Neutral Citation Number: [2026] EWHC 226 (KB)

Case No: KB-2025-001143

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 February 2026

Before :

Jonathan Moffett KC, sitting as a Deputy High Court Judge

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Between :

BG ATLANTIC INC	**Claimant**
- and -	
HAY HILL INVESTMENTS LTD	**Defendant**

- -
- -

Matthew Hoyle (instructed by **Archer, Evrard and Sigurdson LLP**) for the **Claimant**
Duncan Kynoch (instructed directly) for the **Defendant**

Hearing date: 10 December 2025

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 6 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Jonathan Moffett KC, sitting as a Deputy High Court Judge:

A. INTRODUCTION

1. This is an application by the Claimant for summary judgment and/or to strike out the defence.

2. The claim arises out of a judgment in the Claimant's favour given by the Supreme Court of the State of New York ("the New York Court"). The Claimant brought proceedings against the Defendant in the New York Court ("the New York proceedings") alleging that, in breach of an agreement dated 6 November 2018 ("the loan agreement"), the Defendant had failed to pay back a loan of £600,000 which had been provided to it by the Claimant ("the loan"). By a judgment dated 12 July 2024, the New York Court granted an application for summary judgment made by the Claimant ("the New York decision") and, on 30 January 2025, the New York Court entered judgment for the Claimant in the sum of US$1,184,124.11 ("the New York judgment").

3. The claim is a straightforward claim for the debt which the Claimant says arises out of the New York judgment. The Defendant's defence relies on two of the grounds which may be deployed to defeat a claim in debt which relies on a foreign judgment: fraud and public policy. In short, the Defendant says that the funds which the Claimant provided to the Defendant under the loan agreement were the product of a fraud, and it would be unconscionable to permit the Claimant in effect to enforce a judgment which provides for the recovery of such funds.

4. By its application for summary judgment and/or strike out, the Claimant says that the Defendant has not articulated any defence which has any reasonable grounds of success because, as a matter of law, none of the matters relied on by the Defendant are capable of constituting a defence to the claim.

5. At the hearing of the application, the Claimant was represented by Matthew Hoyle, and the Defendant was represented by Duncan Kynoch. I am grateful to both counsel for their very helpful submissions.

B. THE BACKGROUND

6. In support of its application, the Claimant relied on two witness statements from Ilya Bykov, respectively dated 27 August and 8 December 2025. Mr Bykov states that he is the director and shareholder of the Claimant. Mr Kynoch initially objected to Mr Bykov's second witness statement, on the ground that it had been produced too late in the day, but by the end of the hearing he was content for it to be admitted into evidence.

7. The Defendant relied on a witness statement from Yevgeny Okun and a witness statement from Thomas Shaw. Mr Okun is the director of, principal shareholder in, and largest creditor of the Defendant. Mr Shaw is a property investor and developer who had some involvement in the projects to which the loan related.

8. To a large extent, there was no dispute as to the basic facts, at least for the purposes of the Claimant's application. In particular, the Defendant has admitted that it entered into the loan agreement, that it failed to repay the loan, that the Claimant commenced the New York proceedings, and that the Claimant has obtained the New York decision and the New York judgment in its favour. There is, plainly, a dispute as to the fraud alleged by the Defendant, and in his witness statements Mr Bykov strongly contests the allegations made by the Defendant. However, Mr Hoyle did not seek to persuade me that, at least for the purposes of this application, there was no realistic prospect of the Defendant making out its case on the facts in relation to the alleged fraud. Accordingly, I have approached the Claimant's application on the assumption that the factual allegations in relation to the alleged fraud which are set out in the defence would be made out at trial.

(1) The loan agreement and the New York proceedings

9. The Claimant is a corporation incorporated in the state of Delaware, USA. Its registered office is also in Delaware. The Defendant is a company registered in the United Kingdom, with a registered office in London. The Defendant carries on the business of investing in and developing residential property in the United Kingdom.

10. On 6 November 2018, the parties entered into the loan agreement, pursuant to which the Claimant loaned £600,000 to the Defendant. The Defendant agreed to repay the loan, and interest at a rate of 10% per annum, on 6 November 2020, or at the Defendant's discretion on a date no later than 6 November 2021.

11. Under clause 13 of the loan agreement, any disputes, if not resolved between the parties, were to be subject to the jurisdiction of the courts of the State of New York.

12. The Defendant did not pay the outstanding loan amount and the accrued interest by 6 November 2021, and it has not done so since. On 22 November 2023, the Claimant served on the Defendant a notice of default demanding payment on or before 15 December 2023 in the sum then outstanding of £886,720.27.

13. The Defendant did not pay the sums demanded and, on 30 January 2024, the Claimant began proceedings by issuing a summons in the New York Court, and it issued a notice of motion seeking summary judgment. The summons and the notice of motion were served on the Defendant by hand at its registered office in London.

14. Neither party provided this Court with copies of any of the pleadings or applications in the New York proceedings, and nor did they provide any evidence as to the law or procedure which was applicable in the New York proceedings.

15. Nevertheless, it is common ground that the Defendant appeared at the proceedings in the New York Court, and opposed the notice of motion on two grounds: first, the Defendant argued that the New York Court did not have jurisdiction over the Defendant and, secondly, the Defendant argued that the Claimant was enjoined from commencing proceedings in relation to assets belonging to a Larisa Markus, because she was a bankrupt and, as such, United States Federal law imposed an automatic prohibition on the transfer of any of her assets. As I explain below, the Defendant alleges that Ms

Markus was the source of the funds which the Claimant used to make the loan to the Defendant.

16. On 12 July 2024, the New York decision was given by the Honourable Justice Margaret A Chan ("Justice Chan"). She held that the court had jurisdiction, she rejected the argument based on Federal bankruptcy law, and she granted the Claimant summary judgment in the sum of US$1,128,142.84 plus interest. In relation to the bankruptcy argument, Justice Chan held as follows (citations omitted):

> "In an attempt to avoid judgment against it, defendant invokes the bankruptcy proceedings of Larisa Markus as constituting a sufficient question of fact to deny Plaintiff entitlement to summary judgment under CPLR 3213. Such invocation is unavailing for two reasons. First, entitlement to judgment under CPLR 3213 does not depend on extraneous proceedings or larger transactions; judgment under CPLR 3213 is proper as long as there is an instrument which specifies the defendant's obligations to make certain payments and nothing else…. Second, it is well established that automatic bankruptcy stays under 11 USC §362 only apply to debtors in a bankruptcy action (in this case, Larisa Markus), not unrelated third parties such as defendant here…. It is clear that the defendant is not a party to the Markus bankruptcy, and defendant does not argue that any relationship between defendant and Larisa Markus exists (nor can the court discern any such relationship). Accordingly, defendant has not demonstrated how the Bankruptcy stay cited applies to either party in this suit. As a result defendant's invocation of the Markus bankruptcy has failed to meet its burden of creating a triable issue of fact necessary to avoid summary judgment under CPLR 3213."

17. On 30 January 2025, pursuant to the New York decision, the New York judgment was entered, awarding the Claimant the sum of US$1,128,142.84, interest (at the rate of 9% per annum) of US$55,356.27, and costs of US$625, totalling US$1,184,124.11.

18. On or around 16 July 2024, the Defendant appealed against the New York judgment. On 24 September 2024, the Appellate Division of the Supreme Court of the State of New York denied the Defendant's motion to stay enforcement of the New York judgment pending the appeal. Mr Hoyle told me that, insofar as the Claimant was aware, the Defendant was not pursuing the appeal, but there was no evidence before me to that effect. In any event, Mr Kynoch did not suggest that, even if there were an extant appeal, that would be of any relevance to the issues which I have to decide.

19. It is common ground that there is no convention or treaty which would enable the judgment to be enforced directly in England and Wales. I should interpose here that, although I recognise that, in our jurisdiction, the courts are the courts of both England and Wales, and (insofar as is relevant for present purposes) the law is also the law of both England and Wales, for simplicity I shall refer simply to the English courts and to the law of England.

(2) The alleged fraud

20. The allegations of fraud which are set out in the defence may be summarised as follows.

    (1) Mr Bykov is the controlling and directing mind of the Claimant.

    (2) Mr Bykov is, or at least was, the accountant to Ms Markus.

    (3) Ms Markus has been convicted in Russia of a fraud against the Foreign Economic Industrial Bank ("the FEIB"). The fraud involved the embezzlement of some US$2 billion. Ms Markus is currently serving a 9 year prison sentence in Russia.

    (4) Mr Bykov has control over Ms Markus's assets, which he knows to be the product of her fraud.

    (5) Mr Bykov has knowingly sought to dissipate and conceal the sums which Ms Markus had embezzled from the FEIB, because he intends to put those sums to his own use.

    (6) One of the ways in which Mr Bykov sought to dissipate and conceal Ms Markus's assets was to use Ms Markus's assets to fund the Claimant, so that it could provide the loan to the Defendant.

    (7) The monies which were loaned to the Defendant, and which were the subject of the New York proceedings (and are the subject of this claim), are therefore the proceeds of crime and the fraud perpetrated by Ms Markus on the FEIB, and the product of the fraud allegedly perpetrated by Mr Bykov on Ms Markus, and both the Claimant and Mr Bykov knew this.

21. In order to contextualise some of Mr Kynoch's submissions, it is necessary to elaborate on these allegations by reference to Mr Okun's witness statement. As I see it, the Defendant alleges that there were six main steps in the fraud which is alleged against Mr Bykov and the Claimant.

22. The starting point for the Defendant's allegations is that, insofar as is relevant, all of Ms Markus' assets and funds were the product of her fraud on the FEIB, for which she has been convicted and for which she is serving a sentence of imprisonment in Russia.

23. The second step is an oral agreement which is said to have been concluded between Ms Markus and her debtors in 2016, by which certain debts were assigned to the Claimant, and Ms Markus agreed to pay to the Claimant the full amount of the outstanding debt in the sum of US$5,225,816.34. Mr Okun states that no evidence of such an agreement has ever been produced, and he alleges that no such agreement was ever made. In essence, he says that it was a sham.

24. The third step is a summons and a complaint which were issued in the New York Court on 9 November 2016 ("the 2016 complaint"). By the 2016 complaint, the Claimant sought recovery of the debt of US$5,225,816.34, in reliance on the oral agreement

referred to above. Mr Kynoch argued that, by relying on what he said was a fictitious oral agreement, the Claimant had practised a fraud on the New York Court. In his witness statement, Mr Okun points to the fact that the summons was addressed to Ms Markus by way of her lawyer, Katya Yoffe. Mr Okun says that Ms Yoffe is the daughter of one of Mr Bykov's cousins, that Ms Yoffe had no litigation experience, that it is implausible that Ms Markus would have appointed Ms Yoffe to handle the 2016 complaint on Ms Markus's behalf. He says that the true position is that Ms Yoffe was at all times acting under Mr Bykov's direction.

25. The next step is a settlement agreement dated 5 December 2016, by which Ms Markus settled the 2016 complaint. Under that agreement, Ms Markus agreed to pay to the Claimant the sum of US$4,700,000. Mr Okun points to the fact that the settlement agreement purports to have been signed on Ms Markus's behalf by Ms Yoffe. Mr Okun alleges that the settlement agreement was also a sham, and that it constituted self-dealing on the part of Mr Bykov. The sum of US$4,700,000 was never paid by Ms Markus to the Claimant.

