Thursday, 18 February 2021

(10.30 am)

Submissions by MR PILLOW (continued)

LORD JUSTICE HENDERSON: Mr Pillow, just before you continue, I know I said at the end yesterday I was hoping that we would ask you perhaps rather fewer questions, but reflecting on the position overnight, there is one point of a general nature I think we would all quite like to put on the table for you.

It relates to the two-stage test that now appears to be pretty much common ground on the authorities that we need to apply. What I think we would like to pin you down on is what precisely you say is the matter for the purposes of section 9 with regard to each of the relevant causes of action at stage 1 of the two-stage test. I know you have made submissions to us on that aspect in relation to the causes of action you've already addressed, but possibly by way of a brief summary, if you could, as it were, tell us what you consider the stage 1 matter to be in relation to each of the causes of action in a nutshell, I think we would find that helpful.

The other point is, the authority, which I think the two-stage test derives from, is the decision of the Singapore Court of Appeal in the Tomolugen case. I may

be wrong about that, maybe it appeared on the scene before then, but that appears to be the most authoritative statement, albeit not binding on us, strictly speaking, which exists at the moment. We haven't actually been taken to that authority. I was wondering if you were intending to do so at any stage or are you content to rest on the written summaries of the law which we have in front of us?

MR PILLOW: I had been proposing in light of, amongst other things, timings to rely on the written arguments and of course we accept in broad terms that Mr Justice Popplewell, as he then was, brought Tomolugen's principles into English law through the Ruhan cases, as Mr Matthews says. I think that much is common ground. What I will be saying in due course, for example, when Mr Matthews seeks to answer your first question to define the matter that he says is to be arbitrated as the claim in conspiracy, that is far too wide because what one has to look at is the constituent elements of the claim in conspiracy, only some of which are even arguably matters that could be referred to arbitration.

LORD JUSTICE HENDERSON: Yes.

MR PILLOW: In a sense what I'll do, my Lord, in answering your first question, I will try and do it as I go

through each of the heads of claim. Can I preface it by saying of course that it's quite important, in my submission, the court bears in mind that Privinvest have the burden of establishing on the balance of probabilities, not just as a matter of a good arguable case in the normal jurisdictional sense, but on the balance of probabilities that what they define as the matter, and it's their call, if you like, as to persuade you, as they had to persuade the judge, that what they defined as the matter was in its entirety something which fell within the clauses in the arbitration agreements.

LADY JUSTICE CARR: I'm surprised -- is there authority? Surely it is for us to determine what the matter is. That's the whole point of stage 1. We don't take the applicant's definition.

MR PILLOW: My Lady, that might be right at first instance. The question is -- my learned friend's case is that the entire matter of the -- all the claims in conspiracy and all the claims in bribery are to be regarded as the matter in respect of which these proceedings are brought, and the question is then whether those matters are subjects that have to be arbitrated in their entirety.

The judge disagreed and the question is whether the

judge was right or wrong to say that those were either matters or not matters or were sufficiently connected to the contracts or not. But your Ladyship is right in one sense, I do accept, that the question really is -- it's more important to ask the negative question, which is what is not a matter in respect of which these proceedings are brought. I'm going to try and show on each of the claims as defined that the elements that are arguably referable to the supply contracts and therefore the arbitration agreements are not matters in respect of which proceedings are brought or, if they are, they are only a subset of the issues arising and the stay following Tomolugen and Ruhan could at most be a pro tanto stay of those particular elements. That in a sense is what we have conceded in relation to the allegations in the IFA as to the validity of the supply contract, for example.

LORD JUSTICE HENDERSON: Yes.

MR PILLOW: If I can deal with the matter point as I go through each of the heads.

LORD JUSTICE HENDERSON: That's very helpful.

MR PILLOW: Can I start with just one pick-up point from yesterday? I just want to put on the transcript a couple of references, if I may, because yesterday at page 130 of the transcript, line 21, my Lady put to me

that I was advancing a case that was completely different from that I advanced before the judge. I respectfully disputed that in my responses, which I repeat and don't resile from, but a reference for your Lordships' and your Ladyship's note as to how the case I advanced below was indeed exactly the same as I advance here. Can I give you first of all our present skeleton argument, paragraph 43, C1, tab 13, page 322, which expressly refers to the arguments that we made below, which are the same arguments that we now make on all of these points.

In the transcript from the hearing in May, Day 2, page 150, line 19, and onwards for a few pages, where you'll see that what I said to Mr Justice Waksman is identical to the case I'm now advancing before this court. That's bundle S2, tab 27, page 491 and following. Our case really genuinely has not changed and I do respectfully wish to make that clear.

Turning then to each of the causes of action, the first is bribery, and the question, as your Lordship rightly asked me at the beginning, is: of course it's possible to say that these proceedings are brought in respect of claims in bribery. Of course they are. That is not in dispute, so possibly it doesn't really help to define them as a matter. What really is going

to be determinative is the second stage of the test in bribery, which is which parts, if any, of the bribery case have to be arbitrated and which do not.

Mr Matthews bears, as I say, the burden of proving on the balance of probabilities that he has the absolute right to arbitrate some or all of those matters, parts of those matters, as opposed to others.

LORD JUSTICE HENDERSON: One of the difficulties, as it seems to me, is what is the appropriate level of generality at which to analyse the stage 1 matter. It's not terribly helpful to be told you shouldn't be either too granular or too general, which is what the guidance seems to amount to.

MR PILLOW: Yes. My Lord, what in my submission it's getting at is the idea that -- it's about a context point, effectively, in my submission. What one has to do is appreciate as a judge whether the issue that one can see is in the proceedings is in fact a matter in respect of which they are brought or is actually peripheral or tangential and arises in the proceedings properly, even though it might in some contexts require to be or be arbitrated.

There are all sorts of issues like that. For example, we've given in our skeleton the example of the habitual residence of a party. Of course, there are

untold ways in which that might require to be arbitrated if it arises in respect of a matter that has to be arbitrated, but on the other hand you can't say just because it might be arbitrated it always has to be. Our case below was in effect that the IFA was of that nature and it was not genuinely a matter in respect of which these proceedings were brought as opposed to a peripheral evidential tangential matter which went to part of one part of the limb of conspiracy to use unlawful means by entering into the supply contracts.

I'm afraid, my Lord, it is open-textured in that way, but it is designed in my submission to capture those issues that are genuinely matters before the court in respect of which the proceedings are brought versus those that are too granular to be referred to as such.

LORD JUSTICE HENDERSON: The question must obviously be approached objectively in the absence of any evidence under Swiss law of subjective intention. So would you disagree with the proposition we should look at the question as we think a reasonable person of business would look at it?

MR PILLOW: Not quite, my Lord. Firstly, in respect of matters in the stage 1 test, we are not in Swiss law.

LORD JUSTICE HENDERSON: No, I'm sorry, that's right.

MR PILLOW: Secondly, on sufficiency connection, it is an

objective test. I'll come on to exactly what that means and why the judge was right. My submissions is you shouldn't be looking at, you should be giving deference to the judge's appreciation of his factual application of a factual question on Swiss law to the facts.

My Lord, rational man of business is not quite the right test in any event because the Republic of Mozambique is not a business, it's a nation state.

So with that introduction, perhaps, if I can move through the causes of action. The question is what matters are these proceedings brought in respect of for the purposes of the bribery claims and what Ruhan makes clear is that it isn't a pleading issue, we are not looking just at the way it is pleaded, we are looking at how as a matter of substance, legally speaking, because this is a matter of legal substance, are these proceedings concerned with something that might be arbitrable.

The question therefore of substance is: do the supply contracts feature in the Republic's claims in any way? And the answer is no, for the reasons I said yesterday. And more than that, my Lords, my Lady, I have eschewed expressly the case that they were tainted by bribery or invalid, and as I said yesterday, that is or should be the same as having deleted the

issue from the pleadings as against Privinvest.

That's the first part of the question of substance. The second question of substance, as Ruhan tells us, is: is there any reasonably foreseeable way in which the supply contracts are legally relevant to Privinvest's defence to the allegations of bribery? And the answer is no for the reasons I said yesterday and I'll recapitulate in a moment. But all you get from Mr Matthews in relation to that question, or in fact both questions, is a rather bald assertion that it's all about the supply contracts. But it's not. What is it about the supply contracts that can possibly arise in our claim for bribery?

Privinvest, as I say, have the burden of proof on the balance of probabilities of showing beyond a bald assertion that it's all about the supply contracts, that there is an issue in our claims for bribery that must be referred to arbitration.

LADY JUSTICE CARR: So what is the matter of the bribery cause of action? The matter is that the Privinvest companies were engaged in bribery for the purposes of securing the guarantees.

MR PILLOW: Yes.

LADY JUSTICE CARR: Is that the matter?

MR PILLOW: That is one way of putting the matter that I am

content with, my Lady.

LADY JUSTICE CARR: How would you like to put it?

MR PILLOW: I'm content with that. One doesn't get very far with the question of the matter as such. One has to say: however you define the matter, are there issues in the matter that are either pleaded by the claimant or reasonably foreseeable on the defence side which will arise, are required, are disputes which are required to be arbitrated? And that's the second stage of the test.

My submission really isn't about what the matter is, with great respect, it's about --

LADY JUSTICE CARR: You can't decide whether something is included in the matter without knowing what the matter is, surely.

MR PILLOW: But the second stage of the test, my Lady -- yes in one way. If I can put it this way: once one's identified the matter that is undoubtedly in the proceedings, and as I say it's the claims in bribery, we say, for inducing the guarantees, but even if you stop at simply saying it's the claims in bribery, that's a matter that is the subject of the proceedings. What's difficult and what I'm afraid none of these submissions tackle is whether, within that matter, either the whole of it or any of it gives rise to issues of dispute that must be arbitrated under the arbitration agreement.

That requires the substance of the allegations and reasonably foreseeable defences to be analysed. As I said yesterday, there is no part of our claim and no reasonably foreseeable defence to it in bribery that touches upon the supply contracts, their validity, their existence -- well, anything to do with them.

My learned friend did not -- what he said was this case is all about the supply contracts but he didn't even open the pleadings. He took you to one paragraph that is quoted in the judgment, which is the IFA, which I have now eschewed for this purpose, and that sort of bald assertion that it's all about the supply contracts, I'm afraid, led my Lady into the error she made, in my respectful submission, at Day 1, page 166, yesterday, where she put to me or she said:

"This is all about the Privinvest company supply contracts and that will be a central part of the case."

In my submission, and with the greatest respect, that is Mr Matthews' submission, but it's a bald assertion and it's a fundamental mischaracterisation of the bribery case because what the --

LORD JUSTICE HENDERSON: Sorry, is that not how the case as a whole is pleaded in the consolidated particulars of claim? It describes there three transactions of a composite nature which include all of the steps from

the supply contracts at the beginning until the guarantees at the end. That is stated as being the nature of the case advanced, albeit it is said that further particulars can't be given on a great many matters at this stage. That may be right, it may be wrong, but that is not unfamiliar in an international fraud case.

MR PILLOW: My Lord, no, that's not right, because what your Lordship has posited is that we do of course plead that the background to this action is a series of projects, each of which constituted three contracts, being supply contract, guarantee and facility agreement in which case. That's of course the facts.

LORD JUSTICE HENDERSON: Well, isn't that rather the point?

MR PILLOW: No, my Lord, it's not, with respect.

LORD JUSTICE HENDERSON: Why not?

MR PILLOW: Because (a) that doesn't enable Mr Matthews to say, "This is all about the supply contracts", without acknowledging that it's also all about the guarantees. But that is not part of his case and that, with respect, was how he led my Lady into the statement she made. But secondly, because what section 9 is singularly not about is what are the contextual facts in which issues arise. What matters in section 9 is: will the court be deciding disputes, that is to say something that is an issue

in the action, that is a dispute, because it is only a dispute that can be referred to arbitration, that is a dispute that has to be referred to arbitration.

So to say, I'm afraid, rather boldly and glibly that this is just about the supply contracts, not only is wrong factually, because that's just part of the context and it's as much about the guarantees as it is about them, but we would say of course much more because we make no claim except under the guarantees and in respect of the guarantees, I should say. But secondly, it just runs a coach and horses through the notion that what matters for your application of section 9 is identifying disputes that have to be referred to arbitration, not just a factual context that includes a few arbitration clauses.

I know I'm repeating myself, but it really is fundamental in our submission, my client's case needs to be expressed in those ways because what we've faced all along in this action is an attempt to misconstrue our pleading or even a matter of substance as: oh well, it's all about the supply contracts because they are part of the tripartite package of contracts in each contract. They're not, they're contextual, they are there, but none of our causes of action in bribery makes any reference to them and the court will not resolve

a dispute about them in deciding the bribery claim.

