approved by the Deputy Master. The email went on to refer to the revised costs schedule served by Alexey, and pointed out that Olga, who had not seen the revised costs schedule prior to the exchange of the primary submissions, would have made submissions on the revised costs schedule as part of her response submissions. The email then set out the arguments which Olga would have included in her response submissions, had she been given the chance, as follows:

"We note that the costs now claimed by Alexey exceed by £20,643.37 the amount indicated in the schedule dated 14 June 2021. Olga accepts the principle that the costs of reasonable work since the hearing may be recovered. But this amount is excessive. In particular:

1. *£10,291.97 has been claimed by Alexey's solicitors for attendance on client / opponent / others. This is an extraordinary amount to claim following argument and before judgment. This can hardly be regarded as the reasonable costs of the application.*
2. *A further £6,947 has been claimed in respect of work done on documents by the solicitors which again can't be viewed to be reasonable in addition to the fees charged by the counsel team in relation to the submissions on consequential matters.*
3. *There is an entry for £965 on 21 June 2021 said to relate to work done by junior counsel on a "Supplemental Skeleton Argument" (the hearing was on 15 June 2021). We do not know what this relates to.*
4. *Alexey has also claimed £639 as the costs of obtaining a transcript of the hearing on 15 June 2021 (costs which the parties did not agree to share / Olga should not be responsible for reimbursing Alexey given the transcript has not been shared with her).*

In addition to the above, in relation to paragraphs 11-12 of Alexey's submissions dated 3 August 2021, the offer in question was not reasonable. It did not address the matters set out in Olga's submission dated 3 August 2021 (which were already known to Alexey). Also, it was made before Alexey's solicitors provided notification of the additional £20,000-odd that are now being claimed in respect of work since the hearing. It was (i) unreasonable to make an offer which was intended to have costs consequences without providing proper information about the amount that would ultimately be claimed, and (ii) not unreasonable for Olga to refuse the offer given that it represented nearly 90% of the costs that had actually been notified to her to that time.

In the circumstances, we would respectfully submit that the sections of today's judgment in relation to issues as to costs are reconsidered in light of the information set out above."

173. The Deputy Master responded to this email at 17:13 on 5th August 2021. The Deputy Master said this:

"Thanks, but I don't need reply submissions.
I have handed down the judgment. The decision is made and is final."

174. Mr Emmett made what were, essentially, two submissions in support of the Costs Assessment Point. The first submission was that the procedure adopted by the Deputy Master, which resulted in the Deputy Master handing down the Consequential Judgment before Olga had had the opportunity to file her response submissions, was unfair. The second submission was that the Deputy Master's decision that £150,000 was a reasonable and proportionate sum for Olga to pay in costs was wrong. If the Deputy Master had considered the submissions which Olga wished to make on the increased costs claimed by Alexey, there should and would have been a further reduction in the sum assessed by way of costs, in the amount of £10,000 to £15,000.

175. I accept the first of these submissions. I am bound to say that it does seem to me that an unfairness occurred in relation to the submissions on costs. The parties agreed on primary and response submissions by certain deadlines, and the Deputy Master approved these arrangements. In these circumstances it seems to me that the Deputy Master should have awaited the response submissions, before handing down the Consequential Judgment. In my view a procedural irregularity did occur in this respect, which was unfair to Olga.

176. The problems with the Costs Assessment Point arise in relation to the second submission. If the Costs Appeal is to succeed, it has to be demonstrated that, as a result of not waiting for Olga's response submissions in relation to the increase in Alexey's costs, the Deputy Master got the summary assessment wrong, and should and would have made a further reduction of £10,000 to £15,000 if he had not gone wrong.

177. I do not see how this can be demonstrated. As the Deputy Master noted in the Consequential Judgment, the summary assessment of costs is not a matter of precise calculation. It is a more broad brush process. The Deputy Master made his summary assessment by reference to the increased figure claimed by Alexey, not by reference to the original figure. When making his summary assessment the Deputy Master would have had in front of him both Alexey's original costs schedule, which had been sent to him by Olga's solicitors with Olga's primary submissions, and Alexey's revised costs schedule, which had been sent to him with Alexey's primary submissions. The Deputy Master would therefore have been aware of the increase in Alexey's costs and of the fact that the increase in costs was generated by costs said to have been incurred by Alexey following the hearing on 15th June 2021 (see paragraph 14 of the Consequential Judgment). The Deputy Master would also have been aware, from Olga's primary submissions, that Olga's submissions on the reasonableness of Alexey's costs were made by reference to Alexey's original costs schedule.

178. The Deputy Master decided that £150,000 was a reasonable and proportionate sum for Olga to have to pay. The Deputy Master decided that this was the

appropriate figure after consideration of Alexey's revised costs schedule, in the total sum of £190,260.50. In making his decision on the summary assessment, the Deputy Master appears to have had in mind, at least as general points, some of the points which Olga's solicitors made in their email of 5th August 2021; see paragraphs 12 and 13 of the Consequential Judgment.