26. The fourth step is that the Claimant brought a claim against Ms Markus in the New York Court for the sum of US$4,700,000. The New York Court gave judgment in the Claimant's favour on 9 January 2017.

27. The fifth step is proceedings in England. On 14 December 2017, the Claimant brought a claim in debt, seeking the sum of US$4,700,000, in reliance on the judgment of the New York Court dated 9 January 2017. On 2 March 2018, Moulder J entered judgment in the sum sought. The steps which were taken to enforce that judgment included a third party debt order made by Master Kay QC on 26 June 2018, pursuant to which HSBC Bank was ordered to pay £3,036,252.58 to the Claimant.

28. The final step is that the sums which were recovered in the proceedings in England were thereafter used by the Claimant to provide the loan to the Defendant.

29. Mr Okun says that no meaningful steps were ever taken to resist the proceedings in the New York Court or in the English courts, something which he attributes to Ms Yoffe's collusion in what is said to be Mr Bykov's scheme.

30. In summary, the Defendant says that the funding for the loan was the product of two sequential frauds: the fraud which Ms Markus committed against the FEIB, and the fraud which Mr Bykov subsequently committed against Ms Markus.

31. Both Mr Okun in his evidence, and Mr Kynoch in his submissions, also referred to what they were inconsistencies in the chronology which supported the allegations of fraud; in particular, they said that the documents show that certain material documents were supposedly signed by Boris Granik, a former managing director of the Claimant, after his death on 20 November 2017.

32. In addition, although Mr Kynoch did not rely on it in his oral submissions, in his witness statement Mr Okun refers to the opinion of United States Bankruptcy Judge Martin Glenn, given on 23 October 2019, whereby he ordered that all of Ms Markus's property in the United States be turned over to the foreign representative of Mr Markus's

bankruptcy estate, Yuri Rozhkov ("the Glenn opinion"). As I shall explain below, the defence makes extensive reference to the Glenn opinion. On 19 November 2019, Mr Rozhkov brought a complaint against Mr Bykov in the United States Bankruptcy Court.

33. In his witness statement, Mr Shaw gives an explanation of the residential development projects to which the loan funds were applied, and he explains that his understanding was that the monies loaned by the Claimant to the Defendant were Ms Markus's funds.

34. It is right to record that, in his witness statements, Mr Bykov strongly denies the allegations which are made against him in the defence and in Mr Okun's witness statement. For present purposes, it is not necessary to set out Mr Bykov's account in any detail, but in the interests of fairness I shall summarise it briefly.

35. Mr Bykov states that Ms Markus is a former client, to whom he provided accountancy advice and advice on bankruptcy proceedings. He states, that subsequent to Ms Markus's arrest in Russia in 2015, he agreed to act as the manager of Ms Markus's assets in Europe and the United States, having satisfied himself that those assets had not been purchased using funds which were alleged to have been embezzled from the FEIB.

36. Mr Bykov states that, because Ms Markus was unable to pay the fees of the professionals advising her, it was agreed that the Claimant would provide the financing for those fees, which would ultimately be repayable by Ms Markus. Ms Bykov states that Ms Markus eventually ran up a debt to the Claimant which was in excess of US$5.2 million, and that the Claimant therefore issued proceedings against Ms Markus. Those proceedings were settled by way of an agreement that Ms Markus would pay US$4,700,000 to the Claimant, but that sum was never paid, and therefore the Claimant obtained judgment against Ms Markus, and thereafter took enforcement action against her assets.

37. That enforcement action comprised Moulder J's judgment against Ms Markus, the third party debt order against HSBC Bank, and a charging order against a property in London. Mr Bykov states that all of these proceedings were dealt with by English solicitors, who would have conducted conventional know-your-client and anti-money laundering checks, and who must have been satisfied by those checks. Mr Bykov states that it was the monies recovered as a result of the enforcement action which funded the loan which the Claimant made to the Defendant. He says that Ms Markus did and does not have any interest in the sums which were loaned to the Defendant, or in any sums which might be recovered as a result of this claim.

(3) Mr Okun's knowledge of the alleged fraud

38. In view of the arguments which were advanced before me, it is necessary to set out the evidence as to what Mr Okun knew about Mr Bykov's alleged fraud, and when.

39. Mr Okun states that he and Mr Bykov had been best friends since childhood, for some 40 years. He sets out his view of Mr Bykov's relationship with Ms Markus, which he describes as "very close and very trusting". Mr Okun states that, at the time when the loan agreement was entered into, his understanding (which he says was informed by

what Mr Bykov had told him) was that the funding for the loan originated entirely with Ms Markus.

40. Mr Okun was aware of Ms Markus's fraud on the FEIB. In paragraph 9 of his witness statement, Mr Okun refers to the fact that, following her arrest in Russia in 2015, Ms Markus "became infamous". Mr Okun does not state that, at the point at which the loan agreement was entered into, he neither knew nor suspected that the funds which were loaned to the Defendant (which he understood to have originated from Ms Markus) were the product of Ms Markus's fraud. On the contrary, Mr Okun states that, on 8 November 2018, when the first tranche of the loan was paid to the Defendant, Mr Bykov told him that it was to Ms Markus's advantage that the funds were being transferred to the United Kingdom, because that would make it more difficult for Mr Rozhkov to recover them.

41. However, Mr Okun states that what he considers to be the true state of affairs became apparent to him only during the course of the New York proceedings, when the Claimant provided disclosure. In particular, he identifies as key documents the 2016 complaint, and the settlement agreement dated 5 December 2016.

42. It is necessary to set out in full what Mr Okun says about his state of knowledge in paragraphs 32 and 63 of his witness statement.

> "32. I discovered Ms. Yoffe's role after the Defence for Hay Hill was filed in the New York. I became very suspicious about the alleged debt owed by Ms Marcus once I had fully considered the disclosed documents in the US proceedings (which took some time to analyse). When I told my solicitors that it was very suspicious that Katya Yoffe was appointed as Ms Marcus's attorney; but by that point the Defence filing had already taken place and the Defendant's lawyers said they were confident that there was no need to raise other matters as the existing Defence had good prospects of success. The points I raise in this statement (of the fraud of Mr Bykov in relation to the Claimant's money lent in this case) was therefore not examined in the US proceedings.
> …
> 63. I did not advance these collusion/beneficial-ownership arguments in New York because US counsel in the USA advised that issues turning on UK assets/funds were better addressed in England, where the monies now are. The US lawyers were also confident of success on the other points. Additionally, much of the material provided here emerged during the US proceedings and I was sent the key files only after the Hay Hill defence was filed on 21 March 2024 in the US court…. I did not examine the documents immediately, firstly because I was assured by the US lawyers that the Defence, as it was, was likely to succeed; and secondly because it was only later towards the end of 2024 (a few months after the Justice Chan decision), when the US defence had failed, that I began to study all of the disclosed documents that I realised there had been in fact a fraud by Mr Bykov as I describe above. In other words, the fraud of Mr Bykov (and the Claimant) in relation to the monies the subject of this claim took some time to uncover and was not immediately obvious to me."

43. Mr Okun has exhibited an e-mail to him from the Defendant's lawyers in the New York proceedings on 22 March 2024. Insofar as is relevant, that e-mail states as follows.

> "…attached are all the Opposition filings made last evening. Excellent work here by Niall making two cogent arguments, either one of which should prevent Bykov's attempt to get a judgment on Hay Hill being in breach of the Note. The first one is a simple argument that the actual language of the jurisdictional provision deems that this case does not belong in a NY court for the purpose of enforcing a default. A clean and technical argument that gives the Court an easy-out in terms of not having to deal with this case. Will it succeed? At least better than 50-50, I would put it somewhere 65-35 that Court should adopt it.
> Second argument simple in the sense that it educates the Court as to the backdrop of the Markus affair and how it appears the monies used to fund the Note are the fruits of a fraudulent tree that the Trustee has been pursuing and that even though there has been a settlement with Bykov in the bankruptcy, this particular Note is not covered by scope of the settlement, but instead, by definition, covered by the Court Order in the bankruptcy which mandates that all attempts to pursue Markus-related monies are 'stayed' (read, prohibited from proceeding anywhere by anyone until such time as bankruptcy proceedings entirely concluded or the Court otherwise lifts the stay). The history and backdrop is complicated but Niall did excellent job incorporating entirely public information distilled from the docket in the bankruptcy case to educate this Judge.
> Bykov's lawyers have until March 28 to submit a reply to our Opposition. They will doubtless ask for more time which we will give them as they have liberally extended our time. It will be interesting as to what they come up with. They may try argue the Note and issues here not covered by bankruptcy proceedings or the 'stay' and claim all those issues resolved, but unless he is pretty brazen – and he may well be – it is hard to see Bykov submitting something swearing the proceeds for the Note never had anything to do with Markus/originated from her monies.
> …"

C. THE STATEMENTS OF CASE

44. The present claim was commenced on 31 March 2025.

45. As I have mentioned, the Claimant's claim is a claim for payment of a debt, comprising the sum awarded by the New York Court, plus interest. Converted into pounds sterling as at the date of issue, the claim is for £980,249.10.

46. The Claimant says that the New York judgment became enforceable immediately in the United States, but that it has been unable to locate any assets in the United States against which it can enforce the judgment, and that the judgment remains unsatisfied in full.

47. In the defence, the Defendant admits the basic facts which I have summarised above, but alleges fraud against the Claimant. Based on those allegations, the Defendant advances the following by way of defence.

> "6. In the premises:
>
> 6.1. the loan monies claimed in this action by the Claimant comprise the proceeds of crime, engaged in by both the Claimant, and Mr Bykov, fraudulently obtaining the proceeds of crime of Ms Markus, which have been transmitted to the Claimant with the assistance of Mr Bykov. Such monies are tainted by the fraud of Ms Markus and/or the knowledge of the directing mind of the Claimant, Mr Bykov, so that such monies comprise the proceeds of a fraud/crime;
> 6.2. fraud by the judgment creditor is a defence to recognition and enforcement of registration of a foreign judgment;
> 6.3. it would be contrary to the public policy of English law to allow the Claimant to enforce a judgment where the monies advanced under the loan agreement are not beneficially owned by the Claimant and such monies are the proceeds of the criminal activities of Ms Markus, and in relation to which both the Claimant and Mr Bykov are accessories and facilitators to such criminal activities;
> 6.4. the Defendant is not estopped from this public policy defence as the issue of the fraud of the Claimant was not raised, or litigated, in the New York action."

48. It is, at the outset, important to recognise the limits of the Defendant's case, as it is set out in the defence. The Defendant does not allege that the loan agreement between it and the Claimant, on which the New York proceedings were based, was in itself fraudulent. Neither does the Defendant allege that the Claimant practised a fraud on the New York Court; the allegation of fraud relates solely to the manner in which the Claimant acquired the funds which were the subject of the loan agreement. In particular, there is no allegation that any of the facts which the Claimant put before the New York Court in support of the New York proceedings were themselves misleading. Similarly, there is no allegation that the law of New York imposed any duty on the Claimant to disclose any particular facts to the New York court, or that the Claimant was in breach of such a duty.