If the court won't resolve a dispute about the supply contracts in resolving the bribery claim, then there is no section 9 stay that is possible. We do take a firm stand on the requirement that Mr Matthews has to establish on the balance of probabilities that they have a right to take the whole of this bribery claim out of the sunlight, if you like, of open justice and into the closed rooms of private Swiss arbitration. That is his burden and, as I say, we take a stand on it because it's of fundamental importance to the Republic of Mozambique, but secondly, it's what section 9 requires and it's not good enough to say it's just a bit about the supply contracts and they are going to crop up in some way when you have to analyse the disputes that do in fact arise or might foreseeably arise.

Can I make the submission again, it may be slightly repetitive, but it is important to realise that the disputes in relation to bribery can be literally boiled down to: did Mr Chang, say, as the official -- when he took $7 million from Privinvest, as it is admitted he did, did he do so when he was a fiduciary advising the Republic on whether to enter the guarantees and in fact when he signed the guarantees? And if so, was that a bribe, we want it back, and we want to avoid the

Proindicus guarantee, for example.

They are the disputed areas of the bribery claim. We accept the supply contract is out there, we accept the facility agreement is out there, but they are the bare bones of what the court is actually going to have to decided and they are the disputes that Mr Matthews will have to say his client has the absolute right to take away from court and have heard entirely in arbitration.

But how can that possibly, when formulated in that way, we could have put a one-page pleading in to that effect, how could that possibly raise issues that impinge on the supply contracts or their validity or commerciality or anything?

Of course, as I said yesterday evening, before I closed, Mr Matthews has to go further because he seeks a stay of the bribery claims on behalf of all of the Privinvest defendants and so the claim we have to invalidate the Proindicus guarantee and cognate claims for bribery in relation to it would somehow have to raise an issue for determination, a dispute between the parties, not just in relation to or connected with the Proindicus supply contract but also the EMATUM and MAM supply contracts to which D6 was not even a party, but only D7 and D8 were, and all of those permutations in

different combinations.

LORD JUSTICE SINGH: Mr Pillow, it may be that that's the factual context in which I should ask a question which has been in my mind for some time and that's to do with situations in which you have more than one contract and contracts with many different parties and how section 9 is supposed to operate in that context.

A starting point may be Mr Justice Popplewell's judgment in the Ruhan case. I know in the interests of time you didn't want us to go to it, but to explain my question, I think I do need you to go to it. It's in volume 2 of the bundle of authorities. Page 436 is the page I have in front of me.

Paragraph 45. He said that:

"Nothing I have said is intended to apply where the arbitration agreement is in a contract with third parties."

Then he goes on to deal with a scenario where there may be more than one contract, more than one party and he says:

"Different considerations apply in such cases because of the lack of identity of parties."

MR PILLOW: Yes.

LORD JUSTICE SINGH: That may be totally irrelevant to what you were just saying, but I just wonder to myself

whether this may be an important aspect of the present case.

MR PILLOW: My Lord, it may. I was going to come back to something similar to this later, and I will, but to deal with one point that arises from that, you have my point, I think, that if what this -- if the claim in bribery, properly characterised as a matter of law and substance, is a claim that is connected with a guarantee fundamentally only arises because of the guarantee to which the Republic is party, then this is a case of third party arbitration agreements.

LORD JUSTICE SINGH: Quite. It just seems to me, and speaking only for myself, that we do also have to be careful to remember that we are not, even if we were the first instance court, which we are not, we are not yet at the trial stage.

MR PILLOW: No.

LORD JUSTICE SINGH: We are dealing with whether there is a mandatory statutory bar to the courts of this country even attempting to embark on a claim which a litigant wishes to bring before us. It may be the wrong point to start, but I'm afraid, speaking for myself, I start from the position that a litigant is entitled to bring a case before us unless there is a legal bar to their bringing it before us. The fact that it may be a bad case is

a different point.

MR PILLOW: Of course.

LORD JUSTICE SINGH: Then it will lose on its merits.

MR PILLOW: My Lord, I hope that tallies with what I said a moment ago, which is why we take that firm stand on the burden of proof being on Mr Matthews to establish that right.

LORD JUSTICE SINGH: It does. What I'm suggesting is that -- and I'm not talking about this case, if we just look at it to test the principle -- a litigant brings before the court a case that I was a party to a guarantee and it was procured by a bribe. And the question arises: is the court precluded from even considering that allegation because of the arbitration clause in some other contract which may in fact have different parties to it, where the litigant isn't for present purposes even saying the other contract was procured by a bribe?

MR PILLOW: That's exactly the question, my Lord, and we say the answer is clearly no. Might I respectfully suggest that the error into which Mr Matthews falls to escape from that point is the elision of two fundamental legal relationships. There is a legal relationship, no doubt created by the supply contract, it's a contractual one and it involves the terms that were agreed between

whoever was a party to the Privinvest supply contracts. That's one legal relationship.

What the analysis requires is to realise that the legal relationships involved in the bribery allegation are totally different. They are the legal relationships that the law of tort or delict imposes on bribers and nothing to do with the contract to which Privinvest was party at all and certainly not if that contract is not the one that's impugned.

The law of tort imposes a whole different legal set of relationships on the people who bribe others to corrupt them --

LORD JUSTICE SINGH: Well, we have to be slightly careful because it's clear from the authorities, and correct as a matter of principle, that an arbitration clause does not necessarily include only contractual disputes.

MR PILLOW: Of course.

LORD JUSTICE SINGH: It can include non-contractual disputes, and Mr Matthews, it seems to me, must be right as a matter of principle in submitting that, for example, pre-contractual disputes, such as whether there was a misrepresentation, possibly bribery, because in Swiss law that's regarded as being in contrahendo, so we have to be slightly careful. But your fundamental submission, which may ultimately prove to be wrong on

its merits, is that I am bringing a claim in the English Court that the guarantees were procured by bribery?

MR PILLOW: Yes.

LORD JUSTICE SINGH: And you say end of?

MR PILLOW: Yes.

LORD JUSTICE SINGH: Why is that required by an arbitration clause in some other agreement which you are not even contending was procured by bribery for this purpose? Why am I precluded from litigating that in an English court because of section 9? It may be a bad point or a good point, but as I understand it that's your point.

MR PILLOW: Yes. Put another way, what Mr Matthews is forced to say is, well, if it's possible to say that contract A has been induced by a bribe but that is not the case made and it's eschewed, then the fact that it is possible to say contract A has been induced by a bribe means that the allegation that contract B was induced by a bribe falls within the arbitration agreement in contract A. And that is where we respectfully say that cannot be right. It cannot be right.

If you look at what his note in response to my concession on the IFA says, the first point he makes is: oh, you can't have expected the same payments to give rise to different fora for resolution of disputes. But

that is a completely circular argument because it depends on what the allegation is that the payment goes to. Of course I accept if I'd alleged that the payment impugned and rendered invalid the supply contract that that would be a matter for arbitration and we've never said otherwise.

LORD JUSTICE SINGH: I think I've interrupted you for too long, Mr Pillow, thank you very much.

LADY JUSTICE CARR: I had not read paragraph 45 as being of any importance in this case, paragraph 45 of Ruhan. If it is of importance, you're going to need, I'm afraid, to explain to me how it assists.

MR PILLOW: Yes, very well, my Lady, I'll come back to it if I need to. I will. It does arise in the context of a submission I hope to make in a few moments.

Might I add to that -- I was suggesting -- I was making the point the supply contracts don't feature at all in the bribery claim, which they don't as a matter of legal analysis, and it doesn't help to lump together the supply contracts in any way as they are not three separate contracts but a package because, first of all, that is antithetical to an arbitration practitioner and the law of arbitration. The principle of arbitration is that the parties to the contract are sacrosanct. Only the parties to an arbitration agreement can take

advantage of it and no one else can be brought in or affected by it. So that applies obviously a fortiori where the parties are different and they've chosen different fora, seats and rules to govern those separate arbitrations, which is this case. Not even Mr Matthews is seeking to suggest that one defendant can take advantage of the arbitration clause in another defendant's supply contract. And that's important because the effect of what would happen if you stayed everything in favour of arbitration would be to ride roughshod over that principle.

Of course, you'll have the point that separateness of the contracts and the parties is now something Mr Matthews relies positively upon in his skeleton at paragraph 27.3(a).

The further problem with the analysis on bribery, my Lords and my Lady, is that it does skate over these fundamental differences of law between a claim for rescission of a contract for bribery, which is effectively a vitiating factor in the nature of a misrepresentation or other pre-contract wrong in contrahendo, as opposed to those other ways of bribery having a legal effect, legal substance. So at common law you have the tort of bribery sounding in damages. You also have restitutionary claims in unjust

enrichment for the bribes themselves, and in equity you have dishonest assistance giving remedies for bribery if the briber was guilty, was dishonest, because of course it is possible to pay an innocent bribe that's still a secret commission and actionable in tort and in unjust enrichment.

It follows from that legal analysis that once you realise that ours falls only into the latter categories but not the former that they have nothing to do with the supply contracts. And again, Privinvest's analysis --

LADY JUSTICE CARR: Sorry, you're bringing all three?

MR PILLOW: Except for the claim that is contractual, which is the rescission claim in relation to the supply contracts. Our claim for bribery, my Lady, has nothing to do with the supply contracts or rescinding them, only damages for bribery, unjust enrichment for bribery, and dishonest sanction giving rise to equitable remedies for bribery, none of which require the existence of the supply contracts or entail any conclusion about their validity or otherwise. As I have said, all of those causes of action can exist without the supply contracts featuring in any dispute whatsoever about their constituent elements.

What you will find, if you look carefully at Privinvest's argument -- can I ask you please to look at

their ground of appeal on bribery at paragraph 6.1 of the grounds. That's bundle C1, tab 1, page 14, please. You'll see that there is a careful but fallacious elision of all of these principles at the root of their appeal. Paragraph 6.1 is the first particular of ground 2B which is to say that:

"The Republic's allegations of bribery involve an allegation that the reasons for paying the bribes included the procuring of the supply contracts."

That is false. But the first particular of it is:

"The judge held that the tort of bribery is not dependent on the making of a particular contract [which is correct]. However, since the inducement of a contract is never an essential element of the tort of bribery, if the judge's reason was sufficient then allegations of bribery would never fall within the scope of any arbitration agreement."

What's carefully been crafted into that paragraph is two quite important elisions. The first is it equates what it describes in the first part of it as the tort of bribery with, in the second part, a generic reference to allegations of bribery. And of course, if allegations of bribery are legally referable to the contract in question because they are a basis for the attack on its validity, and therefore it is a rescission claim for

bribery in English law, then of course those allegations are likely to be covered by the contract's arbitration agreement. That's exactly what happened in Fiona Trust, which I'll come back to in a moment.

LADY JUSTICE CARR: The first sentence of paragraph 6 is right as matters stood.

MR PILLOW: Quite right, my Lady, yes.

LADY JUSTICE CARR: I thought you said it was wrong.

MR PILLOW: No, my Lady, it's right. What's right is to say that the tort of -- what is happening here is they are saying that because inducement of a contract is not required for the tort of bribery, if that was all that was needed you'd never have an arbitration in relation to bribery. What they're doing is eliding the tort with the rescission claim. Ours is the tort. They'd like it to be a rescission claim because that would be arbitrable, but the tort isn't.

The second thing it does here, of course, is it doesn't cater for the categories of case where the claims in tort or unjust enrichment for that matter are made but don't have any legal connection to the contract in which the clause is to be found. Therefore there's no contractual relationship between the briber and the victim to be found in the contract that is the subject of the claim for bribery, which is in this case the

guarantee.

The Fiona Trust case is mentioned in Privinvest's skeleton at paragraph 27.3(b) on page 13 of their document. They say in that -- and it's important I dispel a myth about that on this point. They say there, and I quote:

"In that case there were multiple arbitration agreements between eight companies within a Russian group. Lord Hoffmann's speech at no point indicates that this fact required a narrow approach to construction. The claims of conspiracy, bribery and breach of fiduciary duty were all held to fall within scope."

That is not correct in a quite important way. It is true that in that case -- and I should say I was counsel in the trial of that case and the arbitration that followed over, I don't know, possibly a decade. But there were claims for conspiracy, bribery, breach of fiduciary duty and all of that in Fiona Trust, but those claims were not stayed under section 9. The only thing that was stayed under section 9 in Fiona Trust was the claim for rescission of the very contract that contained the arbitration clause in each arbitration.

You see that most clearly, if you want the reference in Lord Hoffmann's opinion in the House of Lords or

speech in the House of Lords, at paragraphs 1 and 2 in authorities bundle, tab 4.

So the very case that is relied upon as the sort of exemplar of how to deal with these matters actually is entirely consistent with my case. A complex multi-party international bribery case and conspiracy case goes to the House of Lords solely on the issue of whether only the rescission of the contract should be stayed, not the wider conspiracy and bribery allegations. Really, that's exactly what we say should happen here.

That's bribery. I have to rattle through a couple of things, but hopefully not too quickly, and I'll try and pick up the questions from the court.

Can I just ask you to actually look at the pleading on conspiracy, please, for the first time perhaps.

