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RT OF APPEAL OF THE CAYMAN ISLANDS
FROM THE GRAND COURT OF THE CAYMAN ISLANDS
SERVICES DIVISION

CICA (CIVIL) APPEAL NO. 009 OF 2026
CAUSE NO. FSD 88 of 2023 (DDJ)

IN THE MATTER OF THE ENFORCEMENT OF THE ARBITRAL AWARD OF THE ICC INTERNATIONAL COURT OF ARBITRATION CASE NUMBER 25194/AYZ/ELU

BETWEEN:

(1) KOREK INTERNATIONAL (MANAGEMENT) LIMITED
(2) KOREK TELECOM COMPANY LLC
(3) SIRWAN SABER MUSTAFA

Appellants

AND:

IRAQ TELECOM LIMITED
for itself and on behalf of
INTERNATIONAL HOLDINGS LIMITED

Respondents

Before: **The Hon. John Martin KC, Justice of Appeal**
The Hon. Sir Michael Birt, Justice of Appeal
The Right Hon. Sir Jack Beatson, Justice of Appeal

Appearances: Mr Vernon Flynn KC, instructed by Mourant Ozannes (Cayman) LLP for the Appellants
Mr Peter de Verneuil Smith KC instructed by Harney Westwood & Riegels (Cayman) LLP for the Respondents

Heard: **22 September 2026**

Draft circulated: **20 October 2026**

Judgment delivered: **4 November 2026**

JUDGMENT

BEATSON JA:

I. Overview

1. The Appellants seek to set aside the *ex parte* order made by Kawaley J on 18 May 2023 granting the Respondents leave pursuant to section 5 of the Foreign Arbitral Awards Enforcement Act 1997 Revision ("the FAAE Act") to enforce a Dubai International Financial Centre ("DIFC") ICC arbitration Award dated 20 March 2023 ("the Award") against them as a judgment of the Grand Court ("the Enforcement Order").

2. They wish to rely on section 7(3) of the FAAE Act. That, reflecting Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, provides that the enforcement of an arbitration award in a State that is a party to the New York Convention may be refused "if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award."

3. The Appellants did not, however, apply to set aside the Enforcement Order within 14 days after its service, as paragraph 5 of it required, and so need to obtain an extension of time in which to do so. Their application was made over two years later, on 7 August 2025. On 11 December 2025 Doyle J ("the judge") ordered the application for an extension of time to be heard separately and before the application to set aside the Enforcement Order. That application came before him on 17 March 2026. He dismissed it in a decision and Order respectively made on 7 and 16 April 2026. Although before the judge the Appellants were "applicants" and the Respondents were "plaintiffs", I refer to them in the remainder of this judgment as "the Appellants" and "the Respondents".

4. The issue in this appeal is whether the Appellants have shown that the judge's decision fell outside the ambit of his discretion when considering an application to extend time under GCR Order 3 Rule 5(1). That provides:

> "The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules, or by any judgment, order or direction, to do any act in any proceedings."

5. The applicable principles are well known. Although not entirely agreed in this appeal, they are not substantially disputed. The battleground largely concerned whether the judge, although stating those principles correctly, did not apply them or applied them wrongly in one of the senses set out in the next two paragraphs.[1] The Appellants submit that the decision contains errors of law and/or principle, and that the judge did not in substance or in fact apply the principles or reached a decision that was perverse in the sense that no reasonable judge could have reached it.

6. As to the principles, the authorities in this jurisdiction build on the landmark decision of the House of Lords in *Hadmor Productions Ltd. v Hamilton* [1983] 1 AC 191 at 220. They show that an appellate court can only interfere in a discretionary decision by a first instance judge on limited grounds. It is necessary to show that the first instance judge erred in principle or in law, omitted to consider a relevant factor or considered an irrelevant one, or reached a decision that was plainly wrong in the sense that it was one that no reasonable judge could have reached or lies outside the bounds within which reasonable disagreement is possible: see for example *Davidson v Moualem* 2014 (1) CILR 99 at [22] (Chadwick P); *Scully Royalty Ltd v. Raiffeisen Bank International AG* 2022 (1) CILR 118 at [53] (Birt JA); *Merkanti Holding PLC v Raiffeisen Bank International AG* CICA No 14 of 2021, 16 March 2022 at [6] (Moses JA), and *Al Jomaih Power Ltd v IGCF SPV 21* [2025] CICA (Civ) 20 at [56] (Birt JA).