D. THE CLAIMANT'S APPLICATION

49. On 29 August 2025, the Claimant applied for summary judgment and/or for an order striking out the defence. In short, the Claimant says that the Defendant's defence is flawed as a matter of law, in that it does not articulate any valid fraud or public policy defence to the enforcement of a foreign judgment.

50. In the alternative, the Claimant applied to strike out paragraphs 2.3, 3.2 and 4.1 of the defence, on the ground that they made impermissible reference to the judgments of other courts. In the court of his oral submissions, Mr Hoyle refined this application, and pursued it only in relation to paragraphs 3.2 and 4.1 of the defence.

E. THE PARTIES' SUBMISSIONS

51. There is a measure of common ground between the parties, both as the correct approach to the Claimant's application for summary judgment and/or strike out generally, and as to the substantive law which is applicable in this case.

(1) The correct approach to the summary judgment/strike out application

52. Save for the expected differences in emphasis, the parties were agreed as to the correct approach to an application for summary judgment and an application to strike out a defence.

53. Under CPR 24.3, the Court may give summary judgment against a defendant on the whole of a claim, if it considers that the defendant has no real prospect of succeeding on the claim, and there is no other compelling reason why the case should be disposed of at trial. Further, under CPR 3.4(2), the Court may strike out a statement of case if it appears to the court (a) that the statement of case discloses no reasonable grounds for defending the claim, or (b) that the statement of case is an abuse of the Court's process.

54. The test for summary judgment was helpfully summarised by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch), paragraph 15. Adapting that summary to the context of the present case, the correct approach may be summarised as follows.

    (1) The court must consider whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success.

    (2) A "realistic" defence is one that carries some degree of conviction. This means a defence which is more than merely arguable.

    (3) In reaching its conclusion the court must not conduct a "mini-trial".

    (4) This does not mean that the court must take at face value and without analysis everything that a defendant says in its statements before the court. In some cases it may be clear that there is no real substance in the factual assertions made, particularly if contradicted by contemporaneous documents.

    (5) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial.

    (6) Although a case may turn out at trial not to be complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on an application for summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.

(7) On the other hand, it is not uncommon for an application under CPR Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is simple: if the respondent's case is bad in law, it will in truth have no real prospect of successfully defending the claim against it. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction.

55. Mr Hoyle drew my attention to the recent decision of David Railton KC, sitting as a Deputy High Court Judge, in *Tui Airways Ltd v Smartlynx Airlines Malta Ltd* [2025] EWHC 2098 (Comm), paragraph 6, where the Deputy Judge pithily summarised the central question for the Court on an application for summary judgment as being "whether the defendant has a realistic, as opposed to fanciful, prospect of successfully defending the claim".

56. The main difference between an application for summary judgment and an application to strike out is that, on an application to strike out, the pleaded facts should be assumed to be true, and evidence to support claims made in the pleadings is inadmissible (see *King v Stiefel* [2021] EWHC 1045 (Comm), paragraphs 26-27 *per* Cockerill J). However, it seems to me that, in the context of the present case, this is a distinction that does not make a material difference, because the Claimant's application does not rely on an argument that there is no realistic prospect of the Defendant making out its pleaded case on the facts.

57. Mr Hoyle also relied on *King v Stiefel* as authority for the proposition that the fact that a statement of case alleges fraud is not bar to the grant of summary judgment. In paragraph 24, Cockerill J stated as follows:

> "The reality is that while the court will be very cautious about granting summary judgment in fraud cases, it will do so in suitable circumstances, and there are numerous cases of the court doing so. This is particularly the case where there is a point of law; but summary judgment may be granted in a fraud case even on the facts."

58. Read in the context of the remainder of that paragraph and the one which follows it, it seems to me that Cockerill J was primarily addressing cases where it is alleged either that the allegation of fraud is fanciful or that it has not been pleaded expressly. Nevertheless, I accept that the fact that the defence alleges fraud and dishonesty on the part of the Claimant is not in itself a bar to the grant of summary judgment.

(2) The common ground on the substantive law

59. As to the substantive law which is applicable in this case, as I see it there are six main points of common ground.

60. First, it is common ground that, because there is no treaty or convention which governs the enforcement of judgments as between the United Kingdom and the United States, a judgment creditor who has obtained a judgment in the New York Court can bring a claim in England to recover the judgment debt (see *Godard v Gray* (1870-71) LR 6 QB 139, 149-150 *per* Blackburn and Mellor JJ).

61. Secondly, the parties are agreed that, in order to establish that a foreign judgment has given rise to a recoverable debt, the foreign judgment must be: (a) final and conclusive, (b) for a debt or a definite sum of money, and (c) given by a court of competent jurisdiction (see *Dicey, Morris and Collins on the Conflict of Laws* (16th ed, 2025) ("*Dicey and Morris*"), paragraph 14R-024 (Rule 46)).

62. Thirdly, it is common ground that, for this purpose, a judgment of a foreign court is final and conclusive if it is the final decision of the court which gave it; the fact that the judgment is the subject of a pending appeal does not mean that it is not final and conclusive (*Dicey and Morris*, paragraph 14-030).

63. In light of these first three points of common ground, Mr Kynoch accepted that, at least in principle, the Claimant is entitled to bring a claim in this court seeking recovery of the sum awarded in the New York proceedings as a debt.

64. The fourth point on which there is no dispute is that the Defendant could in principle rely on the defences of fraud and/or public policy to defeat the claim for recovery of the debt.

65. Fifthly, although he does not make a formal concession to this effect, Mr Hoyle does not argue that the fact that the Defendant did not seek to raise the allegations of fraud in the New York proceedings is a bar to it relying on the fraud defence in this Court (see *Dicey and Morris*, paragraph 14-136). Mr Hoyle's reservation in this respect was to the effect that none of the authorities on the point concerned a case in which the defendant had made a deliberate choice not to allege fraud in the foreign proceedings, but he did not seek to press the distinction in his submissions to me.

66. Sixthly, however, if the Defendant seeks now to rely on a defence other than fraud which was available to it in the New York proceedings, it cannot rely on it as a defence in this Court. Although Mr Kynoch did not formally concede this point, he did not seek to persuade me of the contrary. In this respect, the position is helpfully summarised in *Dicey and Morris*, which refers to "the rule that the defendant must take all available defences in the foreign court, and that, if it does not do so, it cannot be allowed to plead them afterwards in England" (paragraph 14-121).

(3) The Claimant's submissions

67. For the Claimant, Mr Hoyle submits that, even if the matters alleged in the defence and in the Defendant's evidence were true, they are legally irrelevant, because as a matter of law neither the defence of fraud nor the public policy defence is open to the Defendant.

68. Mr Hoyle's starting point is the proposition that the defences to recovering a debt created by a foreign judgment are tightly drawn because of what has been referred to as "the general policy favouring finality in litigation and conclusiveness of foreign judgment" (see *Gelley v Shepherd* [2013] EWCA Civ 1171, paragraph 50 *per* Sales J).

69. In relation to the fraud defence, Mr Hoyle argued that the scope of the fraud defence is tightly delimited and, in order to benefit from it, the Defendant has to show that the Claimant practised a fraud on the New York Court (by reference to *Syal v Heyward* [1948] 2 KB 443), and that such a fraud had a material effect on the New York judgment (by reference to *Gelley*, paragraph 49 *per* Sales J). Mr Hoyle particularly relied on *Midtown Acquisitions LP v Essar Global Fund Ltd* [2017] EWHC 519 (Comm), [2017] 1 WLR 3083, paragraphs 58 and 65 *per* Teare J, as setting out what he described as a precise articulation of this principle.

70. Mr Hoyle submitted that, even taken at its highest, the Defendant's case was merely one of what he referred to as a "background" fraud, and that an allegation of such a fraud is insufficient to engage the fraud defence. Mr Hoyle drew attention to what Sales J said in *Gelley* about the fact that, in order to engage the fraud defence, it is not sufficient simply to allege that the relevant judgment is "tainted by fraud" in some general sense (see paragraphs 46, 49), but that was in effect what the Defendant was doing in this case. In particular, Mr Hoyle referred to the fact that no issue on which the Defendant's allegation of fraud might have touched was live before Justice Chan.

71. In relation to Mr Kynoch's submission that the Claimant had practised a fraud on the New York Court by not disclosing concealing the alleged underlying fraud (which I summarise below), Mr Hoyle submitted that none of the authorities suggests that a foreign judgment is tainted by fraud merely because a party has failed to disclose a fraud which occurred in the past, and that to accept a proposition to that effect would represent a significant extension of the fraud principle. Mr Hoyle argued that what was being alleged was in effect a sin of omission, and that for the omission to constitute a sin, the Defendant would have to show that there was a duty not to omit, but it had not done so.

72. In relation to the public policy defence, Mr Hoyle argued that it is not enough for the Defendant to argue that the loan agreement was somehow contrary to public policy; it must show that the New York judgment is itself contrary to public policy (by reference to *Lenkor Energy Training DMCC v Puri* [2021] EWCA Civ 770, [2022] 2 CLC 173, paragraph 40 *per* Lewison LJ). He submitted that the Defendant's case focused entirely on the funds to which the loan agreement related, and that it had not even attempted to make out a case that the New York judgment itself was contrary to public policy. In this respect, Mr Hoyle argued that the public policy defence could not be used to circumvent the tight limitations on the fraud defence (by reference to *JSC VTB Bank v*

Skurikhin [2014] EWHC 271 (Comm)), and that if the Defendant could not succeed on the fraud defence, it likewise could not succeed on the public policy defence. Mr Hoyle accepted that the position might be different if the loan agreement itself had been fraudulent, and if in the New York proceedings the Claimant had sought to enforce a fraudulent transaction, but the mere fact that there might (on the Defendant's case) have been fraud somewhere along the way did not mean that the New York judgment is itself contrary to public policy. In this respect Mr Hoyle drew an analogy with the position adopted by the Supreme Court in *Grondona v Stoffel & Co* [2020] UKSC 42, [2021] AC 540. Mr Hoyle also observed that, if the Defendant were to succeed on its public policy defence in circumstances in which it did not allege that it had been the victim of a fraud, the consequence would be to confer on it an undeserved windfall.

73. Also in the context of the public policy defence, Mr Hoyle argued that it was clear from the Defendant's own evidence that it had made a deliberate tactical choice not to raise its allegations of fraud in the New York proceedings, and that as a result it constitutes an abuse of process for the Defendant to seek to raise the fraud allegations in this Court (by reference to *Henderson v Henderson* (1843) 3 Hare 99, 67 ER 313, 319 *per* Sir James Wigram VC). In this respect, Mr Hoyle argued that the evidence reveals that Mr Okun had the key document on which (as I explain below) Mr Kynoch primarily relied during the course of the New York proceedings, before the New York decision was given.

74. Mr Hoyle also argued that Justice Chan had determined the nature of the relationship between Ms Markus and the Defendant, and that her determination that there was no relationship was inconsistent with the Defendant's argument that the funds which the Defendant received pursuant to the loan agreement were the proceeds of a fraud practised by or on Ms Markus. Mr Hoyle argued that Justice Chan's decision on this point gave rise to a *res judicata* or an issue estoppel. He contended that the defence constituted an impermissible collateral attack on the New York judgment in that respect.

(4) The Defendant's submissions

75. For the Defendant, Mr Kynoch focused on the factual allegations made by the Defendant, and he took me through the Defendant's evidence as to the alleged fraud in some detail. Mr Kynoch argued that, not only were the allegations of fraud serious, they were also credible.