LADY JUSTICE CARR: Are we moving to conspiracy now?

MR PILLOW: We are, my Lady. Paragraph 132 of our pleading that was before the judge at tab 7 of the bundle, page 28 internally or 105 through pagination. You'll see heading 3 is our claim for conspiracy to injure by unlawful means. It starts at paragraph 132.

You'll have, I hope, by now, my Lords and my Lady, the key point that the conspiracy allegation rather speaks for itself in the final sentence of that paragraph 132:

"The key aim of the conspiracy was to render the Republic liable under the sovereign guarantees."

Nothing whatever to do with supply contracts. No suggestion in the pleading that the conspiracy was to procure the entry into them other indeed the underlying financing because the Republic did not enter the supply contracts and the financing on our case. I touched on this yesterday, I think in response to questions from my Lord, Lord Justice Singh, but it is important before we look at the constituent elements of the unlawful means said to give rise to the conspiracy claim to bear in mind what the nature of a conspiracy claim is.

It is the agreement or combination between the conspirators that's the essence of the tort. Only one of the conspirators, in fact none of them, but any one of them will do, needs to commit the unlawful act. It could be an agreement between the alleged conspirators that a third party commit an unlawful act. But only one of them needs to commit a unlawful act in order to render them all individually jointly and severally liable in tort.

It follows that the cause of action in conspiracy will be complete against Privinvest, and of course any other of the conspirators we allege, when any one of the particular unlawful means under paragraph 133 is

established. And it will be complete against all of them at that point and anything else will be a bonus.

That's why it's very important perhaps to bear in mind what I said to you in some haste yesterday evening, that when one looks at 133.1, which brings bribery into the conspiracy allegation or claim, the bribery pleaded at paragraphs 129 to 131 is not just Privinvest's bribery of the Republic's officials but also Privinvest's bribery of Credit Suisse's agents. Those CS deal team defendants, as they are called, have admitted unlawful payments in US criminal proceedings and there's no debate about the actual payments.

On Mr Matthews' logic those payments to the Credit Suisse individuals must be sufficiently connected to the contracts to which their principals, Credit Suisse, were party. That's both the facility agreement and the guarantees. Both contain exclusive English jurisdiction clauses, and the idea that those bribes and a conspiracy to commit those bribes could possibly be sufficiently connected to the totally separate supply contracts to which Credit Suisse were not even party is untenable, in our submission.

So it's important that our case on bribery there does involve two distinct sets of bribes and I will repeat the point that it means that it relates to each

individual Privinvest defendant for each individual of the three guarantees, not just the one in the transaction to which that defendant was involved through the supply contract in that transaction.

So it means that the claim for conspiracy, let's say against D6, has no necessary connection at all to the project in which D6 was involved, the Proindicus project. No necessary connection whatsoever. In what sense could bribery in relation to EMATUM and MAM raise questions of the validity or commerciality of the Proindicus supply contract, which is the only one that has an arbitration clause that D6 could probably take advantage of?

That's why on no analysis could the entirety of our claim in conspiracy, even under the bribery allegation heading of unlawful means, possibly require to be arbitrated and taken away and put in the arbitration.

The second thing we say -- 133.2, the second unlawful means, this is important because it was accepted by Privinvest below that both those unlawful means at 133.2 and those at 133.6, I quote Mr Calver QC as he then was, "obviously would not be referred to arbitration". If one needs the reference, it is Day 2, page 130, of the May hearing, at bundle S2, tab 27, page 486.

They conceded that those unlawful means would not be referred to arbitration. Mr Matthews didn't quite go that far yesterday, you may have noticed. At Day 1 of this hearing, page 82, line 18, he said:

"The only one that isn't infected [by the allegations alleged to connect to the supply contract] is number 2, which is the entry by Credit Suisse into two of the sovereign guarantees."

He said that's actually nothing to do with us at all. But it's no answer, as I have just said, to say that it was not committed by Privinvest but only by Credit Suisse. If there was a conspiracy, and no one's suggested there's not a good argue case that there was, that Credit Suisse would use those acts to advance the conspiracy and damage the Republic, then Privinvest is liable and there is no arguable linkage in any way, shape or form to the supply contracts.

The same applies, but Mr Matthews didn't in fact acknowledge its existence, to 133.6. He said at one point he thought there were only five headings but there were six before the judge, including the deceit, which is Credit Suisse's deceit, effectively, at 133.6.

There are now seven, it's fair to say, because we've amended to add a further pleading of the procuring of the MAM facility and MAM guarantee as a new

paragraph 133.2(a). You'll see that in the revised amended consolidated particulars.

So once one accepts those points as a matter of concession below and inevitable analysis here, it shows you that even on the best of their own case Privinvest cannot possibly establish the right under section 9 to have the entire conspiracy claim against them stayed.

This is where Ruhan -- if I'm wrong on any of this, the Ruhan point or approach will apply. What Ruhan shows you in terms is that -- and the Tomolugen case -- is where you have an overarching claim, here for conspiracy as postulated in Tomolugen and in Ruhan, but in Tomolugen also the unfair prejudice type claim with lots of examples of that underneath it, the court's approach has to be at least as granular as applying the test to each limb of the unlawful means that are alleged or the unfair prejudice that's alleged.

That is why in Tomolugen the result was a pro tanto stay of only some of the allegations whilst the others were not stayed. That's the approach that those cases suggest is appropriate and clearly right.

LADY JUSTICE CARR: Section 9 applications are very common. Since the Ruhan case are you aware of any criticism or suggestion that the principles identified there were not correctly identified?

MR PILLOW: I'm not aware of any, my Lady, no.
LADY JUSTICE CARR: Thank you very much.
MR PILLOW: There are almost certainly people who think that that fragmentation that's caused by the sort of Ruhan approach is not ideal, I wouldn't want to suggest no one's criticised it for that reason, but in terms of authority, no. Not that I'm aware of.
LADY JUSTICE CARR: Thank you.
MR PILLOW: What that then leaves you with, looking at conspiracy, is let's take the matter -- well, the conspiracy claim. What issues arise as a matter of substance in the claim? Now that we have conceded 133.3, effectively as a pro tanto stay of the Ruhan or Tomolugen style, there is nothing left in that conspiracy claim that is arguably referable or connected to the supply contracts. The court will not in resolving any aspect of it have to trespass and decide a dispute that is in connection with the supply contracts. That's a matter -- that goes as a matter of concession.
LADY JUSTICE CARR: So the matter for conspiracy is a conspiracy involving the Privinvest defendants and others to injure the Republic by the unlawful means pleaded at 133.1, 2, 4, 5 and 6? Is that the matter?
MR PILLOW: Yes, my Lady. We are happy with that definition

of it. The question then at stage 2 is: which parts of that matter will inevitably raise matters that are disputes that are only referable to arbitration under the agreement as a matter of Mr Matthews establishing on the balance of probabilities that that has to be the case?

Another way of addressing the matter, I suppose, is to say the matter is -- you can take it as each unlawful means is a matter and the question is: is that matter as a whole something that they have the right to arbitrate and take away from court? My Lady, I don't think it matters, actually, because as long as you're applying the sufficient connection test to a dispute that is captured within this pleading, within the claim, and answering whether that's got anything to do with the supply contract broadly -- we'll come on to the sufficient connection test -- then you are doing the right job.

What we don't say is that any of this is too granular not to be even capable of being a matter that is referable to -- in respect of which these proceedings are brought. That's really the only point at which what the matter is matters. We said below we thought the IFA was of that nature, but we have not pursued that point.

I'm going to come on then to dishonest assistance, which is over the page in the pleading at paragraph 137, please, page 29 internally. Of course the same approach applies to dishonest assistance in that dishonest assistance involves certain acts of assistance and the question for the court below was: are those allegations of assistance that are alleged to give rise to dishonest assistance claims matters in respect of proceedings were brought? We accept they are. They are as a claim. There is a dishonest assistance claim and proceedings are brought within these proceedings for it. The question is: are they anything to do with matters that can only be -- disputes that can only be decided in arbitration? One has to apply that question to each of the limbs of the dishonest assistance claim.

Can I ask bearing in mind -- let's take it one by one. 137.1 is the bribery. So that in a sense takes you back to the bribery claims that we've made, but the breaches of duty the Republic is asserting were assisted by Privinvest bribery, of course, are the breaches of duty of the officials of the Republic to place the Republic's interest above their own, not to make personal and secret profits, and all of those fiduciary type duties that agents of principals are always bound by. We particularise those in schedule 1 to this

pleading in paragraphs 33 to 35 if you're interested. But there's no particular magic to that, they are fiduciary type duties.

So the question is: when bribes were promised or paid, did that cause the officials to breach their duties and was Privinvest's state of mind dishonest? None of that seeks to or does in fact or will raise in these court proceedings anything at all to do with the supply contracts.

It's the same as the bribery claims at common law that we make in respect of bribery. There's no connection whatsoever to the supply contracts there, not least because it doesn't matter whether there were any. Once you pay a bribe, if you know a bribe isn't honest, you're liable for dishonest assistance. No one, I think, is suggesting that if they were bribes they could have been paid honestly.

The paragraph 137.2 is Credit Suisse's entry into the guarantees and the financing. That of course does not apply to Privinvest, they are acts done by Credit Suisse, so Privinvest won't be liable for the assistance here outside the conspiracy, but they will be liable for the assistance within the conspiracy and that's an important point to make because the dishonest assistance is one of the unlawful means in the

conspiracy and Credit Suisse's entry into the guarantees and financing will therefore render Privinvest liable for conspiracy if Credit Suisse is liable for dishonest assistance.

Finally, if you like, the corollary of 137.2 is 137.3, which is Privinvest's entry into the supply agreements with the SPVs. The fact of the SPVs' entry into those agreements is not a disputed matter. The court is not going to get into a question of did they or did they not sign them, it's historic fact. The entry into the supply agreements for this purpose does not of itself need to be and is not alleged to be unlawful, improper or uncommercial in any way. It doesn't give rise, this allegation, to any dispute about the terms, meaning, effect or validity of the supply contracts, merely --

LORD JUSTICE SINGH: I'm not sure I understand that submission because these are particulars of what is said to be the assistance.

MR PILLOW: Yes. That's right, my Lord. What we say -- when you take 137.2 and 3 together, what we're effectively saying is that all the parties to the three contracts that made up each transaction assisted the Mozambique officials to breach their duties by entering into the transactions to which all the bribes were

connected. Again, the merits of that might be debatable as a matter of -- did that really amount to an act of assistance or did it merely complete the breach or give them the payback for the breach that had already occurred. That's a debate of merit and we're not debating merit, that's not part of section 9.

To establish whether the actual entry into the supply contract simpliciter factually assisted the breach of the Mozambican officials does not trespass in any way on anything to do with the content or validity or effect of the supply contracts. It merely says --

LORD JUSTICE SINGH: No, but it might be said to be sufficiently connected with the supply contracts.

MR PILLOW: Well, my Lord, that's the debate between us in some ways. Again, if I'm wrong about this, then the answer is that 137.3 has to be stayed pro tanto.

I haven't got time to waste, really, debating whether I'm right or wrong beyond what I have already said in writing. For the reasons we have said in writing, we are right about this, in my submission. But I accept that it's a question of sufficiency.

I do invite your Lordship to ask the question: what is the dispute notionally that would be referred to the arbitrators? The dispute only can be described like this: did the penning of the signature on that document

assist Mozambican officials to breach their duties to the Republic? That is not -- I struggle, with all respect, to see how that could be an arbitrable dispute.

LADY JUSTICE CARR: The difficulty here is this links in with the artificiality concerns that have been revealed in some of questions. Clearly it has to be dishonest assistance and are you not dancing on the head of a pin to say whatever you might say about withdrawing the IFA, the legitimacy of the supply contracts will be debated by you and the other defendants? It is very difficult to see how the court will not be considering the terms of the supply contracts in the context of deciding whether or not this was dishonest assistance by the Privinvest companies. That is a question of sufficiency, isn't it?

MR PILLOW: No, my Lady, it's not. It's a question of analysis, in my respectful submission, because again I repeat what I said yesterday a little bit to the same point in fairness. The way to test your Ladyship's point is to imagine that this was only a claim against Privinvest and it could be. There might be a settlement with all of the other parties before trial.

But the point is that the Arbitration Act section 9 and arbitration clauses give rise to what your Ladyship is characterising as artificiality, but which on

analysis is no such thing, it's just difficulty and complexity. The judge has to try the case against Privinvest on the allegations made against it and in respect of this dishonest assistance allegation it will not trespass at all in relation to -- on the supply contracts. Analytically, it is, I'm afraid, wrong to say that this is artificial or problematic except in a practical way that is inevitable from the application of a section 9 type of issue.

But just imagine that the only claim we advanced in this case was this dishonest assistance allegation against Privinvest and only Privinvest were parties to the hearing. What's that got to do with the supply contracts?