7. In particular, an appellate court should not substitute its own evaluation for that of the judge and may not interfere merely because its members would have exercised the discretion differently: see *Maso Capital Investments Ltd. v Trina Solar Ltd.* [2025] UKPC 48 at [19] and [49].

8. For a telling example of the approach and the width of the discretion given to a first instance judge, see *Abdulle v Commissioner of Police of the Metropolis* [2015] EWCA Civ 1260, [2016] 1 WLR 898. In that case, Hickinbottom J, at first instance decided not to strike out a claim for failure to comply with certain procedural rules but Lewison LJ stated at [24] that had he been the first instance judge he would have reached the opposite decision. Despite that, the Court of Appeal dismissed the appeal because Hickinbottom J's decision was within the discretionary range of decisions open to him.

9. In *Abdulle's* case the appellant's submissions did not suggest that Hickinbottom J had overlooked any relevant factor, taken into account irrelevant factors, or misdirected himself in law. Rather they were directed to the weight that he attributed to the various factors that he did take into

[1] See e.g. Transcript, pp 13, 15, 29, 46, 178.

account in exercising his discretion. Lewison LJ, with whom Kitchin and Moore-Bick LJJ agreed, stated that they amounted to a submission that the judge's decision was perverse, i.e. one that no reasonable judge could have reached, which the court rejected.

10. The position can be summarised as follows. The exercise of discretion under GCR Order 3 Rule 5(1) is entrusted to the judge at first instance. Although an application for an extension of time in a case such as this is important, it is pre-eminently a matter for that judge, particularly in the light of the need to ensure that such applications do not turn into mini trials. An appellate court should not substitute its judgment for the evaluative judgment of the court below, and should bear in mind that discretionary decisions are ones on which judges may reasonably make different decisions.

11. Mr Flynn KC (for the Appellants) and Mr de Verneuil Smith KC (for the Respondents) presented their arguments before us, both written and oral, with care and skill.

12. This judgment has five sections. Section II summarises the factual and procedural background. It is taken largely from the helpful summary in the agreed background and chronology prepared by the parties and the summaries of the factual and procedural background in their skeleton arguments. Sections III and IV summarise the judge's decision, and the grounds of appeal. Section V considers those grounds and contains the conclusions on the questions before the court in the light of the rival submissions before it.

13. Before turning to those, I note that, as a result of an Order of Kawaley J, made on 13 April 2023, in this arbitration connected case the hearings below and before this court were held in private and the judgment below was anonymised. At the hearing, this court was told that the parties had agreed to this because the extension of time application is within proceedings regarding the enforcement of an arbitral award seated in the DIFC and it is a requirement of DIFC law. Article 14 of the DIFC Arbitration Law provides that "[u]nless otherwise agreed by all parties, all information relating to the arbitral proceedings shall be kept confidential, except where disclosure is required by an Order of the DIFC Court". It was also told that the parties wished the judgment of this court to be anonymised. After the hearing, on 29 September 2026, the Court invited submissions from the parties about the continued anonymisation of the names of the parties and the justification for it in the circumstances of this case. It did so because the parties are identified in a Joint Receivership Order made on 14 December 2023 to which I refer at [20] - [26] and were identified in the judgment of the DIFC Court of Appeal dated 16 June 2025 rejecting an application to set aside the Award which is publicly available on the DIFC Courts' website.