76. As to the fraud defence, Mr Kynoch explained that the Defendant's case is that the Claimant had practised two frauds on the New York Court. First, the 2016 complaint was fraudulent, because it was predicated on a fictitious oral agreement and debt. Mr Kynoch submitted that there was a "direct line" from the 2016 complaint to the New York proceedings. Secondly, in relation to the New York proceedings themselves, the claim which the Claimant had advanced in the New York proceedings was fraudulent, in that it related to the return of funds which had originally been dishonestly misappropriated by the Claimant.

77. In light of the fact that Mr Kynoch accepted that there was nothing fraudulent about the loan agreement itself, and the fact that he did not submit that the Claimant had presented

any evidence or submissions to the New York Court which were positively misleading, I pressed Mr Kynoch as to exactly why the fact that the New York proceedings related to funds which were alleged to have been previously fraudulently obtained itself meant that the Claimant had practised a fraud on the New York Court. Mr Kynoch's response was that the Claimant practised a fraud on the New York Court in the New York proceedings because it did not inform the New York Court that the source of the funding for the loan was the product of the two sequential frauds to which I have referred above. Mr Kynoch submitted that the Claimant did not inform Justice Chan that it had, in effect, stolen the funds to which the loan agreement related, and that it should have done so. He argued that, if Justice Chan had been told that the funds had been stolen by the Claimant, it was inconceivable that she would have made the New York decision in the Claimant's favour.

78. I also pressed Mr Kynoch on the question of what relevant defence would have been open to the Defendant in the New York proceedings. In that respect, he was limited to a general appeal to public policy and to posing a rhetorical question: if Justice Chan had been told that the funds to which the loan agreement were the product of a fraud, what would she have done? Mr Kynoch submitted that the answer to that rhetorical question was obvious: Justice Chan would not have granted summary judgment. In this respect, Mr Kynoch pointed to the successful reliance on the fraud defence to defeat an application for summary judgment in *Jet Holdings Inc v Patel* [1990] 1 QB 335. Mr Kynoch argued that, if anything, the Defendant's case was stronger than that which was advanced in *Jet Holdings*.

79. As to the public policy defence, Mr Kynoch argued that it would be contrary to the common law doctrine of illegality to allow the Claimant to enforce the judgment, in which respect he relied on *Patel v Mirza* [2016] UKSC 42, [2017] AC 467. Mr Kynoch also relied on the *ex turpi causa* principle, and in this respect he referred me to *Gray v Thames Trains* [2009] UKHL 33, [2009] 1 AC 1339. Mr Kynoch submitted that, in light of the allegations of fraud, it was plainly arguable that it would be an affront to public policy to permit the Claimant to enforce the loan agreement. He argued that, at the very least, the scope of the public policy defence was uncertain, and the question whether the Defendant's defence fell within its scope was appropriate for determination at trial. Mr Kynoch rejected Mr Hoyle's suggestion that, if the Defendant were eventually to succeed on the public policy defence, that would confer on it an unwarranted windfall; in this respect, Mr Kynoch told me that the Defendant would be content to pay the sum due under the loan agreement to whomsoever could demonstrate beneficial title to it.

80. As I understood Mr Kynoch's response to Mr Hoyle's reliance on *Henderson v Henderson*, he did not argue (as he did in relation to the fraud defence) that the abuse of process point was not open to the Claimant in principle. Rather, Mr Kynoch argued that it was not available to the Claimant on the facts. He submitted that, at the time of the New York proceedings, the Defendant did not know about a key document which revealed the alleged fraud, namely the 2016 complaint. Mr Kynoch explained that it was this document which, for the first time, alerted Mr Okun to the fact that the source of the Claimant's funds could be traced back to a claimed oral agreement between Ms Markus and her debtors, and to the fact that Ms Yoffe had acted for Ms Markus in relation to the 2016 complaint. Mr Kynoch pointed out that this document was provided

to the Defendant's lawyers in the New York proceedings only after the Defendant had filed its defence to those proceedings.

F. DISCUSSION AND DECISION

81. Before I turn to consider each of the defences relied upon by the Defendant, it is necessary to pause and take stock of the substance of the Defendant's case.

82. The substantive case which Mr Kynoch advanced before me had not previously been advanced in writing; it is not articulated in the defence itself, and it was not articulated in Mr Kynoch's skeleton argument for the hearing. In my judgment, it goes materially further than the case which is advanced in the defence. In particular, as I have explained above, the defence does not allege that the Claimant practised a fraud on the New York Court, whereas that came to be the core submission made by Mr Kynoch at the hearing before me. Mr Hoyle was entitled to make the points that the Defendant's case had undergone something of an evolutionary process during the course of oral submissions, that the case which was eventually advanced orally did not reflect the pleaded defence, that the Defendant was subject to a duty expressly and clearly to allege any fraud upon which it relied, and that there had been no application to amend (or, I would add, any intimation from Mr Kynoch that the Defendant might wish to amend the defence) in order expressly to allege fraud on the New York Court.

83. I have considerable sympathy with the points made by Mr Hoyle. Indeed, it seems to me that there has been something of an element of reverse engineering on the part of the Defendant, in order to try to bring its case within the authorities.

84. Be that as it may, I consider that for present purposes I should approach the Defendant's case at its highest, on the basis on which Mr Kynoch advanced it in his oral submissions. If I were to reach the conclusion that, as a matter of substance, the Defendant has a defence which has a realistic prospect of success, and which could be advanced by way of a relatively straightforward amendment to the pleading, I would be loath to grant summary judgment or strike out the defence.

(1) The fraud defence

85. The general position was helpfully summarised by Lord Bridge in *Owens Bank Ltd v Bracco* [1992] 2 AC 443, 484B-C:

> "A foreign judgment given by a court of competent jurisdiction over the defendant is treated by the common law as imposing a legal obligation on the judgment debtor which will be enforced in an action on the judgment by an English court in which the defendant will not be permitted to reopen issues of either fact or law which have been decided against him by the foreign court. But this is subject to the special defence that the foreign judgment was obtained by fraud."

86. As I have mentioned, for present purposes there is no dispute that, at least in principle, the fraud defence is open to the Defendant, notwithstanding the fact that it did not seek

to advance such a defence in the New York proceedings. The dispute before me relates to whether the particular type of fraud alleged by the Defendant falls within the scope of the fraud defence. Accordingly, it is necessary for me to consider the scope of the fraud defence and, in order to do so, to consider a series of Court of Appeal decisions.

87. Of the authorities to which I was referred on this point, *Abouloff v Oppenheimer* (1882) 10 QBD 295 was the first in time. In that case, the claimant had obtained a judgment from the High Court of Tiflis in Russia ("the Russian Court") that the defendants should return certain goods to her and that, in default of the return of the goods, the defendants should pay certain sums to the claimant. The claimant brought a claim in the English courts which sought to recover the relevant sums, which was defended on the ground that the claimant had fraudulently represented to the Russian Court that the relevant goods were not already in her possession. The Queen's Bench Division gave judgment in favour of the defendants, and the claimant appealed to the Court of Appeal, where she argued that the Russian Court had already considered and rejected the defendants' defence, and it was not now open to them to re-open that defence in the English courts.

88. The Court of Appeal rejected the claimant's argument. Lord Coleridge CJ held that the authorities supported proposition that, "where a judgment has been obtained by the fraud of a party to a suit in a foreign country, he cannot prevent the question of fraud from being litigated in the courts of this country, when he seeks to enforce the judgment so obtained" (p 300). Lord Coleridge CJ went on to explain that (p 301):

> "the question for the Courts of this country to consider is whether, when a foreign judgment is sought to be enforced by an action in this country, the foreign court has been misled intentionally by the fraud of the person seeking to enforce it, whether a fraud has been committed upon the foreign court with the intention to procure its judgment."

89. Lord Coleridge CJ rejected the claimant's argument to the effect that the defendant's defence had been or could have been advanced before the Russian Court, therefore that court had been mistaken and not misled, and that because the English court could not inquire into whether a foreign court had been mistaken, and it was not open to the English court to inquire into whether the judgment of the Russian Court had been obtained by fraud (p 302). He held that an argument that a foreign court had been mistaken, and not misled, was fallacious in circumstances in which "a fraud has been successfully perpetrated for the purpose of obtaining the judgment of a Court" (p 303).

90. Baggallay and Brett LJJ agreed with the Lord Chief Justice. Baggallay LJ explained that the fraud defence is available not only "where a fraud has been perpetrated upon the foreign court itself", but also "where a fraud has been perpetrated and the foreign court was not ignorant of the facts on which the assertion of fraud was based" (p 303). Brett LJ held that the fraud defence is available "if the judgment…was procured from the foreign court by the successful fraud of the party who is seeking to enforce it" (p 306).

91. In *Vadala v Lawes* (1890) 25 QBD 310, the claimant had obtained judgment against the defendant from the Royal Tribunal of Commerce of Messina, a judgment which was subsequently confirmed by the Court of Appeal at Palermo ("the Italian Court").

The claimant sought to recover the sum which had been awarded to him by the Italian Court by way of proceedings in England. The defendant alleged that the claimant had obtained the judgment of the Italian Court by fraud, in that the claimant had asserted that what were in fact gambling transactions were genuine commercial dealings, and that the claimant had relied on forged bills of exchange on which the defendant was not liable. At the trial of the claimant's claim, Charles J ruled that the defendant could not rely on the defence of fraud. The Divisional Court subsequently overturned that ruling, and the claimant appealed from the Divisional Court's decision.

92. The only reasoned judgment was given by Lindley LJ, with whom Bowen LJ agreed. Having disposed of a pleading point, Lindley LJ considered whether the fraud defence was open to the defendant at all. In this respect, he considered the potential conflict between the rule that a judgment can be impeached for fraud and the rule that, when a claim is brought on a foreign judgment, the English court cannot go into the merits of the claim which was tried in the foreign court (p 316). Lindley LJ held that the conflict had been resolved by the Court of Appeal in *Abouloff*, which he summarised as deciding that "if the fraud upon the foreign Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can reopen the whole case" (pp 316-317). Accordingly, he upheld the decision of the Divisional Court (pp 319-320).

93. In *Syal v Heyward* [1948] 2 KB 443, the claimant was a moneylender who claimed that he had loaned certain sums to the defendants. The claimant obtained a judgment from the First Civil Judge at Sahranapur ("the Indian Court"). The judgment was registered in England under the Foreign Judgments (Reciprocal Enforcement) Act 1933 ("the 1933 Act"), but the defendants applied to have that registration set aside on the ground that it had been obtained by fraud, because the sum which the claimant had claimed was substantially greater than the sum which they had borrowed from him. The Master declined to order a trial of the defendant's application, a decision which was reversed by Jones J, whereupon the claimant appealed to the Court of Appeal.

94. The *Syal* case is, to my mind, of limited assistance. It was an application under the 1933 Act and, although it was common ground that an application under that Act should be approached in the same way as an equivalent application would have been approached before the Act came into force, it was also common ground between the parties that the defendants had to show that there had been "fraud on the court" (p 447 *per* Cohen LJ for the Court of Appeal). The only issue that the Court had to decide was whether the claimant was correct that the fraud defence could be relied on only where the defendants had discovered the fraud after the date of the foreign judgment (see pp 447-448). On that point, the Court accepted the defendants' argument to the contrary, and dismissed the claimant's appeal (see p 449).