LADY JUSTICE CARR: So you say dishonest assistance by an entirely legitimate contract?

MR PILLOW: Yes, absolutely, my Lady. Absolutely. For this purpose the contract could be the best contract in the world. The question for the court that has to be heard in court is: did the conclusion of that contract factually assist the acceptance or promise of bribes by the Mozambican officials?

LADY JUSTICE CARR: Did the conclusion of the contract dishonestly factually assist?

MR PILLOW: No, no, my Lady, no --

LADY JUSTICE CARR: (Overspeaking) question. Dishonesty is an integral part of the claim.

MR PILLOW: My Lady, yes, but you have elided, if I may respectfully day, the dishonesty and the contract.

LADY JUSTICE CARR: I'm just trying to explore. I do understand, Mr Pillow, but you are saying that the Privinvest companies were dishonest --

MR PILLOW: Yes.

LADY JUSTICE CARR: -- by entering into entirely legitimate valid contracts. That's the proposition?

MR PILLOW: No, it's not, my Lady, I'm afraid you're skirting over the important elision.

LADY JUSTICE CARR: Right, what is it?

MR PILLOW: The dishonesty is paying bribes, the corruption. You can pay bribes for a perfectly legitimate reason, you might think, for a contract that is commercial, valid and desirable.

LADY JUSTICE CARR: That's not how I read paragraph 137.

MR PILLOW: With respect, my Lady, that's our case. The assistance -- paragraph 137.3 does not particularise dishonesty, it particularises assistance. This is a really important part of the analysis that dishonest -- imagine that I pay a bribe to a counterparty. My Lady won't, I hope, have too much difficulty in assuming that I might have a good arguable

case that that was dishonest regardless of whether a contract eventuated or not.

If I have that state of mind having paid the bribe, it is then a factual question whether the action I took to enter that contract with that state of mind was an act of assistance. On a proper analysis it has nothing to do with what you might call the honesty of the supply contracts. If it were otherwise, you could never have a bribery claim to induce honest contracts. It is not, of course, our case that the supply contracts were honest, but it's not our case that they were dishonest. We don't have to make that case and we have eschewed it in terms of the validity of the supply contracts. And the reason we have eschewed is it is does not form part of our cause of action for dishonest assistance.

LADY JUSTICE CARR: One of the difficulties here is the pleadings because if you look at paragraph 137:

"By reason of the matters herein, in particular at 62 to 93 and 136... dishonestly assisted."

Well, there is no reference to the claim for bribery in those paragraphs. The claim for bribery is 129 --

MR PILLOW: That's 137.1, my Lady.

LADY JUSTICE CARR: Sorry?

MR PILLOW: That's 137.1.

LADY JUSTICE CARR: Yes, but if you look at...

(Pause)

MR PILLOW: Of course, this isn't a question of what the pleading says, my Lady, it's a question of the substance.

LADY JUSTICE CARR: I understand that. I'm trying to look at a fair reading of the substance and that's what I am struggling to find. Absolutely it's a question of substance, not form.

I see, so the bribes at 137.1, not only the assistance but also the dishonesty, you say, on a fair reading, and then point 3 is just a factual entry and not dishonesty?

MR PILLOW: No, I don't think I accept that, my Lady. The references to those paragraphs capture the bribes in 136, for example, as breaches of duty, as well as all of the facts, the background matters relating to the entry into the transactions at 62 to 93.

In my respectful submission, this question is not going to be resolved by parsing the pleading, it's going to be resolved by your Ladyship asking herself analytically: does an allegation of entry into a contract that reasonably, arguably, factually assisted the payment or promise of bribes involve any dispute that could be referred to arbitration under that arbitration agreement?

The factual entry isn't dishonest because the contract itself -- well...

LADY JUSTICE CARR: Look, I don't want to take up too much time, but it's a question of fair reading and working with what we've got, but it's fair to say, perhaps not unreasonably, that the Privinvest companies at 503, page 477 of the defence in C2, don't appear to understand that pleading to be limited to a factual allegation and assistance.

MR PILLOW: That's because it suits them to assert otherwise in order to seek a stay on the basis that this has something to do with the dispute under the supply contracts or in connection with the supply contracts. I have said all I can say about that and I do say, with all due respect, that it is not a matter of doing the best you can with the pleadings, it is a matter of analysing the constituent elements of the cause of action and ascertaining whether the factual entry into the contracts is a matter that is capable of a dispute that could be arbitrated, because it's not, even if one is assuming that that was attended by dishonesty in some way.

The fallback position, of course, always is, if your Ladyship is against me on that, then you stay the claims insofar as or to the extent of paragraph 137.3.

LADY JUSTICE CARR: My Lords may be entirely with you and I may be with you, Mr Pillow. I'm just trying to --

MR PILLOW: My Lady, exactly. That is the solution to it. What you don't do is throw the baby out with the bath water and say the whole dishonest assistance claim must be a matter they are entitled only to arbitrate. So I won't spend too much longer on that point.

Knowing receipt I'm really not going to spend much time on because what it has boiled down to here is they say we haven't got a good arguable case of knowing receipt for anything. We say we have and that's not a matter of section 9 at all. The whole debate over knowing receipt was artificial because Mr Calver QC for Privinvest, as he then was, said the only thing we might be claiming for knowing receipt was the purchase price under the supply contracts. We said, no, of course we're not claiming that in knowing receipt, not least because you'd require the relevant transfer of funds to Privinvest to have occurred as a breach of trust or fiduciary duty owed to the Republic. And that's not possible where the money didn't come from the Republic, it came from Credit Suisse. It wasn't extracted from the Republic in breach of fiduciary duty or breach of trust in the relevant sense for knowing receipt.

My learned friend even says now that we couldn't

have a claim in knowing receipt for that money without rescission of the supply contracts. If he's right about that, then that's another reason why this has never been connected to the supply contracts. What it boils down to, and you'll see we have amended this paragraph 139 to make clear what I said to the judge below was our position and the judged accept was our position: there is now no possible connection to any knowing receipt claims and the supply contracts. We have made that clear and there is nothing there to stay, even if my learned friend doesn't think whatever claim we do have has got any merit.

Can I just ask you your Lordships and your Ladyship to turn up the note that Mr Matthews sent to you on 1 February? It's at core 2, tab 17. It was his response to our note on the review of the case and the concession that followed.

What was remarkable about that note, well about Mr Matthews' submissions yesterday on the IFA and the concession, is that those submissions bore no resemblance to the submissions whatsoever in this document, which was submitted a few weeks earlier and was at least, we say, analytically coherent if wrong.

What you will see that they said in this note, and it really starts at paragraphs 6 and 7 on page 520 --

the tenor of the note was they said: ah well, conceding the IFA does not dispose of the section 9 application in the Republic's favour in relation to bribery however they are framed for three reasons, which I'll come on to in a moment. But they specifically in this note did not say what Mr Matthews sought to say yesterday, which was that the concession of the IFA in fact disposed of the bribery claims the other way, entirely in their favour. What you see they attempted to do, which was the proper analytical way to deal with it, was to try to salvage the connection between the bribery claims and the supply contracts by reference to three things other than the IFA.

I made the point yesterday that the grounds of appeal don't permit this approach because the grounds of appeal are predicated upon our case being that the supply contracts were invalid and that is not our case.

But leaving that to one side, what they said in paragraph 8.3 and following is: okay, the IFA may have gone but that was not the foundational premise of Privinvest's case, they say in 8.3. In fact, there are three arguments that they do raise to make the sufficient connection argument in relation to the bribery claims. I would like to briefly, before the break, examine those three points, because on analysis

they are wrong.

The first point they make in 8.4 is that the reason the bribery claims are connected to the supply contracts is because the same payments were bribes that procured the supply contracts and the guarantees. That in itself is wrong in its own terms. You'll see in the first sentence of 8.4, because it includes -- it presupposes that the Republic is alleging that the bribes procured the supply contracts. That's what it says. We are not alleging that. So again one has the foundational premise of their new case on bribery requiring us to be alleging that the supply contracts were induced by bribery when we do no such thing. That was entirely what I sought to dispose of by the IFA concession.

This relates therefore back to the point I made to my Lord, Lord Justice Singh, in response to his questions, which is that if all they are saying is there is a sufficient connection because the same payments could impugn the supply contracts then that is an utter irrelevance to our bribery claims because it's not good enough to say it's possible to allege that the same payment induced contract A if there is in fact only a specific and limited allegation that the payment induced contract B.

Looking at it another way, I suppose, going back to

my Lord, Lord Justice Henderson's question at the beginning, Privinvest could only make this sort of argument if you define the matter at such a high level of abstraction, ie the matter is a payment and somehow a payment can be connected to the contract, supply contract, that you're trapped inside the arbitration clause. But that's just to treat the payment as entirely shorn of its legal context and again there is no dispute that we want to air in this action, nor that Mr Matthews wants to air in this action, that the payments procured the supply contracts. On analysis, that first point is no better than any of the other points he's already made about bribery.

The second point at 8.6 is to resort to the culpa in contrahendo notion. That's 8.6. On analysis, that's exactly the same point put in a different way because of course if it's true that these payments gave rise to a culpa in contrahendo claim, that might be connected to the supply contracts, but we do not make a culpa in contrahendo claim in relation to the supply contracts. Of course they don't make it. We've expressly disavowed it. So who is making the allegation that is necessary for this paragraph to be relevant of culpa in contrahendo? Not us, not them, and it won't be an issue between us in the court proceedings. So that can't be

a sufficient connection any more than the IFA ever could.

Then finally is the point of -- at 8.3 it is said that Privinvest always relied on the fact that the Republic claims an account of profits, which includes the profits or is referable to the profits made by each of the suppliers under the supply contracts.

One has to just be a little careful there. The remedy of account of profits only relates to our claim in dishonest assistance, so one gets through our bribery claims and our conspiracy claims before this point is even arguably relevant to the analysis of the claims. Then one gets to the dishonest assistance claim in which it is true that the law of equity gives us the right to seek disgorgement of the wrongdoers', the dishonest assisters', profits caused by their act of assistance.

This is only therefore an adjunct to the point I've discussed at length with my Lady a moment ago as to that particular ground of dishonest assistance and it will stand or fall with that. The reason it is a bad point is that it is a tail-wagging-the-dog point. The fact that there's a remedy for dishonest assistance that is calculated by reference to the profits made under a particular contract is not in itself again a dispute arising between the parties that's got anything to do

with the supply contract. It's a matter of factual happenstance whether the disgorgeable profits for dishonest assistance arise under a contract with the Republic. We say there wasn't one, they say there was, it was the supply contracts, but we say there wasn't one, or the profits arise under a contract with a certain dispute resolution clause with someone else or no contract at all.

The question is a factual one for the court, once it's decided the case of dishonest assistance in our favour, what are the profits calculable and recoverable?

A prime example of an issue that could be arbitrable if it was relevant in an arbitrable dispute is what profits were made by the Privinvest defendants, but it's not one that is required to be arbitrated, that Mr Matthews has a right to be arbitrated no matter what context it arises in. And certainly on no analysis could the fact that we do claim or reserve the right to elect a profits-based remedy rather than a loss-based remedy for dishonest assistance, on no analysis could that drag the entire claim for dishonest assistance into the arbitration from the outset. That would be doing -- that's the tail wagging the dog because that is Privinvest doing what they accuse us of. They say in their skeleton at paragraph 5.2 that we wrongly focus

not on the actual wrongdoing but on the remedy claimed. That's not a fair criticism of us, but that's what they're trying to do here.

The answer, if you don't accept that this is a matter that does not require to be arbitrated anyway, of course, is to say, well, if and when, or when, the Republic do seek to claim on account of profits then I suppose it would be said, well, the question of how much profit may have to be arbitrated, and the Republic might then take a view on whether it wants to engage in that process. But that cannot possibly be a tail that wags the entire dog of the dishonest assistance claim and brings the whole claim into the arbitration clauses.

There's a further point on this, which of course is you'll have realised that the Logistics entities, D9 and D10, are not suppliers under the supply contracts, although it's alleged they were parties to them. They are only parties or signatories to the subcontracts that the judge refers to and those were called inter-company agreements and they were back to back, as you know, with the supply agreements. Two of them, the EMATUM and MAM ones, had exclusive English jurisdiction and choice of law clauses, and as a matter of fact any profits that D9 and D10 made under those contracts, the inter-company

agreements, have got nothing to do with the supply contracts. There's no reason in the world why the profits made under the ICAs with English jurisdiction clauses would not fall to be decided in the English Court, even if the supply contracts somehow took the profits under those contracts into arbitration. So Privinvest's argument on any analysis can't cover all the permutations of profit that are possible from all of the Privinvest defendants.

