Neutral Citation Number: [2021] EWHC 3166 (Comm)

Case No: CL-2020-000367

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

Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 26 November 2021

Before :

MR SIMON SALZEDO QC (sitting as a Judge of the High Court)

- -

Between :

(1) ATHENA CAPITAL FUND SICAV-FIS S.C.A. **(2) ATHENA CAPITAL REAL ESTATE AND SPECIAL SITUATIONS FUND 1** **(3) WRM CAPITAL ASSET MANAGEMENT S.A.R.L.** **(4) RAFFAELE MINCIONE**	**Claimants/Respondents**
- and -	
SECRETARIAT OF STATE FOR THE HOLY SEE	**Defendant/Applicant**

- -

Michael McParland QC, Samar Abbas Kazmi and James Bradford (instructed by **Hill Dickinson LLP**) for the Defendant/Applicant
Charles Samek QC and Tetyana Nesterchuk (instructed by **Withers LLP**) for the Claimants/Respondents

Hearing dates: 25 – 26 October 2021

- -

JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 26 November 2021 at 11:30 am.

MR SIMON SALZEDO QC (sitting as a Judge of the High Court) :

1. This is my judgment on the Defendant's application to set aside service of the Claim Form or to stay these proceedings on the basis that the Court has no jurisdiction over them, or should not exercise such jurisdiction as it may have, or should stay the proceedings pending certain events. The claim is mainly for declarations and the Defendant's contention is that its purpose and/or effect would be to prejudice a criminal investigation overseas.

Parties

2. The Defendant is the Secretariat of State of the Holy See. The Defendant describes itself (in the dramatis personae that its counsel provided to the Court, which was supported by references to the evidence) as follows:

> "A governmental unit of The Holy See, which is the jurisdiction of His Holiness, the Pope, the Supreme Pontiff of the Roman Catholic Church. The Holy See exercises sovereign jurisdiction over the Vatican City State, and is recognized as foreign sovereign in international law, possessing full international legal personality and enjoying the same rights and obligations as States. The Secretariat of State is a core governmental unit of the Holy See and has three Sections: the Section for General Affairs, the Section for Relations with States and the Section for Diplomatic Staff of the Holy See. The Secretariat of State provides 'close assistance to the Supreme Pontiff in the exercise of his supreme office' and its functions include various administrative roles as well as responsibility for diplomatic relations with other States. The Secretariat of State is thus a department of the government of a foreign state, and therefore a 'State' within the meaning of s.14 of State Immunity Act 1978."

3. As appears from that description, the Defendant is not itself the Holy See. However, many of the documents refer to the Defendant by explicit definition as the "Holy See", which is apt to confuse in the present context. In this judgment I will generally refer to "the Defendant" for clarity. Where I use the term the "Holy See", it is intended in its accepted broader sense, consistent with the above description.

4. The Fourth Claimant, Mr Mincione, is an individual holding Swiss and British nationality who is a person of interest in an investigation by the Vatican State's Office of the Promoter of Justice (the "**OPJ**") into various alleged wrongdoing. Mr Mincione is a member of the Board of Managers of the Third Claimant ("**WRM**"). At relevant times, he was one of two such members, the other being Mr Robert Henric Hessing. The Articles of WRM provided that in general it could be bound by the signature of any two members of the Board of Managers or by any person to whom powers were specially delegated. For some relevant purposes, powers were delegated to Mr Hessing, but not (on expert evidence of Luxembourg law that was adduced from Mr Thibaut Partsch) to Mr Mincione.

5. WRM was (according to the Particulars of Claim) the general partner, director and alternative investment fund manager of the First Claimant ("**Athena Capital**"). Athena Capital describes itself as a corporate partnership and an investment company with variable capital, organised under the laws of, and registered in, the Grand Duchy of Luxembourg. The Second Claimant ("**RSS1**"), the parties agree, is not a separate legal person at all, but is a sub-fund of Athena Capital, in which capacity it was the sole legal and beneficial owner of all the issued shares in 60 SA-2 Limited, which was the sole legal and beneficial owner of all the shares in 60 SA-1 Limited, which was the sole legal and beneficial owner of all the shares in 60 SA Limited. 60 SA Limited was the legal and beneficial owner of a freehold property at 60 Sloane Avenue, London, SW3 3XB (the "**Property**").

6. I have already mentioned the OPJ. The OPJ, like the Defendant, is an emanation of the Vatican City State, but the two entities operate independently of each other. The evidence is that the OPJ investigates alleged crimes on behalf of the state, but it does so under conditions of secrecy which prohibit it from disclosing the information it generates during an investigation, including to the Defendant.

Facts

7. This being primarily a jurisdiction application, I have heard submissions on the basis of written evidence only. My description of the facts is based on that evidence and it is not intended to make binding findings save insofar as required for the determination of the application before me. The essential background to the claims and the application is certain investigations and allegations of wrongdoing in relation to the business of the Holy See. The allegations that are most material for present purposes relate to a transaction (the "**Transaction**"), whose description I take largely from the Particulars of Claim. I will then set out the outlines of the investigation which have been detailed mainly in the Defendant's evidence.

The Transaction

8. Prior to the Transaction, the Defendant owned shares in a sub-fund of Athena Capital, called the Global Opportunities Fund, which held 45% of the units in RSS1. The Defendant was therefore the holder of a substantial indirect interest in the Property. The Claimants say that the Defendant wanted to become the 100% owner of the Property and that to that end it was agreed that the Defendant would purchase all the shares of 60 SA-2 Limited from RSS1 for consideration of £40 million plus the Defendant's shares in the Global Opportunities Fund. The Claimants further say that it was agreed that the Defendant would act in the Transaction through its agent, Gutt SA, a company incorporated in Luxembourg.

9. The Transaction was implemented through several documents, the most important of which I now describe.

10. A "**Framework Agreement**" dated 22 November 2018 was made between (1) Gutt SA as "Purchaser", (2) Athena Capital as "Seller", stated to be acting on behalf of RSS1 and to be represented by its General Partner WRM, itself represented by Mr Hessing, and (3) the Defendant, represented by the Head of the Administrative Office, Mgr. Alberto Perlasca. In the Framework Agreement, "The Holy See" was a defined term meaning the Defendant. Recital A to the Framework Agreement stated:

> "(A) The Purchaser is instructed and funded by Holy See in connection with the acquisition of the Shares as described in this Framework Agreement and has full authority to negotiate this Framework Agreement and any other documentation required to effect the Transaction (as defined below)."

11. Other recitals described the Property, the interests in it and defined the Transaction. Then from recital J onwards, the following was stated:

> "(J) It is intended that the Seller and the Purchaser will enter into a binding sale and purchase agreement ('**SPA**') in respect of the Shares for a consideration consisting of (a) a fixed cash consideration and (b) the transfer to the Seller of the GOF Shares, so that the Purchaser becomes the owner of 100% of the share capital of the Company (as well as, in turn, indirectly, the owner of 100% of the share capital of 60SA1 and 60SA).
>
> (K) The Holy See currently intends, given the positive progress and developments having occurred in respect of the management of GOF by the General Partner including, for example, the value creation arising from the Planning Permission, to consummate the Transaction, which will enable the Holy See to take control of the Property through the ownership of the Sale Group. The Property has become a strategic asset for The Holy See and retains significant upside potential. As a result, The Holy See wishes to exercise greater oversight of the Property through the Purchaser as its agent whom it is anticipated will carry out future strategic decisions relating to the development of the Property. The Holy See has determined that the Purchaser is suitably experienced and qualified for this purpose.
>
> …
>
> (N) The Seller, the Purchaser and the Holy See acknowledge and confirm the statements in the recitals above and it is the common understanding between them that such statements are the basis on which this Framework Agreement is being entered into and will be the basis on which the SPA will be entered into and completed.
>
> (O) The Seller, the Purchaser and the Holy See wish to record in this Framework Agreement their common understanding of the material terms of the SPA (all of which are, for the avoidance of doubt, acknowledged and understood by The Holy See)."

12. Clause 1 of the Framework Agreement defined the "Transaction" as follows:

> "1. MAIN TERMS OF THE TRANSACTION
>
> It is intended that the SPA will reflect the terms in this Clause 1.

> 1.1. Sale and Purchase of the Shares
>
> 1.l.1 The Seller will undertake to sell to the Purchaser, and the Purchaser will undertake to purchase from the Seller, the Shares in consideration for the Purchase Price on the Closing Date (as defined below) (the '**Transaction'**).
>
> 1.1.2. It is intended that the SPA and any ancillary documents thereto shall be entered into between the Seller and the Purchaser no later than 29 November 2018 (or such other date as may be agreed between the Seller and the Purchaser) and that completion of the sale of the Shares to the Purchaser shall take place immediately thereafter on the same day (the 'Closing Date').
>
> 1.1.3 Without prejudice to the terms of this Framework Agreement, it is proposed that the Transaction is structured through the sale and purchase of the Shares on the terms of the SPA, as may be further assessed and agreed by the parties following the date of entry into this Framework Agreement as may be necessary or desirable for commercial or other reasons, provided that such structure is possible and practicable and in compliance with all applicable legal. regulatory, professional and internal policy requirements and restrictions and being understood, in any case, that the relevant agreements shall include and reflect the provisions contained herein."

13. Clause 3 of the Framework Agreement set out the Purchaser's and the Defendant's "Representations and Warranties for the Purposes of this Framework Agreement" as follows:

> "3.1. The Purchaser and The Holy See jointly and severally represent and warrant to the Seller that:
>
> a) (i) in the case of the Purchaser, it is duly organized and validly existing companies, operating under their respective applicable laws; they have all authorizations, licenses and approvals required for conducting their respective activities; they are not subject to any liquidation or insolvency procedures, to the extent applicable, nor have they applied for admission to such procedures, nor has any such application been filed or threatened in writing by any third party, and (ii) in the case of The Holy See, it is the duly organized entity which, operating according to the respective applicable laws, manages the general administrative operations of the sovereign State of Holy See; it has all authorizations, licenses and approvals required for conducting its activities;
>
> b) the entry into and performance by it of this Framework Agreement does not and will not (i) breach any provision of its articles of association, by-laws or equivalent constitutional

> documents, nor (ii) result in a breach of any laws or regulations applicable to it, or of any order, decree or judgment of any court or any governmental or regulatory authority;
>
> c) all consents, approvals, authorizations and other requirements provided for under any applicable law, which must be: obtained or satisfied for the execution and consummation of this Framework Agreement by it; have been or will be obtained and satisfied by the Closing Date;
>
> d) The Holy See is the beneficial owner of the GOF Shares free from any encumbrances.
>
> e) the Purchaser and/or The Holy See, have (and on the Closing Date shall have), sufficient funds and full unfettered authority to instruct the transfer of the GOF Shares in order to pay the Purchase Price due for the sale and purchase of the Shares as envisaged in Clause 1.2 (*Purchase Price and Closing*) and to make all other necessary payments of fees and expenses in connection with the Transaction and the consummation of this Framework Agreement and/or the Final Agreements; and
>
> f) the negotiations in connection with the Transaction and for the consummation of this Framework Agreement have been carried on by the Purchaser, on behalf of The Holy See, directly with the Seller and no agent, broker, investment bank, person acting on behalf of the Purchaser and/or the Holy See is or will be entitled to claim any fee vis-a-vis the Seller in connection with the Transaction.
>
> 3.2 Each of the Purchaser and the Holy See acknowledges that the Seller has entered into this Framework Agreement in reliance of the representations and warranties given by the Purchaser and the Holy See in this Clause 3."

14. Clause 4 of the Framework Agreement set out "Further Representations by the Holy See [i.e., the Defendant] for the Purposes of this Framework Agreement", which included the following:

> "4.1. In consideration for the mutual representations and understanding between the Parties, the Holy See hereby further represents, acknowledges, confirms and agrees to the Seller (and shall be deemed to have represented, acknowledged, Confirmed and agreed at the Closing Date that):
>
> a) it has had the opportunity to carry out all relevant assessments and assumptions in respect of the Transaction and/or the Shares and/or the Sale Group and/or the Property;
>
> b) …

c) it has engaged the Purchaser to perform the role as Purchaser in connection with the purchase of Shares in connection with the Transaction.

4.2. In consideration for the mutual representations and understanding between the Parties, the Holy See hereby further acknowledges, confirms and agrees, also for its controlled companies and/or entities (and shall be deemed to have acknowledged, confirmed and agreed at the Closing Date that), … that it does not and shall not have any claims of any kind, rights and causes of action, (relating to obligations, actions, damages, costs, expenses and compensations) whether known or unknown, direct or indirect, irrespective of their legal nature and whether past, present or future, against the Seller, the General Partner and any of their affiliates (including, for the avoidance of doubt, the Seller's managers and/or principals, as well as representatives and consultants), which are a result of or connected with any acts, omissions or events in respect of any matters relating to the Transaction or any part thereof, the Shares and/or the Sale Group and/or the Property and/or the GOF Shares and any investment and/or holding in GOF (including the GOF Shares) and in any other fund and/or entity managed by the General Partner, including without limitation as regards any past, present or future tax liabilities.

4.3. With effect from Closing, the Holy See hereby it [sic] irrevocably and unconditionally waives, and forever releases the Seller, the General Partner and any of their affiliates (including, for the avoidance of doubt, the General Partner's managers and/or principals, as well as representatives and consultants), from, any and all claims of any kind, rights and causes or actions, demands, obligations, actions, damages, costs, expenses and compensations whether known or unknown, direct or indirect, irrespective of their legal nature and whether past, present or future, against the Seller, the General Partner and any of their affiliates (including, for the avoidance of doubt, the Seller's managers and/or principals, as well as representatives and consultants), which are a result of or connected with any acts, omissions or events in the period up to the Closing Date in respect of any matters relating to the Transaction or any part thereof, the Shares and/or the Sale Group and/or the Property and/or the GOF Shares and any investment and/or holding in GOF (including the GOF Shares) and in any other fund and/or entity managed by the General Partner, including without limitation as regards any past, present or future tax liabilities,

4.4. Each of the Purchaser and the Holy See acknowledges that the Seller has entered into this Framework Agreement and will, upon exchange and completion of the Final Agreements, have entered into such Final Agreements in reliance of [sic] the

> representations, acknowledgements, confirmations and agreement by the Purchaser and the Holy See in this Clause 4. Notwithstanding anything to the contrary in the Final Agreements, this Clause 4 shall survive exchange of contracts on the Final Agreements."

15. Clause 11 of the Framework Agreement dealt with governing law and jurisdiction as follows:

> "11.1. This Framework Agreement is governed by, and shall be construed in accordance with, the laws of England.
>
> 11.2. Any dispute arising in connection with this Framework Agreement shall be submitted to the competent courts of England."

16. Although Mr Mincione is not named as a party to the Framework Agreement, the Claimants make the following plea in their Particulars of Claim, which I have not understood the Defendant to dispute for the purposes of the application before me:

> "Mr Mincione had and has the benefit of all the Holy See's said acknowledgments, confirmations, agreement, waivers and releases as expressed in the Framework Agreement, alternatively Clauses 4.2 and 4.3 of the Framework Agreement, since he was and is a manager and/or principal and/or representative and/or consultant of RSS1. In the premises, Mr Mincione is entitled in his own right to enforce the said acknowledgments, confirmations, agreement, waivers and releases, alternatively Clauses 4.2 and 4.3 of the Framework Agreement, pursuant to Section 1 of Contracts (Rights of Third Parties) Act 1999 (the operation of which is not excluded)."

17. Another document dated 22 November 2018 is a Power of Attorney which appears to grant to Mgr. Perlasca authority to sign the Framework Agreement, an SPA and a "Comfort Letter". The Power of Attorney appears to be signed on behalf of the Defendant by Mgr. Edgar Robinson Peña Parra. The Claimants submitted that this Comfort Letter conferred authority on Mgr. Perlasca to sign the SPA dated 3 December 2018. This submission was mistaken. The SPA described in the Comfort Letter is "The contract known as 'Share Purchase Agreement' to be signed today for the purchase of 30,000 shares of GUTT SA, a Luxembourg company with registration number B178735, with Mr Gianluigi Torzi, born in Termoli on 16.01.1979." That is plainly a reference to another SPA in the bundles before the Court which is indeed dated 22 November 2018 and matches the description given in the Comfort Letter. It is not "the SPA" as defined in the Framework Agreement and the Particulars of Claim.

