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Case No: CL-2018-000297, CL-2018-000404, CL-2018-000590,
CL-2019-000487, CL-2020-000369 (CONSOLIDATED)

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

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

Date: 12/01/2024

Before :

MR JUSTICE ANDREW BAKER

- -

Between :

SKATTEFORVALTNINGEN (the Danish Customs and Tax Administration)	**Claimant**
- and -	
SOLO CAPITAL PARTNERS LLP (in special administration) and others	**Defendants**

- -
- -

Charles Graham KC, Abra Bompas and Matthew Hoyle (instructed by **Pinsent Masons LLP**) for the **Claimant**
Nigel Jones KC, Lisa Freeman, Sarah McCann and Emily Betts (instructed by **Meaby & Co Solicitors LLP**) for the **Sanjay Shah Defendants and Usha Shah**
David Head KC, Christopher Bond and Hannah Glover (instructed by **DWF Law LLP**) for the **DWF Defendants**
Some of the other Defendants appeared or were represented, but did not participate on this issue.

Hearing date: 13 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.00 am on 12 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE ANDREW BAKER

Mr Justice Andrew Baker:

Introduction

1. The final trial of these consolidated Claims is listed to commence on 9 April 2024. The first of two pre-trial reviews took place on 13 and 14 December 2023. On the second day, I gave directions on the trial timetable, supplementing and amending a timetabling order I had made at a case management hearing in June 2023.

2. Under the trial timetable as it now stands, the first months of the trial are to comprise:

   (i) initial reading time;

   (ii) 2 weeks for documentary openings (Sections J.8.1 to J.8.3 of the Commercial Court Guide (11th Edition, 2023 Update));

   (iii) 3 weeks for SKAT's factual witnesses;

   (iv) 2½ weeks for Sanjay Shah's factual evidence; and then

   (v) 2½ weeks for the DWF Defendants' factual evidence (12-13, 17-20, 24-27 June 2024); followed by

   (vi) a non-sitting week (w/c 1 July 2024), which will operate as the first of several 'safety valves' in the timetable allowing for the possibility of slippage, further reading time (Section J.5.1 of the Guide), or simply respite from what would otherwise be the relentlessness of an exceptionally long trial.

3. After that non-sitting week, the factual witness evidence is scheduled to resume for the last few weeks of Trinity Term and the first few weeks of Michaelmas Term so as to complete (if we keep to time) in early November 2024, followed by additional reading time, expert evidence in November and early December 2024, a break for preparation of closing argument, including an exchange of written submissions, and finally oral closing argument over five weeks in March and early April 2025.

4. The DWF Defendants are Graham Horn, Anupe Dhorajiwala and Rajen Shah. They are all resident in Dubai. Other things being equal, they would have been willing and able, and would have preferred, to travel to London to give evidence at trial. However, each of them is the subject of a European Arrest Warrant such that if he came to London he would expect to be taken into custody with a view to being extradited to Denmark to face criminal charges relating to the conduct or alleged conduct upon which SKAT seeks to found its civil claims against him in this litigation. In addition, Rajen Shah is the subject of a travel ban imposed by a Dubai court, at the instigation of SKAT itself in connection with civil proceedings it has brought against him in Dubai, such that it would be a contempt of the Dubai court for him to travel to London to give evidence at this trial. (In referring to "SKAT itself", I do not mean that it is a different legal person to the Kingdom of Denmark, or different therefore to the legal person pursuing criminal charges against the DWF Defendants (and others). As in previous judgments in the litigation to date, it is not necessary to take a view on that question now.)

5. On the first day of the pre-trial review hearing, I refused an application by the DWF Defendants for an order that, for the period scheduled for their factual evidence and subject to confirming practicalities:

   (i) the trial would instead be adjourned; and

   (ii) I would take their evidence in Dubai sitting as a special examiner, having appointed myself to that role for that purpose pursuant to CPR 34.13(4),

   with the intention that, when the trial resumed in London, the DWF Defendants would seek to adduce in evidence some record of their Dubai depositions, *in lieu* of giving evidence at trial.