There's a further point here, which is that the defence that Privinvest have served at paragraph 251.6, bundle C2, tab 15, page 428, admits or highlights in terms that D7 in fact made another profit from this transaction by way of what's called a rebate letter, contractor rebate, of $3.3 million approximately. It's described as some subvention fee rebate. But if that is right, that doesn't appear to be anything to do with the supply contract, it's from Credit Suisse, and that profit, for example, would not be something that's got anything to do with the supply contracts and we'll be amending or, first of all, pleading in our reply, I suppose, to cover that off and the profits under the inter-company agreements that the offshore, the Logistics entities made. The point there therefore is that on the best for Mr Matthews, there's only

partial arbitrability of some of the profits that might be recoverable.

I see that is then an appropriate time for a break. If it's suitable for the court, that's suitable for me.

LORD JUSTICE HENDERSON: Yes. Thank you very much. How much longer do you think you're likely to be, Mr Pillow? I know we have been pestering you with questions.

MR PILLOW: I tried to agree with Mr Matthews a rough split. If I stick to that, to the letter, it will be 12.20 when I hand over and I very much hope it will be there or thereabouts.

LORD JUSTICE HENDERSON: Thank you very much. In that case, we'll resume in about 6 minutes' time.

(11.51 am)

(A short break)

(11.57 am)

MR PILLOW: Can I try to answer a question from the court and take you to Tomolugen briefly at tab 20 of my bundle -- it may have been split into two -- and the passage I particularly would like you to focus on is 109, paragraph 109, which is 576 of the authorities bundle, internal page 59 of the judgment.

I really want to do that to help the court on the question of what matters are because I'm no doubt guilty of messing or mixing up the concepts a little bit, and

I want the court to be clear what they should be in my submission.

Can I preface that by -- well, introducing this as a methodological question, which is exactly what it is, as the court in Singapore says at 109:

"The methodological question is the degree of specificity with which the court should characterise a matter. One side argues a broad approach with the court seeking to identify the essential dispute or main issue. And on that view the sole matter in this case [it is said over the page] is: has there been an oppressive or unfair prejudicial conduct of the company? The other party, on the other hand, Lionsgate advocates a more granular approach and it contends that the court is entitled to segment as a separate matter each issue which is material."

That's the approach of taking an unlawful means by unlawful means approach rather than the conspiracy as a whole approach.

They then address the methodological question at 111 and this is where, in the passages that follow in 113 -- your Lordship, Lord Justice Henderson, has rightly pointed out that they come to the view that you shouldn't be overly broad or unduly narrow. The reason it's not such a problem is that what the purpose of

a matter, defining a matter is is to try to identify candidates for disputes that may be required to be arbitrated under the contract of arbitration. That's all it really does, it's an identification so that you can go into the second stage of asking whether that matter is actually entirely arbitrable, requires to be arbitrated, is it a candidate for that? And if you kind of get the candidates too wide or too narrow, your second-stage enquiry is either going to take too long or miss important points.

You'll see at 111 in Tomolugen the court makes the rather obvious point, and the right point in my submission -- it is at the top of page 61 -- that if you do it too wide, if you say the whole question of unfair prejudice is the matter, you will inevitably weaken the case for it falling within the arbitration clause. That's the top two lines of page 61 in paragraph 111.

The reason for that is if you gather too much into your matter, you will inevitably, almost inevitably, and certainly in this case you will, in my submission, gather things, issues, disputes, that are not properly the subject of mandatory arbitration and in fact that would damage Mr Matthews' case, in my submission. So that's why, for example, if he tries to sweep up the whole conspiracy as the matter and he then tests whether

the whole of the conspiracy is sufficiently connected to the arbitration agreement, in my submission he will fail.

That's fine for me, I don't mind if that's the outcome, of course, but in my submission that would be an example of trying to take the matter too widely and you've got to look at sub-issues or sub-particulars where they can be the subject individually of possible disputes, and you then alight upon a level of granularity that makes the second stage workable in practice.

The more candidates you have, obviously, the longer and more difficult the question and fragmented the outcome could be. So that's where the balance has to be struck between granularity and width, and that's where I come back to my point that if you really dissect the bribery case -- let's say the conspiracy case right down to issues like were the payments made in connection to the supply contracts, well, maybe they were, but that's not anything to do with the real cause of action in issue that we're claiming.

In another world we might have claimed that they were, but we don't, and no one does. But it really -- it's that question of what are the candidates that may be referable and does it help you answer the question of

whether they have exclusively to be referred to arbitration.

The problem with it all is that obviously the more granular you get, the more the question becomes obviously bound up with what the parties intended to fall within the scope, which is the second stage of the enquiry. In my submission, that's the point of the matter question. I do rely on that to say that if Mr Matthews takes his stand on the matter in question being defined at the high level he does, namely bribery claim, conspiracy claim, dishonest assistance claim, knowing receipt claim, then he will fail to show that every issue within those matters that is capable of being a dispute between the parties is exclusively required to be arbitrated and not litigated.

It would be much better for his case, in my submission, if he takes the pro tanto approach that the court in Singapore and Mr Justice Popplewell in Ruhan ended up taking, but I am in the happy position that Mr Matthews' grounds of appeal do not permit him to do so.

Mr Matthews' grounds of appeal are all or nothing in this case, and that, in my submission, is one reason why they fail in toto.

LADY JUSTICE CARR: Sorry, Mr Pillow, what's that point?

It's a new point that you say that we can't pro tanto refer to arbitration because of -- I'm sorry, I may have missed your point.

MR PILLOW: My Lady could if you take on the burden of the first instance judge's role and decide the question afresh for yourselves.

LADY JUSTICE CARR: I don't mean it rudely, but to make it clear, you are taking a pleading point because there is no pro tanto relief claimed on appeal, we can't do that because nobody's proceeded by way of a re-hearing and there's been no application to that effect?

MR PILLOW: What I am saying is that Mr Matthews' appeal is predicated upon succeeding in the argument that the entirety of each cause of action is entirely and exclusively referable to arbitration and if he fails on that, and this is not a re-hearing, then the appeal must be dismissed.

LADY JUSTICE CARR: Is that a point you've taken anywhere in writing? I'm asking --

MR PILLOW: Yes, it is. It is at the end of our note on the concession, my Lady, where we made clear that even our concession does not give Mr Matthews the result he needs to win this case.

LADY JUSTICE CARR: Hold on. Just let me have a look at that. Because he hasn't pleaded a partial relief claim?

MR PILLOW: Because his appeal is predicated on the matter in question wholly falling within the arbitration clauses, my Lady.

LADY JUSTICE CARR: That is at paragraph?

MR PILLOW: 13 at page 512 of the bundle. If, of course, your Ladyship is not attracted by what you call a pleading point --

LADY JUSTICE CARR: I don't mean to be rude, Mr Pillow, I'm just trying to identify what it is. It has taken by me surprise is all I say.

MR PILLOW: I have made the point, but what you may not be surprised to know one thing this is geared at is the issue of costs, whether Mr Matthews comes away with what he wanted. I won't go any further because your Ladyship and your Lordships will have to decide whether you are going to redecide the question the judge decided because you are satisfied he made an error of principle and that this is something that entitles you to re-open the question. Our submissions on that you have in writing and we say very clearly he did not err in principle, he made a finding --

LADY JUSTICE CARR: Of course. You say he's completely right for all the reasons he gave, with the exception of the IFA, on which you take no point. But you go on to say that we should read into paragraph 13 effectively

you flagging up that there is no -- I mean, you have made submissions throughout the course of your very helpful submissions, Mr Pillow, to the effect if that's the view we take, we should adopt a pro tanto approach. But you now say, by the way, we can't do that because it's not put in the grounds of appeal.

MR PILLOW: I say that that would be giving Mr Matthews more than he is entitled to on the appeal, my Lady. It's obvious. If you do exercise the judge's discretion afresh or appreciation afresh and you come to the view that the right approach is a pro tanto approach, that is the approach you must decide is right, and we'll argue about whether Mr Matthews has won or lost the appeal later.

LORD JUSTICE HENDERSON: Yes. I think really these matters go to costs ultimately. That's not to say they're unimportant, but they are not ones we should treat as dispositive at this stage.

MR PILLOW: My Lord, that's right and I don't want to dissuade the court from a minor pro tanto stay if the alternative is a stay of everything.

LORD JUSTICE HENDERSON: Yes.

MR PILLOW: I don't beat about the bush here, of course. What I'm saying is the way Mr Matthews frames the appeal chimes with Tomolugen in 111 where it's said that if you

frame it that wide, you're going to have a weaker case than if you frame it more narrowly. You'll see that the answer is at 113 of Tomolugen as to what the degree of granularity of the matter is and why it matters and I'm afraid you are left with the not too big/not too small approach. But the consolation is that this is only an aid to identifying candidates for the stay. It doesn't actually tell you whether they should be stayed.

LORD JUSTICE HENDERSON: One of the oddities of all this is we have a scheme under which reference to arbitration is compulsory and there's no room for any discretion about it, but there is considerable leeway in actually how one identifies and applies the relevant tests.

MR PILLOW: Yes.

LORD JUSTICE HENDERSON: (Inaudible: distorted) debate makes very clear and the really very loose nature of the guidelines. It may be one can't do any better than that, but it's a curious mixture of a relatively relaxed approach at the stage of identifying (overspeaking) and the degree of connection combined with an absolute imperative with no discretion at all as to whether you have to refer to the arbitration.

MR PILLOW: But I do say that one way in which it's not such a major problem for everybody is it is for the appellant, for the party seeking the stay to identify

what it says is the matter --

LORD JUSTICE HENDERSON: Yes, I see that.

MR PILLOW: -- and persuade the court that it is entirely within the mandatory arbitration agreement. It's not the court's job to do that for them, that's not my job. It is my job to say that he has got it wrong and at best the answer might be this, that or the other.

Your Lordship is right -- again, in a sense, it feeds back to my point that you mustn't lose sight in my submission of Mr Matthews' burden of proving on the balance of probabilities that nothing that he wants stayed is outside the mandatory scope of the arbitration agreements.

LORD JUSTICE SINGH: Mr Pillow, I can understand that point if we were a court of first instance, but we're not, we're the Appellate Court, and don't we need to bear in mind at all times that the question for us is not for example whether the burden of proof in our opinion has been discharged but whether the judge was entitled to reach the conclusions which he did or whether he was wrong?

MR PILLOW: Yes. You're right, my Lord. This appeal at times has sounded like a re-hearing in many ways, but you're right and I do invite you to impose that rigour on it. One of the reasons is that when we look at Swiss

law, which I'll do in the few minutes available to me, this is a question that isn't just, oh well, it's very much like English law so you can do as good a job as the judge did. I'll come on to deal with that in a moment.

I'm now looking at points that go to, if you like, ground 1 of the appeal, which is a curious way to end an appeal, I know, but we've all focused very much on the substance of the claims and what exactly is in the claims and what is arbitrable. But in terms of ground 1 of the appeal, which they have to get through to get to ground 2, namely the judge went wrong, can I just mention something that was very telling yesterday in answer to my Lord, Lord Justice Singh's question.

Mr Matthews says that his case now is that any connection to the supply contracts is good enough for him as a matter of Swiss law. You may think that is an argument of first instance, but it's certainly seeking to rewrite history. He said that at Day 1, page 37, line 20 of this hearing.

His own expert below accepted that it wasn't any connection, it was a "sufficient connection". That was at the May hearing, Day 1, page 29, line 11 to page 30, line 7, bundle S2, tab 27, page 401.

The expert, and this is the important point, agreed when I asked him that sufficient means that the parties

intended it to be within the clause. That is the link to the Swiss law evidence that has completely been missed by Mr Matthews in the entirety of his exposition because he's so keen to get rid of any qualification to the word "connection" that he hasn't actually explained to your Lordships and your Ladyship what sufficiency means as a matter of Swiss law.

The reason it's important is because -- this goes to the question of whether you're in as good a place as the judge to actually revisit the question and you're not because the sufficiency of the connection came from the principle of Swiss law that you interpret contracts as the parties to them objectively and acting in good faith must be taken to have intended them to mean. So the question that the judge had to answer in relation to sufficiency wasn't just some nebulous, "Was it sufficient or is it factually connected?"

The question he was asking himself, on which 2 days of oral evidence was heard virtually was: was the connection such that parties in the position of these parties, including the nation state, acting in good faith and objectively as a matter of Swiss law, must have intended that to be resolved behind closed doors in arbitration only or not? You can't skirt around that. There were 2 days and masses of reports on that. That's

why the judge, when he approached the question of sufficiency, was doing something that you are not able to do in this court, which is to take on board the evidence he had orally and the reports, feeding into the question of what Swiss law means when it says "good faith", "intention" and "objectively" in the context, and then applying that fact of foreign law to the further facts that are relevant in all of the causes of action that we've been discussing.

It's very tempting to say because the judge says it's all a bit like Fiona Trust to say therefore this court is in as good a position as any. It's glib and meaningless to say it's a bit like Fiona Trust unless it's identical to Fiona Trust and the reason it's not identical to Fiona Trust is that there's a Grundnorm, if you like, in civil law, Swiss law, of good faith, which is the whole origin of the objective interpretation of contracts in their systems which we simply don't have.