18. The Comfort Letter is dated 23 November 2018 and is a letter on the headed paper of the Defendant, apparently signed by Mgr. Perlasca, addressed to the First and Second Claimants which confirmed that Gutt SA "is instructed and has full authority to pursue the Transaction as purchaser on behalf of The Secretariat of State of the Holy See."

19. The SPA dated 3 December 2018 was entered into between (1) Athena Capital as "Seller", stated to be acting on behalf of RSS1 and to be represented by its General Partner, WRM and (2) Gutt SA as "Buyer". The SPA set out the terms of the Transaction consistently with the description I have already given. For present purposes, the most material parts of the SPA were clause 11 – Governing Law and Jurisdiction, and Schedule 6 in which Gutt SA gave warranties, including the following:

> "1.1 The Seller is a duly authorised alternative investment fund incorporated as a *société en commandite par actions*, validly existing under Luxembourg law;
>
> 1.2 The Seller has all the powers, has been duly authorised and has carried out all the necessary corporate actions in connection with the execution of the Transaction Documents and the performance of the obligations provided therein.
>
> 1.3 The Seller has all consents, approvals, authorisations and other requirements provided for under any Applicable Law, which must be obtained or satisfied for the execution and consummation of the Transaction Documents.
>
> 1.4 The execution of the Transaction Documents and the performance of the obligations provided for therein do not and will not (i) breach any provision of the Seller's constitutional documents, nor (ii) result in a breach of any laws or regulations or judicial order, judgment, arbitral award, injunction order, writ or decree that are binding on or otherwise affecting the Seller or its assets, which may be prejudicial to the transfer of the Shares to the Buyer;
>
> 1.5 The Transaction Documents are valid and binding on the Seller and are enforceable vis-à-vis the Seller pursuant to their terms.
>
> 1.6 The Seller is solvent, is not subject to any pending insolvency proceedings, crisis or debt restructuring procedures, is not conducting any negotiations with its creditors (or certain classes of such creditors) for the restructuring of its debt, and, to its knowledge, information and belief, there are no facts or circumstances that may result in the Seller becoming insolvent or unable to duly fulfil its obligations or being admitted to bankruptcy proceeding, and no corporate action has been taken for the Seller's winding-up or liquidation, and no other actions have been taken that may negatively affect the possibility and ability of the Seller to carry out the transactions set out in this Agreement or any other Transaction Document."

20. SPA Clause 11 provided:

> "This Agreement and any dispute or claim arising out of or in connection with it or its subject matter, existence, negotiation,

> validity, termination or enforceability (including non-contractual disputes or claims) shall be governed by and construed in accordance with English law.
>
> 11.2 Each Party irrevocably agrees that the Courts of England shall have exclusive jurisdiction in relation to any dispute or claim arising out of or in connection with this Agreement or its subject matter, existence, negotiation, validity, termination or enforceability (including non-contractual disputes or claims)."

21. I should also set out the entire agreement clause 8.8, upon which the Defendant relied in relation to the question whether the Defendant was party to the SPA as the principal of Gutt SA:

> "8.8.1 Subject to Clause 8.8.3, each of the Parties confirms that this Agreement together with the Agreed Form documents referred to in it, represents the entire understanding, and constitutes the whole agreement, in relation to its subject matter and supersedes any previous agreement between the Parties with respect thereto and, without prejudice to the generality of the foregoing, excludes any warranty, condition or other undertaking implied at law or by custom, usage or course of dealing.
>
> 8.8.2 Each Party (in the case of the Seller subject to Clause 8.8.3) confirms that
>
> (A) In entering into this Agreement it has not relied on any representation, warranty, assurance, covenant, indemnity, undertaking or commitment which is not expressly set out or referred to in this Agreement or the Agreed Form documents referred to in it; and
>
> (B) in any event, without prejudice to any liability for fraudulent misrepresentation or fraudulent misstatement, the only rights or remedies in relation to any representation, warranty, assurance, covenant, indemnity, undertaking or commitment given or action taken in connection with this Agreement or with any of the Agreed Form documents referred to in it are those pursuant to this Agreement or such Agreed Form document, and for the avoidance of doubt and without limitation, no Party has any other right or remedy (whether by way of a claim for contribution or otherwise) in tort (including negligence) or for misrepresentation (whether negligent or otherwise, and whether made prior to, or in this Agreement).
>
> 8.8.3 The Buyer acknowledges that in entering into this Agreement the Seller has relied on the representations, acknowledgements, confirmations and statements by The Holy See [ie the Defendant] in para. 4 of the Framework Agreement

> between the Seller, the Buyer and The Holy See and dated 22 November 2018."

The Investigation

22. According to a Letter Rogatory dated 19 December 2019 sent by the OPJ to the Federal Prosecutor of Switzerland (the "**Letter Rogatory**"):

> "The investigation arose after two reports containing allegations were submitted by the IOR (Institute for Religious Works) in July 2019 and by the Office of the General Auditor in August 2019; the latter, in particular, claimed that very serious crimes had been committed, including embezzlement and other types of fraud (Article 413 of the Criminal Code), misappropriation (Article 417 of the Criminal Code), corruption (Articles 171-174 of the Criminal Code) and aiding and abetting (Article 225 of the Criminal Code).
>
> The investigations carried out by the Office of the Promoter of Justice have focused on a real estate investment in London, set up for speculative and financial purposes, in part - at least as far as preliminary inquiries have ascertained - using sums of money belonging to the Secretariat of State and used by same to support the religious and charitable works of the Holy Father (known as Peter's Pence).
>
> …
>
> Based on what the investigation has uncovered so far, the damage caused to the assets of the Secretariat of State by way of the criminal conversion activities described above is enormous (currently quantifiable as no less than 300 million euro).
>
> This Office considers that each of the suspects is answerable for the following offences:
>
> - Abuse of power (official misconduct) (Article 175 of the Criminal Code)
>
> - Embezzlement (Article 168 of the Criminal Code)
>
> - Corruption (Articles 171-174 of the Criminal Code)
>
> - Money laundering, self-laundering and use of proceeds of criminal origin (Articles 421, 421b, 421c of the Criminal Code).
>
> Given that the relations between the different parties inside and outside the Secretariat of State existed for a considerable amount of time, by setting up complex legal instruments based in various countries, also 'black lists', and with the many criminal offences

> committed, a further offence is alleged of criminal association (see Article 248 of the Criminal Code) against the Holy See."

23. The Letter Rogatory named six individuals as the "persons under investigation" or "suspects", of whom the first named was Mr Mincione. He is said to have "benefitted the most" from the Transaction. The essence of the allegations under investigation appears to be that the Transaction involved substantial overpayment by the Defendant for its interest in the Property, with the surplus monies being diverted to the personal use of Mr Mincione and his associates.

24. On 1 October 2019 searches ordered by the OPJ were carried out at the Defendant's offices, documents were seized and five Vatican officials were suspended including Mr Tirabassi who is an official of the Defendant. These facts were reported in the Italian press. Later in October, the international press reported the investigation and Mr Mincione gave interviews defending the Transaction.

25. On 22 November 2019, at the request of the OPJ, the Office of the Attorney General of Switzerland imposed an interim freeze on the bank accounts of persons including Mr Mincione and related companies. Mr Mincione submitted an appeal on 5 December 2019 which was dismissed on 6 April 2020. Further appeals were made and dismissed thereafter. The evidence suggests that assets worth in the region of €48 million were frozen in this way.

26. On 24 January 2020, the Swiss authorities agreed to provide judicial assistance in response to the Letter Rogatory. This was embodied in a decision (the "**January 2020 Order**") which was to be served (and the Defendant says it should be inferred, was served) on "the affected persons" including Mr Mincione.

27. In February 2020, the press reported that the OPJ had seized computers and documents from the home of Mgr. Perlasca, who was one of the suspects accused of conspiring with Mr Mincione.

28. On 6 May 2020, the OPJ informed Mr Mincione's lawyers that they intended to hear him on 13 May 2020 and asked for details of his availability in order for a formal summons to be issued. Mr Mincione's lawyers replied the next day, indicating that although Mr Mincione was available to be questioned, he could not leave his home in Switzerland due to regulations associated with the Covid-19 pandemic. However, Mr Mincione offered to attend via video link with his Italian defence counsel attending in person in Rome.

29. On 13 May 2020, Mr Mincione's Italian lawyer wrote to the OPJ suggesting a possible meeting in Rome on either the 8 or 15 June. It was then agreed that the meeting should take place on 19 June 2020, which was confirmed by an email from the OPJ on 29 May 2020.

30. On 5 June 2020, an alleged co-conspirator, Mr Torzi, was arrested in the Vatican City and charged with extortion, embezzlement, aggravated fraud and money-laundering, all relating to the Transaction. Mr Torzi's arrest was made public by the Holy See's Press Office Communique of 5 June 2020. The Communique stated the arrest order was issued "… in relation to the well-known events connected with the sale of the London property on Sloane Avenue, which involved a network of companies in which some

officials of the Secretariat of State were present…". The Defendant says that Mr Mincione must have become aware of Mr Torzi's arrest shortly after it occurred, which seems reasonable given that it was made public on the same day and Mr Mincione can be assumed to have been following these events.

31. On 19 June 2020, Mr Mincione did not attend the agreed interview with the OPJ. On that same date, his lawyers filed with the OPJ a document entitled in translation "Statement in the Interests of Dr Raffaele Mincione". (Although this document refers to him as "Dr Mincione", he was called "Mr Mincione" throughout the hearing before me.) This document was described by the Defendant as a "Defence Brief" and I will adopt that label, even though it was disputed by the Claimants who emphasised that it was a voluntary statement without formal status. The conclusion of the Defence Brief was that Mr Mincione was innocent of all the allegations and had no case to answer. The final substantive paragraph immediately above a short "Conclusions" section was the subject of argument before me, so I set it out here:

> "Finally, we need to communicate that Athena Capital, REF [sic], WRM and Mincione have been forced to take legal action in the High Court of Justice, in the Business and Property Courts of England and Wales, Commercial Court (QBD), with the preliminary statement about to be notified to the defendant, the Secretariat of State. The aim of the action is to obtain a Declaratory Relief judgement which will achieve, among other things, the recognition and confirmation of the rights and obligations of each of the parties based on the Framework Agreement, the SPA, the Transfer Agreement, the Power of Attorney and, more generally, their validity and binding nature on the parties."

32. That paragraph reflected the fact that these proceedings had been issued on 16 June 2020. Before describing these proceedings, it is convenient to complete the narrative of events relating to the investigation.

33. There were other events between June 2020 and July 2021, but these are not directly relevant to anything I have to decide, so I will not lengthen this judgment with them. However, I do need to mention the Indictment issued by the OPJ on 1 July 2021, charging Mr Mincione and another 13 defendants with serious offences including in relation to the Transaction. According to the Indictment, the Framework Agreement and the SPA were among the instruments of a fraudulent conspiracy by Mr Mincione and others against the Holy See.

34. On 22 July 2021, the Defendant formally joined the criminal proceedings as a civil party (or "*parte civile*"), for the purpose of claiming an indemnity in relation to the damage incurred as a result of the criminal conduct alleged in the Indictment.

35. A trial of the Indictment commenced on 27 July 2021 with the formal arraignment of the 14 defendants and was adjourned to 5 October 2021. On that date, the defendants made preliminary objections based on the fact that they had not been interviewed or received a written charge. On 6 October 2021, the Court upheld these objections, with, as it is put in the translation before the Court "the consequent return of the indictment to the [OPJ] within the relevant subjective and objective limits." The return of the

indictment did not apply to all charges, but it did apply to all offences charged against Mr Mincione. There is a dispute between the parties as to whether the proper characterisation of these events is that: (i) as the Claimants would have it, the Indictment has been declared a nullity and as a result there are no criminal proceedings in existence against any of them; or (ii) as the Defendant submits, the Indictment has been returned to the OPJ to cure some purely technical objections as part of the ongoing criminal investigation or proceedings against Mr Mincione and others.

36. Although the Defendant's own documents were seized by the OPJ in October, a different set of documents has become available to the Defendant following its admission to the criminal proceedings as a *parte civile*:

i) Mr Peter Wood¸ a partner of Withers LLP, the Claimants' solicitors, stated in his fourth witness statement:

> "23. I understand that, if the Secretariat is accepted as a civil party to the Vatican Proceedings (which is likely to take place during the hearing on 5 October or later), the Secretariat will have access to the same documents and exhibits filed by the OPJ and that will be filed by the defendants to the Vatican Proceedings.
>
> 24. These documents will include the Transaction Documents, together with correspondence relating to the Transaction.
>
> 25. Therefore, contrary to what was stated at paragraph 106 of Paniagua-1, the Secretariat should be able to give a precise and comprehensive account as to which documents remain in the hands of the OPJ and, where the Secretariat is no longer in possession of the same, download copies of the files or request electronic versions from the OPJ."

ii) The reply evidence from Mr Paul Michael Walsh, a partner of Hill Dickson LLP, the Defendant's solicitors, (in his fourth witness statement) said:

> "12. After the hearing on 27 July, the Prosecution provided both the defence teams and the civil parties with some 29 GB of electronic documents. I am informed by Mons. Díaz Paniagua that additional documents are expected to be provided in the coming weeks.
>
> 13. However, and in any event, it remains the position that the Secretariat of State does not itself have effective access to all the evidence which may be relevant to defending the present claim, in particular, as regards key witnesses in this case. For instance, I am informed that Mr Tirabassi (who is accused in the Indictment as I will explain below) remains suspended and that he is not cooperating with the Vatican Court nor with the Secretariat of State."

37. In his sixth witness statement, filed after the hearing, Mr Wood has stated that the Italian press has reported that on 19 November 2021 Mgr. Perlasca was cleared of corruption by a Vatican judge, who is reported as having said that "he might be accused of mere negligence".

The Claim

38. The Claimants' Particulars of Claim in these proceedings sets out the Transaction and its component documents. It alleges that the Defendant has appeared to make claims that are inconsistent with the documents, which the Claimants say they discern or infer from the Letter Rogatory and from sundry media reports.

39. The Particulars of Claim seek lengthy declaratory relief tracking the declarations and warranties which I have set out above from the Framework Agreement and the SPA and other similar statements from the documents. There is also a claim for relief in the form of declarations that the Defendant is estopped by contract and/or representation from denying these matters or from contending that it has claims against the Claimants in relation to the Transaction that depend on any proposition that (inter alia) the Defendant was not bound by the Framework Agreement or the SPA, or that Gutt SA lacked authority from the Defendant. Those are just two out of several dozen individual points on which declarations are sought, but they give a sufficient flavour for present purposes. The question whether such declarations can be granted will inevitably involve inquiry into the disputed facts which lie behind the allegations that the OPJ has advanced in the Vatican State criminal investigation.

40. In draft amendments produced during the hearing, the Claimants propose to make clear that they accept that Mr Mincione is not entitled to any declaration deriving from the terms of the SPA, as he is not party to that document. As far as the argument before me disclosed, there is no objection to those amendments being made if the claim otherwise proceeds.

Procedural history

41. The Claim Form and Particulars of Claim were issued on 16 June 2020, along with a without notice application to serve them out of the jurisdiction and an order for alternative service. The application was supported by the first witness statement of Mr Wood ("**Wood 1**"). Wood 1 set out that "The Holy See is a sovereign state and is not party to any European jurisdiction regulation, such as the Judgments Regulation. Accordingly, I understand that the provisions of CPR 6.36 and 6.37 and PD6B para. 3 are engaged, thus the Claimants must obtain the permission of the Court to serve the Secretariat out of the jurisdiction." Mr Wood went on to identify four gateways under PD6B paragraph 3: (6(c)) a claim is made in respect of a contract governed by English law; (6(d)) a claim is made in respect of a contract containing a jurisdiction agreement in favour of England and Wales; (11) the subject matter of the claim relates wholly or principally to property within the jurisdiction; (4A) a claim is made under (inter alia) gateway (6) and a further claim is made against the same defendant which arises out of the same or closely related facts.

42. On 17 June 2020 Bryan J made an order on the papers giving the permission sought that the claim could be served on the Defendant at certain addresses and an email address. Later in June 2020, such service was carried out.