14. In their submissions, the Respondents stated that in view of the references to the Award and the names of the parties on the Global Arbitration Review, Investment Arbitration Reporter and the Jus Mundi websites, the confidentiality of the arbitration has fallen away. I note that it was the Respondents who originally applied for sealing of the court file and that the hearings be in private. They did so in part because their application to the Grand Court for the enforcement of the Award was being made in conjunction with concurrent applications for its enforcement in the British Virgin Islands and the DIFC. They stated that they considered it important that the Appellants did not become aware of the Cayman application until freezing and other ancillary relief sought against them was in place. The Appellants, however, submitted that anonymisation continues to be justified in particular because of the confidentiality obligations under DIFC law which the parties have not displaced. They also rely on the fact that the DIFC Court has not ordered that the Award be disclosed and maintain that publication without anonymisation would render nugatory the confidentiality restrictions imposed by DIFC law to which the parties submitted themselves by selecting a DIFC seat. I reject those submissions. The compelling factor weighing against continued anonymisation of the names of the parties is that the DIFC Court of Appeal itself has made its judgment publicly available. That judgment names the parties and sets out the factual background to the dispute and the underlying contractual framework in some detail.

II. The factual and procedural background

15. The two Appellants are Korek Telecom Company LLC ("Korek Telecom"), an Iraqi company, and Mr Sirwan Saber Mustafa ("Mr Mustafa"), its founder. The first Respondent to this appeal is Iraq Telecom Limited ("Iraq Telecom"), acting for itself and on behalf of the second Respondent, International Holdings Limited ("International Holdings"). Iraq Telecom and International Holdings are both companies incorporated under the laws of the DIFC. Korek International (Management) Limited ("Korek International"), a Cayman Islands company, the first defendant below and the second Respondent in the arbitration did not participate in the proceedings below or in this appeal.

16. Iraq Telecom and International Holdings were the claimants in the arbitration. Their claims against Korek Telecom and Mr Mustafa included a conspiracy by which they corruptly procured a decision of their Iraqi regulator ("the regulator") which resulted in substantial loss to them. They contended that Korek Telecom and Mr Mustafa had procured the regulator's decision by bribing regulatory officials. In the arbitration Korek Telecom and Mr Mustafa contended *inter alia* that the arbitral tribunal lacked jurisdiction to rule on matters relating to the regulator's

decision because doing so would violate the (foreign) act of state doctrine. They also submitted that the tribunal should not rely on certain hearsay statements from sources whose identities had been anonymised and on evidence in a statement, an invoice, a spreadsheet and a letter which they claimed had been illegally obtained.

17. In its Final Award, issued on 20 March 2023, the tribunal found that Korek Telecom and Mr Mustafa had unlawfully conspired to defraud Iraq Telecom and International Holdings and procured the regulator's decision by bribing its officials. They drew adverse inferences from Korek Telecom and Mr Mustafa's conduct before and after the regulator's decision and from Mr Mustafa's failure to give evidence. They also found payments had been channelled to the regulator's officials through an entity which was a sham vehicle for making illicit payments to them. In several places in the Award, they stated that they had not relied on the evidence which Korek Telecom and Mr Mustafa contended had been obtained unlawfully.

18. The tribunal awarded Iraq Telecom and International Holdings damages in excess of US$ 1 billion which together with interest and costs exceeds US$ 1.6 billion. The Award found that the act of state doctrine was not engaged because Iraq Telecom and International Holdings' claims did not require any finding that the regulator's decision was invalid or unlawful and fell within the *Kirkpatrick* limitation to it where the cause of action does not rest on the asserted invalidity of the official act of a foreign sovereign.[2] The Award also found that, had the act of state doctrine been engaged, the public policy exception to it would have applied.

19. Thereafter the following procedural steps were taken. On 10 April 2023 Iraq Telecom and International Holdings applied to the DIFC Court for leave to enforce the Award as a judgment of that court. They were given leave to do so on 14 April 2023. On 11 April 2023 they applied to the Grand Court for leave to enforce the Award as a judgment and on 18 May 2023 were given leave to do so by the Enforcement Order. By then there had been two developments. Iraq Telecom and International Holdings had obtained an *ex parte* worldwide freezing order from the DIFC Court against Korek Telecom and Mr Mustafa in the sum of the Award.[3] Korek Telecom and Mr Mustafa had put Iraq Telecom and International Holdings on notice that they intended to apply in the DIFC Court to set aside the Award. Korek Telecom and Mr Mustafa made that application

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2 The limitation, based on the decision of the United States Supreme Court in *WS Kirkpatrick & Co Inc v Environmental Tectonics Corpn International* (1990) 493 US 400, was endorsed by the United Kingdom Supreme Court in *Belhaj v Straw* [2017] AC 964 at [240] and "*Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela* [2023] AC 156 at [136].