95. The next case in time is the decision of the Court of Appeal in *Jet Holdings*, on which Mr Kynoch particularly relied. In that case, the claimants had brought proceedings in the Superior Court of the State of California ("the California Court") seeking to recover sums which had allegedly been misappropriated by the defendant, a former employee of the claimants. The California Court ordered the defendant to provide a deposition and that he present himself to be medically examined in Los Angeles, but the defendant did not comply, and the California Court entered judgment in default against him. The claimants brought proceedings in the High Court in England to recover the sum

awarded to them by the California Court. The defendant sought to defend the proceedings on the basis of allegations that the claimants had intimidated him and extorted money from him in order to prevent him from defending the proceedings (allegations which had, at least to some extent, been advanced before the California Court), and that therefore default judgment had been obtained by fraud. The claimants applied for summary judgment, which was granted by a Master, a decision which was upheld by the High Court. The defendant appealed to the Court of Appeal.

96. Staughton LJ, with whom Nicholls LJ agreed, gave the only reasoned judgment. The first issue that he addressed was whether, on the assumption that the California Court had considered and rejected the allegations of fraud, the English courts could nevertheless consider those allegations afresh. The claimants sought to distinguish previous authority (*Abouloff* and *Vadala*) on the basis that the relevant cases were concerned with "fraud going directly to the cause of action", not with what was referred to as the type of "procedural" or "collateral" fraud" which was alleged by the defendant. Staughton LJ did not accept that this was a valid ground of distinction (p 345A-C), and held that, notwithstanding the "generally desirable" objective of enforcing foreign judgments (p 344F-G), "a foreign judgment cannot be enforced if it was obtained by fraud, even though the allegation of fraud was investigated and rejected by the foreign court" (pp 344H-345A). Staughton LJ went on to hold that, on the evidence, there was an issue to be tried, and that appeal should be allowed.

97. Pausing there, I note that in the *Owen Bank* case, Lord Bridge recorded that there had been academic criticism of *Abouloff* and *Vadala*, and that there was force in the argument that the fraud defence should be available in relation to a foreign judgment only in the circumstances in which it would be available in relation to a domestic judgment, i.e. where the evidence of fraud on which the defendant relies was not available to the defendant, and could not have been discovered with reasonable diligence, before the foreign judgment was given (although as to the position in relation to domestic judgments, see now *Takhar v Gracefield Developments Ltd* [2019] UKSC 13, [2020] AC 450). Nevertheless, the House of Lords did not find it necessary to rule on that argument, and Lord Bridge emphasised that *Abouloff* and *Vadala* had been followed by the Court of Appeal in *Syal* and *Jet Holdings*, and that they would remain good law unless and until overturned by the apex court (p 487C-F).

98. The last of the Court of Appeal cases to which my attention was drawn was *Gelley*. That case involved a dispute over the ownership and the right to occupy land in Darlington, County Durham. One of the issues which arose for determination by the High Court was whether an order made by a court in the British Virgin Islands ("the BVI Court") restoring a company to the register of companies in the British Virgin Islands should be recognised in England. At first instance, HHJ Walton held that the order of the BVI Court was "tainted by fraud", because the applicant for the order had misled the BVI Court in various respects (see paragraph 31), and therefore the order should not be recognised by the English court (see paragraph 30). On appeal, one of the issues which arose for consideration by the Court of Appeal was whether the fraud which HHJ Walton had identified meant that the English courts should not recognise the order which had been made by the BVI Court.

99. The only reasoned judgment was given by Sales J, with whom Richards and Floyd LJJ agreed. The starting point for Sales J's analysis was the general principle that an order of a foreign court will be recognised by the English courts without investigation of the merits or reasoning underlying the order (paragraph 47), which reflects the general policy interests of finality in litigation and conclusiveness of foreign judgments (paragraph 50). The separate principle, that the English court does not give effect to a foreign judgment which has been obtained by fraud, operates as an exception to the general principle, an exception which is "carefully delimited" and which is "not to be given an expansive application" (paragraph 47). In this respect, Sales J cautioned against the use of imprecise expressions, such as "tainted by fraud", which might suggest that the exception has a wider scope of application than it does (paragraphs 46, 49).

100. Sales J referred to *Jet Holdings* and emphasised that, in order for the fraud exception to operate, the foreign judgment must have been "obtained by fraud". He held that, in this respect, "in order for the exception to recognition to apply it is necessary to establish that the fraud in question has been operative in obtaining the foreign judgment and order in issue, in the sense that without such fraud having been practised the order would not have been made, or there is a real possibility that it would not have been made" (paragraph 49). Sales J explained that there is a principled basis for this approach, in that "[i]f the fraud in question is not operative in the sense I have described, then there is not a sufficient basis for overriding the general policy of finality and conclusiveness of foreign judgments; and the person seeking to rely on the foreign order will not in reality be seeking to take advantage of his own wrongdoing, but will only be seeking to rely on an order which would have been made by the foreign court in any event" (paragraph 50).

101. In the event, Sales J held that, although HHJ Walton had been entitled to find that the applicant had deliberately sought to mislead the BVI Court (paragraph 52), her fraud was not operative in the requisite sense, in that, even had the true picture been presented to the BVI Court, it would still have made the order that it did (paragraph 54).

102. There is an additional authority to which I should refer in this context. In *Midtown Acquisitions*, the parties had entered into an agreement governed by New York law, pursuant to which the defendant accepted liability under a guarantee and signed a confession of judgment. The claimant obtained judgment from the court in New York under a summary procedure, and sought to enforce it in England. In response to an application for summary judgment by the claimant, the defendant relied (amongst other matters) on the fraud defence, on the basis that the court in New York had been misled by an innocent misrepresentation. One of the issues which arose on the claimant's application for summary judgment was whether the fraud defence can be made out by reference to anything less than dishonesty (see paragraph 56). Teare J reviewed the authorities, including *Abouloff*, *Vadala*, *Jet Holdings*, and concluded that "conscious and deliberate dishonesty" is required (paragraph 65). Teare J's conclusion has since been cited with approval: see *Commercial Bank of Dubai PSC v Al Sari* [2025] EWHC 1810, para 135 *per* Calver J.

103. In my judgment, none of the authorities to which I have referred defines the full scope of the fraud exception. Indeed, apart from *Gelley* and *Midtown Acquisitions*, in none of

those cases was the court called upon to decide whether the particular type of fraud which was alleged fell within the scope of the fraud defence. In *Abouloff*, the issue which the Court of Appeal had to decide was whether the fact that the Russian Court was (or could have been) appraised of the defendant's defence prevented the English court from inquiring into whether the judgment of the Russian Court had been obtained by fraud. In *Vadala*, the issue was whether the fraud defence was available in relation to a foreign judgment as a matter of principle. The question in *Syal* was whether the defendants could rely upon the fraud defence in circumstances in which they were (or could have been) aware of it at the time of the proceedings in the foreign court. The only two issues which the Court of Appeal had to decide in *Jet Holdings* were: (a) whether the fact that the defendant had raised the alleged procedural or collateral fraud in the foreign proceedings was a bar to the English court considering the same defence; and (b) whether, on the facts, there was a triable case of procedural or collateral fraud.

104. Insofar as *Gelley* and *Midtown Acquisitions* decided whether a particular type of fraud falls within the scope of the fraud exception, they are relatively limited in their effect. The issue which was decided by *Gelley* was that the fraud must be one which had an operative effect on the foreign judgment (in the sense that there must be a causative link between the fraud and the foreign judgment). The issue decided by *Midtown Acquisitions* was that the fraud must be conscious and deliberate; innocent misrepresentation is not enough. My attention was not drawn to any other authority which defines or illuminates the types of fraud which do and do not fall within the scope of the fraud exception, and I note that the relevant section in *Dicey and Morris* does not seek to define it either (*cf* paragraphs 14-135 – 14-145).

105. Nevertheless, it is clear that, for nearly a century and a half, the courts have proceeded on the basis of a consistent understanding of the types of fraud which fall within the scope of the fraud exception. It is not necessary, and it would be unwise, for me to attempt exhaustively to define the parameters of the fraud defence, but in my judgment it is possible to discern the following four elements of the courts' consistent understanding of the types of fraud which fall within the scope of the fraud defence which are of particular relevance for present purposes. First, the fraud must be a fraud which was practised on the foreign court. Secondly, the fraud may be one which relates to the claim which was advanced in the foreign court (in the sense that a fraudulent claim was advanced before the foreign court), or it may be one which is collateral to the foreign proceedings (in the sense that the claimant dishonestly interfered with the process of the foreign court, such as in the manner alleged in *Jet Holdings*). Thirdly, the fraud must be conscious and deliberate. Fourthly, the fraud must be one which had an operative effect on the foreign court.

106. I accept Mr Hoyle's submission that, for the Defendant's pleaded defence to have any prospect of success, there would have to be a significant expansion of the current understanding of the fraud defence. As I have explained, in its pleaded case the Defendant relies solely on what Mr Hoyle described as a "background" fraud, in that the allegation of fraud relates only to the manner in which the Claimant is said to have obtained the funds which subsequently became the subject of the loan agreement. In this sense, the fraud relied on is perhaps better characterised as an historic fraud. As I have also explained, the Claimant's pleaded case does not allege that the loan agreement was itself fraudulent, that the claim which was advanced in the New York

Proceedings was itself fraudulent, or that the Claimant otherwise practised a fraud on the New York Court (such as by way of a collateral, or procedural, fraud). In my judgment, the pleaded case falls outwith the first and second elements which I have identified above.

107. Accordingly, in order for the Claimant's pleaded case to succeed, the current understanding of the fraud defence would have to be expanded. In my view, the necessary expansion would be significant; in a case such as the present it would require the English court not just to examine the immediate circumstances in which the foreign judgment was obtained, but to go well beyond that and examine the Claimant's historic actions, including its dealings with third parties, and the basis of previous judgments in the New York Court and the English courts. In this context, I agree with Mr Hoyle that Sales J's words of caution in *Gelley* are particularly pertinent. As I have mentioned, in *Gelley*, Sales J emphasised that the fraud defence is "a carefully delimited exception" to the general principle that an English court will give effect to a foreign judgment, an exception which "is not to be given expansive application" (paragraph 47). I consider that the Defendant's pleaded case envisages precisely the type of expansive application of the fraud defence which Sales J warned against.

108. I recognise that, in an appropriate case, it might be open to the courts to develop the fraud defence, but any such development would to take place in an incremental and principled manner. As a result, I consider that, in order for the Defendant's pleaded defence to have a realistic prospect of success, it would need to point to an arguable basis for expanding the fraud defence beyond its current understanding. However, Mr Kynoch did not seek to persuade me that there was such a basis, whether in principle or on the specific facts of this case, or that there was a realistic prospect of such a basis being forthcoming at trial; rather, his submissions were predicated on an elaboration of the Defendant's pleaded case. Accordingly, were I to proceed solely on the basis of the Defendant's pleaded defence, I would hold that it does not have a realistic prospect of success, and it does not put forward a defence which is as a matter of law capable of constituting a good defence to the claim.