The judge was aware of it because we went over hill and down dale on it and he brought that to bear when he analysed sufficiency as a matter of Swiss law, so we do say we are clearly in the Dallah case line, the Lord Justice Moore-Bick case that we have in the bundle of authorities at tab 6, paragraphs 28 and 29.

The error in Mr Matthews' invitation to say,

"Because it's a bit like English law or might look a bit like English law, you can just bring your English law experience to bear", it begs the very question in issue, which is how much like English law it is and whether in fact you're able to do that. We say the devil is obviously in the detail, the judge was steeped in it after 3 or 4 days, I can't remember how long it was, but the hearing took at least 3 days, and what this court can do is only island hop and Mr Matthews in opening hasn't even mentioned Swiss law at all. We say that's why you can't safely trespass over his appreciation of Swiss law facts to the facts of the case.

Finally, if I could just mention one of the important reasons why the multiplicity of arbitration agreements obviously does point to the narrowness of each individual arbitration agreement, the judge was absolutely right in our submission. I am not going to go through everything we say at paragraph 42 onwards of our skeleton, but it's a matter of logic at the end of the day. The judge's view that you approach the arbitration clauses more narrowly when there are several of them and they are separate, the parties are different and the institutions are different, is obviously right because once you start from -- once you include in the analysis the one-stop shop approach, the higher the

number of arbitration agreements that are in different terms -- and the expert on Privinvest's side agreed that these were incompatible arbitration agreements as between the ICC and SCAI arbitration -- but the more separate arbitration agreements you have to which only certain parties are parties and the more incompatible they are in principle as a matter of Swiss law, then the more -- all other things being equal -- likely it is that the one-stop shop approach will not provide you with the answer that Mr Matthews wants as to whether any particular issue falls within an individual arbitration clause.

It's just a matter of obvious logic, let alone Swiss law. You see the judge saying that as paragraph 78, 81.3. All he's saying in those paragraphs is it's a relevant consideration in the context.

LORD JUSTICE SINGH: Mr Pillow, can I just ask you about this. I understand your submission insofar as it is that where you have multiple agreements and multiple arbitration clauses, that tends to suggest that the parties to one of them didn't necessarily intend something which is concerned with another agreement falls within the arbitration clause in their specific agreement. I understand that, but I think Mr Matthews was making a broader point, which was that the fact that

the party have agreed that it must be arbitration rather than courts is the significant point. Even if there might be no one-stop shop here because there might have to be, for example, three arbitrations, nevertheless what we can be clear about, Mr Matthews says, is that what all the parties have agreed is this shall be subject to arbitration and not the ordinary courts.

MR PILLOW: Right. I do think that's partly what he does say, but the answer to it is that, firstly, he relies in achieving the breadth of the clauses he wants to capture all of the claims he refers to on the one-stop principle as a matter of Swiss law. The outcome he achieves by doing that is the opposite of a one-stop shop and so that is a logical fallacy in his approach.

Secondly, and perhaps more fundamentally, it's not good enough to say, oh, we all want arbitration. It doesn't answer the question of whether the dispute in question falls entirely and exclusively within one or more of the arbitration clauses.

LADY JUSTICE CARR: This is a question of whether or not it was a legitimate -- in ground 1, looking at narrowness, and in the context of the criticism of the judge that he relied on these matters as pointing towards a narrow construction, so on that point what's your answer?

MR PILLOW: The answer is he was obviously right to say in

context that the more arbitrations you agree separately with incompatible or potentially incompatible clauses, the less you can rely on the one-stop shop principle to give rise to an assumption that the clause in question is broad, and that's obviously right. How broad or narrow it is is a matter of construction on Swiss law principles, but there's nothing objectionable saying it's a relevant factor and it tends to narrow rather than expand the clause. Because otherwise what we say is that you can't -- put yourselves in the position of the Republic of Mozambique and each individual Privinvest defendant assuming against me that they were both parties to the supply contracts. The Swiss law question for the judge, having seen that they'd agreed three separate contracts with three separate arbitration clauses, two of which were incompatible, is: did the parties in good faith, and one of them is a nation state, objectively intend that a claim that wasn't referable to those contracts in the sense of a validity challenge but in fact related to another contract, the guarantees, involving a conspiracy amongst not just the Privinvest defendants themselves but many others outside it -- did the parties intend in good faith as a matter of Swiss law that that sort of claim would be broken up not just as between court and arbitration but as between

court and at least three separate arbitrations so that you're going to end up with bribery claims, international national bribery claims relating to a guarantee to which Privinvest is not party being decided with the bribers in one place, the court action, or three places, each of the three arbitrations, the bribees in court, Credit Suisse who are alleged to be jointly liable for the bribes and therefore bribers in court, some of the Credit Suisse deal team defendants in court, in a situation where the findings of an arbitrator in the D6 arbitration will only bind D6, the arbitrators in D7, only D7 and so forth, so you end up with you like, on both sides of the coin, this multinational corruption claim in relation to the guarantees decided amongst multiple locations in multiple fora.

In our respectful submission, not only is that not a question this court isn't entitled to ask, because the judge was and he answered it properly.

Can I finally, respectfully, request the court, ask the court to look at one of -- for example, and we make points about the text of the contracts, not because we are making that point that Mr Matthews thinks we're making about in connection with a contract or under a contract. We're not making those sorts of Fiona Trust

points that have gone by the by. We ask you to look at what the contracts specifically say and it's quite clear when you look at them -- and you'll see this in our skeleton -- that the Proindicus and EMATUM contracts talk about disputes in connection with the projects. That's, we say, indicative of the intention of the parties to confine those clauses to project-related issues, not guarantees that have nothing to do with Privinvest.

But there's an important clause, for example, in the MAM contract. It's at bundle C -- and this is my very last point -- tab 9, page 264. It's clause K of the MAM supply contract.

LADY JUSTICE CARR: This is the separate contract point, independent contract, not related to anything else?

MR PILLOW: Yes. My Lady has the point. But it's an important point because what Swiss law, as the judge knew, but you haven't had explained to you, what Swiss law certainly does not say is that you ignore the words of the contract. So one has to look at the MAM contract to see that the parties have agreed that that contract is not connected with any other contract which the contractor, that's Privinvest, or any party connected to the contractor, has entered into with anyone affiliated to or connected with the customer.

So D8 was the signatory to the MAM contract that we were looking at. If there is a claim against D8, as there is, in relation to bribery that we allege to have tainted the guarantees in relation to all of the transactions, including importantly Proindicus but also EMATUM, then how can that claim possibly be within the MAM supply contract arbitration agreement when the parties have explicitly agreed that that contract is not connected with either of the other supply contracts let alone not connected to -- well, that's all I need to say.

The question the judge asked himself in light of that clause, amongst others, was whether the parties' objective intention acting in good faith would have been for a contract containing that clause and an arbitration agreement only with D8 would cover a dispute in relation to Proindicus and EMATUM amongst other things. The answer, in my respectful submission, is obviously -- there's only one answer and that is no.

LADY JUSTICE CARR: Where did he do that? You say he implicitly did it.

MR PILLOW: Yes, my Lady. This was a point we made to him, it was a point that the Swiss law goes to because we cross-examined the Swiss lawyers on the limits of the objective interpretation question and what feeds into

it. It was, I'm not going to say common ground, but I don't think there was any dispute that you don't use the interpretation of a Swiss contract to override the express words in the contract. The express words were the starting point.

The judge had all this in mind when he said, yes, actually of course these bribery claims aren't sufficiently connected to each individual supply contract, in my submission. He had to do so because this clause in itself makes Mr Matthews' case impossible on at least various of the permutations.

I know that I have taken a little longer than I promised Mr Matthews, and I apologise to him for that, but I hope that I have tried to answer your Ladyship's and Lordship's questions.

LORD JUSTICE HENDERSON: We fired quite a lot of questions at you, Mr Pillow. I'm sure I speak for all of us in saying we're very grateful for your submissions.

MR PILLOW: I do stress that I haven't had the time to recapitulate all of the things in writing and I know that it's easy to say I rely on them all and it gives you the burden of looking at it, but I am afraid in this occasion I have to and I do invite you to focus on them.

I'm grateful to my Lords --

LORD JUSTICE HENDERSON: Thank you very much indeed.

Mr Matthews, if you need more than the half hour until 1 o'clock, we could give you until 1.10, to give you the 40 minutes you were assuming you were going to have if you need them.

Reply by MR MATTHEWS

MR MATTHEWS: I'm very grateful, my Lord. I will try to press on as quickly as I can and hopefully not canter too fast.

I need to pick up a number of housekeeping or homework points that I have been set in the course of doing so and I shall pick those points up as I go through.

The first one was a point your Lordship set me, which is whether there was any formal document recording the agreement as to the assumption. There doesn't appear to be any such form document so that what I shall indicate to your Lordship is this. First of all, of course, as Mr Pillow accepted yesterday in response to questioning from my Lady, Lady Justice Carr, which is recorded in the transcript yesterday at page 159, line 21:

"Nobody was suggesting that the respondent was party only to the arbitration agreements and not also the supply agreements."

That may perhaps be sufficient for the court's

purposes, but in case not, I'll add briefly this. The concession has to be right as the only route suggested by which the respondent was bound by the arbitration agreements was through the supply agreements rather than somehow independently of those supply agreements.

The remaining arguments are termed the beneficiary issue and the interference issue and they are defined in the judgment at paragraphs 22.1 and 22.2, and they are that the respondent was the beneficiary of those contracts or that they performed and became parties to the contracts in both cases, clearly referable to the supply contracts, not just to the arbitration agreements within them.

At the respondent's skeleton below at paragraph 23.1 in the supplementary bundle 1, tab 14, page 248, it is stated that:

"One of the facts assumed in favour of the appellants is that the respondent became bound to the various supply contracts, not just the arbitration clauses or agreements within them, on [the various dates identified there]."

Also in oral submissions below, Mr Pillow made two submissions which are to the same effect. On Day 2 in supplementary bundle 2, tab 27, page (inaudible: distorted) Mr Pillow said:

"We are assuming..."

Did I temporarily disappear? Did you get the reference, which is page 148, lines 4 to 9 internally of that transcript, where he said:

"We are assuming for the purpose of the scope argument that the Republic is, on Privinvest's case, party to the supply agreements."

And then at page 171 internally, lines 19 to 24, supplementary bundle 2, tab 27, page 496, he said this:

"I go back to the point I made at the beginning, my Lord, which is that we are operating, although we are operating for section 9 purposes under the assumption that the Republic was party to the supply agreements. My pleaded case is we were not party and never bound to the supply agreements."

So hopefully, that is a sufficient answer. We accept of course the main focus has been on the implications arising from the assumption that the respondent is party to the arbitration agreements but the precondition to that is being party to the supply agreements and hopefully -- I'm sorry there isn't a formal record, and I know it would be helpful if there were, but I'm afraid I can't assist further on that.

The second point. We were asked by my Lord, Lord Justice Singh, whether the point as to the judge's

dealing with the Republic being party to the supply agreement was specifically raised in the grounds, namely that the judge had proceeded, for example at paragraph 94 of the judgment, on the wrong assumption that the respondent not only chose not to bring the claims under the supply contracts but could not in fact do so.

The short answer is no, but as I indicated to my Lord at the time, this is not, we would say, of itself a ground but simply an argument we raise in support of the grounds, which are only supposed to state as concisely as possible the respects in which the judgment of the court below was wrong.

We raise it to disentangle the point made in the respondent's skeleton argument on their internal page 2, footnote 1, in which they rely on the judge's comments at paragraphs 45 to 46 of the judgment that the claims are made on the basis that the Republic is not a party to the supply contracts. We simply point out, so they may be, but if we succeed in the stay it will be on the basis that the respondent is party to the supply contracts and thus the arbitration agreements within them, and thus that foundation for their claims that they are not a party and the judge's apparent reliance on that foundation, for example at paragraph 94, will

fall away. That's all I was proposing to say on that matter.

Then I was going to pick up my main, third point of housekeeping from my Lady, Lady Justice Carr, in the context of dealing with sufficient connection. We say in relation to that, as we have indicated already, we would suggest the court might wish to be careful about introducing a new brand of complexity, where none is warranted by any authority that you have been shown, of reintroducing a big pitfall under the guise of objective intention.

In that context, I will come to deal, if I may, with section B3 of the respondent's skeleton argument because although it is headed "Section 9 of the Arbitration Act 1996", it deals at paragraph 18 with the second part of that, which is the process of assessing matters to be referred to arbitration. So I will say first of all that in relation to section B3, we do agree with paragraphs 16 and 17. Paragraphs 18 to 20 have to be viewed a bit more cautiously. Paragraph 19 and footnote 19 are all right so far as they go and they are, we would say, quite informative because the scenarios that they envisage are a far cry from the facts of our case.