43. On 7 October 2020, the Defendant filed an application seeking an order setting aside service on the ground that what had been done thus far contravened the State Immunity Act 1978. On 16 October 2020, the Claimants applied to extend time for service of the Claim Form, without notice. This application was granted by order of Foxton J on 19 October 2020. On 21 October 2020, Foxton J amended that order to record that:

> "Pursuant to CPR 66.4(2), a request is made for service outside of the jurisdiction in accordance with Mr Justice Bryan's order of 17 June 2020 to be arranged by the Foreign and Commonwealth office under the State Immunity Act 1978."

44. By further amendment on 27 October 2020, Foxton J ordered:

> "A request is made for permission to serve out of the jurisdiction under the State Immunity Act 1978. Pursuant to such request and pursuant to paragraph 1 of the Bryan J Order, the Claimants have permission to serve the Claim Form and Particulars of Claim and all other documents in these proceedings on the Defendant out of the jurisdiction under the State Immunity Act 1978 and pursuant to CPR 6.44."

45. On 17 November 2020, Moulder J made a consent order including the following terms:

> "1. By reason of the fact only that the purported service of the Claim Form made pursuant to the Bryan J Order was contrary to the mandatory provisions of section 12(1) of the State Immunity Act 1978 (the "Act"), the Court has no jurisdiction over the Defendant pursuant to CPR 11(1). All of the Defendant's rights and any challenges to the jurisdiction of the Court that the Defendant may have are reserved.
>
> 2. Without prejudice to, and save as to, the grant of permission in paragraph 1 of the Bryan J Order to the Claimants to serve the Defendant out of the jurisdiction, which said permission is unaffected by this Order, the Bryan J Order is in all other respects set aside. For the avoidance of doubt such grant of permission and the Foxton J Orders do not permit the Claimants to serve the Defendant out of the jurisdiction in any way other than as expressly provided for by the Act and CPR 6.44 or as may be agreed between the parties or their legal representatives.
>
> 3. Pursuant to CPR 11(6)(b), service of the Claim Form is set aside."

46. Service was effected in accordance with the State Immunity Act on 14 January 2021. On 1 April 2021, the Defendant filed an acknowledgment of service stating an intention to contest jurisdiction. On 28 April 2021, the Defendant filed its application challenging jurisdiction (the "**Application**"), which is the principal subject of the present judgment. The Application set out that the Defendant intended to apply for an order that:

> "1. Declares, pursuant to CPR 11(1), that the Court has no jurisdiction over the Defendant or, alternatively, shall not exercise any jurisdiction it may have; and / or
>
> 2. Setting aside the claim form dated 16 June 2020 (the "Claim Form") pursuant to CPR 11(6)(a); and / or
>
> 3. Setting aside service of the Claim Form, pursuant to CPR 11 (6)(b); and / or
>
> 4. Discharging the previous orders giving permission to serve the Claim Form pursuant to CPR 11(6)(c); or
>
> 5. Staying the proceedings until the conclusion of the ongoing criminal investigation being conducted by the Office of the Promoter of Justice of the Vatican City State against the Fourth Claimant (which investigation involves the dealings of the other Claimants as well as a number of other suspects) pursuant to CPR 11(6)(d); or
>
> 6. Further or other provision under CPR 11(6) as considered appropriate by the Court in the circumstances; and
>
> 7. That the Claimants pay the Defendant's costs of the application, to be summarily assessed, on an indemnity basis."

47. The reasons were summarised in the application notice as follows:

> "As set out in the evidence in support of this application, the requirements to permit service out of the jurisdiction are not met. In relation to the relief claimed in the Particulars of Claim ("POC"), there is no serious issue to be tried on the merits, England is clearly not the appropriate forum or proper place to bring the claim and the Court should not exercise its discretion to permit service out of the jurisdiction and, in any event, they have 'no good arguable' case on the jurisdictional gateway(s). In particular:
>
> 1. The relief sought in the POC should not be granted in circumstances where the criminal investigation involving the same transactions is ongoing.
>
> 2. In any event, permission to serve out should not be granted because the relief sought in the POC will not serve a useful purpose.
>
> 3. The relief sought in the POC amounts to an interference with the legitimate acts of a foreign State and runs contrary to the principles of comity.
>
> 4. The matters forming the basis of the POC do not constitute a justiciable civil dispute before the Court.

> 5. The relief sought in the POC, and the Claimants' subsequent conduct, amount to an abuse of the Court's process.
>
> 6. Alternatively, the proceedings should be stayed under the Court's inherent case management powers pending the conclusion of the criminal investigation."

48. Evidence was exchanged and the hearing of the Application was fixed for 1.5 days (which was later extended to 2 full days) on 25 and 26 October. On 12 October 2021, Withers sent a letter to Hill Dickinson giving notice that the Claimants' position would be that permission to service out of the jurisdiction was never in fact required, because Article 25 of the Brussels Recast Regulation (Regulation EU No. 1215/2012) ("**BRR**") applied to the claim by virtue of the jurisdiction agreements in the Framework Agreement and the SPA, regardless of the domicile of the Defendant.

49. The Defendant's skeleton argument dated 18 October 2021 stated that this "volte-face" had come too late for written response and that it would be responded to at the hearing. The Claimants' skeleton argument dated 20 October 2021 made clear that they contended that their BRR Article 25 analysis was fundamental to their response to the Application.

50. In the light of my reading of the skeleton arguments, on 20 October 2021, by email I invited the Defendant to address: "(a) whether the Court has jurisdiction under Art 25 of the Regulation; (b) whether any issue arises under CPR 6.34(2); (c) If there is jurisdiction under Art 25, what issues remain to be determined", and I suggested that the Claimants might also address issue (b).

51. On 21 October 2021, the Claimants issued an application notice seeking retrospective permission under CPR 6.34(2)(b) for the Claim Form and Particulars of Claim to have been served without a form N510, alternatively that they be treated as validly served and if necessary for relief from sanctions. I directed that this application be listed as part of the hearing on 25 and 26 October 2021. This application was accompanied by the Claimants' Note on CPR 6.34(2). The three issues I had raised by email on 20 October 2021 were addressed by the Defendant's Supplemental Note dated 22 October 2021, and that was responded to by the Claimants' Note in Response dated 24 October 2021. On 4 November 2021, by email, I sought clarification of the parties' positions on an issue and I received responses from the Claimants' counsel on the same day and from the Defendant's counsel on 11 November 2021. The latter response raised new authorities to which the Claimants' counsel responded on 12 November 2021. I circulated an approved judgment on 18 November 2021 and received on 22 November 2021 (as well as the usual minor corrections) additional substantive submissions from the Claimants as well as a further witness statement. A few substantive changes were made to the draft in response to these submissions and an amended draft judgment was circulated on 23 November 2021.

52. The main hearing bundle ran to 3,951 pages and included thirteen witness statements. A supplemental bundle contained another 359 pages. The original and supplemental joint authorities bundles plus additional authorities filed or cited during and after the hearing ran to some 120 authorities approximating to 3,000 pages. The hearing itself lasted two full court days following one and a half days of judicial pre-reading.

Issues for determination

53. Even after the exchange of supplemental written submissions to which I have referred above, the parties' positions were to some extent diffuse and not necessarily matching or engaging with each other in the clearest way.

54. Accordingly, at the start of the hearing, I set out a list of what appeared to me to be the legal issues that the Court would have to decide in what I suggested might be a convenient order. I invited the parties to comment on this list and to propose any corrections that they wished to propose. Mr McParland Q.C. for the Defendant had to commence his submissions immediately and he understandably did not attempt to reform his argument to address issues in the order I had proposed. By the end of the hearing (where, of course, he had exercised his right of reply on the second day), he had not suggested that the issues as I had formulated them were not the ones that required to be addressed. Mr Samek Q.C. for the Claimants was content to address the issues as I had set them out. Accordingly, subject to one overarching point, I will proceed to address the issues in substantially the way I set them out at the start of the hearing, with a few changes to reflect the submissions of the parties.

55. The overarching point is that the Defendant's submissions are not neatly encapsulated in the legal issues that I will set out below, because their starting point and central argument on several issues is the same. The Defendant argues that the starting point for every issue is the proper characterisation of the claims. It will be most convenient to consider that argument first.

The Defendant's central argument

56. The Defendant's case is that at all material times (namely, when these proceedings were issued and up until the hearing of the Application), the only relevant or real dispute was and is between the Claimants (whom the Defendant contends are controlled by Mr Mincione) and the OPJ and concerns whether or not Mr Mincione is guilty of the criminal offences which the OPJ has alleged against him and others. Accordingly, the Defendant argues that the purpose and/or effect of these proceedings is to subvert a criminal process, that there is no real present civil dispute to be determined between the parties to this claim and that it is an abuse of the process of this court to seek to use it to influence criminal proceedings in another state.

57. The Defendant says that from the perspective of the Claimants, the purpose and intention of bringing these proceedings is to try to influence the criminal process and/or the publicity emanating from the criminal process. The Defendant says that the Defendant itself is essentially neutral about the disputed issues, because it is awaiting their outcome in the criminal proceedings to discover whether it has been the victim of the serious acts of dishonesty which are alleged against former officers of the Defendant who are alleged to have conspired with Mr Mincione and others. It follows that the party who is actually in opposition to the Claimants in respect of the questions raised in these proceedings is the OPJ and not the Defendant and that the attempt to secure declarations against the Defendant is one which the Court should not countenance. At best, the Defendant argues, these proceedings are a request to the English court to give advisory rulings or opinions for the benefit of the Vatican State criminal court, which does not require them.

58. The evidence upon which the Defendant relies is the factual chronology which I have summarised above (as well as other matters which I have not set out as I consider them to be less material). The Defendant says that this demonstrates that the proceedings were commenced at the instigation of Mr Mincione instead of attending the questioning that he had agreed to attend on 19 June 2020, as a result of learning of the arrest of Mr Torzi, and for the purpose of having something to say to the news media and the Vatican State criminal court to support the sincerity of his claims of innocence.

59. As appears from that summary, there are a number of questions wrapped up in the Defendant's central argument. I will first address certain factual issues which arise from it, preliminary to determining the legal issues that arise on the Application.

60. First, it is necessary to address the stance of the Defendant as to the allegations against Mr Mincione and others. Based on the Defendant's evidence, it appeared that its fundamental position was one of neutrality. When I sought to confirm that with Mr McParland Q.C. he told me that Mgr. Diaz Paniagua's evidence was that "it looks from the investigations that the Secretariat of State have been the victim of a very serious fraud and that would obviously have to be investigated". The references that Mr McParland Q.C. gave me to two paragraphs from the evidence of Mgr. Diaz Paniagua were the following:

> "From the documentation I have reviewed and which I exhibit, it seems clear that a number of individuals (including former working members of the Secretariat of State) are under investigation, alongside Mr Mincione, for having allegedly committed criminal offences. These include Mgr. Alberto Perlasca, the former head of the Administrative office of the Secretariat of State, Mr. Fabrizio Tirabassi and Mr Enrico Crasso, a 'financial manager' and banker employed by Credit Suisse."

and

> "Having read both the documents related to the judicial assistance provided by the Swiss authorities and the February 2021 Request listing a series of offences for which Mr Mincione is under investigation, there appear to be reasons to suspect that the Secretariat of State has been the victim of a major fraud over the course of a number of years directly involving Mr Mincione. The criminal allegations of, inter alia, fraud, corruption and embezzlement clearly pertain to the 60 Sloane Avenue property and relate both to the initial investment of Secretariat of State funds and the transactions which took place in 2018. Those allegations, if confirmed, would be a matter of the deepest concern and the Secretariat of State, while fully respecting the independence of the Office of the Promoter of Justice, welcomes its efforts to investigate these matters thoroughly."

61. The high point of these passages in terms of departure from neutrality are the words "there appear to be reasons to suspect that the Secretariat of Sate has been the victim of a major fraud over the course of a number of years directly involving Mr Mincione."

62. In the course of his submissions, Mr Samek Q.C. took me through several media reports which he submitted showed senior officers of the Defendant itself (not merely the Vatican authorities more generally or the OPJ) explicitly adopting some of the allegations. Counsel also made the point that the Claimants have plainly asserted (in the Particulars of Claim and in their evidence for the hearing) that the sources of allegations in the media against the Claimants include the Defendant and that the Defendant has chosen not to deny the truth of that assertion.

63. When I asked Mr McParland Q.C. about this he told me that the Defendant was not in a position to state whether the statements made in them did in fact emanate from the Defendant. I therefore accept the Claimants' submission that I should assume for the purposes of the Application that the statements reported as emanating from the Defendant did in fact do so. The point that Mr McParland Q.C. made in his oral submissions in reply was that a careful reading of the documents relied on by the Claimants would show that they do not support the claim that the Defendant was disputing any aspects of the Transaction or making the relevant allegations.

64. For the most part, in my judgment, Mr McParland Q.C. was right about that. The majority of the press articles referred to attribute to the Defendant (as opposed to the OPJ) statements that the allegations are under investigation and that it is right that they be investigated.

65. The quotations which Mr Samek Q.C. emphasised included:

i) A report in "Eurasia Review" dated 11 December 2019, including these words:

> "During a recent press conference, Pope Francis was asked about the London investment. While confirming that he had personally authorized the October raids, he emphasised that proof of corrupt or illegal activity was 'not yet clear', before concluding that 'it passed what passed: a scandal.' 'They have done things that do not seem clean', the pope said. Last week, the Holy See press office confirmed that several investments and funds used by the Secretariat of State were under investigation. 'Lines of enquiry which may help clarify the position of the Holy See with respect to the aforementioned funds and any others, are currently being examined by the Vatican judiciary, in collaboration with the competent authorities,' a statement said.

ii) An article from Governance, Risk & Compliance Monitor Worldwide dated 19 December 2019, including the following:

> "The Holy See's Secretary of State, Cardinal Pietro Parolin, has said that the Vatican's London investment must be investigated, but has not yet indicated what parties are responsible for the investment, or whether internal investment policies have been violated. Pope Francis said last month that some involved in the investment have done things that seem, to him, 'not clean'."

iii) An article from Il Corriere dated 3 May 2020 which is translated as including the following statement:

> "Pope Francis himself, on his return from Japan, had clearly said that 'there is corruption, you see it' while the Secretary of State, Paolo Parolin, had defined the whole affair as 'opaque'. Even if it is not certain that crimes can be proved. So much so that for this reason that a civil action, for damages, is not off the table."

iv) The following report in the Financial Times of 8 June 2020:

> "Cardinal Pietro Parolin, the Vatican's second highest official after the Pope, said last month that the London property deal 'was rather opaque and now we are trying to clear it up'."

66. Although there were others, these give a sufficient flavour of the parts of the materials upon which the Claimants placed greatest reliance. In my judgment, the substance of these may be summarised as follows:

i) Official statements from the Defendant itself, including Cardinal Parolin, were generally to the effect that allegations were being investigated and that they needed investigation, because the Transaction was "opaque". Taking all of the material together, I read the word "opaque" in its context as meaning that there are aspects of the Transaction that require investigation because they are not fully understood by the Defendant.

ii) The Pope is reported as having gone further in expressing the view that it looked as if there had been corruption. The Claimants submit that the Pope should be taken as speaking for the Defendant, but I reject that submission. There is no suggestion in these reports that the Pope was purporting to do so. Instead, it seems to me that the official position of the Defendant was that communicated by Cardinal Parolin and the Pope's views were being expressed as personal ones, so far as these reports disclose.

iii) I reject the Claimants' submission that the (translated) Il Corriere article should be read as reporting a threat by the Defendant itself to bring a civil claim against the Claimants. That is a possible reading, but not the only one. Even if it is the right reading, this would be very weak hearsay indeed, which is not attributed by the publisher to any particular person. Against the background of all the other material showing general neutrality by the Defendant, I would not give this one unsourced statement in a press article any significant weight.

67. In relation to neutrality, there is also the point the Defendant is or, at least, has applied to be a *parte civile* to the Vatican criminal proceedings. The Claimants make the point that there are no existing criminal proceedings against Mr Mincione since the Indictment was quashed or returned to the OPJ, so the Defendant is not in fact a *parte civile* to any actual prosecution. But, the Claimants go on to say, if the Defendant is a *parte civile*, then this involves the Defendant in making an actual claim against Mr Mincione and departing from neutrality.

68. Mr Walsh stated in his evidence:

> "Further, it is wrong to suggest that the Secretariat of State 'is not a civil party (*parte civile*) in any Vatican criminal

> proceedings as against Mr Mincione'. As noted above, the proceedings continue and the Secretariat of State's position as a civil party to those proceedings is not affected. I further understand from Monsignor Carlos Fernando Diaz Paniagua that Mr Mincione's lawyers in those proceedings have not opposed the Secretariat of State's inclusion as a civil party."