109. Nevertheless, as I have explained, I should also consider the Defendant's case as explained by Mr Kynoch in his oral submissions, by which Mr Kynoch sought to bring the Defendant's case within the scope of the understanding of the fraud exception which I have summarised above. Mr Kynoch sought to overcome the lacuna in the Defendant's pleaded case in relation to the first and second elements to which I have referred above by arguing that the Claimant had practised a fraud on the New York Court in two ways, ways which he argued were interrelated: first, by bringing the 2016 complaint; and, secondly, by not disclosing to Justice Chan the fact that the funds which had been loaned to the Defendant under the loan agreement were the product of a fraud.

110. In my judgement, Mr Kynoch's reliance on the 2016 complaint does not advance the Defendant's case in this respect. The 2016 complaint was part of the history relied upon by the Defendant to support its case that the funds which were loaned to the Defendant under the loan agreement were the product of fraud. I do not consider that the happenstance that that history involved a previous claim against a third party in the same court as that which gave the judgment relied on by the Claimant is even arguably sufficient to bring the Defendant's case within the scope of the understanding of the

fraud defence which I have set out above. In my view, it is merely part of the factual chronology on which the Defendant relies to make out its case of background or historic fraud on the part of the Claimant. As such, I consider that the potentially crucial element of Mr Kynoch's oral exposition of the Claimant's case is that the Claimant practised a fraud on the New York Court because it failed to inform Justice Chan that the funds to which the loan agreement related had been obtained by fraud.

111. As a matter of principle, I can see some force in an argument that, if a claimant in foreign proceedings were consciously and deliberately to omit to disclose a particular matter to the foreign court, and that omission had the necessary operative effect on the foreign judgment, that might be sufficient to constitute a fraud which falls within the scope of the fraud defence. However, in order to constitute a fraud, the omission must itself be fraudulent. I consider that, at least insofar as is relevant in the context of the present case, for an omission to be fraudulent, the claimant must be in breach of some form of a duty to disclose the matter which was omitted. In my judgment, it is very difficult to see how it could be characterised as fraudulent for a claimant not to disclose a matter which it was under no obligation to disclose. To my mind, this approach chimes with the fourth of the elements of the understanding of the fraud defence to which I have referred above: if a claimant fails to disclose to a foreign court a matter which it had no obligation to disclose, it is difficult to see how the failure to disclose could have had an operative effect on the foreign court's judgment.

112. Approached in this way, the difficulty with Mr Kynoch's argument is that, putting it at its highest, his submission that the Claimant was somehow required to disclose to Justice Chan the fact that (on the Defendant's case) the funds which were the subject of the loan agreement were the product of fraud was based on no more than an oral assertion. In this respect, I should say that I am not sure that Mr Kynoch even went so far as to assert that the Claimant was under an obligation to disclose the alleged fraud to the New York Court. To my mind, it was telling that, when I pressed Mr Kynoch on the exact nature of the fraud which was said to have been practised on the New York Court, by way of response he repeatedly resorted to rhetorical formulations of the kind to which I have referred above.

113. In any event, Mr Kynoch did not refer me to any authority or evidence which could support an assertion that the Claimant was under an obligation to disclose the alleged fraud to the New York Court, and he did not suggest that any such authority or evidence would be forthcoming at trial. In my view, Mr Kynoch's submission did not amount even to the type of Micawberish argument that "something might turn up" which the courts have previously rejected in the context of applications for summary judgment (see, for example, *King v Stiefel*, paragraphs 21-22 *per* Cockerill J).

114. I recognise that the Claimant bears the burden of showing that the Defendant has no realistic prospect of succeeding on its defence. However, as I have held, the success of the fraud defence would depend (at least) on the Defendant showing that the Claimant was under an obligation to disclose the alleged fraud to the New York Court. In those circumstances, I consider that, in this context, it would not be enough for the Defendant simply to say that the Claimant has failed to provide a negative (although, to be fair to Mr Kynoch, I did not understand him to make such a point). Rather, I consider that I am entitled to look to the Defendant for at least some explanation as to why an argument

to the effect that the Claimant had an obligation to disclose would have a more than fanciful prospect of success at trial (see, by analogy, *Korea National Insurance Corp v Allianz Global Corporate and Speciality AG* [2007] EWCA Civ 1066, [2007] 2 CLC 748, paragraph 14 *per* Moore-Bick LJ). In my judgment, an unsubstantiated assertion in oral submissions (if, indeed, Mr Kynoch went that far) does not come close to providing even the beginning of an explanation.

115. For the avoidance of doubt, I do not accept Mr Kynoch's submission that the facts of this case provide a stronger basis for the application of the fraud defence than the fraud which was alleged in *Jet Holdings*. As I have explained, the allegation in *Jet Holdings* was that the claimants had, by means of intimidation and extortion, prevented the defendant from meaningfully participating in the proceedings before the California court. It is difficult to imagine a more striking example of collateral and procedural fraud and, even apart from the fact that the Defendant does not allege collateral or procedural fraud, the present case does not even come close to the facts of *Jet Holdings*.

116. In consequence, I do not consider that the Defendant's fraud defence has a realistic prospect of success.

117. Finally, in this context, I should note that the editors of *Dicey and Morris* set out, by reference to authority, illustrative examples of the types of cases in which a fraud defence is and is not likely to be open to a defendant (see paragraphs 14-146 – 14-147). I derive some comfort from the fact that none of the examples of cases in which a fraud defence is said to be likely to be available is at all analogous to the present case, as I also do from the fact that Mr Kynoch was not able to refer me to any case in which the English courts had upheld a fraud defence in analogous circumstances.

(2) The public policy defence

118. As Mr Hoyle accepted, there is limited authority on the public policy defence (see *Dicey and Morris*, paragraphs 14-149 – 14-156). Further, because public policy may evolve over time, the scope of the defence may also evolve (see *JSC VTB Bank v Skurikhin* [2014] EWHC 271 (Comm), paragraph 30 *per* Simon J).

119. Nevertheless, I consider that Mr Hoyle was correct in his submission that the public policy defence is concerned with the public policy implications of the enforcement of the relevant foreign judgment, not with the public policy implications of the enforcement of the underlying transaction to which the foreign judgment relates.

120. In *Lenkor Energy Trading DMCC v Puri* [2021] EWCA Civ 770, [2022] 2 CLC 173, a company associated with the claimant ("Lenkor HK") had entered into a contract with a company associated with the defendant ("IPC") to supply gasoil to a third party. IPC agreed to act as the guarantor for the third party's payments, and issued to the claimant two cheques drawn on a bank in Dubai. Lenkor HK performed the contract illegally, with IPC's knowledge, because it sourced the gasoil in Iran. The third party failed to pay the full amount owed under the contract, and the claimant obtained an arbitration award to the effect that, notwithstanding the illegality in the performance of the contract, it was entitled to the balance from IPC. The claimant attempted to cash the cheques which had been provided to it by IPC, but they were not honoured. The

claimant brought proceedings in Dubai against the defendant under a Dubai law which imposed personal liability on the drawer of a dishonoured cheque. The claimant secured judgment in Dubai ("the Dubai judgment"), and brought a claim for the relevant sum in the English court. The claimant sought summary judgment, and the defendant sought to resist the claim on the basis it was contrary to public policy to permit the indirect enforcement of a contract which was tainted by illegality. The Master granted summary judgment, a decision which was upheld by Murray J, and the defendant appealed to the Court of Appeal.

121. Lewison LJ (with whom Arnold and Edis LJJ agreed) dismissed the defendant's appeal, for five main reasons. The first reason was that the exercise in which the English court was engaged was not that of enforcing the underlying contract; it was that of enforcing the Dubai judgment, which was a judgment given by a foreign court of competent jurisdiction (paragraph 40). The remaining four reasons arose out of the specific facts of the case (see paragraph 40). The second reason was that the liability which the Dubai judgment reflected was one which was independent of the underlying contract, in that it arose out of the Dubai law in relation to cheques. Thirdly, even the underlying liability in relation to which the cheques were payable did not arise out of the underlying contract; it was a claim in unjust enrichment or under a separate agency agreement. Fourthly, the quantum awarded by the Dubai judgment was not the same as the underlying contract price, and there was therefore only "a slight degree of connection between the claim sought to be enforced and the relevant illegality". In this respect, Lewison LJ held that the "[t]he degree of connection between the claim and the illegality must also be balanced against the strong public policy in favour of finality, and in favour of enforceability". Fifthly, it would be unjust to allow the defendant to retain the economic benefit of the sums in dispute.

122. I do not understand Lewison LJ to have been suggesting that his first reason was, in itself, a sufficient reason to dismiss the appeal, but I accept that it correctly articulates the principle that the focus should be on whether it would be contrary to public policy to allow a claimant in effect to enforce a foreign judgment, not on whether it would be contrary to public policy to allow a claimant in effect to enforce a contract which underlies the foreign judgment. The editors of *Dicey and Morris* consider this to be the correct approach (see paragraph 14-151). That said, it seems to me that Lewison LJ's judgment indicates that, on the facts of *Lenkor*, when assessing whether it would be contrary to public policy to allow the claimant to enforce the Dubai judgment, the Court of Appeal nevertheless had regard to all the circumstances, including the circumstances in which the illegality that is alleged to underlie the foreign judgment had arisen, and its degree of connection with the Dubai judgment.

123. In support of the Defendant's public policy defence, Mr Kynoch relied on the same matters on which he relied in support of the fraud defence. In effect, his argument was that it would be contrary to public policy to allow the Claimant in effect to enforce the New York judgment, because that judgment was tainted by fraud. As he recognised in his oral submissions, the Defendant's fraud defence and its public policy defence are "two sides of the same coin".

124. However, I consider that, in the circumstances of this case, the fact that I have held that the Defendant's fraud defence has no realistic prospect of success presents a

fundamental obstacle to me reaching a different decision in respect of the public policy defence. As Sales J recognised in *Gelley*, the fraud defence is itself underpinned by considerations of public policy; as such, the fraud defence is in effect a limb of the public policy defence. In circumstances in which there is no realistic prospect of the Defendant making out the fraud defence, I cannot see how, simply by re-packaging exactly the same alleged facts and matters under the rubric of the public policy defence, and without identifying any additional ingredient, there can be a realistic possibility of success on the public policy defence. In particular, Mr Kynoch did not identify any element of public policy in play which is different or additional to that upon which he relied in the context of the fraud defence. As Simon J held in *VTB JSC Bank*, "[i]f the fraud exception fails, it is difficult to see why enforcement could properly be regarded as contrary to public policy, unconscionable, unjust or immoral" (paragraph 86). For this reason alone, I consider that the Defendant does not have a realistic prospect of succeeding on its public policy defence.

125. Even if I were wrong about that, I would reach the same conclusion on an application of the type of broader approach which Lewison LJ appears to have taken in *Lenkor*, for three main reasons.

126. First, I consider that there is only a remote link between the fraud alleged by the Defendant and the New York judgment. The New York judgment enforced the Claimant's rights against the Defendant under the loan agreement, and there is no suggestion that the loan agreement was itself fraudulent. Further, the alleged fraud on which the Defendant relies was not fraud practised on the Defendant itself; it is fraud which is alleged to have been committed against unrelated third parties. In addition, the fraud would have to be traced through previous judgments of the New York Court and the English courts, none of which have (insofar as I am aware) ever previously been called into question. Accordingly, to adapt the words of Lewison LJ in *Lenkor*, there is only a very slight degree of connection between the New York judgment and the Defendant's allegation of fraud.