6. The application was advanced pursuant to an Application Notice dated 20 November 2023, but the application there intimated was different. It sought an order authorising the DWF Defendants' solicitors to liaise with my Clerk and the Commercial Court Office for the production of "*a formal request from the Commercial Court to the DIFC Court for permission for Mr Justice Andrew Baker to sit in the DIFC Courts for the duration of the DWF Defendants' evidence in the Main Trial.*" That was an application for a direction in principle that for the DWF Defendants' evidence, the trial would relocate to the DIFC.

7. Between the Application Notice and the skeleton argument served in support, DWF's preliminary enquiries with the DIFC Court indicated that it might be willing and able to facilitate the taking of the DWF Defendants' evidence there, before me, but it would require confirmation that if that happened I would be sitting as a special examiner authorised by the English High Court to take evidence overseas and would not have judicial powers or functions when in Dubai. The skeleton argument therefore proposed that "*the most appropriate course would be for the Court to 'sit' to hear the DWFDs' oral evidence in the DIFC as a special examiner appointed under CPR 34.13(4) (rather than as a Judge) …*", and sought a direction "*that this is, in principle, an appropriate case for the Court to hear the evidence of the DWFDs in the DIFC, within the meaning of [Section] H.5.2 of the Commercial Court Guide*". That displayed muddled thinking:

   (i) Section H.5.2 of the Guide refers to the possibility of the court conducting part of the trial overseas, as was proposed by the Application Notice, whereas a deposition before a special examiner under CPR 34.13(4) would amount to the taking of evidence otherwise than at trial (albeit with a view to the subsequent deployment at trial of some record of that evidence).

   (ii) A direction that it was appropriate in principle for there to be a deposition before a special examiner pursuant to CPR 34.13(4) would not be a direction for the court to sit to hear evidence in the DIFC – *the court* would not be sitting at all.

8. It was clear at the hearing, however, that the application pursued *was* for a deposition before a special examiner under CPR 34.13(4) and was *not* for any part of the trial to take place overseas. The summary in paragraph 5 above is therefore accurate.

9. In refusing the application at the hearing, I said, briefly and compendiously, that in my view any marginal gain to be enjoyed by my being in the same room, in person, as the witnesses, likewise at least the principal cross-examiner, was overstated by the DWF

Defendants' application, and was in any event outweighed by the disadvantages. I was not persuaded that it would be in the interests of justice to adjourn the trial and take the evidence of the DWF Defendants as special examiner rather than take their evidence at trial by giving them permission to give evidence remotely (from Dubai). I did not want to delay proceedings further by giving a longer judgment, so I said that fuller reasons would follow in writing at a later date. This judgment now sets out those fuller reasons.

10. Usha Shah is Sanjay Shah's wife and, like the Sanjay Shah Defendants, she is represented by Meaby & Co Solicitors LLP instructing a team of counsel led by Nigel Jones KC. For reasons that do not matter for present purposes, Mrs Shah is not one of the Sanjay Shah Defendants, as that term has generally been used in the litigation. She is also resident in Dubai. Since early November 2023, she has been subject to a travel ban imposed by the Dubai court at the instigation of SKAT. But for that travel ban, she would wish to travel to London to give her evidence at trial. Her evidence is scheduled to occupy only a single sitting day.

11. Were I relocating to Dubai for three weeks or so, to sit as a special examiner to take depositions from the DWF Defendants, it would be a nonsense not also to take Mrs Shah's evidence in that way while I was there, if she was still then subject to the travel ban. Mr Jones KC made that contingent application informally at the hearing. He did not otherwise have an application ready to be pursued, and indicated that he needed time to consider the matter further, and take instructions, as to whether to make an independent application for a Dubai deposition to be ordered for Mrs Shah after it had been refused for the DWF Defendants. The rest of this judgment therefore considers only the DWF Defendants and the application they made.