69. The relevant official document records (in translation) that on 22 July 2021, a lawyer representing the Defendant:

> "… takes civil action incidental to the criminal proceedings indicated in the title of this document, pursuant to the terms of Article 54 of the Criminal Procedure Code, in the name of and on behalf of the Secretariat of State and the APSA, in accordance with the declaration of civil action incidental to criminal proceedings and related special mandate which she files and attaches to the present report (and which must be understood to be recorded in full in the present report), against the following accused parties: Mauro Carlino, Enrico Crasso, Tommaso Di Ruzza, Cecilia Marogna, Raffaele Mincione, Nicola Squillace, Fabrizio Tirabassi, Gianluigi Torzi, Giovanni Angelo Becciu, Logsic Humanitarne Dejavnosti, D.O.O. (in the person of the legal representative Cecilia Marogna), Prestige Family Office SA (in the person of the legal representative Enrico Crasso), Sogenel Capital Investment (in the person of the legal representative Enrico Crasso), Hp Finance LLC (in the person of the legal representative Enrico Crasso), in relation to the charges indicated in the declaration of civil action incidental to criminal proceedings attached to the present report, for the purpose of obtaining the full indemnity of all damages to assets and otherwise, incurred by the Secretariat of State and the APSA due to the conduct described in the charges indicated in the declaration of civil action incidental to criminal proceedings attached hereto."

70. I have not received any expert evidence of Italian or Vatican State law which would enable me to make any concluded finding as to the status of a civil party to criminal proceedings in the Vatican State. Based on the words of the document I have set out above, my understanding is that by seeking to register as a *parte civile*, or even if it has in fact done so, the Defendant has not taken a position that the charges are true, but merely asserted a right to compensation in the event that they are proved.

71. In response to the circulation of this judgment in draft, the Claimants pointed out that Mr Walsh's 4th witness statement gave some further information about the *parte civile* process and exhibited the relevant sections of the Vatican Criminal Procedure Code. Mr Walsh stated as follows:

> "14. On 22 July 2021, both the Secretariat of State and the Administration of Patrimony of the Apostolic See (Amministrazione del Patrimonio della Sede Apostolica, the APSA), as the "injured parties" identified it the Indictment,

> formally joined the criminal proceedings. I am informed that APSA are separately represented and are participating in the trial with different counsel. They joined as civil parties for the purpose of obtaining a full indemnity in relation to all the damage incurred to assets and otherwise as a result of the alleged criminal conduct which was the subject of the Indictment. This was done pursuant to the terms of art. 54 of the Vatican Criminal Procedure Code ('**CPC**').
>
> 15. I am advised by Mons. Díaz Paniagua that according to art. 2043 of the Vatican Civil Code "Any malicious or culpable act, which causes another person an unwarranted loss, obliges the person who has committed the act to compensate the loss." Art. 7 of the CPC recognizes the right of a victim of crime to seek compensation and reparation from the person who committed the crime, from those who participated in it and from any other person who, under civil law, is also deemed liable.
>
> 16. A civil claim may be presented jointly with the criminal proceedings or separately, before a civil court, but civil proceedings cannot be initiated or continued if the criminal proceedings are ongoing and charges have been brought by the Prosecution (CPC art. 9). If the victim of crime intends to bring a civil claim, they must make a declaration to that effect before the clerk of the court. The victim may submit evidence to demonstrate both the facts and damages it has suffered (CPC art. 63) and the defendants to the civil action are invited to present their defences (CPC art. 67). Mr Mincione and the other defendants to those civil claims are entitled to present their defences to any civil claims brought against them in due course."

72. The relevant provisions of the Vatican CPC were exhibited together with a translation. They appear to support what Mr Walsh said about them. It is a significant feature of the relevant legal framework that civil proceedings are barred or in effect stayed while the criminal case proceeds. As a result, any alleged victim has a strong incentive to join as a *parte civile* as failing to do so will, at best, lead to a much longer process before any compensation can be granted. For present purposes, what is most important about these provisions is that, whilst the alleged victim may submit evidence in the case, including as to its damages, there is no suggestion in the materials to which my attention have been drawn that it is required to do so, or to take a partisan position on whether the crime in fact took place.

73. The Claimants might say that the words "for the purpose of obtaining a full indemnity" in the document of 22 July 2021 (which are also reflected in Mr Walsh's evidence) indicate a partisan stance. If so, I would not agree. As I read the relevant legal framework, this remains a contingent claim by the Defendant which will be advanced if and when the relevant facts are established in the criminal case. As Mr Walsh noted, the Vatican CPC permits a person in the position of the Defendant to "submit evidence to demonstrate both the facts and damages it has suffered". If the Defendant does so, that might indicate that it has become an active adversary to the Claimants' position in

respect of the matters in the claim. However, the evidence on this application does not disclose that that has occurred nor that it necessarily will do so.

74. Taking all in all, it seems to me that the Defendant has adopted a neutral position in relation to the allegations against Mr Mincione and others. As an organ of the same state which is investigating the allegations, it has naturally not sought to play them down, and indeed, it has welcomed the fact of an investigation. The Defendant's public pronouncements are consistent with a view that there appear to be questions which it is proper for the OPJ to investigate, but it has gone no further than that.

75. Secondly, there is a question as to the subjective motivation of the Claimants for bringing these proceedings. As to that, I have evidence from Mr Mincione that the Claimants have been subject to: (i) libellous press reports (and Mr Mincione points out that he has commenced libel actions in the English High Court in respect of some of them); (ii) queries having been raised by the Financial Conduct Authority in May 2020 which he says "were eventually resolved, but not without having incurred much time and cost", and by a Luxembourg financial regulator, the Commission de Surveillance du Secteur Financier, to which "WRM has had to devote an undue amount of time and effort in responding to their many requests"; and (iii) WRM's application to become a full member of the Italian Private Equity, Venture Capital and Private Debt Association was refused because of concerns about Mr Mincione's reputation. Mr Mincione asserts that this type of prejudice will continue so long as the Defendant continues to dispute the lawfulness and validity of the Transaction.

76. In one sense, I accept Mr Mincione's evidence. I accept that he wishes to contest the allegations and commentary relating to, among other things, the Transaction and that one reason why he wishes to do that is to mitigate the kind of disadvantages he refers to. In another sense, I do not accept it. Since I have found that the Defendant has adopted a neutral stance towards the allegations, I do not accept that it is any challenge to the lawfulness of the Transaction by the Defendant that has led to the issues faced by the Claimants. Nor do I accept that Mr Mincione believes otherwise. It is obvious from the public pronouncements of relevant parties that the source of the commentary is the undisputed fact that the OPJ has been investigating Mr Mincione and others and has brought, or wishes to bring, serious charges against him and them.

77. Thirdly, there arises the question whether Mr Mincione is seeking to interfere with a criminal process or whether that would be the effect of these proceedings. The Defendant's case is that Mr Mincione wants to be able to say to the criminal court that this Court is investigating the Transaction and, if the Claimants' claims succeed, that this Court will have declared that the Transaction was lawful. This is consistent with the deployment of these proceedings in the Defence Brief to which I referred earlier. Mr Samek Q.C. said that the relevance of the paragraph that I quoted above was to show the OPJ that Mr Mincione truly believed in his defence and that he was having the matters resolved by the court chosen by the parties to the contractual documents. This response was consistent with the Defendant's case that at least one subjective purpose for which the Claimants bring these proceedings is to permit Mr Mincione to tell the Vatican criminal authorities that this Court is considering issues that are at the heart of the criminal investigation. Accordingly, I find that it is indeed part of the Claimants' intention that the fact of these proceedings – and no doubt any favourable judgment that they might obtain - should be the subject of submissions to the investigator and/or criminal court in the Vatican State.

78. Mgr. Diaz Paniagua's evidence (adduced by the Defendant and cited to me by the Claimants who have not challenged it) is that "From the perspective of Vatican law, however, I cannot see how any declaratory rulings of this Honourable Court will assist either the Office of the Promoter of Justice in the conduct of their criminal investigation, or indeed, the Vatican court system in any criminal trial of these matters." From that, two conclusions flow. First, these proceedings would not assist any criminal investigator, prosecutor or court in the Vatican State. Secondly, as far as the evidence adduced before me discloses, these proceedings will also have no effect on the criminal process. I asked Mr McParland Q.C. precisely how these proceedings would interfere with the criminal process and his answer was that he could not say if or how the process might be influenced by what was proceeding in this Court, but his submission was that "producing something that can be deployed within the context of those criminal proceedings" was sufficient to constitute interference. I will return below to the legal issue of "interference", but my finding of fact, on the evidence adduced and submissions made on this application, is that nothing in these proceedings is likely to have any actual significant influence on the Vatican State criminal process.

79. Fourthly, I should deal here with a preliminary point made by the Claimants, which is that whatever might be said about Mr Mincione, the other Claimants are not accused of any wrong-doing by the OPJ and it cannot be said of them that their real dispute is with the OPJ rather than the Defendant. I accept that point as far as it goes. There is no evidence to suggest that the corporate Claimants have been operated otherwise than properly in accordance with their constitutions and the law of Luxembourg. However, the evidence on behalf of all four Claimants has been given by solicitors and by Mr Mincione. I have found nothing in it to indicate that any of the Claimants is acting for any reason other than those that Mr Mincione has given. I therefore do not consider that they are in a different position to that of Mr Mincione so far as concerns the purpose or usefulness of the present proceedings.

80. To summarise, to a large extent, I accept the Defendant's case about what subjectively lies behind this action. In short, the Claimants are anxious to issue a counterblast to the media interest in the OPJ investigation and this action is the convenient means that has presented itself for that purpose. The Defendant is caught in the middle because it does not own the allegations and has not endorsed them, but nor has it disowned them, and nor could it be expected to do so. However, the Defendant has not demonstrated that these proceeding would in fact be likely to interfere with a criminal process in the Vatican State.

Issue 1: Is there a good arguable case that BRR Article 25 governs some or all of the claims?

81. The Defendant did not dispute that the Framework Agreement and the SPA contained jurisdiction agreements which engaged Article 25. Three points were, however, taken by the Defendant:

    i) The claim was not a "civil and commercial matter" within the meaning of BRR Article 1(1);

    ii) Mr Mincione was not a party to the SPA and could not rely upon it;

    iii) The Defendant was not a party to the SPA for the purposes of Article 25.

Civil and commercial matter

82. BRR Article 1(1) provides:

> "This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*)."

83. The point taken by the Defendant was that the present claim concerned the liability of a State for acts and omissions in the exercise of state authority and it, therefore, was not a "civil and commercial matter". This provision of BRR is given an autonomous meaning in European law (see *Dicey, Morris & Collins on the Conflict of Laws*, 15th Ed, 11-030 and the authorities there cited).

84. The Defendant's argument depends on its central thesis that the real purpose or objective of these proceedings is to attack the OPJ's investigation. On that basis, it submits that the true subject matter of the claim is the public law activity of investigating and prosecuting crimes. That seems to me to be misconceived, because the question whether the claim is a civil or commercial matter does not turn on the subjective intentions of the claimant as to the ultimate effect that a claim might have on its interests, but on an objective reading of the claim itself and the relief that it seeks from the court. On that basis, it is a claim for declarations against the Defendant concerning the Defendant's entry into commercial transactions with the Claimants.

85. While the parties cited several authorities in relation to the approach to this question (including *Grovit v de Nederlandsche Bank* [2008] 1 WLR 51 and *Dynasty Company for Oil and Gas Trading Limited v The Kurdistan Regional Government of Iraq* [2021] EWHC 952 (Comm)), none of them addressed the distinction I have drawn between the subjective intentions of the claimant as to the ultimate effect of a claim and an objective reading of the claim and the relief it seeks from the court. However, they are all, in my judgment, consistent with the view I have expressed.

86. The Defendant also submitted that even on an analysis of the Transaction itself, it was entered into by the Defendant in the purported exercise of public powers. I reject that argument. The Transaction was one that any private person could have entered into if it had the requisite funds. Nothing that was essential to the Transaction required sovereign powers to enter it and nothing that the Defendant did or purported to do was in the exercise of public authority.

87. Accordingly, I find that the claim does fall within the scope of the BRR as a "civil and commercial matter". (I note in passing that, as the Claimants submitted, this is consistent with the omission by the Defendant to claim state immunity as a ground for dismissing the claim at this stage).

Mr Mincione not a party to the SPA

88. It is common ground that Mr Mincione is not a party to the SPA and not entitled to the benefit of any declarations deriving from the SPA. As a result of this point being raised during the hearing, the Claimants provided a draft Amended Particulars of Claim to

make it clear that he did not seek any such benefit. The Defendant has not commented on the draft, but I see no reason why some such amendment should not suffice to deal with this issue.

Is the Defendant a party to the SPA for the purposes of Article 25?

89. The issue raised by the Defendant was that the SPA was made by Gutt SA as purchaser, not by the Defendant itself. The question at the present stage is whether the Claimants had a good arguable case that the Defendant had agreed that the courts of England were to have jurisdiction within the meaning of BRR Article 25 (for the test, see *Dicey, Morris & Collins on the Conflict of Laws*, 15th ed, 11-249 and the authorities cited there). Article 25 provides as follows:

> "If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. The agreement conferring jurisdiction shall be either:
>
> (a) in writing or evidenced in writing;
>
> (b) in a form which accords with practices which the parties have established between themselves; or
>
> (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned."

90. The Claimants referred to the documentary references I have set out above which, on their face, stated that Gutt SA was acting as agent for the Defendant. Although they were mistaken about the Power of Attorney, the Comfort Letter is a clear statement by an officer of the Defendant addressed to the First and Second Claimants to the effect that Gutt SA would be pursuing the Transaction as agent for the Defendant. Although no doubt the good faith of the Comfort Letter is a matter that could be in dispute, in the meantime, Mr McParland Q.C. accepted in his reply submissions that he could not deny that there was a good arguable case that Gutt SA entered the SPA as agent for the Defendant, notwithstanding his reliance on the entire agreement clause of the SPA. I consider that concession was rightly made.

91. It was not in dispute that the question whether the Defendant agreed to the jurisdiction provisions of the SPA is a question to be determined under the relevant national law which in this case is English law. It was also common ground that there is no decision of the European Court that grapples with this question in the context of agency. I was however referred to several English cases.

92. In *Standard Steamship Owners Protection and Indemnity Association (Bermuda) Limited v GIE Vision Bail and others* [2004] EWHC 2919 (Comm), [2005] Lloyd's Rep IR 407, Cooke J set out the background:

> "1. Between April 2002 and July 2003 the fifteenth Defendant (now known as Silver Waves Shops Limited, but then called Louis Duty Free Shops Limited: hereinafter 'LDFS') held the duty free, logo and gift shop concessions on five cruise ships owned and/or operated by companies in the Festival Group (Festival). LDFS needed employers' liability cover in respect of its employees who would staff the shops on the ships and, as part of the negotiation of a Retail Concession Agreement with Festival, Festival ultimately agreed to obtain insurance cover for LDFS on Festival's P & I cover with the Claimant (the Club).
>
> 2. The process for agreeing the inclusion of LDFS on the Club's cover was essentially left to Festival and its brokers PL Ferrari (Ferrari). The Club maintains that what was agreed between Ferrari and the Club's managers (Charles Taylor) on 8/9 May 2002 was that LDFS would be insured as a 'Joint Entrant' on the Festival covers with the Club. It is accepted for the purposes of the current application that there is a triable issue as to whether LDFS is bound by an Agreement concluded by Ferrari and Charles Taylor that it should be insured as a Joint Entrant, on the basis that there is a triable issue as to the actual authority of Festival and Ferrari to bind LDFS in respect of P & I cover.
>
> 3. The Club's rules provide for English jurisdiction by rule 32.1 which reads as follows:
>
> > 'Disputes and differences
> >
> > The Member hereby submits to the jurisdiction of the High Court of Justice of England in respect of any action brought by the Club to recover any sums which the Club may consider to be due to it from a Member. Without prejudice to the foregoing the Club shall be entitled to commence and maintain any action to recover any sums which the Club may consider to be due to it from a Member in any jurisdiction.'
>
> 4. The Club claims that LDFS is liable to it in respect of premiums and calls for the 2002/03 and 2003/04 Club years in respect of ships entered with the Club by Festival. Since LDFS is a Cypriot company, service of the claim form was effected on it in Cyprus. The claim form contained a certificate stating that the English Court had power under Council Regulation 44/2001 of 22 December 2000 ('the Jurisdiction Regulation'), because LDFS was a party to an agreement conferring jurisdiction to which Article 23 of that Regulation applied.