179. If one concentrates on the increase in the figure claimed by Alexey by way of costs, namely the sum of £20,643.37, this was subject to the overall reduction of 21% which was applied by the Deputy Master to the global figure of £190,260,50. Olga's case is that this figure of £20,643.37 should then, in addition to this 21% discount, have been subject to a further reduction of £10,000-£15,000 which, taken at the upper end of these figures, would have left Alexey with virtually no recoverable costs in respect of the post hearing period. This seems an impossible result, in terms of the summary assessment of the figure of £20,643.37.

180. The above point seems to me to illustrate the difficulties in arguing that the summary assessment exercise carried out by the Deputy Master would have been any different if the Deputy Master had waited to take account of the arguments which would have been in Olga's response submissions and were articulated in the email from Olga' solicitors sent on 5th August 2021. I do not think that the summary assessment exercise would have been any different if the Deputy Master had waited for the response submissions before making the summary assessment.

181. It seems to me that there is further support for this conclusion in the terms of the email sent by the Deputy Master on 5th August 2021. By the time this email was sent, the Deputy Master would have had time to read and digest the further submissions which Olga wished to make, because they had been set out in the earlier email sent that day to the Deputy Master by Olga's solicitors. There would then, I believe, still have been time to alter the summary assessment in the Consequential Judgment, because the Marsh Order had not then been finalised or sealed. The Deputy Master made it clear however that he did not need response submissions. It seems to me reasonable to assume that the Deputy Master did not need response submissions because he had read the email from Olga's solicitors, and had concluded that the arguments in that email did not cause him to change the summary assessment which he had made in the Consequential Judgment.

182. There are further difficulties with the Costs Assessment Point. If it is assumed that the summary assessment of the Deputy Master should be set aside, because of the procedural unfairness which occurred, there are, in theory, two options. First, the summary assessment could be remitted to the Deputy Master, for the Deputy Master to carry out the process of summary assessment over again. Second, I could make my own summary assessment. The first of these options would plainly be a disproportionate exercise, in terms of the costs and time involved even if one assumes, contrary to my view, that the Deputy Master fell into error in the summary assessment which he did make. The second of these options is equally unattractive. It seems to me that the Deputy Master was in a far better position than I am to assess the costs of the Jurisdiction Application. The Deputy Master conducted the hearing of the Jurisdiction Application, and heard all the arguments. I would be making a summary assessment of the costs at second hand, which seems to me to be highly undesirable, and more likely than

not to compound any unfairness in the original summary assessment if, contrary to my view, it is assumed that the procedural unfairness which occurred did actually result in substantive unfairness in the summary assessment made by the Deputy Master.

183. Drawing together all of the above discussion, I conclude that there are no grounds upon which Olga is able, or should be permitted to challenge the summary assessment of costs made by the Deputy Master.

Conclusion – the PTA Application

184. If the PTA Application is considered in isolation, it seems to me, on the basis of my discussion of Abuse Point and the Misdirection Point, that there was more than sufficient in these two Points to characterise them as having a real prospect of success.

185. I am rather more hesitant in relation to the Evaluation Point. For the reasons which I have explained, it seems to me that it was always going to be difficult for Olga to challenge the evaluation exercise carried out by the Deputy Master, if one assumes that the Deputy Master did not go wrong in the manner alleged in the Misdirection Point. That said, and if I had been considering the PTA Application in isolation, I think that I would have been prepared to grant permission to appeal on the Evaluation Point. I do not think that I would have thought it right to refuse to allow the Evaluation Point to proceed, in circumstances where I was prepared to allow the Abuse Point and the Misdirection Point to proceed.

186. I am therefore prepared to grant permission to appeal in respect of the Jurisdiction Appeal, on all the grounds of appeal in support of the Jurisdiction Appeal.

187. Turning to the Costs Appeal, the position seems to me to be different. While I have found that there was procedural unfairness, the reality seems to me to be that there was no substantive unfairness, and no viable ground of challenge to the summary assessment of costs made by the Deputy Master. Nor can I see any other compelling reason for granting permission to appeal. I conclude that permission to appeal in respect of the Costs Appeal should be refused.

Conclusion – the Appeal

188. It follows from my discussion of the Abuse Point, the Misdirection Point, and the Evaluation Point, that the Jurisdiction Appeal falls to be dismissed.

189. No formal decision is required on the Costs Appeal, given my decision to refuse permission to appeal. If I had been minded to grant permission to appeal, it follows from my discussion of the Costs Assessment Point that the Costs Appeal would have fallen to be dismissed.

Outcome

190. The outcome of the PTA Application and the Appeal (so far as it arises) is as follows:
    (1) Permission to appeal is granted in respect of the Jurisdiction Appeal.
    (2) The Jurisdiction Appeal is dismissed.
    (3) Permission to appeal is refused in respect of the Costs Appeal.

191. I will hear the parties, as necessary and so far as matters cannot be agreed, on the terms of the order to be made consequential upon this judgment.