Preliminary Matters

12. CPR 32.2 provides as follows, so far as concerns the process to be followed at trial in relation to matters of fact to be proved by witness evidence:

> "*(1) The general rule is that any fact that needs to be proved by the evidence of witnesses is to be proved –*
>
> *(a) at trial, by their oral evidence given in public …*
>
> *(2) That is subject –*
>
> *(a) to any provision to the contrary contained in these Rules or elsewhere; or*
>
> *(b) to any order of the court.*"

13. CPR 32.1 allows the court to control evidence, including the evidence given at a trial, *inter alia* by "*giving directions as to …(c) the way in which the evidence is to be placed before the court*". A direction that evidence from a witness be adduced by putting before the court at trial a transcript or other record of evidence given by the witness otherwise than at trial would be such a direction.

14. CPR 34.13 applies (*per* CPR 34.13(1)) "*where a party wishes to take a deposition from a person who is … out of the jurisdiction*"; and CPR 34.13(4) provides, as one possibility for such a case, that: "*If the government of a country allows a person*

appointed by the High Court to examine a person in that country, the High Court may make an order appointing a special examiner for that purpose." Where a deposition abroad is ordered under CPR 34.14, then *per* CPR34.13(5), the person to be deposed "*may be examined … on oath or affirmation or in accordance with any procedure permitted in the country in which the examination is to take place*".

15. Who would or might be the relevant governmental authority for the DIFC in relation to CPR 34.13(4) was not considered in the evidence for the application. DIFC Court Rules 30.65*ff* provide for the taking of depositions in the DIFC by a person appointed *by the DIFC Court*. Such an appointment requires a request from a "*requesting court*" (which can be a court or tribunal exercising jurisdiction in any part of the world), for evidence to be obtained in the DIFC for the purpose of proceedings before the requesting court or whose institution before the requesting court is contemplated, and then, if the request is for the examination of witnesses, an order of the DIFC Court appointing someone to be the person before whom the examination is to take place. DIFC Court Rule 30.78 permits the DIFC Court to appoint for that purpose:

"*(1) any fit and proper person nominated by the person applying for the order;*

(2) an examiner of the Court [i.e. the DIFC Court]; or

(3) any other person whom the Court considers suitable."

16. In terms of those DIFC Court Rules, my being appointed as special examiner under CPR 34.13(4) was neither necessary nor sufficient for the intended purpose of evidence being taken from the DWF Defendants at a deposition before me in the DIFC:

(i) It was not necessary because it would be open to the DIFC Court to consider me a "*fit and proper person nominated by [the DWF Defendants]*", or a "*person whom the Court considers suitable*", without such an appointment. However, as I indicated in paragraph 7 above, when DWF explored the matter with the DIFC Court, the response (from the Assistant Registrar) was that although the DIFC Court could assist, it would require a "*formal request from the High Court*" stating *inter alia* "*that Mr. Justice Andrew Baker would be sitting as a 'Special Examiner' i.e. a person authorised by the High Court to take evidence overseas and would have no exercisable judicial powers or functions when overseas*". Thus, in practice, my being appointed under CPR 34.13(4) was going to be a requirement, as an aspect of reassuring the DIFC Court that I would not be purporting to sit there as a judge of the High Court of England and Wales (or, let alone, as a judge of the DIFC Court). At the risk of pedantry, but since it neatly encapsulates one of the complexities arising, Mr Justice Andrew Baker would not be sitting *at all* when in the DIFC. Rather, on analysis, the idea would be that I go to the DIFC for the proposed witness examinations to be conducted before me there in my personal capacity as Sir Andrew Baker, special examiner appointed under CPR 34.13(4), and *not* as a judge.

(ii) My being so appointed was not sufficient for the DWF Defendants' purpose, because an order of the DIFC Court appointing me under DIFC Court Rule 30.78 would still have been required.