> 5. Following service, LDFS issued an application seeking a declaration that the Court had no jurisdiction over it or alternatively that the Court should not exercise jurisdiction over it and that service of the claim form upon it should be set aside."

93. Article 23 in the original Brussels Regulation (EC 44/2001) was the predecessor of BRR Article 25. It is in almost identical terms, save that Article 23, unlike Article 25, applied only where one or more of the parties was domiciled in a Member State.

94. As a matter of the interpretation of the Club Rules, Cooke J held that Rule 32.1 applied to a "Joint Entrant" in the same way as a Member. On the facts, he found there was a good arguable case that Ferrari agreed that LDFS should be added as a Joint Entrant on the terms of the Club Rules. Cooke J held that the jurisdiction agreement met the requirements of one of more of sub-paragraphs (a), (b) and (c), which is not a point that is disputed in the present case.

95. Cooke J then turned to the matter which is in dispute in the present case, reciting that:

> "LDFS maintained that the question of consensus had to be considered as between LDFS itself and the Club and not by reference to any dealings through its agents, although for these purposes it conceded that Ferrari and Festival were arguably its agents."

96. Cooke J considered the authorities that had been cited to him and held as follows at paragraph [53] of the judgment:

> "53. The effect of LDFS' argument is to negate the concept of agency, at least in a large number of situations and thus to override principles of national law in relation to it. The whole basis of agency in English law and elsewhere is that, if the agent has actual or ostensible authority to conclude a contract on behalf of the principal, then the principal is bound. As a matter of principle and logic, if the agent specially agrees a jurisdiction clause, and it is within his actual or ostensible authority to do so, that ought to bind the principal. The agent stands in the shoes of the principal. If this was not recognised, a person dealing with a fully authorised agent would still have to enquire behind the agency, to ensure that there was a specific agreement by the principal to the jurisdiction clause. I consider that this cannot be right."

97. Cooke J concluded on the point at [55]: "Provided therefore that there is actual authority or ostensible authority on the part of the agent, the issue is whether or not the requirements of Article 23 are satisfied, as between the agent and the third party." He then held at [57] that since there was a good arguable case of agency, there was also a good arguable case that the requirements of Article 23 were satisfied.

98. I accept Mr Samek Q.C.'s submission that that was a decision precisely on the point that I have to decide. Mr McParland Q.C. did not try to persuade me that the decision was wrong, but submitted that the real point in the case was the issue of construction of

the Club Rules and that what fell from Cooke J on the subject of the satisfaction of Article 23 by an agreement made by an agent was "in a sense *obiter* to the main decision, that they were already a member of the club and bound the jurisdiction clause in its contract." I do not accept that the relevant reasoning of Cooke J was in any sense *obiter*, but even it had been, that would not of itself be a reason not to follow it.

99. The Claimants also submitted that Cooke J's decision in *Standard Steamship* has received obiter approval from the Court of Appeal in *Antonio Gramsci Shipping Corpn v Receletos Ltd* [2013] EWCA Civ 730, [2014] Bus LR 239 at [58]-[59]. There is no hint there of disapproval of the decision, but nor had it been questioned, so I do not view this authority as assisting either way.

100. Since Mr McParland Q.C. has not attempted to persuade me that there is a good reason not to follow the decision of Cooke J as a persuasive decision of a Judge of this Court, I will do so. Even if I had taken the view that the relevant reasoning was *obiter*, in any event I find it entirely persuasive and consider it to be plainly right.

101. I therefore find and hold that there is a good arguable case that the Defendant has agreed to be bound by the jurisdiction of this Court in respect of the SPA as well as the Framework Agreement.

Conclusion on issue 1

102. It follows from the above findings that in my judgment there is a good arguable case that all of the claims in the Particulars of Claim (at least with the proposed amendments I have mentioned) are claims to which BRR Article 25 applies.

Issue 2: Can and should the Court exercise jurisdiction on the basis of Article 25?

103. Issue 2 arises because, as I have set out above, the claim was served out of the jurisdiction on the basis of the common law tests for jurisdiction and not under BRR. It was only on 12 October 2021, less than 2 weeks before the hearing of the Application, that the Claimants asserted for the first time that jurisdiction for their claim arose under BRR Article 25. The Claimants' approach was to say that the claim had already been served and the question that now arose was simply whether the Court had jurisdiction under Article 25, the question which I have just answered in their favour.

104. However, in response to prompting from the Court, the Claimants recognised that CPR 6.34 was relevant. This provides as follows:

> "(1) Where the claimant intends to serve a claim form on a defendant under rule 6.32 or 6.33, the claimant must—
>
> (a) file with the claim form a notice containing a statement of the grounds on which the claimant is entitled to serve the claim form out of the jurisdiction; and
>
> (b) serve a copy of that notice with the claim form.
>
> (2) Where the claimant fails to file with the claim form a copy of the notice referred to in paragraph (1)(a), the claim form may only be served—

(a) once the claimant files the notice; or

(b) if the court gives permission as relevant."

105. CPR 6BPD2 provides "Where rule 6.34 applies, the claimant must file practice form N510 when filing the claim form." Form N510 is the form of notice which states the grounds upon which the claimant is entitled to serve the claim form out of the jurisdiction.

106. The Claimants submit that the proper course is for the court now to grant retrospective permission to serve the claim form without a form N510 under the power in CPR 6.34(2)(b). The Defendant does not dispute that there is power in the court to grant such permission retrospectively, but it submits that the application for such power to be exercised is an application for relief from sanction. The Claimants disagree. Ms Nesterchuk who dealt with this issue on their behalf submitted that the case was analogous to *Mark v Universal Coatings & Services Ltd* [2018] EWHC 3206 (QB), [2019] 1 WLR 2376 in which Martin Spencer J held that a failure to comply with the requirement of CPR 16 PD 4.3 to serve with particulars of claim for personal injuries a schedule of loss and a report from a medical practitioner was not subject to an express or implied sanction and therefore did not engage the relief from sanction principles. At [54] Martin Spencer J noted that the word "must" is used liberally in the CPR and that it is not sufficient without more to indicate an implied sanction. The *Mark* decision shows that the word "must" is not sufficient to imply a sanction and that there is an exercise of interpretation to be carried out in respect of any rule where the issue of implied sanction is raised.

107. Ms Nesterchuk referred me to *DSG International Sourcing v Universal Media Corp (Slovakia) SRO* [2011] EWHC 1116 (Comm), [2011] ILPr 33. In that case, the claimant sought to establish jurisdiction under Brussels Regulation Article 23 (predecessor of BRR Article 25) or Article 5. The claimant had filed an N510, but ticked an incorrect box which did not assert jurisdiction under the Regulation at all, but only under the Civil Jurisdiction and Judgment Act 1982, which was applicable only to jurisdiction in relation to a few remaining territories for which the Brussels Convention remained relevant. David Steel J recorded at [33] that since no revised notice had been filed, the claim form could only be served with leave of the court under CPR 6.34(2)(b). At [38] David Steel J held that such permission should be granted because the difference between the Brussels Convention and the Brussels Regulation was immaterial, especially in respect of Article 23, the defendant had suffered no prejudice (other than potential costs implications) and the court had a discretion which should be exercised in accordance with the overriding objective.

108. The Claimants also referred to several more recent decisions in which an issue had arisen in relation to CPR 6.34.

109. In *Heraeus Medical GmbH v Biomet UK Healthcare Ltd* [2016] EWHC 1369 (Ch) Mann J had to consider a somewhat curious argument concerning the state of mind of a solicitor who had signed form N510 in the context of an issue of *lis pendens*. Of relevance for present purposes is Mann J's formulation of the purpose for which N510 exists at [55]:

> "The purpose of the notice which has to be provided under CPR 6.34 is probably twofold. First, it provides some sort of mechanism to police service of proceedings without permission under the Regulation so as to try to ensure that only proper cases make use of the opportunity to serve out of the jurisdiction without permission. It obviously requires and expects the claimant (or its solicitor) to consider the point, and to that extent is intended to act as a sort of filter. Second, it provides an indication to the recipient of the notice that the claimant considers that there are no equivalent proceedings on foot so that the recipient can decide whether to challenge service (and jurisdiction) if it disagrees (though the recipient is less likely to be interested in that because it will form its own view on the matter anyway)."

110. The Claimants relied on what Mann J derived from this at [56]:

> "None of that makes the state of mind of the person signing the notice (at least assuming that the belief is genuinely held) relevant to the propriety of service. As a matter of principle the conditions required by CPR 6.33 are either fulfilled or they are not. If there is a challenge it should be on the footing that the conditions are not fulfilled. Nothing else makes any real practical sense. If the conditions are not fulfilled then service ought not to be effected, and if necessary the English court will go on to decline jurisdiction (Article 29(3)) and, presumably, strike out the proceedings. That seems to me to be the real question, and it is hard to imagine how the state of mind of the maker will be of any interest to the defendant. It will make no difference whether the maker is conscientious and wrong or unconscientious and wrong — the result will be the same."

111. This statement at [56] was not made in the context of any finding that the claimant needed to rely on 6.34(2)(b), so I am not convinced that it assists on the issue I have to decide.

112. In each of *DSG* and *Heraeus*, the court referred to, and distinguished, an earlier dictum of Gloster J, which the Defendant also cited on this issue, from the consideration of indemnity costs in her first instance decision in *National Navigation Co v Endesa Generacion SA: the Wadi Sudr* [2009] EWHC 196 (Comm), [2009] 1 Lloyd's Rep 666 (reversed on other points at [2009] EWCA Civ 1397, [2010] 1 Lloyd's Rep 193):

> "It is very important in cases said to fall under the Regulation, where this court takes jurisdiction on the basis of a statement in a claim form pursuant (now) to CPR 6.33, and accordingly there is no requirement for the court's leave to serve the proceedings out of the jurisdiction, that solicitors issuing proceedings take particular care to ensure that they have a reasonable basis for their belief, and that the facts supporting it are stated in a transparent fashion in the claim form. First seisure under the Regulation may obviously have important consequences for both

> parties, and for proceedings in other jurisdictions. It is therefore vitally important: (a) that jurisdiction is not wrongly asserted without reasonable belief; and (b) the grounds are clearly stated so that a jurisdictional challenge can, if necessary, be speedily and easily made. This did not happen in the present case."

113. Next, in *BDI-BioEnergy International AG v Argent Energy Ltd*, 19 December 2017, HHJ Hacon sitting as a judge of the Intellectual Property Enterprise Court considered applications in a claim in which the wrong box had been ticked on the N510 which was served and the N510 had not been filed with the Court at all. In respect of the wrong box, having referred to *Heraeus*, HHJ Hacon said at [19]: "Mr Davis argued that, by analogy, what matters here is not what BDI's patent attorneys identified as the ground for this court's jurisdiction on Form N510. What matters is whether this court has jurisdiction or not. I agree." As to the failure to file form N510, HHJ Hacon said:

> "23. It follows – Mr Davis did not dispute that this was the case – that the claim form has not been properly served. That being so, the claimant must seek relief from the sanction which would normally follow from a failure to correctly serve a claim form and I must apply the usual rules under CPR 3.9. In summary, I must consider whether the breach is trivial. Secondly, I must consider why the default occurred. Thirdly, I must consider all relevant circumstances in deciding whether relief should be granted.
>
> 24. It seems to me I cannot characterize this as a trivial breach, and therefore, I must apply the two other factors.
>
> 25. It's not possible for me to say why the failure it occurred. There are at least two possibilities. One, which Mr Johnson pressed on me, was that the claimants simply failed to send an electronic copy of Form N510 to the court. The other possibility, which I cannot discount, is that there was a mistake by someone at the court. Mr Davis submitted that it would be unfair for me to reach any kind of conclusion today, without at least giving the claimant the opportunity to deal with the matter by investigating the reasons why Form N510 was not filed.
>
> 26. What really mattered in practice was that Form 510 was served on the defendant, so they were in receipt of it. The failure to put it on to the court file, while being in breach of the rules, does not seem to me in all the circumstances to be a breach causing sufficient prejudice to Argent Scotland to warrant the consequence that BDI must start again. Therefore, I will retrospectively give BDI permission to file Form N510 out of time."

114. In *Cargill International Trading Pte Ltd v Uttam Galva Steels Ltd* [2018] EWHC 974 (Comm), Popplewell J said, obiter:

> "52. The last point taken on behalf of Uttam on this aspect of the argument was that, where there is an exemption from a requirement of permission to serve out of the jurisdiction under rule 6.32 or rule 6.33, there is nevertheless a mandatory requirement under rule 6.34 to file with the claim form a notice (in form N510) containing a statement of the grounds on which the claimant is entitled to serve the claim form out of the jurisdiction. Because Cargill did not do so when serving Law Debenture in this case, it is said that permission is required under rule 6.34(2)(b).
>
> 53. The view which was taken by Cargill's solicitors at the time was that because service was being effected within the jurisdiction, pursuant to a contractual entitlement, there was no need to file a form N510 notice. As I have indicated, that view was correct. If, however, it had been incorrect, I would have had little hesitation in giving retrospective permission under rule 6.34(2)(b) for the claim form to have been served in that way without a form N510 notice. Insistence on such a notice would serve no useful purpose."

115. Next, the Claimants referred to *In re Carna Meats (UK) Ltd, Wallace v Wallace* [2019] EWHC 2503 (Ch), [2020] 1 WLR 1176 at [26], where Adam Johnson QC sitting as a Deputy High Court Judge said:

> "26. It follows from this conclusion that in my view, the certification provided by the liquidator's solicitors in Form N510 was the wrong certification. No permission to serve out was required, but the relevant provision was CPR r 6.33(3) not CPR r 6.33(1). Here, however, I agree with the approach of Judge Hacon in *BDI-BioEnergy International AG v Argent Energy Ltd* (unreported) 19 December 2017, that the critical question is not whether the correct box has been completed on the form, but substantively whether the case is an appropriate one for service without permission or not (see at para 19). For the reasons already given, it seems to me it is, and that the defect in Form N510 is a minor, formal irregularity which causes no prejudice and which does not invalidate the service effected: see IR 2016, r 12.64."

116. Finally, the Claimants cited *Ablynx NV v Vhsquared Ltd* [2019] EWHC 792 (Pat), [2019] FSR 29. In that case, having determined that there was jurisdiction for the claim under the BRR, HHJ Hacon said:

> "114 Ms Lane told me that there were three defects in the service of the claim form and the particulars of claim.
>
> 115 The first was that in breach of CPR 6.34(1)(b) the claim form was not served with Form N510, the form which contained the statement of the grounds on which the claimants were entitled to

> serve the claim form out of the jurisdiction. (Form N510 was filed pursuant to r.6.34(1)(a), but it was not served.)
>
> 116 The second was that although Ablynx pleaded reliance on the relevant licences to establish its exclusive licence, copies of them were not served with the particulars of claim in breach of PD63, para.4.1(2).
>
> 117 The third was that in breach of PD51U, para.5.1, Ablynx did not serve an initial disclosure list of documents with the claim form or particulars of claim and that the initial disclosure list was not served until five days after the date on which the claim form expired for service within the jurisdiction.
>
> 118 Mr Turner admitted the breaches. Ms Lane did not suggest that any of them had caused the defendants any prejudice. Neither did she direct my attention to any sanction under the rules from which Ablynx expressly requires relief pursuant to CPR 3.9. However, Ms Lane referred to the judgment of Edwards-Stuart J in *Venulum Property Investments Ltd v Space Architecture Ltd* [2013] EWHC 1242 (TCC); [2013] 4 Costs L.R. 596. This was an application to extend time for service of the particulars of claim. Edwards-Stuart J ruled that the court's discretionary power to extend time should be exercised according to the framework set out in CPR 3.9. He refused to extend time, stating three factors that were of particular importance: (i) the claimant delayed for five years between the event complained of and service without any explanation for the delay; (ii) the claim was not a strong one; and (iii) the claimant was advancing a claim for bad faith pleaded in particularly vague terms such that the claimant did not merit indulgence.
>
> 119 There are no equivalent factors in the present case. Ablynx did not become aware of V565 until June 2017 and the delay of just over a year in starting the action can be explained by attention being focused on the litigation in the Netherlands. I have no basis on which I could say that Ablynx's claim is weak (or strong). In my view, none of the breaches of the rules was either serious or significant within the meaning given to those terms by the Court of Appeal in the context of the first stage of the assessment under CPR 3.9, see *Denton v TH White Ltd* [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926.
>
> 120 I decline to set aside service of the claim form or particulars for breach of the rules."