127. Secondly, insofar as the position in domestic law provides me with a guide as to whether considerations of English public policy weigh against giving effect to the New York judgment, I do not consider that it is obvious that, if the English courts had been seized of proceedings to enforce the loan agreement, they would have declined to do so on public policy grounds.

128. In support of his argument on English public policy, Mr Kynoch relied primarily on *Patel v Mirza* [2016] UKSC 42, [2017] AC 467, and contended that, as a matter of public policy, the loan agreement fell foul of the common law doctrine of illegality. In *Patel*, the claimant paid money to the defendant, pursuant to an agreement that the defendant would use it to place bets on the movement of shares, bets which would be informed by information provided contrary to a criminal prohibition on insider dealing. In the event, the insider information was not forthcoming, and the agreement could not be carried out. The claimant sought repayment of the money. He failed at first instance, but succeeded in the Court of Appeal. The Supreme Court dismissed the defendant's subsequent appeal. Mr Kynoch did not take me to any particular passages in the judgments on which he relied, but was content to rely on the headnote to the Appeal Cases report, which summarises the Court's decision as follows:

> "The two broad policy reasons for the common law doctrine of illegality as a defence to a civil claim are that (i) a person should not be allowed to profit from his own wrongdoing and (ii) the law should be coherent and not self-defeating. The essential rationale of the doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality). The rule that a party to an illegal agreement cannot enforce a claim against the other party to the agreement if he has to rely on his own illegal conduct in order to establish the claim does not satisfy the requirements of coherence and integrity of the legal system and should no longer be followed. Instead the court should assess whether the public interest would be harmed by enforcement of the illegal agreement, which requires it to consider (a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) any other relevant public policy on which the denial of the claim may have an impact and (c) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts."

129. Mr Kynoch argued that, if the Claimant's claim to enforce the loan agreement had been brought in the English courts, the English courts would not have countenanced enforcing it on public policy grounds, because the Claimant had sought to benefit from its own fraudulent conduct. However, this argument was put in no more than very general terms, and Mr Kynoch did not seek to address me on how the approach which was identified by the Supreme Court in *Patel* should be deployed in the present case. Further, Mr Kynoch did not seek to grapple with the fact that in *Patel* the Supreme Court held that the claimant was entitled to rely on the agreement, notwithstanding the fact that the agreement was itself illegal. In that respect, it seems to me that the illegality which arose on the facts of *Patel* was more obviously material than that which is alleged in the present case.

130. For his part, Mr Hoyle relied primarily on the decision of the Supreme Court in *Grondona v Stoffel & Co* [2020] UKSC 42, [2021] AC 540. In that case, the claimant had fraudulently secured a mortgage which she used to purchase a property. However, negligently and in breach of contract, the claimant's conveyancing solicitors failed to register her title and or the charge in favour of the lender. The lender brought proceedings against the claimant to obtain a money judgment, and in turn the claimant sued her solicitors. The solicitors sought to defend the claim on the basis that the claimant had instructed them in order to further a mortgage fraud, and therefore the claim should be dismissed on the basis of the claim of illegality. The solicitors' defence was rejected at first instance and by the Court of Appeal.

131. The Supreme Court dismissed a further appeal by the solicitors. Lord Lloyd-Jones (with whom the other members of the court agreed) recognised that the effect of *Patel* was that the availability of an illegality defence was no longer determined by whether a claimant had to rely on the relevant illegality to make out his or claim. However, Lord Lloyd-Jones held that, when considering the various matters which the Supreme Court had identified in *Patel*, it was nevertheless of significance that the essential facts founding the claim could be established without reference to the illegality, and that the claimant's claim against her solicitors was conceptually entirely separate from her

mortgage fraud (see paragraph 43). Similarly, in the present case, the Claimant's hypothetical claim for enforcement of the loan agreement in the English courts could have been established without reference to the alleged fraud, and the claim against the Defendant would have been conceptually distinct from the alleged fraud.

132. Mr Hoyle also relied on *Costello v Chief Constable of Derbyshire* [2001] EWCA Civ 381, [2001] 1 WLR 1437, in which the police had seized from the claimant a car which they believed to have been stolen. The claimant sought delivery up of the car and damages for its unlawful detention. Lightman J (with whom Robert Walker and Keene LJJ agreed) held that the law recognises an entitlement to possession, "whether or not it has been obtained lawfully or by theft or by other unlawful means" (paragraph 31), and that the court cannot withhold an equitable order for delivery up to a person who is legally entitled to possession, "whether or not he be a thief or a receiver of stolen property" (paragraph 34). Mr Hoyle correctly submitted that *Costello* demonstrates that there is no principle of English law which automatically bars a person from recovering property from a third party merely because the person came into that property by dishonest means.

133. Finally, Mr Kynoch relied on *Gray v Thames Trains Ltd* [2009] UKHL 33, [2009] 1 AC 1339. In that case, the claimant was a passenger on one of the trains which was involved in the Ladbroke Grove rail disaster and, as a result, he suffered post-traumatic stress disorder. While suffering from that disorder, the claimant killed a man, and his plea of guilty to manslaughter on the ground of diminished responsibility was accepted by the Crown. The claimant was detained pursuant to a hospital order. The claimant brought a claim in negligence against the train operator and the company responsible for the railway infrastructure, in which he claimed damages in respect of his loss of liberty and other consequences of the killing. The House of Lords held that, as an aspect of the public policy expressed by the Latin maxim *ex turpi causa non oritor actio* ("from a dishonourable cause an action does not arise"), it is not possible to recover damages to compensate a claimant for an injury or disadvantage which the criminal courts imposed on him or her by way of punishment for a criminal act. I do not consider that the decision in *Gray* assists the Defendant; although the members of the House of Lords discussed issues of public policy, they did so in a context which is very different to that of the present case, and Mr Kynoch did not draw my attention to anything in their Lordships' speeches which could usefully be read across to the present context.

134. Mr Kynoch took me to no other authority which indicated that the English courts would have been unlikely to enforce the loan agreement on public policy grounds. Indeed, in this respect, it seemed to me that Mr Kynoch's argument collapsed back in the argument which he advanced in relation to the fraud defence.

135. Neither party suggested that I needed to decide whether, if the Claimant had sought to enforce the loan agreement in the English courts, the English courts would as a matter of principle have refused to do so on the basis of public policy considerations (and, if I had needed to decide that matter, I would have required more detailed submissions on that issue). In my view, for present purposes it is sufficient for me to conclude that there is (at the very least) real doubt as to whether the allegations of fraud relied on by the Claimant would have resulted in the English courts declining to enforce the loan agreement on public policy grounds.

136. Thirdly, notwithstanding the assurance proffered by the Defendant (for the first time in Mr Kynoch's oral submissions) that the Defendant would willingly relinquish the funds to whomsoever could demonstrate beneficial title to them, it seems to me that the effect of acquiescing to the Defendant's argument would be to allow it to retain funds to which it is not entitled, which would be unjust.

137. Drawing the threads together, I consider that there is only a slight degree of connection between the fraud alleged by the Defendant and the New York judgment; I do not consider that it is at all obvious that the underlying claim, if it had been brought in England, would have been dismissed as contrary to public policy, and I consider that it would be unjust to permit the Defendant to retain the sums which were loaned to it under the loan agreement. On this basis, I do not consider that, even taking the Defendant's case at its highest, there is a realistic prospect of the Defendant being able to show at trial that the public policy in the finality of litigation and the conclusiveness of foreign judgments would be outweighed by any public policy considerations telling against the enforcement of the New York judgment.

138. In consequence, for the reasons set out above, I do not consider that the Defendant's public policy defence has a realistic prospect of success.

(3) The public policy defence: abuse of process

139. My conclusion in relation to the public policy defence means that it is unnecessary for me to reach a decision on the Claimant's abuse of process argument based on *Henderson v Henderson*. Nevertheless, I should briefly explain why, had it been necessary to consider this argument, I would have accepted it.

140. As I have already explained, Mr Kynoch did not argue that, at least in principle, the abuse of process argument was not open to the Claimant in relation to the public policy argument, notwithstanding the fact that the argument relates to the failure of the Defendant to take a point before a foreign court rather than an English court. In this context, Mr Hoyle reminded me that *Henderson v Henderson* itself concerned a failure to take a point in a foreign court, the Supreme Court of Newfoundland, and that it applies to defendants as to claimants (see *Johnson v Gore Wood & Co* [2002] 2 AC 1, 31B-C *per* Lord Bingham; *Barnett-Waddington Trustees (1980) Ltd v Royal Bank of Scotland Plc* [2017] EWHC 834 (Ch), para 78 *per* Mann J).

141. Rather, Mr Kynoch's response to the abuse of process argument was that the key document which evidenced the fraud, the 2016 complaint, was not available to the Defendant at the time of the New York proceedings, and therefore the Defendant could not reasonably have been expected to rely on the alleged fraud in those proceedings. I would not have accepted this response.

142. First, the 2016 complaint was available to Mr Okun, and therefore the Defendant, during the course of the New York proceedings. Although it was disclosed by the Claimant only after the Defendant had filed its defence, it was not suggested that this meant that there was somehow an absolute bar on the Defendant subsequently advancing a defence which relied on the alleged fraud (such as by way of an amendment

to its defence). Secondly, the only reason why Mr Okun had not seen the 2016 complaint was because he did not review the Claimant's disclosure when it was received; he did not contend that he could not, with reasonable diligence, have identified the 2016 complaint. Thirdly, Mr Okun's own evidence is that, even though he had not seen the 2016 complaint, he was in any event suspicious about Ms Yoffe's role, and he raised his suspicions with the Defendant's lawyers during the course of the New York proceedings. Fourthly, it is apparent from the e-mail that the Defendant's lawyers sent to Mr Okun on 22 March 2024 that they were aware of the point that "the monies used to fund the Note [*sc* the loan agreement] are the fruits of a fraudulent tree", and indeed that they had sought to "educate" the New York Court as to that point indirectly. Fifthly, it is also apparent from that e-mail, and Mr Okun's own evidence, that the allegation of fraud was not deployed as a direct defence in the New York proceedings for tactical reasons.

143. I consider that it is clear from the Defendant's own evidence that it was open to it to rely on the alleged fraud in the New York proceedings, but it elected not to do so. Mr Kynoch did not argue that there were any other considerations which should lead me to conclude that it was not an abuse of process for the Defendant to seek to rely on the fraud argument in this Court. Accordingly, had it been necessary to do so, I would have held that it was an abuse of process for the Defendant to advance its public policy defence in reliance on the fraud for the first time in this Court.

(4) The public policy defence: res judicata and issue estoppel

144. It is also unnecessary for me to decide the Claimant's arguments based on *res judicata* or issue estoppel. However, had it been necessary for me to do so, I would not have accepted them. I can state my reasons briefly.

145. The Claimant's argument that Justice Chan had determined that there was no relevant relationship between Ms Markus and the Defendant was based entirely on one sentence in the New York judgment, where Justice Chan stated that "[i]t is clear that defendant is not a party to the Markus bankruptcy, and the defendant does not argue that any relationship between defendant and Larisa Markus exists (nor can the court discern any such relationship)".