17. It has been held that a High Court judge hearing or scheduled to hear a trial may appoint themselves as special examiner under CPR 34.13(4) so as to preside over a deposition abroad with a view to the admission at the trial of a record of the evidence thus taken: *Peer International Corp v Termidor Music Publishers Ltd* [2005] EWHC 1048, *per* Lindsay J at [8]-[14]. That was assumed to be correct by the Court of Appeal in *Attorney General of Zambia v Meer Care & Desai et al.* [2006] EWCA Civ 390 (on appeal from [2005] EWHC 2102 (Ch)), but it was not necessary to the decision there (which was to dismiss an appeal against a refusal to stay proceedings), and the point does not appear to have been contentious between the parties. It seems from the subsequent trial judgment, [2007] EWHC 952 (Ch), that Peter Smith J did then sit as special examiner in Zambia. It was also assumed to be correct in *Kimathi et al v Foreign and Commonwealth Office* [2015] EWHC 4116 (QB), [2015] EWHC 3684 (QB), although in that case the application was refused.

18. Going back to *Peer International*, again it seems that the question of principle whether a High Court judge could appoint themselves under CPR 34.13(4) was not the subject of argument. The only argument, which was rejected by Lindsay J, appears to have been that "*the full requirements for the issue of a Letter of Request must be followed through*" (*ibid*, at [14]).

19. It follows that the proposition that a trial judge can appoint themselves as special examiner under CPR 34.13(4) and take evidence from trial witnesses abroad, interrupting a trial to do so, has not been rigorously tested, at all events on the authorities to which I was referred. It is taken to be true in *Phipson on Evidence* (20th Ed. 2021) at para 8-36, but without detailed analysis or the citation of any authority beyond *Peer International*.

20. I do not consider it self-evident that the proposition is correct. Firstly, CPR 34.13 does not stand alone. It supplements CPR 34.8-34.12, so as to deal with the specific case of evidence given by deposition from a person who is out of the jurisdiction. The primary provision is CPR 34.8, allowing a party to apply "*for an order for a person to be examined before the hearing takes place*" (CPR 34.8(1), my emphasis); and a 'deposition', therefore, is evidence taken from a person (a 'deponent') before, but for use at, some later trial (or other hearing (CPR 34.8(2)). Secondly, by definition, and so that there would be no exercise of judicial power from outside the jurisdiction, when taking evidence abroad as a special examiner, not only would the trial judge not be acting as the trial judge, they would not be acting, and could not act, as a judge *at all*.

21. The first difficulty, therefore, is that the application made here was for an order under CPR 34.13, but the proposal was not for the taking of a deposition, for the purpose of the trial herein, within the terms of CPR 34.8 (and therefore within the terms of CPR 34.13), but for the taking of evidence after the trial was well underway, but otherwise than as part of the trial. Whether the court's general case management powers extend to the making of such an order, so as to circumvent the apparent condition in CPR 34.8 that any evidence gathering by deposition should occur before the hearing at which that evidence is to be deployed, may be a nice question, not addressed by the parties (perhaps because the application was not actively contested).

22. The second difficulty – special examiners are not judges – is not just the absence of coercive authority or judicial powers relating to the examination itself, e.g. to compel a witness to attend or to answer individual questions, adverted to in *Peer International* at

[16] and *Kimathi* (first judgment) at [14(viii)]. In the discretionary balance, the lack of such authority or such powers might weigh against the making of an order, and that was a relevant consideration in this case as I explain below. But that would not go to the availability of an order in principle.

23. Nor is the second difficulty only that the trial judge could not attend to other judicial business while away from the jurisdiction acting as special examiner. As I mention below, that is also a concern in this instance, at least as a matter to be taken into account in the exercise of any discretion; but it is also linked to, or a by-product of, the larger concern to which the second difficulty gives rise.