117. I have to decide whether the Claimants' application for retrospective permission under CPR 6.34(2)(b) is an application for relief from an implied sanction. As far as authority is concerned, the following may be gleaned from the cases I have mentioned above:

i) Although made in a slightly different context, there remains validity in the general point made by Gloster J in *the Wadi Sudr* that the claimant's statement of the basis upon which it asserts jurisdiction under the Brussels regime is a matter of significance because of the potential importance of which court is first seised;

ii) David Steel J considered an application under CPR 6.34(2)(b) without reference to relief from sanctions in *DSG*, but since the case predated the reformulation of CPR 3.9 and the Court of Appeal's decision in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, I do not think I can draw a great deal from that;

iii) In *BDI-BioEnergy*, HHJ Hacon appeared to find it obvious that an application under CPR 6.34(2)(b) was an application for relief from sanction and, moreover, that he could not characterise as a trivial breach the fact that in that case the N510 had not been filed, even though it had been served;

iv) In *Cargill*, Popplewell J indicated that he would have given permission under 6.34(2)(b) without referring to relief from sanctions, but given that this was a very brief and explicitly *obiter* indication and there is no suggestion that relief from sanction was referred to in argument, I do not think I can treat this as authority on the particular issue with which I am concerned;

v) In *Wallace v Wallace*, the ticking of an incorrect box on form N510 was treated as a minor procedural irregularity, but that is plainly at a different level to failing to file or serve the form at all;

vi) In *Ablynx* where an N510 had been filed but not served, HHJ Hacon seems to have proceeded on the basis that if relief from sanction was required, then the breach was neither serious not significant.

118. To my mind, the words of CPR 6.34(2) plainly provide a sanction for failing to file the notice contained in form N510 or to obtain the Court's permission, namely that the claim form may not be served. In context, that means that it will not be treated as having been served formally, so as to initiate the procedures that follow service of the claim form. Whether this is called an express or implied sanction, I think that an application for permission under CPR 6.34(2)(b) is an application for relief from sanction within the meaning of CPR 3.9 and that there apply to it the principles laid down by the Court of Appeal in *Denton v TH White* [2014] 1 WLR 3926.

119. Under those principles, the first stage is to identify and assess the seriousness and significance of the failure to comply which engages rule 3.9(1). In this case, the relevant failure is the failure to file form N510. This is rather curious, because it might be thought that the failure to serve a copy of it is a more serious matter than the failure to file, but it is only the failure to file that is the subject of the sanction set out in 6.34(2). Like HHJ Hacon in *BDI-BioEnergy*, I cannot dismiss the breach in this case as neither serious nor significant, so the inquiry does not come to an end at this first stage.

120. The second stage is to identify the reason for the breach. It seems to be clear that the Claimants' legal team wrongly believed that BRR did not apply to the claim in circumstances where the Vatican State was not a member state of the European Union

and failed to understand that the wording of BRR Article 25 (in contrast to its predecessor) applied to claims wherever the defendants were domiciled. A mistake by legal advisers is not a "good reason" such as to bring the *Denton* inquiry to an end at the second stage, but it is also not the worst reason: it does not represent any deliberate flouting of the rules, or an improper attempt to gain tactical advantage.

121. At the third stage of the inquiry, it is necessary to consider all the circumstances of the case. In this case, one of those circumstances is the policy and principles of BRR (see *National Bank of Greece (Cyprus) Ltd v Christofi* [2018] EWCA Civ 413, [2019] 1 WLR 1435 at [104]). The policy and principles of the BRR include the principle embodied in Article 25 that where there is a jurisdiction agreement to which the Article applies, jurisdiction is allocated exclusively to the agreed forum. This factor tells forcefully in favour of granting relief once it is established that there is a good arguable case for the application of Article 25.

122. Particular weight must also be given to "factor (a)" and "factor (b)" as set out in CPR 3.9. Factor (a) is "the need (a) for litigation to be conducted efficiently and at proportionate cost". In the present case, it seems to me that this factor is strongly against visiting the Claimants' error with the sanction of non-service of the Claim Form, which would inevitably lead to great inefficiency and delay in this conduct of this litigation. Factor (b) is "the need (b) to enforce compliance with rules, practice directions and orders". This factor is neutral in the present case, where the error was an error of law innocently made in circumstances where there was no common sense analogue for the rule that was breached.

123. Thus far, then, the balance is weighted heavily towards granting relief. The Defendant urges me not to do so on the basis of the following factors:

i) It alleges that the Claimants' past conduct of the proceedings has been to show a consistent disregard for proper procedure compounded by a series of serious material non-disclosures in their application for permission to serve out;

ii) The parties have incurred costs, and the Court wasted time, on the false basis of the original application for permission to serve out at common law; and

iii) The Claimants have delayed making the application under CPR 6.34(2)(c) and have not explained that delay.

124. The second of these factors is a matter that can be compensated in costs as far as concerns the Defendant. The court time that has been wasted cannot now be cured and indeed is likely to be increased if the Claimants are put to serving again.

125. The third factor is technically correct, but it seems from the sequence of events immediately before the hearing that the delay in making the application under CPR 6.34(2)(c) until immediately after I raised the question was another oversight on the part of the Claimants' legal team rather than any tactical or deliberate manoeuvre. The Defendant could have referred to the lack of an application under CPR 6.34(2)(c) before the matter was raised by the Court, but it chose to keep its powder entirely dry on the whole BRR Article 25 issue. In those circumstances I consider this to be a consideration of light weight.

126. That leaves the first factor. I accept that if there was a course of deliberately disruptive or abusive or otherwise improper conduct in the prosecution of these proceedings by the Claimants, that might be a factor of very substantial weight. I have not yet reached the stage of this judgment where I will consider the allegations of non-disclosure. However, even on the assumption that I find these to be made out, I would not consider them to amount to the kind of conduct that ought to outweigh the very substantial factors that are on the side of granting relief once jurisdiction under Article 25 is established. On this hypothesis, permission to serve out was never actually required, so the alleged non-disclosures made no ultimate difference to the outcome.

127. It is right to stand back and consider – in the words of CPR 3.9 – how to "deal justly with the application". It seems to me that taking everything in the round (including assuming at this stage the non-disclosure point in favour of the Defendant), it is right to grant the application under 6.34(2)(c). On my analysis above, there is no prejudice to the Defendant that cannot be compensated in costs and the duty of the Court to ensure that its processes comply with the policy and principles of the BRR is a highly significant factor. I do accept that the failure to file N510, especially in the surrounding circumstances where that has resulted from an underlying error which has led to both parties and the Court being involved in lengthy and expensive arguments that can now be seen to be unnecessary, is a serious and significant failure. But that is the start of the inquiry rather than the end of it, and in my judgment the just outcome of the application for relief is still to grant it.

Issue 2: conclusion

128. As a result of the conclusions I have reached on the sub-issues of Issue 2, I find and hold that the Court has jurisdiction under BRR Article 25 over the claims in the Particulars of Claim (as clarified by the proposed amendments to remove Mr Mincione from the SPA claims).

Issue 3: should the claims be dismissed at this stage?

129. The Defendant submits that, even where there is jurisdiction under BRR Article 25, the Court has a residual discretion to dismiss or permanently stay the action, which should be exercised in this case for each of the reasons set out in its application notice, namely that:

    i) The relief would interfere with a criminal investigation into the same transaction;

    ii) The relief sought in the Particulars of Claim would serve no useful purpose;

    iii) The relief sought amounts to interference with the legitimate acts of a foreign state and would be contrary to comity;

    iv) The matters forming the basis of the Particulars of Claim do not constitute a justiciable civil dispute before the Court; and/or

    v) The relief sought, and the Claimants' subsequent conduct, amount to an abuse of the Court's process.

130. The Claimants accept that the Court has a case management discretion to stay the proceedings pending some other event, but deny that it would be permissible for the Court to dismiss the proceedings on any of the other bases advanced by the Defendants. That is because they say that to permit the action to be halted on the basis of lack of a serious issue to be tried, or on the basis of an application to strike out that was deemed to have been made as a condition of relief under CPR 6.34(2)(b), would subvert the BRR regime.

131. I reject the Claimants' submission on this point. The effect of my decision on BRR Article 25 is that the Court must accept jurisdiction over the claims. The claims then fall to be decided in accordance with all of this Court's ordinary procedural rules. Those rules include the ability of a defendant to apply to strike out a claim or for summary judgment if it has no real prospect of success. The Defendant clarified in the post-hearing submissions that it does wish to pursue such applications. Both parties made clear that they took the view that the "serious issue to be tried" question (which as they accept invokes the same test as "real prospect of success") had been fully argued before me, along with the strike out on various grounds including abuse of process, on the basis that jurisdiction was required to be founded on common law principles, and that I should in any event express views upon these questions, even if I concluded that Article 25 did apply. Neither party has suggested that the outcome of any of these issues would be different if jurisdiction is established under Article 25, save that the Claimants emphasise that I must not allow English procedural rules to undermine the principles of BRR, which I accept.

132. Thus the difference between the parties is whether any strike out or summary judgment application by the Defendant can be pursued as part of this hearing, or must be the subject of a further application. The only reasons that the Defendant is not entitled as of right to rely on the equivalent of "no serious issue to be tried" under CPR Part 24 are the late change of course by the Claimants and the extremely late application for relief under CPR 6.34(2)(b). In these circumstances, I can see no merit whatsoever in my expressing *obiter* views on fully argued points (as both parties invite me to do) and then leaving the parties to re-argue them at some future hearing (which is the consequence of the Claimants' submission). Accordingly, the Defendant is to be treated as having amended its application notice dated 28 April 2021 to include an application to strike out the claim under CPR 3.4 and/or for summary judgment under CPR 24.2 and/or to stay the claim under the inherent jurisdiction of the Court on the grounds that are already set out there.

133. I will take the grounds of the application in a different order to the order they are listed in the application notice.

134. I start with the ground that these proceedings would interfere with a criminal proceeding. In relation to this ground, the Defendant relied strongly on *Imperial Tobacco v Attorney General* [1981] AC 718 for the proposition (as stated in its skeleton argument) that "It is a fundamental principle of civil courts that they will not permit their procedures to be used by litigants to obtain declaratory rulings which they intend to deploy in response to criminal proceedings, when those proceedings are in respect of the litigant's past conduct, have been properly instituted and are not vexatious or an abuse of the process of the criminal court." In oral argument, Mr McParland Q.C. put the principle still more widely as being "the English civil courts will not involve themselves in any way in any matter [in] which the criminal process has begun, unless

of course it can be said that … the criminal process was being used vexatiously or in abuse of that process."

135. The Claimants point out that there are no criminal proceedings on foot because the Indictment was returned to the prosecutor and also that there is not even an investigation into the corporate Claimants. I accept that these points are correct, but they are objections going to form rather than substance. The substance of the matter is that there is a criminal investigation with which a competent criminal court is seised and the matters alleged against Mr Mincione and others will have obvious knock-on effects on the other Claimants' interests in the Transaction.

136. The debate between the parties also disclosed differences as to the true principle to be derived from *Imperial Tobacco* in the light of several later authorities.

137. In *Imperial Tobacco* the plaintiffs had started an advertising scheme for their products which involved the possibility of winning prizes. Following complaints from the plaintiffs' competitors, on 24 November 1978, summonses were issued by the Nottingham justices against the plaintiffs and some of their officers alleging that they had committed offences of running an unlawful lottery or an unlawful competition contrary to sections 2(1)(b) and 14(1)(b) of the Lotteries and Amusements Act 1976. By originating summons of 13 December 1978, the plaintiffs claimed against the Attorney-General a declaration that their scheme was lawful and did not contravene the provisions of the 1976 Act. Donaldson J dismissed the claim on the ground that the scheme was an unlawful lottery, though it was not an unlawful competition. The Court of Appeal held that the scheme was lawful and granted the declaration sought. The House of Lords unanimously held that the scheme was an unlawful lottery though not an unlawful competition.

138. Both Donaldson J and the Court of Appeal rejected the Attorney-General's argument that the originating summons was abusive on the ground that the issue should be decided in a criminal rather than a civil court. That argument was not initially pursued in the House of Lords, as Viscount Dilhorne recorded at 735B.

139. Counsel for the appellant Attorney-General (Peter Taylor Q.C., Simon D Brown and Andrew Collins) are reported at 721H as stating expressly that "the Attorney-General concedes that the civil courts have jurisdiction to determine the question on this summons where the facts are certain." The report notes at 724F that shortly after counsel for the respondent plaintiffs (Stanley Brodie Q.C. and Stephen Nathan) had commenced their submissions "Viscount Dilhorne stated that their Lordships desired to hear argument on the question whether the court had jurisdiction to make the declaration sought and, if so, how the court should exercise its discretion."

140. Following this, at 724G-725A, the report notes the submission from Mr Brodie Q.C. that: "The procedure in the present case was by way of originating summons for a declaration that no offence had been committed. It is conceded that it is only in a most exceptional case that this procedure should be used where the plaintiff on the summons could be the subject, or is the subject of, criminal proceedings in respect of the matter raised on the summons." Then the report suggests that, following completion of submissions and reply submissions on the substantive issues, there was separate argument on the issue of jurisdiction. In that argument, Mr Brodie Q.C. started from the proposition that the Solicitor General had conceded in the Court of Appeal that there

was jurisdiction and that the issue was the limits of the discretion. He went on to repeat his earlier concession concerning exceptionality with a little more detail, thus:

> "The respondents concede that the procedure adopted in the present case ought only to be adopted in very exceptional cases where it could be seen that it was just and convenient to deal with the particular problem. It was justified in the present case because there were threats to prosecute retailers and wholesalers who were really not responsible at all for the introduction of this scheme."

141. That was followed by submissions by Mr Taylor Q.C. for the Attorney-General, the report of which I set out in full:

> "Taylor Q.C. on the issue of jurisdiction. The Crown does not desire to pursue this matter since it has been abandoned before Your Lordships' House and therefore in the circumstances all that it is desired to state on this question on behalf of the Attorney-General is that there must be very few and rare cases in which the course taken in the present case could properly be adopted. It would be necessary that the facts should not be in dispute. On the question of discretion attention is drawn to the following passages in the authorities: *London & Country Commercial Properties Investments Ltd. v. Attorney-General* [1953] 1 W.L.R. 312, 316-317; *Thames Launches Ltd. v. Trinity House Corporation (Deptford Strond)*, [1961] Ch. 197, 204, 209 and *Munnich v. Godstone Rural District Council* [1966] 1 W.L.R. 427, 428, 434D et seq. 438."

142. Viscount Dilhorne (a former Solicitor-General and Attorney-General as Sir Reginald Manningham-Buller Q.C. M.P., and a former Lord Chancellor) stated at 735B that the question whether the originating summons was an abuse of process and whether the issue should be decided in a criminal rather than a civil court was a question "of great and far-reaching importance" upon which their Lordships had heard argument.

143. Having reached his conclusions on the illegality of the scheme, Viscount Dilhorne said that if the Court of Appeal decision were to stand it would "form a precedent for the Commercial Court and other civil courts usurping the functions of the criminal courts." He went on to emphasise the importance of the fact that a criminal prosecution had already commenced and it was not a question in the case whether future conduct would be permissible, saying:

> "The justification for the Court of Appeal taking this unusual and unprecedented course — no case was cited to us where a civil court had after the commencement of a prosecution, granted a declaration that no offence had been committed — was said to be the length of time it would have taken for the matter to be determined in the criminal courts. I can well see the advantages of persons being able to obtain rulings on whether or not certain conduct on which they propose to embark will be criminal and it may be a defect in our present system that it does not provide for

> that. Here, I wish to emphasise, it was not a question whether future conduct would be permissible but whether acts done were criminal. It was said that the administration of justice would belie its name if civil courts refused to answer reasonable questions on whether certain conduct was or was not lawful. I do not agree. I think that the administration of justice would become chaotic if, after the start of a prosecution, declarations of innocence could be obtained from a civil court."