3 On 9 August 2024 the DIFC Court made a specific disclosure order against Korek Telecom and Mr Mustafa, and on 2 July 2025, ordered cross-examination of Mr Mustafa and specific disclosure of information and documents, both on the ground that there had been inadequate compliance with the disclosure requirements of the DIFC freezing injunction.

on 20 June 2023, raising their act of state, public policy and reliance on illegally obtained evidence grounds.

20. On 20 June 2023, following an application *ex parte* on notice on 1 June 2023 by Iraq Telecom and International Holdings, Kawaley J made a freezing order prohibiting the Appellants from disposing of assets in the Cayman Islands. On 2 October 2023, Iraq Telecom and International Holdings applied *ex parte* for a Joint Receivership Order over Mr Mustafa's shares in Korek International and Korek International's shares in International Holdings. In his *ex-tempore* judgment Kawaley J stated that the order was interim in nature because it sought to "hold the ring while the challenge to the award works its way through the Dubai court".

21. Korek Telecom and Mr Mustafa's application in the DIFC Court to set aside the Award was rejected at first instance on 29 August 2024 and by the DIFC Court of Appeal on 16 June 2025.

22. On 3 July 2025, the Appellants notified the Receivers of the decision of the DIFC Court of Appeal and of their intention to apply to the Grand Court to set aside the Enforcement Order made on 18 May 2023.

23. On 17 July 2025 the Respondents applied to vary the Joint Receivership Order to seek a power of sale over Mr Mustafa's shares in Korek International and Korek International's shares in International Holdings.

24. On 7 August 2025, the Appellants applied for an extension of time in which to apply to set aside the Enforcement Order and for an Order setting that Order aside on three grounds. They are that:

    (i) The Award is in respect of a matter that is non-arbitrable by reason of the act of state doctrine.

    (ii) The enforcement of the Award would be contrary to the public policy of the Cayman Islands because it is contrary to the act of state doctrine.

    (iii) The Claimants in the Arbitration, the Respondents to the application, relied on illegally obtained evidence and the reasoning and conclusions of the Arbitral Tribunal relied on and were tainted by such evidence contrary to the public policy of the Cayman Islands.

    The Appellants also applied for permission to rely on expert evidence of Iraqi law which they said supports their case on act of state on the ground that under Iraqi law an administrative decision procured by bribery and corruption is null and void (referred to by the judge as "the new

Iraqi law argument"). The Appellants had not adduced any such evidence before the tribunal or before the DIFC courts.

25. On 9 September 2025 the parties agreed that the application to give the Receivers a power of sale under the Joint Receivership Order would be stayed pending the determination of the Appellants' application to set aside the Enforcement Order at first instance.

26. After the judge's dismissal of the application for an extension of time to apply to set aside the Enforcement Order, a hearing for the application to give the Receivers a power of sale under the Joint Receivership Order was listed for 27 and 28 October 2026. The Appellants successfully applied for this appeal to be heard at a Special Sitting before that hearing.

III. The judge's decision:

27. The first 35 pages of the judgment give what the judge described as a high-level overview, a summary of the position of the parties, and his statement of the applicable law. As well as GCR Order 3 Rule 5(1), he set out paragraphs 1 to 4.3 of the preamble to the Rules stating their overriding objective, the duty of the parties, and the duty of the court to manage proceedings, and GCR Order 41 Rule 5 on the content of affidavit evidence. He primarily referred to decisions of courts in these Islands, and in England and Wales and the Privy Council, but also to decisions from Singapore, Hong Kong, and Jersey. He stated at [50] that *Soinco Saci v Novokuznetsk Aluminium Plant* [1998] 2 Lloyd's Rep 337 *("Soinco"),* concerning a refusal to extend time to set aside an order granting leave to enforce an arbitration award, on which the Respondents relied, was a more relevant and persuasive judgment than his own judgment in *Re New Frontier Health Corporation* (FSD, 24 April 2024), perhaps because the context of the latter was not arbitration but fair value proceedings and possible overseas penalties. But he also stated at [57] that the correct approach to the merits of such applications had moved on in England since *Soinco.*