24. That larger concern is that, on analysis, the application is in substance for an order that the trial judge give themselves leave of absence from office for whatever period is required to allow them to act instead as special examiner. Albeit the purpose is to obtain evidence to be deployed before the judge at trial, the request is that the judge agree to undertake work otherwise than as a judge, for a certain period of time. I do not think it obvious a judge can do that. Under their terms of office, High Court judges commit to His Majesty to be available to sit throughout the legal terms (if fit and not on leave), *and* they may not undertake any task or engage in any activity that limits their ability to discharge their judicial duties to the full.

25. Under the modern constitutional settlement for the judiciary, it may be that the Lady Chief Justice, or the relevant Head of Division as her delegate, would have authority to release a High Court judge in the manner required. But it seems to me unsatisfactory to take that as a given, without argument, just because there was no active opposition to the DWF Defendants' application; and in any event, if there is such authority, for this case it would be for the Lady Chief Justice or the President of the King's Bench Division, and not for me, to consider whether it should be exercised. It would not entitle me to release myself, and I think it would be inappropriate to express a view in favour of an order in the absence of a prior decision by the Lady Chief Justice or the President of the King's Bench Division, at least in principle, that it was appropriate for me to be released.

26. On the applicability, in principle, of CPR 34.13(4), the reasoning in *Peer International* is, with respect, very limited. It boils down to saying that because the rule does not expressly preclude the possibility of judges appointing themselves as special examiners, it must be permissible. The concerns I have with the idea are not identified or, therefore, addressed. In the circumstances, I would not have been content to follow the precedents, such as they are, but would have required persuasion, on the basis that the matter is open for decision *de novo*, and I would have wanted to ensure, if possible, that there was a proper contest on the point so that the decision could be informed by full argument.

27. With those concerns unresolved, I considered the application as presented by the DWF Defendants *de bene esse* as to whether I had power to grant it, if persuaded of its merits. Since I was not so persuaded, it is not necessary to consider further what I might have concluded would need to be done to see whether those concerns could be resolved.

Pros and Cons

28. The primary advantage pressed on behalf of the DWF Defendants in support of their application was that the risk would be avoided of something being lost from the quality of their oral evidence by its being given remotely. This echoed the language of Grant and Mumford, "*Civil Fraud*" (1st Ed., 2022 supplement), which Mr Head KC cited for its note at para 30-052 that although the Covid-19 pandemic highlighted the court's flexibility over evidence being given remotely, "*live evidence*" (by which the authors mean evidence given in person at trial) "*will most likely remain the preferred option as Courts and practitioners are broadly agreed that something is lost through evidence being given remotely*".

29. Mr Head KC emphasised the serious nature of the allegations made by SKAT against the DWF Defendants, creating (he said) the real prospect of financial and professional ruin should the allegations succeed; and the fact that the DWF Defendants have been required by SKAT's choice of venue, not by a choice of their own, to litigate away from home. None of the DWF Defendants was resident in this jurisdiction when SKAT commended proceedings against him. I agree that those factors heighten the importance of the DWF Defendants being able to give their best evidence, or something as close to it as is achievable in the circumstances applicable to them.

30. The other points raised in support added no real weight to the application. It was said that the time difference between here and Dubai would make it likely that the DWF Defendants would be giving evidence until 7.30 pm their time. Dubai operates on Gulf Standard Time (GMT + 4) all year, whereas the court will be on British Summer Time (GMT + 1) in June when the DWF Defendants are scheduled to give evidence. For experienced professional individuals, I do not consider that a summertime sitting day from 1.30 pm to 7.30 pm, with appropriate breaks, can sensibly be regarded as difficult or unfair, absent evidenced medical issues that might affect the assessment. In any event, I directed that trial sitting hours would ordinarily be 10 am to 4 pm, not 10.30 am to 4.30 pm; and 9.30 am to 3.15 pm when taking evidence remotely from witnesses in Dubai. It was said further that the duration and likely intensity of cross-examination "*will result in real fatigue in giving … evidence over video link*". But there is no reason why, properly managed, giving evidence remotely should be more fatiguing for the DWF Defendants than if they were in the witness box in the trial courtroom in the Rolls Building. In that regard, I expect the DWF Defendants' remote set-up will not require the close-up use of a single small screen (e.g. a laptop) that can be fatiguing. Indeed, I envisage that they will be in a position to ensure that, if anything, they are better positioned, ergonomically, than they would be in the witness box, with good quality sound and images, and a high speed connection.