144. He concluded the substantive part of his speech at 742C-D:

> "My Lords, it is not necessary in this case to decide whether a declaration as to the criminality or otherwise of future conduct can ever properly be made by a civil court. In my opinion it would be a very exceptional case in which it would be right to do so. In my opinion it cannot be right to grant a declaration that an accused is innocent after a prosecution has started.
>
> While I would allow the appeal on this ground alone, I have felt it to be desirable to state my opinion on the questions on which the Court of Appeal and Donaldson J. pronounced."

145. Lord Edmund-Davies appears to have founded his decision on the substantive issues, stating:

> "My Lords, the speech of my noble and learned friend, Viscount Dilhorne, contains a close and careful consideration of the many cases cited to this House on the subject of the modern law relating to lotteries. The reasons he gives and those developed by my noble and learned friend, Lord Lane, in a speech which I venture to describe as one of outstanding clarity and cogency, have convinced me that no advantage would accrue were I to carry out my original intention of contributing one of my own. I have therefore destroyed the draft upon which I had been engaged; In its place, let me say simply that, being in respectful agreement with my noble and learned friends, I concur in holding that this appeal should be allowed …"

146. Lord Fraser of Tullybelton also allowed the appeal on the lottery point, but stated also:

> "I am in entire agreement with my noble and learned friends that this is not a case in which the discretion of the court should have been exercised to make the declaration. By doing so the civil court, in my opinion, improperly intruded into the domain of the criminal court, notwithstanding that criminal proceedings had already been begun. We were not referred to any reported cases where such intrusion had occurred and in my opinion it ought not to be permitted except possibly in some very special circumstances which are not found here."

147. Lord Scarman stated his agreement with the speeches of Viscount Dilhorne and Lord Lane.

148. Lord Lane decried the decisions to prosecute or threaten with prosecution individuals and tobacconists rather than just the plaintiff companies and noted that it was not surprising that the action had been brought. He then said at 750E:

> "Understandable though that action was, was it right, even assuming there was no illegal lottery, that a declaration in these circumstances should be granted? Although the appellant contested this aspect of the matter before Donaldson J and the Court of Appeal he did not do so before this House. It would not however be right in a matter of such great importance for your Lordships to let it pass without expressing a view.
>
> There is no doubt that there is jurisdiction to grant a declaration in these circumstances. Anyone is on principle entitled to apply to the court for a declaration as to their rights unless statutorily prohibited expressly or by necessary implication: *Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government* [1960] A.C. 260 and *Ealing London Borough G Council v. Race Relations Board* [1972] A.C. 342. There was no such prohibition here; but was the learned judge right to exercise his discretion as he did, as the Court of Appeal thought he was?"

149. After reviewing authority, at 752, Lord Lane set out his conclusions on this issue in terms which are replied upon by the Defendant in the present case:

> "Counsel appearing before your Lordships' House were unable to find any case in which a defendant in criminal proceedings already properly and not vexatiously instituted had applied for a declaration that the criminal proceedings were unfounded or based on a misapprehension as to the true meaning of the criminal statute. I do not find that dearth of authority surprising. It would be strange if a defendant to proper criminal proceedings were able to pre-empt those proceedings by application to a judge of the High Court whether sitting in the Commercial Court or elsewhere. What effect in law upon the criminal proceedings would any pronouncement from the High Court in these circumstances have? The criminal court would not be bound by the decision. In practical terms it would simply have the inevitable effect of prejudicing the criminal trial one way or the other.
>
> Where there are concurrent proceedings in different courts between parties who for practical purposes are the same in each, and the same issue will have to be determined in each, the court has jurisdiction to stay one set of proceedings if it is just and convenient to do so or if the circumstances are such that one set of proceedings is vexatious and an abuse of the process of the court. Where, however, criminal proceedings have been properly

> instituted and are not vexatious or an abuse of the process of the court it is not a proper exercise of the court's discretion to grant to the defendant in those proceedings a declaration that the facts to be alleged by the prosecution do not in law prove the offence charged."

150. As the Defendant pointed out, a feature of Lord Lane's reasoning is that that the effect of any relief granted in the civil action against the Attorney-General would not be to bind the criminal court. It would nevertheless potentially prejudice the criminal trial. The vice of this was procedural: the proper place to determine the outcome of a prosecution was the criminal court system, not the civil court system. It was acknowledged that there may be defects or delays in the criminal system, but the point of principle was that there could be no self-help remedy for these in the form of a civil action for declarations, at least in any ordinary circumstances.

151. As I read the speeches in *Imperial Tobacco*, against the context of the facts and arguments in that case, they stand for the principle that a person who has been properly charged with a criminal offence who wishes to raise a point of law showing that person to be innocent will not normally be permitted to pre-empt the determination of that point in the criminal proceedings by a civil action for declarations against an officer of the state. That is narrower than the principle that the Defendant urged upon me, but I think it is as wide a doctrine as the speeches in their context justify.

152. Later authority has made it clear that the civil courts may entertain actions against the Crown for declarations that proposed future conduct would not be criminal, but that this jurisdiction should only be exercised in exceptional circumstances: *R (Rusbridger) v Attorney-General* [2004] 1 AC 357. This was stated to be the general principle to be drawn from *Rusbridger* by Lord Burnett of Maldon LCJ (with the agreement of King and Baker LJJ) in *Secretary of State for Justice v A Local Authority and others* [2021] EWCA Civ 1527, [25].

153. *Imperial Tobacco* was cited in another case that the parties before me have relied upon: *Thames & Hudson Ltd v Design and Artists Copyright Society Ltd* [1995] FSR 153, a decision of Evans-Lombe J. The defendant Society had served summonses in the Magistrates' Court on the plaintiffs alleging that they had knowingly distributed works in breach of copyright. The plaintiffs sought declarations from the High Court that there was no infringement. On a motion for an injunction restraining the Society from taking further proceedings in their summonses, Evans-Lombe J held that the summonses were not vexatious or abusive, so there was therefore no basis for the Court to enjoin the Society against pursuing them. After reaching that decision, he said:

> "For these reasons, in my judgment, I should refuse the relief sought in this motion. I am, however, concerned that what is in fact a commercial dispute between two bodies of standing and good repute in their field should be determined with the minimum of duplication of effort and cost. I accept Thames & Hudson's submission that the Chancery proceedings are much more likely to determine that dispute once and for all. Even if the magistrate were to find that the fair dealing defence was not available to Thames & Hudson in respect of the Beckmann book it by no means follows that it will not be available to them in

> respect of their World of Art series. The evidence necessary to decide the Chancery proceedings will not be extensive and I was told that it ought to be possible to try the case within four or five working days. On the present state of the lists, and if the parties act with due diligence, it ought to be possible to obtain a trial date within six or nine months of today. It would obviously be unfortunate if this Court and the Magistrates' Court arrived at different conclusions as to whether the Beckmann book published the works of Max Beckmann in breach of copyright. I have concluded, on the facts before me, that the criminal proceedings cannot be categorised as vexatious or an abuse of process. That is a finding that does not bind the magistrate to whom the application to strike out the criminal proceedings can be renewed on the same or further evidence on the adjourned hearing of the summonses in August. I do not wish in any way to be seen to attempt to conduct the business of the Magistrate's Court. However, I place for consideration by the magistrate the possibility that he might permit the final disposal of the summonses to be adjourned pending the decision in the Chancery proceedings and provided that he is satisfied that those proceedings are being pursued to a hearing with due diligence. He may rest assured that this Court will use its powers to ensure that that takes place."

154. While it does not appear that Evans-Lombe J was being asked to dismiss or stay the proceedings for a declaration, it does appear that, putting it at the lowest, he did not consider it obvious that any issue that was properly raised in the Magistrates Court ought to be disposed of there rather than in the Chancery Division. A note at the end of the FSR report states that an application to adjourn the criminal proceedings was refused, but I am not aware of what transpired thereafter.

155. *R v Director of Public Prosecutions, ex p Camelot plc* (1998) 10 Admin LR 93 was a decision of the Divisional Court comprising Simon Brown LJ and Curtis J. The applicant, Camelot, administered the National Lottery. Camelot was concerned that a private scheme was an unlawful lottery and referred it to the Director of Public Prosecutions. The Crown Prosecution Service (acting under the supervision of the DPP who in turn acted under the superintendence of the Attorney-General) decided that it would not prosecute, on the basis that it did not believe that the scheme did constitute an unlawful lottery. Camelot sought leave to challenge that decision by way of judicial review, on the ground that the decision was based on an error of law as to the status of the private scheme. After citing from *Imperial Tobacco,* Simon Brown LJ (with whom Curtis J agreed) said: "It will readily be seen from those passages, first that the House of Lords found no jurisdictional bar to the grant of declaratory relief in these cases, and second that its strictures were targeted principally at the particular course adopted there, namely the accused's attempt by civil process to pre-empt criminal proceedings already started against them." Simon Brown LJ then cited from a number of post-*Imperial Tobacco* authorities in which civil courts had recognised their jurisdiction to grant declarations concerning issues of criminal law while also recognising the danger of usurping the function of the criminal courts.

156. The Divisional Court refused the application (while formally granting permission to review in order that there would be jurisdiction for an appeal) for two main reasons: (i) Camelot had a readily available alternative remedy in the form of a private prosecution; and (ii) on the particular configuration of facts, the outcome sought by the applicants would effectively declare that third parties running the private scheme were criminals, in proceedings to which they were not party.

157. In the course of the judgment, Simon Brown LJ expressed the general conclusions to be drawn from authority as follows:

> "1. The decision falls to be taken not as one of high principle but rather in the light of a number of relevant considerations.
>
> 2. The Court should adopt an essentially flexible approach to the exercise of its declaratory jurisdiction in this field. The only rigid rule is, following *Imperial Tobacco*, that once criminal proceedings have begun, the civil courts should not intervene.
>
> 3. That said, other things being equal, criminal disputes, even upon pure issues of law, are best decided:
>
> (a) in criminal courts, and
>
> (b) between the parties most directly affected by their outcome.
>
> The civil courts should, moreover, be the warier of embarking on this jurisdiction:
>
> (i) otherwise than at the suit of the Attorney General (not least where he has refused his fiat for relator proceedings),
>
> (ii) when it involves existing, and not merely prospective future, conduct,
>
> (iii) when what is sought is a declaration of criminality rather than of non-criminality, and
>
> (iv) (not this case) when the facts are in issue.
>
> 4. The availability of an alternative remedy is always a relevant, and may be a decisive, factor. The Court should consider the various advantages and disadvantages of the respective remedies. …"

158. In all of the cases cited to me on this subject, the relevant civil and criminal proceedings (or potential proceedings) have both been under English law and in the courts of England and Wales. In all of them, with the exception of *Thames & Hudson*, the issue has been a point of law on the basis of agreed or assumed facts. The point of law has generally been a question of interpretation of the relevant criminal statute. The Defendant invites me to apply this line of authority to the present case, where the claim

is not for any declaration directly as to criminality and where any criminal proceedings will take place in another jurisdiction and under another law.

159. It seems to me that it would be wrong to describe the relief sought in the present proceedings as a usurpation of the function of the Vatican State's criminal courts, or their investigating or prosecuting authorities. I accept that if the declarations sought are to be granted, that is likely to involve the determination of some of the factual issues that may also be raised by any criminal proceedings in the Vatican, such as whether certain officers of the Defendant acted for improper purposes or outside their authority. However, none of the declarations sought would involve any assertion as to what does or does not amount to criminality as a matter of the law of the Vatican State.

160. Whether the doctrine of *Imperial Tobacco* can ever be pressed into service at the jurisdiction stage to protect a criminal process overseas rather than in England is a question that should await another case. I see considerable force in the Claimants' submission that to apply that doctrine to deny or refuse to exercise jurisdiction that arises under BRR Article 25 would be tantamount to subverting the BRR regime by effectively preferring another jurisdiction to that which is exclusively allocated by the BRR. However, I prefer to put my decision on this issue on the ground that the present claims would not in fact interfere in the relevant sense with any criminal process in the Vatican (as I have found earlier in this judgment) and would not on these facts be a usurpation of the proper function of some other court, whether in England or abroad.

161. That disposes of the first ground of the Defendant's application and to a substantial extent also of the third. I do not accept that the present proceedings, even if successful, would interfere with the legitimate actions of a foreign state. As to comity, the Defendant cited *Joujou v Masri* [2011] EWCA Civ 746, [2011] 2 CLC 566, in which the Court of Appeal held that it would infringe the principle of comity to uphold an order made by Gloster J against a judgment debtor company insofar as the order purported to bind personally the judicial administrators of that company through a penal notice. Rimer LJ at [60] and Arden LJ at [74] found, crucially, that the judicial administrators were not officers of the debtor company, but officers of the Lebanese court. That situation seems to me to be very far from the present case and I see nothing in the *Joujou* decision which would show that it would breach comity for this court to accept jurisdiction over the Claimants' claims.

162. I also reject the fourth ground – no justiciable civil dispute – to the extent it was pursued at all. The terms of the Particulars of Claim are juridically unremarkable and plainly do identify a justiciable civil matter.

163. I do not accept that these proceedings are abusive (the Defendant's fifth ground). The relevant species of abuse of the process of the court is using it for a purpose other than its proper or usual purpose. The Defendant's contention seems to be that this follows from their argument that these proceedings will interfere with the criminal process elsewhere alongside their submission that such is the intention of the Claimants. As I have rejected the first part of that antecedent, I must also reject its consequence. In my judgment the Claimants do genuinely wish for the relief they seek in the proceedings in order to gain the very benefit that they appear to want, namely public vindication from certain charges which have been publicly made against Mr Mincione in relation to the Transaction, which, according to Mr Mincione's evidence, have affected the attitude of regulators and trade associations to all the Claimants. The fact that these

charges are being investigated elsewhere, even combined with that being the most important part of the Claimants' subjective motivation for bringing the claim, does not make it abusive to raise here such issues as there is a good juridical basis for them to raise.

164. I have not overlooked the Defendant's submissions concerning what was said in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2014] AC 366 about the tort of abuse of process, but I do not accept their relevance to the position in this case as I have found it to be.

165. That leaves the second aspect of the application: namely, whether the relief claimed would serve a useful purpose.

166. It was common ground before me, and in any event well established, that the Court will not grant a declaration unless to do so serves a useful purpose. I was referred in this respect to the discussion in *Zamir & Woolf: the Declaratory Judgment*, 4th ed (2011) at 4-104 to 4-109.

167. I was also referred to the several stages of *BNP Paribas v Trattamento*, in which first, Robin Knowles J held at [2018] EWHC 1670 that certain negative declaration claims fell within a contractual jurisdiction agreement in favour of England, secondly, the Court of Appeal upheld that decision at [2019] EWCA Civ 768, [2019] 2 Lloyd's Rep 1 and thirdly, Cockerill J at trial ([2020] EWHC 2436 (Comm)) made some of the declarations claimed but also refused one of them, which, the Defendant submitted, was in similar terms to one of those in issue in the present claim.

168. I do not think that the similarity of form of a declaration is of importance in the present case, but Cockerill J's summary at [78] of some of the principles that apply to the grant of declarations is helpful:

> "78. Overall I conclude that the interesting argument which I have heard on the authorities has been in danger of over-refining an exercise which is essentially discretionary. The overarching issues relevant to this case which can be taken away from the authorities and which I apply when coming to consider the individual declarations sought are as follows:
>
> i) The touchstone is utility;
>
> ii) The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose;
>
> iii) The prime purpose is to do justice in the particular case: see *TQ Delta, LLC v ZyXEL Communications UK Limited, ZyXEL Communications A/S* [2019] EWCA Civ 1277 at [37]. 'Justice' includes justice not only to the claimant, but also to the defendant: see *Fujifilm Kyowa Kirin Biologics Co., Ltd. v Abb Vie Biotechnology Limited* [2017] EWCA Civ 1; [2018] Bus LR 228 ('Fujifilm') at [60];

> iv) The Court must consider whether the grant of declaratory relief is the most effective way of resolving the issues raised: see *Rolls Royce v Unite the Union* [2010] 1 WLR 318 at [120]. In answering that question, the Court should consider what other options are available to resolve the issue;
>
> v) This emphasis on doing justice in the particular case is reflected in the limitations which are generally applied. Thus:
>
> a) The court will not entertain purely hypothetical questions. It will not pronounce upon legal situations which may arise, but generally upon those which have arisen: Zamir & Woolf at 4-036 & *Regina (Al Rawi) v Sec State Foreign & Commonwealth Affairs* [2008] QB 289 at 344.
>
> b) There must in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them: *Rolls Royce* at [120].
>
> c) If the issue in dispute is not based on concrete facts the issue can still be treated as hypothetical. This can be characterised as 'the missing element which makes a case hypothetical': see Zamir & Woolf at 4-59.
>
> vi) Factors such as absence of positive evidence of utility and absence of concrete facts to ground the declarations may not be determinative; Zamir and Woolf note that the latter 'can take different forms and can be lacking to differing degrees'. However, where there is such a lack in whole or in part the court will wish to be particularly alert to the dangers of producing something which is not only not [f]utile, but may create confusion."