So footnote 19, which my learned friend also came

back to orally, we would accept that disputes about the parties' habitual residence in a court claim having nothing to do with their contract, containing an arbitration agreement, would not be something that would be referred to arbitration for the simple reason that that issue is not connected to the arbitrable issues and do not raise an arbitrable issue. That is so, it's said, even if the exact same disputes could fall for determination in arbitration under a different matter if a different matter were being raised. We see that and we accept that.

Likewise, paragraph 19 recognises that you can have tort claims, which may raise matters that if the arbitration agreement extended to the tort claims would come within the arbitration agreement, but if the arbitration agreement carves out the tort claims then insofar as it's a tort claim, it falls to be dealt with by the court and not by the arbitration agreement. Of course we accept that. But of course we say that's very different from the facts of our case, for reasons we'll come on to. That is identifying the right sort of level of differentiation, not the much more granular differentiation which is being sought to be made in this case, which we'll come back to in a moment.

Paragraph 20 is of course true, but it simply begs

the question and I fear doesn't assist the court much in determining the issues before it.

It's paragraph 18 which is more problematic. That is essentially because none of the cases cited bear any relation to the issues which arise in our case. The Panama Canal case -- and they're listed at the top of internal page 7, bundle page 313 -- where it is said, "This was the case in each of", and then five cases are listed. The Panama Canal, the first one, which is your authorities bundle 13 for your note, that was all about what was the matter in question in the action, and accordingly whether it properly fell to be brought under one contract which was subject to an English Court jurisdiction or another contract, which was subject to Miami arbitration. It was not about the objective intention of the parties as to the scope of the arbitration agreement. The court decided that the matter in question was a claim under the English Court jurisdiction agreement. It doesn't help you in trying to identify the scope of the arbitration agreement, it goes to what is a matter.

Secondly, the PT Thiess Contractors Authority (No.8) case was another one where the parties had two agreements with different dispute resolution clauses. The question was to which one did the matters in the

action relate. Again, it was not concerned with the objective intention of the parties but with defining the matter in question in the claim, though of course there has been some overlap in the analysis in this case.

The other three cases are not actually decided on section 9 at all; they are concerned with the court's supervisory jurisdiction under sections 67 and 68 of the Arbitration Act 1996, and as Mr Justice Knowles in the third of those, Minister of Finance v IPC, which you have in your bundle at 16, said:

"Section 9 is only engaged if the dispute must be referred to arbitration. It is inapplicable when there is a choice of jurisdictions."

So none of those three authorities assist the court because they are cases where there was a choice of jurisdictions and therefore it wasn't a situation in which the fact that it could be referred to arbitration under an arbitration agreement triggered the mandatory section 9 because section 9 will only arise if the relevant dispute must be referred to arbitration under the wording of the arbitration agreement.

So as we say, we respectfully suggest that paragraph 18 is not a very helpful analysis for the court on our facts.

Turning back to the sufficiency point and taking the

bribery claim as an example, we'll come back to it in a little more detail, time permitting, but the same principle applies to the other claims. When the parties agreed that all disputes in connection with the project would go to Swiss arbitration, giving those words their natural meaning, which is where one is supposed to start, would they have thought that a dispute as to whether a bribe had been given to procure or even facilitate or influence the entry into the project and related financing contracts is a matter in connection with the project? In particular, where the commercial or otherwise terms of the supply contract lay at the heart of the allegation that the payments in question were bribes.

In our submission, clearly the parties would on any objective analysis. It is of course commonplace, as the court will know, for bribery claims to fall within arbitration clauses. My learned friend effectively seems to be saying that it's unlikely that a party would expect a bribery claim to be dealt with in arbitration, but they routinely are, so that is a rather odd submission for them to be making.

There is no differentiation of the alleged bribes as between causing the supply contracts and causing the guarantees, and that's not surprising because,

of course, they were all part of the same transaction and the guarantees simply flow from the supply contracts, the supply contracts, of course, being supplies to the respondent.

I would suggest that it is an unhelpful exercise, fraught with complexity for future cases, if nevertheless one starts to investigate other matters such as whether other parties might be involved in the claim, whether that might increase or decrease the prospect of the arbitration clause being engaged, regardless of whether relief is being sought in relation to the contracts or whether the claimant is choosing not to claim relief in connection with the contracts as the claimant is choosing not to in this case.

We don't say, of course, there might not still be claims on the very margin, which might raise issues of more detailed analysis, but most cases where the facts and circumstances surrounding the entry into and execution of the contract between parties to the contract ought to be clear enough. What we say here, of course, is that the judge went into error because he was looking for some narrow test to be applied, some extra additional element of sufficiency of connection which caused the problem. My Lady?

LADY JUSTICE CARR: Mr Matthews, you mentioned...

MR MATTHEWS: My Lady was very audible before and then muted.

LADY JUSTICE CARR: You say in connection with a project where the terms may have (inaudible: distorted) bribes; is that the position after the concession?

MR MATTHEWS: Yes, because it is still -- the concession simply says that those parts need to be dealt with by the arbitrators, but that doesn't alter the fact or rather it's impossible to unscramble what the case then is. Is it being suggested that the court is going to have to consider the position from the perspective of the appellants on the premise that there was nothing in relation to the contracts which was anyway objectionable and there was nothing objectionable in the manner of their being procured? Nor is there anything to assist the court in deciding whether or not these payments were bribes by reference to the nature of the contracts.

One has only to state that to recognise the artificiality of the process which the respondent is trying to encourage the court to embark upon as an attempt to rescue its claims from the agreements it has entered into on the premise that we have, namely that they go to arbitration.

There was a curious plea orally that a bona fide

party in the position of the respondent would have wanted allegations of corruption in the context of procuring the contract to be resolved in the English Court and not in a Swiss arbitration. That was, with respect, playing to the gallery and is subject to a range of flaws.

First of all, of course, they agreed Swiss law and arbitration with their suppliers, not English law and court. One would have thought that if the argument held good, it would apply equally, for example, to fraudulent misrepresentations inducing these contracts, but there's no suggestion by my learned friend that it does indeed extend to such claims and he recognises that those would be within the contract.

It is again striking -- again, one turns to what is the concession. The concession is that the IFA and the UMIFA are properly matters within the arbitration clause and it is therefore rather difficult to see this supposed objective intention of the respondent in those circumstances. And of course, the legitimacy of the payments which are called into question directly is related to the supply contracts. They are payments that were made to a whole range of people including the then defence minister, now president, and payments for their benefit, which my clients considered to be entirely

legitimate and not in any way matters that could be impugned as wrongful payments. All of that is tied up with the IFA, all of that is properly, in our submission, conceded as needing to go to the arbitrators, and in our submission it is impossible to unscramble the bribery allegations from that and the attempt to do so is entirely artificial.

Artificiality is an important point here. First of all because, of course, it's recognised that artificiality is not something that can be introduced by a claimant to avoid the consequences of their having agreed to arbitration. It is notable in this case that the respondent has not only taken the two steps identified in our opening to try to manipulate their case out of the arbitration agreements, namely the re-amendment subsequent to the judgment and the concession that the IFA and UMIFA must go to arbitration, but in oral submissions they go further. They again and again seek to recast their case. When faced with a difficult question from the bench, they say, "Suppose our case were this", or, "Suppose our case were that". That is precisely the problem. Those postulated hypotheses are not their pleaded case or even their real case.

LADY JUSTICE CARR: Can I ask a question of both of you?

Everybody agrees it's substance, not form. What is a court to do when all it has is pleadings? We haven't got the substance beyond that before us, if you see what I mean. We have to take a pragmatic approach, do we, to the pleadings?

MR MATTHEWS: Yes. One takes a pragmatic approach to the pleadings to ask oneself: what are the issues that realistically arise on this? What are the true claims being advanced? And yes, one does it by reference to the pleadings, and I will come back to the pleadings if time permits, otherwise by paragraph references, shortly in order to demonstrate that if one does it by reference to what is the true case by reference to the pleadings, one recognises that once the IFA goes to arbitration, the rest falls as well.

But we do say that they are seeking to carve out an artificial segment of what their case really is in order to try to capture an element of it which might not be caught by the arbitration agreement. They fail in our submission, but it's telling that in answer to these questions they do not say, "Our case is this", they say, "Suppose we had pleaded it like this", or, "Suppose we had only claimed against others". In our submission that is not of assistance in the approach to section 9.

If the respondent is, as we say it is, subject to

the arbitration agreements by virtue of the beneficiary or interference principles, there is nothing to prevent it making all its allegations and recovering all its losses against the appellants in accordance with the arbitration agreements in the supply contracts. So that is not a bar to them doing so. They are simply choosing to try to bring them through another means in the English Court for tactical reasons.

But if one looks in detail, time permitting, at the bribery claim, on which the respondent focuses a lot of its attention, it is worth seeing how it is put rather than the various more artificial ways in which the respondent says it could be but it is not in fact put.

I had sought to deal with the nature of the allegation by reference only to how it's characterised in the judgment, but it does perhaps need to be brought out slightly more by reference to the pleading which the judge had before him. In fairness, in trying to extract the components of the case from the pleading before or after re-amendment it is not easy, but if one starts at tab 7, page 83 in the core bundle, not in our submission a bad place for the court to start when it's being asked to decide whether the matter is a matter which has been agreed to be referred to arbitration. This is in the summary of the claim which the respondent says it is

bringing.

The court will see by glancing at an appropriate moment at the equivalent part of the re-amended case at tab 8, page 135, that the summary of the case has been very substantially altered by post-judgment amendment, we say artificially, to suggest that its factual case is somehow other than it is and to try to deflect attention away from the issues that are obviously going to be at the heart of the consideration of respondent's claims, namely the circumstances in which the supply contracts were allegedly procured by the appellants from the respondent and their SPVs.

Paragraph 28.1 is the first of the key parts of the respondent's summary and it is that the three transactions and the three transactions are those identified at paragraph 26.3 and it is the three transactions identified there in paragraph 26 -- the three transactions involve the payment of large bribes to government officials of the Republic, including to Mr Chang. Then paragraph 28.6 --

LADY JUSTICE CARR: Sorry, just to be clear, the three transactions are defined in paragraph 27 and they are the supply contracts and -- ah, I see, yes. Ignore me.

MR MATTHEWS: We'll work backwards. They are the three supply contracts financed by the sovereign guarantee.

You get -- 26 is the Proindicus transaction, and the EMATUM transaction and the MAM transaction are defined. The Proindicus, for example, is that:

"Proindicus purported to enter into a transaction financed using a sovereign guarantee for the purpose of acquiring vessels."

That's the Proindicus transaction. Those three transactions are defined as the three transactions in paragraph 27.

If one goes to 28.1:

"The three transactions [namely the supply contracts financed by the guarantees] involved the payment of large bribes."

This is how they put their case.

Then 28.6:

"The bribes and the three transactions, including in particular the sovereign guarantees, were together the key elements of a fraudulent scheme designed to obtain and to render the Republic liable for [about $2 billion]."

Obviously, we say that it's fanciful the three transactions did not involve the payments of large bribes and the three transactions were not a fraudulent scheme aimed at extracting $2 billion but were formed and aimed at the reasons stated in the preambles to the

three supply contracts. Nevertheless, the matters raised by the respondent in this action are precisely those, whether the true reasons for the supply contracts were the matters identified in the preambles or these were fraudulent transactions giving rise to fraudulent scheme and shams and that the bribes had been paid in order to procure the supply contract together with the financing of it.

In our submission it is perfectly apparent that the whole question of whether the supply contracts were indeed a fraudulent scheme procured by bribes is, as has now been recognised, a proper matter for the arbitrators, and that is the summary of the Republic's case.

The position therefore in our submission is the bribery claim is itself connected to the supply contracts and properly a matter to be ventilated between the parties in the arbitration as agreed and not in court. The bribery allegations are, of course, a key component of the IFA and rightly conceded to be a matter for the arbitrators.

The respondent now invites you to consider whether a claim in bribery could be made out without reference to the supply contracts, but in relation to that I would urge caution. First of all, we say this is part of the

way in which the respondent seeks artificially to focus not on the case that it is actually running but rather on the case that it does not run, which it hopes to show would not engage the arbitration agreements, and secondly the respondent engages with the court as to the theoretical position, of course, under English law. It's not apparent why the appellant should be judged by reference to English law and the matter of course is covered in our defence, which you have.

The proper law we say, of course, is Mozambican law. That's at paragraphs 346 to 352 in bundle C2, tab 14, beginning at page 461. Therefore one has to look at the relevant principles of Mozambican law of bribery, which begin at paragraphs 365 and following of that pleading.

In that context, and we submit rightly, the respondent is focusing on whether in fact the bribes did play a significant part in the creation of the supply contracts because that's something they're going to have to demonstrate under Mozambican law. But the short point is that these pleadings, the case as advanced, ties directly the allegations central to the IFA into the bribery claim and into the other elements of the claim. In those circumstances, we say they are within the arbitration clauses and the parties must be taken to have anticipated that the particular allegations which

are interrelated between the IFA and the bribery and other claims would fall to be determined between the parties to the arbitration agreement in determining whether the supply contracts are or are not to be impugned in this way.