31. Turning, then, to the main point, this case did not present a choice between an optimal arrangement and a sub-optimal alternative. The choice, rather, was between two sub-optimal arrangements. On no view will there be the ideal of the DWF Defendants giving their evidence in person at trial. The choice was between their evidence being given:

    (i) at trial, and therefore in the ideal venue, i.e. the trial courtroom in London, with all parties, the general public and the press able to attend or be represented in the same way as they are able for all other trial evidence, but with the DWF Defendants appearing remotely from Dubai via video-conferencing rather than in person; or

(ii) not at trial, and therefore in a sub-optimal venue, not the trial courtroom in London, such that the ability of parties, the general public and the press to attend or be represented will differ both *inter se* and as between the DWF Defendants' evidence and the evidence taken at trial, but a venue that would allow me to be in the same room, in person, as the DWF Defendants as they were questioned.

32. In my judgment, the departure from the ideal involved in (ii) above is qualitatively greater in this case than that involved in (i) above, and risked real injustice that (i) above did not. That was sufficient to dispose of the application. There were two parts to that judgment.

33. Firstly, if anything will be lost by the DWF Defendants' giving evidence via video-conferencing, I do not think it will be a material loss. The DWF Defendants' experience of trial will not be the same as if they attended in person to give their evidence. There may be an unavoidable risk that they will feel a touch detached from the trial process. However, in my view that risk would not be removed, or appreciably reduced, by their not giving evidence at trial at all but being instead deposed abroad at a non-trial hearing, and it is not a risk the existence of which ought to have any impact on the quality of their evidence.

34. More generally, in relation to the DWF Defendants' evidence, this is largely not a case about unknown or uncertain basic facts, with witness testimony potentially of substantial value for establishing, or failing to establish, what did and did not occur. Nor in the main will the cross-examination of the factual witnesses be a memory test about details or sequences of events a decade or so ago, the period of primary interest in the case being August 2012 to July 2015 when the tax refund applications were made and paid that SKAT alleges to have been unfounded. So far as each of the DWF Defendants is concerned, the essential function of his factual witness testimony, as I see it, will be to explain, as best he can recollect it, the nature and extent of his involvement (if any) in designing the sets or patterns of transactions by reference to which the impugned tax refund applications were made to SKAT, and the nature and extent of any consideration he gave at the time to whether those refund applications were well-founded refund claims and/or to whether the making of those applications involved false statements of any kind being made to SKAT. The assessment of that evidence, and of the honesty of the DWF Defendants' respective actions in connection with the now-impugned tax refund applications, will largely be an exercise in judging the content of those explanations, and not a matter of presentation or demeanour 'in the box'. To the extent (if at all) that elements of how those explanations come out in oral evidence might influence the assessment, there is no reason why those should not be captured well so as to be as evident to me on screen as they would be in person. In that regard, I am expecting to find, as I indicated to the parties at the pre-trial review, that when evidence is being given remotely, there will be a large, high quality screen in the witness box replicating as closely as possible (for a 2-D image) how the witness would have appeared if sat there in person; and I am expecting high quality sound and connection.

35. Furthermore, SKAT bears the burden of proof, and I shall remain alert, the above views notwithstanding, to the possibility that something imperceptible might have been lost by the DWF Defendants' inability to give their evidence in person in London. Any doubt as to whether that may have occurred is apt to be resolved in their favour, if that might make a difference to whether SKAT has made its case good.

36. I was not persuaded, therefore, that there will be any material loss of quality in the factual witness evidence given by the DWF Defendants if it is given remotely from Dubai, but otherwise at trial in the normal way, as compared to its being given at trial in person if the DWF Defendants were willing and able to travel to London for trial.