169. The Claimants submitted with force that the question whether the declaratory relief sought would serve a useful purpose is a substantive question of the merits, which ought to be decided at trial. However, the Defendant submitted with equal vigour that this was in the nature of an issue that can and should be grappled with an early stage. I accept that the standard that I have to apply to this question is the summary judgment standard, but I also accept that the potential futility of declaratory relief can, in some circumstances, be seen at the outset to be fatal to the claim.

170. At the heart of the Defendant's submission was the decision of the Court of Appeal (Lord Woolf MR, with the agreement of Hale LJ and Lord Mustill) in *Messier-Dowty v Sabena SA* [2000] 1 WLR 2040. In short (and shorn of some irrelevant qualifications) Dowty supplied landing gear to BAA, acting for Airbus, under agreements with governing law and jurisdiction clauses in favour of England. Airbus used the landing gear in aircraft supplied to Sabena under agreements subject to French law and jurisdiction. It was alleged that the landing gear, and consequently the aircraft, were defective and had caused substantial loss to Sabena. Dowty issued proceedings in England against Airbus, BAA and Sabena seeking declarations of non-liability. The Court of Appeal upheld the decision of Moore-Bick J to set aside service of the claim

form upon Sabena on the basis that Sabena was not susceptible to the jurisdiction of the court in respect of the claim.

171. It is recorded in the judgment at [14] that Airbus and BAA accepted the jurisdiction of the court, but had applied to stay the proceedings, presumably pending certain investigations that were going on in France. That application was refused by Langley J.

172. Lord Woolf MR pointed out at [26] that it was generally accepted (and it is, of course, now clear) that where the Brussels Convention conferred jurisdiction on the English court, there was no discretion to stay proceedings on the basis that some other court was the more appropriate forum. However, at [27], he stated "The jurisdictional rules of the Convention do not prevent the English courts under their own procedural rules disposing summarily of proceedings which should not have been brought." At [36] Lord Woolf MR made clear that there was no longer any valid reason to treat claims for negative declaratory relief differently for jurisdictional purposes from any other claim, save that as he said at [42] the reversal of the natural roles of claimant and defendant "can result in procedural complications and possible injustice to an unwilling 'defendant'. This in itself justifies caution in extending the circumstances where negative declarations are granted, but, subject to the exercise of appropriate circumspection, there should be no reluctance to their being granted where it is useful to do so."

173. Lord Woolf MR held at [46] that as far as domestic law was concerned, the joinder of Sabena to the English proceedings was not justified. One of the reasons for this was that: "Although Sabena has every reason to reserve its position as to whether it intends to make a claim against Dowty, it is doubtful if it will ever have cause to do so. The real dispute is as to who was responsible for the faulty design of the landing gear. This is now primarily a dispute between Dowty, Airbus and possibly BAA."

174. Lord Woolf MR then considered the position under the Brussels Convention and held at [47]:

> "This is not however a situation where the question of the joinder of Sabena can be considered in isolation from the question of jurisdiction. Jurisdiction is governed by the Convention and, if the Convention required Sabena to be sued now within this jurisdiction or if this was consistent with the policy of the Convention, then this would be a compelling circumstance against exercising discretion in a way which I have indicated. In fact there is nothing in the Convention which requires Dowty to bring proceedings in England and, if proceedings are brought, England does not have exclusive jurisdiction."

175. The situation in *Messier-Dowty* therefore had an important similarity and an important difference to the situation in the present case. The similarity is that, as I have found, the defendant is an unwilling defendant who has proper reasons for not conceding the declarations sought, but is not the true or primary opponent of the claimant in respect of the subject matter of those declarations. The difference is that the BRR does confer exclusive jurisdiction on this court in respect of the present claims. As I have already

said, I do not think that concludes the issue before me, which is whether these claims should proceed to trial as a matter of English law and practice.

176. It is at this stage that the findings I have made in relation to the Defendant's central argument become important. On the evidence before this Court, the real adversary of the Claimants in relation to the Transaction is not the Defendant, but other organs of the Holy See or the Vatican State, in particular, the OPJ. I readily accept the Claimants' submission (supported by reference to *National Bank of Khazakstan v Bank of New York Mellon* [2017] EWHC 3512 (Comm) at [48]) that the Defendant's neutrality is sufficient to constitute a "dispute" for the purposes of the Court's jurisdiction to grant declarations. But that does not address whether such declarations would serve a useful purpose or whether they would be futile and risk creating confusion, as Cockerill J put it in the *Trattamento* case.

177. The Defendant submitted that it does not have access to its own documents, which have been seized by the OPJ, that it will not be in a position to call any of the key factual witnesses, and that it does not have a position on whether its officers acted in the Transaction properly on the Defendant's behalf or in breach of duty and trust (using those terms loosely, as English law may not govern some or all of the issues arising).

178. The points about documents and witnesses are less powerful now that the Defendant has access to documents through its participation as a *parte civile*. However, I consider that determination of the issues as between the Claimants and the Defendant would serve no useful purpose because it is not the Defendant who is primarily interested in them at this stage and because there is another party who is interested, but who will not be before the Court, namely the OPJ. Given that the OPJ is acting in its capacity as the official investigator and prosecutor of a foreign state, there would be no reality to any suggestion that it ought to join the English proceedings. To grant declarations which are primarily aimed at the position of a third party who is not before the court, cannot be brought before the court and who cannot reasonably be expected to come before the court voluntarily is, in my judgment, a paradigm example of a claim which is barred by the principle of utility. In these circumstances, it is almost adventitious that another defendant presents itself as one over whom the court has jurisdiction and that event should not be permitted to overwhelm the reality of the situation.

179. Does this point reach the level of a determination that there is no real prospect of any of the claims for declarations succeeding? I must bear in mind not only the evidence now available, but also the evidence that can reasonably be expected to be available at trial. Whether a declaration will be granted at trial will depend on all the circumstances that pertain at the time of trial. In that connection, I accept that it is reasonably possible that the picture might look different at trial, not so much because the evidence before me is incomplete without disclosure and oral evidence, but because the situation might reasonably be expected to change in important respects. In particular, it is possible that the prosecution of Mr Mincione might be dropped, or it might fail or succeed. It is also possible, as far as the evidence before me reveals, that the Defendant itself might take a partisan position either in the course of its *parte civile* action or in some other way. If events of that sort occur, then they might change the picture and bring it within the bounds of reasonable likelihood that the claim could succeed. For these reasons, I conclude that I ought not to grant summary judgment for the Defendant.

Issue 4: do the claims meet the common law tests for service out of the jurisdiction?

180. In the light of my finding on Issue 2, this issue does not arise, but the parties have asked me to make findings on it, so I do so briefly.

181. As to serious issue to be tried, I have already made clear my findings above. In short, I have concluded that the claims do meet the summary judgment standard and thus that there is a serious issue to be tried.

182. The Defendant did not make any argument as to the jurisdictional gateways over and above those I have rejected in relation to Article 25. I therefore find that the Claimants have shown a good arguable case that each gateway they relied upon was satisfied.

183. As to appropriate forum, no other forum has been suggested for the trial of the claims in the Particulars of Claim, so I have no hesitation in stating that this Court has been shown to be clearly and distinctly the most appropriate forum on the basis of the jurisdiction agreements.

Issue 5: non-disclosure

184. The Defendant submits that a series of serious non-disclosures made in the without notice application for permission to serve out should lead the court to set aside the permission to serve out, even if it would otherwise have been upheld. Since, as I have held, the Court has jurisdiction which it should exercise under BRR Article 25, this issue does not arise. Again, I will try to deal with it as briefly as the subject matter permits.

185. This issue was argued by the Defendant in its skeleton argument by reminding me of the well-known principles in the field and then by referring me to the ten non-disclosure allegations made in Mr Walsh's 2nd witness statement at [55] and to the long passage at [8] – [31] of Mr Walsh's 3rd witness statement. The latter culminated in five numbered allegations. Those five are condensed to four in the Defendant's skeleton argument. In oral argument, Mr McParland Q.C. referred to these same points in brief summary.

186. Taking the four key matters from the Defendant's skeleton argument, they were the following:

> "it is clear that the Claimants have consistently fallen well short of the duty imposed upon them to (a) draw to the Court's attention the nature and extent of the criminal allegations against Mr Mincione and their interplay with the relief sought in the PoC; (b) produce the material evidence available to them (e.g., the Letter Rogatory to Switzerland) in a manner and with the requisite level of assistance which would have enabled the Court to weigh the question of grant fully; (c) failed altogether to draw the Court's attention to the Swiss proceedings and the fact of Mr Mincione's assets being frozen; and (d) omitted to address any basis for or against the 'useful purpose' and 'solid practical benefit' which might be achieved from allowing the claims for declaratory relief to proceed."

187. It was, of course, apparent from the Particulars of Claim themselves and from the Claimants' evidence in support of their application for permission to serve out that serious allegations were being made by the Vatican authorities in relation to the bona fides of the transaction. That was the core premise of the case that declarations were required. Why, then, did the more detailed history of the criminal inquiry and the Swiss proceedings matter to a Judge considering whether to permit service out of the jurisdiction? Mr McParland Q.C.'s answer was in the terms of point (d) above: these things all mattered because the Claimants should have anticipated the Defendant's line of argument that declarations would serve no useful purpose and there was on that basis no serious issue to be tried.

188. In his first witness statement, Mr Wood included a section on full and frank disclosure, which included the following:

> "34. First, at present, the Holy See is conducting prosecutorial investigations within the Holy See in relation to the Secretariat of State's investment policies and involvement with the Transaction. This appears to include specifically Mr Mincione who had been invited to attend an interview within the Vatican but who in the event will not. I also refer to the fact, as referenced in the Particulars of Claim, that the Holy See has made a request for judicial assistance to the Swiss authorities. However, all these are matters which relate to possibly contemplated criminal proceedings against Mr Mincione. I do not see therefore that they have any relevance on the question of permission to serve this Action out of the jurisdiction. I do not see that those matters override the jurisdiction provisions in the Framework Agreement and the SPA.
>
> …
>
> 39. Fifthly, the Holy See might argue that there is no dispute and so no need for the English Court to grant declaratory relief. But it seems plain to me from the actions taken by the Holy See in the said criminal context and to which I have referred above, as well as to the plethora of media reports in relation to which I infer that their sources or one of their sources must be an individual or individuals with authority within the Holy See (otherwise the Holy See would surely have denied the stories) that there are the disputes which are identified in the Particulars of Claim."

189. In these passages, the term "the Holy See" is used in various senses, sometimes referring to the Holy See generally, and sometimes to the Defendant. That is an unfortunate confusion, especially in the light of the way that the issues have developed since then. However, I see no reason to doubt Mr Wood's good faith in the matter and I therefore conclude that at the time of signing his first statement, Mr Wood was not conscious of the potential significance of the distinction between (i) the Holy See itself, (ii) the OPJ which was conducting the investigations and making requests of the Swiss authorities and (iii) the Defendant, the Secretariat of State, often referred to in the contractual documents, confusingly, as the "Holy See".

190. It could be said that the Claimants themselves should have identified this confusion and ensured that it was clarified before the application was served. That might then have led a careful legal team to identify the no utility issue as one which might go to serious issue to be tried and to disclose it.

191. However, it is important to judge the issue of full and frank disclosure without hindsight. Without downplaying in any way the importance of parties and their legal teams complying with the duty upon them to make such disclosure in any without notice application, I take account of the fact that this was an application for permission to serve out of the jurisdiction which does not have the draconian consequences of, say, a freezing or search order. It is an application that is dealt with on the papers under the practice of this Court, so there is no second line of consideration of counter-arguments through the submissions of counsel. I judge that the Claimants in this case, through Mr Wood, made a genuine and reasonable attempt to comply with that duty and I am not prepared to find that there was any material non-disclosure and certainly none that would justify setting aside the permission granted to serve out, had that been relevant.

Issue 6: stay of proceedings

192. The final issue is whether I should grant a stay of these proceedings. Both parties submit that I have discretion to do so on case management grounds, to be exercised in accordance with the overriding objective and other principles laid down by authority.

193. The Claimants have emphasised that a claim should only be stayed on case management grounds "in rare and compelling circumstances" and that where there is an exclusive jurisdiction clause in favour of England, "exceptionally strong grounds" are required and that the court's power should not be used to achieved by the back door a result which the BRR bars from the front. A further point emphasised by the Claimants is that a stay will not generally be appropriate if the other proceedings will not bind all the parties or resolve all issues. Several authorities were cited for these principles, including *Unwired Planet International Ltd v Huawei Technologies (UK) Ltd* [2020] UKSC 37, [2020] Bus LR 422, [99] and *Municipio de Mariana v BHP* [2020] EWHC 2930 (TCC), [261], adopting principles summarised by Bryan J in *Mad Atelier International BV v Manes* [2020] EWHC 1014, [82]. Each of these referred to the Court of Appeal's well known earlier decision in *Reichhold Norway ASA v Goldman Sachs* [2000] 1 WLR 173, 186. I did not understand the Defendant to contest any them, and I have kept all of them in mind.

194. I have already made clear that in my view, this claim cannot succeed whilst circumstances remain as they are. I have decided not to grant summary judgment only because circumstances might reasonably be anticipated to change between now and trial. Those findings seem to me to make a stay desirable so that the claim can be fought out, if at all, in the light of circumstances that give it a realistic prospect of success. Of course, I must consider that general desirability against applicable principles.

195. I start with the overriding objective to deal with cases justly and at proportionate cost. That includes so far as practicable ensuring that parties are on an equal footing and can participate fully in proceedings. As matters currently stand, the Defendant is hamstrung from participating fully by its proper role as a neutral party awaiting the outcome of a criminal investigation of alleged crimes in relation to which it would be the alleged victim, but of which it has no actual direct knowledge. That is a matter that I cannot

rectify other than by staying or dismissing the proceedings. In that sense, I consider it would be neither just nor fair to require the Defendant to answer these claims at the moment.

196. In the draft of this judgment, the immediately preceding paragraph included as an additional factor "the practical issue of the retention of at least some of its material documents by the OPJ". I accept the Claimants' submission following circulation of the draft that this point was over-stated. I have given very careful consideration to whether that ought to change my overall conclusion on this issue. I have decided that it should not do so, because that was a relatively minor additional factor and not the principal or decisive one.

197. The circumstances, in which the Defendant is party to relevant contracts, but is behaving reasonably in professing neutrality as to their effect, are highly unusual. As I have said, the real adversary of the Claimants' claims is the OPJ, or the Vatican State more generally in its capacity as prosecutor, and there is no reasonable prospect of it becoming party to these proceedings, nor any basis for suggesting that it ought to do so. That too is a rare factor and one which in my judgment is compelling.

198. As to the BRR and the jurisdiction agreements, I do not think that a stay would fail to give them their proper weight. If the claims under the contracts are to be tried at all, then they should be tried in England. But in my judgment, under English principles of fairness, they should not be tried until such time as the Defendant is freed from the impediment that I have mentioned above or has become in substance an appropriate respondent to the Claimants' claims for declaratory relief.

199. The Defendant seeks a stay pending resolution of the criminal proceedings in the Vatican State. That seems to be me to be too determinate and to risk undermining the decision which I have made as to jurisdiction. It also faces the difficulty that if there are currently no proceedings against Mr Mincione, as the Claimants contend, then it would be unclear what event would bring the stay to an end. I prefer to say that these proceedings should be stayed until there is a material change of circumstances, with materiality to be judged by reference to the reasons given in this judgment, with both parties having liberty to apply to lift the stay if so advised.

Summary

200. For the reasons given in this judgment, the Court has jurisdiction over the claims made in this action pursuant to BRR Article 25, the claim form will be deemed served on that basis, but the claim should be stayed for the time being with liberty to apply.