146. Mr Hoyle argued that this finding is inconsistent with the argument that the funds which the Defendant received pursuant to the loan agreement were the proceeds of a fraud practised by or on Ms Markus. I do not agree. As I have mentioned, this Court has not been provided with the pleadings or other filings in the New York proceedings (or any evidence as to the applicable New York or federal law), and therefore I can do no more than approach Justice Chan's statement on its own terms, in the context which she sets out. As I read the relevant part of Justice Chan's judgment, she was addressing the fact that, under United States Federal law, the automatic stay which the Defendant sought would be available only if the Defendant were a debtor of the bankrupt (in this case, Ms Markus), or was essentially identical to a bankruptcy debtor. In my view, the statement on which Mr Hoyle relies constitutes no more than Justice Chan's conclusion that the Defendant did not fall within either of these categories. Accordingly, I do not consider that Justice Chan's comment can properly be read as dispositive of the

question whether the original source of the funds which were provided to the Defendant under the loan agreement was Ms Markus.

(5) No compelling reason for the claim to go to trial

147. Mr Kynoch submitted that there was, in any event, a compelling reason why the Defendant's defence should be allowed to proceed to trial, in it would enable the Defendant to obtain the disclosure which it had repeatedly (but to date unsuccessfully) sought from the Claimant. I do not accept this submission. If, as I have held, there is no realistic prospect of the fraud alleged by the Defendant sustaining a defence to the claim, the fact that there might in the future be additional evidence which the Defendant could deploy in support of its allegations of fraud against the Claimant is not a compelling reason to allow the defence to proceed to trial.

(6) The relevance of any outstanding appeal from the New York judgment

148. I have referred above to the fact that there is, or may be, an outstanding an appeal from the New York judgment. I have also referred to the fact that it was common ground that such an appeal would not mean that the New York judgment was not final and conclusive for present purposes. However, paragraph 14-030 of *Dicey and Morris* suggests that, in such circumstances, it may be appropriate to grant a stay of execution of a judgment of this Court pending the determination of the appeal from the foreign judgment (see also *Midtown Acquisitions*, paragraphs 74-75 *per* Teare J).

149. I raised this point with the parties during the course of argument. Mr Hoyle's position was that, if the Defendant sought a stay, it would need to make a formal application under CPR 83.7, and no such application had been made or foreshadowed. Mr Kynoch did not seek to persuade me otherwise, and he did not argue that, if I were to grant the Claimant's application, I should stay the effect of my decision pending the conclusion of any appeal in New York. In consequence, I do not consider that it would be appropriate to grant a stay of execution.

G. THE CLAIMANT'S ALTERNATIVE APPLICATION

150. In light of my decision, I do not need to address the Claimant's alternative application to strike out paragraphs 3.2 and 4.1 of the defence. Nevertheless, I should indicate that, had it been necessary for me to consider that application, I would have granted it, and I would have struck out those paragraphs.

151. Paragraph 3.2 of the defence indicates the Defendant's intention to rely on the Glenn opinion as evidence in support of its defence, and paragraph 4.1 sets out extensive quotations from the Glenn opinion.

152. In brief, I would have accepted Mr Hoyle's submission (which was made by reference to *Jinxin Inc v Aser Medica PTE Ltd* [2022] EWHC 2431 (Comm), paragraphs 55-62 and 91 *per* Peter MacDonald Eggers KC (sitting as a Deputy High Court Judge)) that the decision of a foreign court is not admissible as evidence of the truth of any findings

made in it, and that the court is entitled to strike out passages in a statement of case which purport to plead such a decision as evidence. In my view, this is exactly what the Defendant has sought to do here.

153. In my judgment, Mr Kynoch did not have any real answer to Mr Hoyle's argument on this point. Mr Kynoch sought to rely on *Tulip Trading Ltd v Bitcoin Association For BSV* [2023] EWHC 2437 (Ch), paragraph 40 *per* Mellor J, as establishing an exception to the principle discussed in the *Jinxin* case, but the relevant passage is concerned with the different issues of what material a court may take into account when considering at an interlocutory stage whether there is a serious issue to be tried, and what material counsel may take into account when deciding whether it is proper to plead an allegation of fraud (see also *Jinxin*, paragraph 87). Indeed, in paragraph 40 of *Tulip Training*, Mellor J expressly observed that the material at issue in that case (which consisted of references in a witness statement to decisions of foreign and domestic courts in other cases) would be "inadmissible at trial". Mr Kynoch did not seek to persuade me that there was any other proper basis for including the pleas at paragraphs 3.2 and 4.1 of the defence.

H. CONCLUSION AND ORDER

154. For the reasons set out above, I do not consider that the Defendant has a realistic prospect of defending the claim. In light of my reasoning, I therefore grant summary judgment in favour of the Claimant.

155. When I circulated this judgment in draft, I invited the parties to agree a draft order giving effect to my judgment and, if there were a dispute as to any matter, to make submissions in writing. In the event, it was agreed that the Claimant was entitled to be awarded the principal sum of £857,395.85 (being the sterling equivalent of US$1,184,124.11 as at the date of my order). However, there was agreement on little else, and as a result there are five ancillary matters which I have had to decide. Neither party suggested that it was necessary to adjourn determination of these matters to a further hearing.

156. First, there is a dispute as to the rate at which interest should be calculated for the purposes of s 35A(1) of the Senior Courts Act 1981. Mr Hoyle submitted that I should award the same rate of interest as that awarded by Justice Chan in the New York judgment, i.e. 9% or, if not, at the rate of 8%, by analogy with interest under the Judgments Act 1838. Mr Kynoch argued that the rate should be 6%, which he said was the rate provided for by clause 3 of the Loan Agreement. However, as I have mentioned above, the interest rate provided for by the Loan Agreement is in fact 10%. Accordingly, the Defendant is unwittingly arguing for a rate which is higher than that proposed by the Claimant. In those circumstances, I consider that it is appropriate to award interest at the rate advocated by Mr Hoyle, i.e. at the rate of 9% provided for in the New York judgment. The parties are agreed that I should award interest from the date of the New York judgment until the date of my order. On the basis of a rate of 9%, the relevant sum is £78,848.65 (being the sterling equivalent of US$108,906.98 as at the date of my order).

157. Secondly, there is a dispute as to whether I should summarily assess the costs of the entire claim, or whether I should refer them for detailed assessment. Mr Hoyle argued in favour of summary assessment, in reliance on CPR PD44, paragraph 9.2(b), which provides for the general rule that the court should summarily assess costs at the conclusion of a hearing which has lasted for not more than a day and, if the hearing disposes of the claim, the court may deal with the costs of the whole claim, unless there is good reason not to do so. Mr Kynoch asked for detailed assessment, but did not explain why that was said to be the appropriate course and, in particular, he did not make any submissions as to why there is a good reason not summarily to assess costs.

158. CPR PD44, paragraph 9.2(b) is not particularly happily worded (or, indeed, punctuated), in that the use of the permissive "may" in the second sentence of that subparagraph potentially casts some doubt on whether the general rule applies to that part of the subparagraph. Nevertheless, whether I had to apply the general rule under paragraph 9.2, or to exercise the general discretion under paragraph 9.1, I would take the same view, in that I consider that it is appropriate summarily to assess costs. No sensible purpose would be served by dragging out these proceedings any further and forcing the parties to incur the time and expense of a detailed assessment.

159. Thirdly, there is a dispute as to whether I should order costs on the standard basis or the indemnity basis. Mr Hoyle argued for the indemnity basis, in reliance on either CPR 44.5(1) or CPR 44.3(b). CPR 44.5(1) provides that, where the court assesses costs which are payable by the paying party to the receiving party under the terms of a contract, the costs payable under those terms are presumed to be costs which have been reasonably incurred and are reasonable in amount. Mr Hoyle argued that clause 5.1 of the loan agreement entitled the Claimant to be indemnified in respect of any legal fees which it incurred as a result of the loan, and therefore CPR 44.5(1) was engaged. As to the general discretion to award indemnity costs under CPR 44.3(1), Mr Hoyle made three main points: the Defendant has made serious allegations of fraud whichwere legally irrelevant, the Defendant has (at least in one respect) committed an abuse the process of the Court, and the Defendant has inappropriately raised an unmeritorious defence in an attempt to frustrate the enforcement of the New York judgment, thereby forcing the Claimant to relitigate the matter in this Court.

160. In response, Mr Kynoch argued that this was not a case which was "out of the norm", and that it was not an appropriate case for indemnity costs.

161. I do not accept Mr Hoyle's argument in relation to CPR 44.5(1). The Claimant has not pleaded any claim for costs under the Loan Agreement, and I have received no evidence in relation to such a claim. Under clause 5.1 of the Loan Agreement, the obligation on the Defendant to indemnify the Claimant arises only if the Claimant makes a written demand of the Defendant, a demand which would have to be served in accordance with clauses 8.1 to 8.3 of the Loan Agreement. There is no evidence before me that this condition has been satisfied. Accordingly, I do not consider that CPR 44.5(1) applies

162. As to the general discretion under CPR 44.3(1), I accept that Mr Hoyle's points have some force. However, it seems to me that, as a matter of substance, they are different ways of making the more general point that the Defendant had a weak legal argument. Generally, the weakness of a legal argument is not in itself a reason for awarding

indemnity costs, and some other, additional factor is usually required, such as some ulterior commercial or tactical purpose unconnected with any real belief in the argument's merit (see *Arcadia Group Brands Ltd v Visa Inc* [2025] EWCA Civ 883, [2015] Bus LR 1362, paragraphs 83-84 *per* Sir Terence Etherton C). On the basis of the evidence before me, and in particular in light of paragraph 63 of Mr Okun's witness statement (which was not challenged), I do not consider that I can find that there has been the type of culpable motive or improper conduct which the Chancellor contemplated in the *Arcadia Group* case. Accordingly, I decline to assess costs on the indemnity basis, and I shall assess them on the standard basis.

163. Fourthly, there was no agreement as to the sum which I should summarily assess, although Mr Kynoch did not positively contend that any of the items specified in the Claimant's schedule of costs were unreasonably incurred or unreasonable in amount. The total amount of costs claimed by the Claimant (when adjusted for an error in the schedule of costs) is £90,987.45. I note from the schedule of costs that nearly £26,000 of the total sum claimed is attributable to work done on documents by the Claimant's previous solicitors, but no particulars of that work have been provided, and it is not possible to tell whether there has been any duplication of work. Inevitably, the summary assessment of costs is a rough and ready exercise and, having considered matters in the round, I consider that a reasonable and proportionate amount of costs is £75,000.

164. Finally, there is a dispute as to whether the Defendant should be ordered to make payment with seven or 14 days. In this respect, Mr Hoyle argued that it was appropriate to depart from the default provision for 14 days made by CPR 40.11 because, by reason of the fact that I had circulated my judgment in draft, the Defendant had in effect already had a period of advance notice of the fact that it would have to make payment. I do not consider that the circulation of a judgment in draft is, of itself, a good reason to abridge the time for payment, particularly in circumstances in which there remained a dispute as to exactly what sum the Defendant would have to pay. Accordingly, I shall order that the Defendant must make payment within 14 days of my order.

165. I should note that it appeared from the written submissions which I received that, at an earlier stage, there had been a dispute as to whether the Claimant was seeking to recover "interest on interest". However, the composite draft order which was provided to me did not include the paragraph to which the Defendant objected, and therefore my understanding is that this dispute was resolved.