Of course the matter does fall to be decided -- well, I don't think I need to make that point, I can move on from that.

Conspiracy, if I can take it shortly. The short point is the respondent has accepted by its concession that part of its conspiracy claim is indeed subject to the arbitration agreements. That's UMIFA, so the attempt to characterise the issues in respect of the conspiracy claim as a general application do not work. It is again artificial to say that as a matter of objective intention the parties cannot have intended the arbitration agreement to involve claims that embrace their counterparties' involvement in other contracts. That begs the question rather than simply to assert it. The reality though is that what is being said is each supply contract and related financing and guarantee was procured by unlawful acts. That is a matter which can perfectly properly and understandably be contemplated as coming within, as they often do, arbitration agreements.

It is perfectly to be anticipated, indeed, that the

party to supply contract A would say: insofar as you are alleging this supply contract and associated financing was procured by bribery, I do want it addressed in our chosen forum. Of course insofar as there may be wider claims that may be another matter but not what we're -- what we're concerned with on this application is the allegations actually made against the appellants in connection with supply contracts.

So this morning when you were taken to claim paragraph 133 at page 105 of the bundle there was a notable slip of the tongue from Mr Pillow when he read out from paragraph 133 -- sorry, it's the last sentence of paragraph 132 and it comes back again. But it's the last sentence of 132. Instead of reading, as his pleading does:

"A key aim of the conspiracy was to render the Republic liable under the sovereign guarantees."

He actually read to the court:

"The key aim of the conspiracy..."

And that actually is rather an important distinction and that is what they are trying to elide. We say it's artificial in seeking to focus on the guarantee as opposed to the supply contracts. A central feature of this conspiracy claim, 133.1, is the bribery, and that inevitably leads you to the IFA allegation.

One cannot get away from the fact that a foundation of the conspiracy claim is a matter within the arbitration clause, especially as it's now conceded that 133.3, the IFA element, must go to arbitration.

I acknowledge I referred to five heads of claim instead of six and I apologise for that. I took them from the judgment at paragraph 65, which does likewise, and if there's a sixth, I and the judge missed it, but it doesn't in my submission add anything.

Dishonest assistance. There is nothing to add to that. It goes back to dishonesty on the part of the appellants which goes back to the bribery and the IFA.

Did the appellants act dishonestly? A core part of that case is the case on the IFA. Did the officials breach their duties? Again a core part of that is the case on the IFA. Whether the payments were bribes or not depends on the respondent's case on the IFA because all of the points that are being considered there are whether the nature of these payments and the nature of the contracts were such as to demonstrate that the payments to these various parties must have been bribes because the terms of the contracts were not such as any sensible person would have entered into.

What is to be arbitrated is obviously whether the appellants acted dishonestly in procuring the

transactions and the supply contracts were of course the foundation of that.

LADY JUSTICE CARR: Mr Pillow says that you can't have -- you say it's all wound up together, it must be part of the dishonesty, but that's not his case, it's never going to be his case. So what are we to do with that submission? Clearly, the IFA could be a substantial, if not the best point he may have, I don't know, on dishonesty. But he says, "I'm not running it, we've eschewed it, it's deleted".

MR MATTHEWS: We say if the court were to do that, they'd have to work out what the case actually is without it and then we'd be able to look at the various different bits that were still there. But in effect, what he must be accepting therefore is that for the purposes of this action all of the elements of the IFA are resolved in my client's favour. So there is no dishonesty in relation to the entry into the supply contracts, there is nothing odd about the supply contracts, there is nothing about the terms of the supply contracts which would have triggered anybody to think there must be something wrong with these, these must be fraudulent or a sham. In fact, they're entirely genuine contracts. If one starts from that premise, it is impossible to see --

LADY JUSTICE CARR: I just need a nod. That is what

Mr Pillow is going to say, is that right, Mr Pillow?

MR PILLOW: Well, not quite, because what I have made clear, my Lady, is that our case will survive that finding. This only thing I can say is we are not going to make a case that puts in issue the validity or commerciality of the supply contracts between us and the Privinvest defendants. I'm not going to say anything about them, but I'm not going to run a case that puts me in the IFA territory.

LADY JUSTICE CARR: So Mr Pillow is going to run his IFA allegations insofar, as all the other defendants are concerned, in the English courts, but not against you in the English courts. That's his position. So that's the premise we are invited to proceed on. What do you say about that?

MR MATTHEWS: Two things. First of all, it's entirely artificial and, secondly, when the court is considering what matters are or are foreseeably likely to arise, inevitably one has to ask the question: what are we going to say in defence? And the key points we're going to say in defence if we're to properly defend ourselves in this case is all the matters that are subject to the IFA. This was a perfectly proper supply contract. One can see it all set out in the defence because of course we've had to plead our defence without prejudice to the

section 9 point. And of course we go to all the points and I recognise that the pleading of the defence was prior to the abandoning of the -- or the concession on the IFA and the UMIFA. But the fact remains that we are going to want to be saying in defence to all of these allegations, the supply contracts were entirely legitimate, all of the terms of the supply contracts were not such as would have led anybody to think that there was anything odd about them, the payments that were made to the various people were legitimate payments for the reasons that we would have to go into and explain, and all of that is matters which go to the question of whether in fact the supply contracts were legitimate proper contracts or not. And we would submit that those are matters which are quite obviously intended to have been dealt with within the arbitration agreement in each of the contracts.

Knowing receipt. It's not identified what it is alleged that the appellants might have received if not proceeds of supply contracts, so this is again the completely artificial position. They resile orally from anything that might indicate a connection, but one is then left utterly confused as to what is their actual case. It's all very well to say in fraud cases you often don't entirely particularise your case and so on

and so forth, but there is a starting point for a fraud case, which is that it is harder to plead a fraud case because putting pen to paper requires you to be satisfied that you have credible evidence that frauds have been committed, and in order to do that one would have to demonstrate what is actually said to be the case on fraud.

In circumstances where we are only now getting various oral indications of what it might be and as regards knowing receipt we have no idea now what it might be said we might have received and therefore what knowing receipt might have taken place, it's very difficult to see how one can really address this fairly from the appellant's point of view.

The final point that I was going to -- I need to deal very briefly with losses. Well, I think I don't really need -- there was a point taken that we knew what the case is when we pleaded it in our defence but we say a different point. We dealt with losses by reference to the judge's definition of those losses by picking up the four categories of loss he identified which, in our submission, is a perfectly proper approach from judgment paragraph 67. What we say is that the first element, which is sums paid or payable in respect of three transactions, inevitably leads back to the supply

transactions because the guarantees were simply guaranteeing the financing but essentially the supply transactions were the payments for the equipment and that is what this is designed to -- the loss that is sought to be being recouped, as it were, is at least very substantially a loss in relation to the payments for the supply transactions. And the other three heads of loss are likewise all traceable back to the alleged sin of having entered into rogue supply contracts and the related financing of them, which we say are arbitrable, there being no independent complaint about the guarantees if the supply contracts were not corruptly concluded.

LADY JUSTICE CARR: Mr Matthews, I have a quick question. If you were party to the court proceedings, but not the subject of the IFA in court, but the IFA is tried, tested and ruled upon in the Commercial Court, will your clients be bound by those findings as to the validity of the agreements?

MR MATTHEWS: Two things. Strictly not --

LADY JUSTICE CARR: Because it's not being raised against you directly?

MR MATTHEWS: Indeed, my Lady. Obviously, one would then have to go back as a matter of case management, which of course this court -- the first instance court hasn't

actually looked at because the concessions post-date the judge's analysis of the position.

LADY JUSTICE CARR: Even if the IFA comes out, is deleted, and you plead your defence, is it reasonably foreseeable that you will still wish to rely upon the validity and genuineness and commerciality of the supply contracts as part of your defence of honesty --

MR MATTHEWS: Well, we'd have to.

LADY JUSTICE CARR: -- bribes and other matters?

MR MATTHEWS: We would have to, my Lady, yes. In our submission that makes the point that one cannot artificially differentiate and try to strip out in this way, and the only purpose of the stripping out which the respondent is doing is to try to avoid the consequences of the arbitration agreement, which on our case and on the only basis upon which this is all relevant, they agreed to. We simply say that we have dealt fully with the heads of loss that arise. Defence paragraph 348.1 was simply addressing the question of the proper law applicable to heads of loss, and we say that it's Mozambique law because the heads of loss were all suffered in Mozambique. So it is not, with respect, us who are trying to manipulate the position, but it is in fact the appellants.

Related to this is the very odd suggestion that was

made orally yesterday, and seemed to be hinted at again today, that the respondent has not paid anything under the supply contracts because the money was made by Credit Suisse. That's a very odd circumstance. Obviously, the respondent's borrowing was channelled direct by its lender to the supplier because the borrower had procured the payment under the supply contracts in that manner. But the fact remains that payment was made, the payment was made in satisfaction of the customer's obligations under the supply contracts and financed by the loan agreements entered into by the customer and also on the basis that we are concerned with, namely that the respondent is party to those supply contracts, which were in any event for the benefit of the respondent. Those payments were made effectively by the respondent for the benefit of what was supplied under the contract.

So that is what I propose to say about losses. It's said this morning that if the court does not establish an error in principle, it should not set aside the judgment. Of course the concessions mean that the court is having to look at it on a completely different basis from the way in which the judge below approached it. So we do say, because of the analysis on the sufficiency test and so on, that the judge did err in principle, but

in any event because the judge took into account, with respect, completely the wrong matters and approached the IFA, on any view, in completely the wrong way, one does have to look at the matter again, and one can't simply escape it by saying, well, no error of principle approach. The concessions mean that the court has to look at it again and, secondly, whether the court is entitled to adopt a pro tanto approach if satisfied that parts of the causes of action were the relevant matter rather than the whole of the cause of action. As it developed, that sounded liked a matter of costs, therefore perhaps I'd better not take time on it now.

Ultimately, the respondent has chosen to ignore the agreements to arbitrate that it concluded on the premise or assumption on which this matter proceeds. In this respect we say, as in so many others in relation to the supply contracts, it's changed its mind. That route is not open to it and a mandatory stay is appropriate to hold them to their agreements.

I'm sorry to have overtrespassed on your time, my Lords and my Lady, but I'm very grateful.

LORD JUSTICE HENDERSON: Thank you very much, Mr Matthews. I think you kept pretty well to the 40 minutes I gave you and anyway there's been a lot of ground to cover, I know, and I'm afraid it has meant that everybody has

been under a certain amount of time pressure.

May I just check that neither of my Lord or my Lady have any questions for you. Heads are being shaken.

MR PILLOW: My Lord, might I raise just one matter very briefly? It's not an attempt to reply or anything. In light of her Ladyship's question, my juniors did another search to see if Ruhan has been mentioned anywhere else. We found actually earlier this month, there is a case which mentions it. It doesn't appear to move the dial, it's a case called Premier Cruises v DLA Piper. What we will do is we'll look at it in detail. If it's got anything of interest, I'll discuss with Mr Matthews whether you need to be troubled by it.

LADY JUSTICE CARR: Thank you so much. I knew there'd been something. I wouldn't mind seeing it anyway if that isn't too irritating, Mr Pillow.

MR PILLOW: No, not at all, we'll send it straight to you, mt Lady.

LADY JUSTICE CARR: That's very kind of you, thank you.

MR PILLOW: It's just a slight gloss, I think, on the Ruhan wording as to the nature of the substance of the issue that's a matter --

LADY JUSTICE CARR: Who is the judge?

MR PILLOW: That I have not been told. I have not seen the actual case, I've just been told there is one.

LADY JUSTICE CARR: Thank you very much.
LORD JUSTICE HENDERSON: It's a first instance case, presumably?
MR PILLOW: It's Mr David Edwards QC sitting as a deputy judge.
LORD JUSTICE HENDERSON: Thank you very much. I think that brings the argument to a close. You won't be surprised to hear that we will be reserving our judgment.
You have given us a lot to think about. We appreciate this appeal has been expedited and we will do our best to get our judgments to you sooner rather than later, but I'm not going to give any rash promises because we're all under a lot of pressure with other work as well and we simply can't do the impossible.
I would wish to end by thanking both of you, Mr Matthews and Mr Pillow, and your respective teams for the very interesting written and oral arguments that we have much enjoyed listening to over the last day and a half. When we have our judgments ready, we will follow the usual rigmarole, which I'm sure you're all very familiar with, of submitting it to you, inviting corrections but not re-argument, and inviting you to agree, as far as you can, all consequential matters with any matters of disagreement to be the subject of written submissions, which we will deal with on paper unless we

notify you to the contrary.

I think, unless anyone else has any further final points, all that remains for me to do is to thank you all very much and bring this hearing to a formal conclusion.

(1.16 pm)

(The hearing adjourned)

I N D E X