37. Secondly, the price proposed to be paid to avoid that supposed loss would be significant. There would be substantial additional litigation costs – not enough, given the scale of the litigation, to be a major factor in itself, but still a factor. More significantly, there would be inequality between parties who are willing and able to attend or be represented at the overseas examination and parties who are not. Parties attending the examination remotely who had notified in advance a wish to cross-examine one or more of the DWF Defendants, or who found themselves wishing to do so in the light of oral evidence given under questioning by other parties, would not be in the same position as if the evidence were being given remotely at trial. They (the other cross-examiners) would not be in the room with me; and I would not have my normal authority as trial judge to control or rule upon their participation.

38. Nor would it be appropriate for me to engage with the examination or intervene to the extent I might at trial. Even within our adversarial litigation system, it is proper, and in modern times normal, for a trial judge, having in mind the matters they will have to determine, to seek clarification from a witness, ask questions of their own, or raise with counsel whether areas should or should not be explored, none of which I would consider it appropriate to do if acting as a special examiner. Any suggested benefit of the special examiner being the same individual as the trial judge cannot properly be to allow that individual to act as if they were the trial judge during the examination.

39. Further, and equally concerning, an unequal playing field would be created such that only SKAT, the DWF Defendants, and any other defendants (if there are any) willing and able to attend the examination in person in Dubai, would have the same experience that I had of the DWF Defendants' evidence for trial.

40. Building on that last thought, and though it is not necessary to go this far, I respectfully question the premise that seems to have been thought persuasive in *Peer International* and *Attorney General of Zambia*, namely that any marginal gain to be achieved by the trial judge observing the examination in person (by being the special examiner) is a gain that it is proper to chase. It is not the function of a special examiner taking a deposition to make an assessment of the witness or of the evidence; and the oral evidence, as given by the DWF Defendants in Dubai if they were examined there pursuant to CPR 34.13(4), would *not* be trial evidence. The trial evidence generated by the examination would be, and would only be, whatever record of the examination was then admitted into evidence at trial. I question the appropriateness of the trial judge taking into account matters that could only be noticed or assessed by being present in the room with the witnesses, those matters, *ex hypothesi*, having formed no part of the trial.

41. Finally, my judicial duties during the three-week period in June for which, on the DWF Defendants' proposal, I would instead be taking depositions in Dubai as a special examiner, would not otherwise have been limited to sitting on this trial. I would be unable to give trial management directions, housekeeping rulings, or make other orders in the case from Dubai; and I agree with a submission made by Mr Graham KC that it is not desirable to have an alternate judge making such decisions independently of the

trial judge in the middle of a long and complex trial. Adopting the proposal would also prevent me from dealing on trial days (Monday to Thursday) with applications on paper in other cases, although dealing with such matters alongside sitting on a trial is a normal part of the duties of a judge of the Commercial Court; and it would prevent me from taking any Friday lists. I dare say the Commercial Court Listing Office, and my fellow judges, would adopt their usual attitude of doing what was necessary to ensure that all other business was still attended to, if possible; but I consider that it would require a much more compelling argument than the DWF Defendants had here, to the effect that an injustice would otherwise be done in the individual case, before it would be right to impose that burden on the system and run the inevitable risk that would still exist that some other litigant or litigants might have justice delayed or denied through judicial unavailability.

Conclusion

42. For the reasons given above, expanding on the summary I gave at the hearing:

(i) I entertained real doubt over the propriety of a trial judge appointing themselves as special examiner under CPR 34.13(4) and interrupting a trial so as to take a deposition abroad, the precedents of *Peer International* and *Attorney General of Zambia* notwithstanding; however

(ii) without having to take a final view on that, on the facts of this case I considered that the disadvantages of adopting that approach for taking evidence from the DWF Defendants outweighed the supposed advantages by a clear margin, such that it would not be in the interests of justice to adopt that approach.