28. The judge (at [150]) adopted the approaches of the Court of Appeal of England and Wales in *R (Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633 and of Popplewell J (as he then was) in *Terna Bahrain Holding Co WLL v Bin Kamil Al Shamsi* [2012] EWHC 3283 (Comm). At [9] of his high-level overview, he stated that he held that in "the present context" (i.e. proceedings related to the recognition and enforcement of an arbitral Award) the primary factors to have regard to when considering applications for an extension of time are:

> "(1) the extent of the delay, (2) the excuse for the delay, (3) the strength of the case for setting the order aside if an extension was granted and (4) the degree of prejudice to the respondent if the application is granted."

He added:

> "The strength of the case would only normally be considered if without much investigation on a brief perusal of the grounds it can be seen that the challenge is either very strong or very weak. In this case because public policy grounds and a new argument has been flagged, I have considered the supposed merits in a little more detail. The court must also take into account and seek to give [e]ffect to the overriding objective of dealing with cases in a just, expeditious and economical way. In doing that the court considers, as far as is practicable, (a) ensuring that the substantive law is rendered effective and it is carried out (b) ensuring the normal advancement of the proceeding is facilitated rather than delayed, (c) saving expense, (d) dealing with the case in ways which are proportionate (i) to the amount of money involved; (ii) to the importance of the case; and (iii) to the complexity of the issues and (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other proceedings. The court should also take into account access to justice, finality, legal certainty and in the present context the pro-arbitration policy of the Cayman Islands, public policy, and the very limited basis on which the enforcement of an arbitration award may be refused."

29. His determination considered those primary factors and the approach he took to them. He stated (at [101]) that "[i]n the context of the 14 days provided in the GCR and the Cayman Order" the 798 days or 2 years, 2 months and 6 days "delay in this case is a very long period of time".

30. The judge summarised and discussed the reason for the delay given in the Appellants' skeleton argument and the affidavits sworn by Mr. Hunt, their English attorney, and Mr. Fox, their Cayman Islands attorney at [103] to [136] of his judgment. Essentially the reason given was that, if the challenges to the award in the DIFC had been successful, there would have been no award to enforce in the Cayman Islands and no need to apply to set it aside in the Cayman Islands. The affidavits stated that the Appellants' understanding was that, in those circumstances, outside rare circumstances such as the decision at the seat overturning the award being produced by fraud, they would not be precluded from seeking to set aside the Cayman Islands Enforcement Order after the end of the 14-day period. Their evidence was also that they believed that the

Respondents had not suffered any prejudice from the delay in making the Cayman Islands set aside application. This was because, had they applied to set aside the Enforcement Order within the specified period, they would have been able to seek to stay the proceedings pending the outcome of the proceedings in the DIFC Courts. In paragraph 95 of their skeleton argument (to which the judge referred at [267]) they stated that they "reasonably sought to avoid burdening the court with a set aside application that may have been rendered otiose by success in the DIFC".

31. At [117] the judge observed that it appeared that the Appellants made a "deliberate decision … not to comply with the Cayman Order". He was critical of the fact that their evidence on this issue came exclusively from their attorneys and, contrary to GCR Order 41 Rule 5, included matters of which those attorneys had no personal knowledge: see *inter alia* [107] and [113]. Mr Fox had not advised the Appellants until well after the relevant time. There was, the judge stated at [146], "no evidence before the court to indicate that the [Appellants] were unaware of the Cayman Order or the proper procedure in respect of applications to set aside and stays or that they received negligent legal advice or by way of some inadvertence they failed to take it, or that some other innocent mistakes were made". He concluded at [148] that he could only determine the application for an extension of time on the basis of the admissible evidence before him and that revealed "a deliberate informed failure to comply with the Cayman Order with no proper explanation or good excuse". That, he stated, "on the face of it, is abusive conduct". He recognised at [119] and [149] that the fact that no proper explanation had been provided in the evidence in respect of the delay was not the end of the matter and turned to the merits of the Appellants' application and the prejudice to the Respondents.

32. As to taking account of the merits of the application to set aside the Enforcement Order as part of the balancing exercise, the judge referred at [150] and [205] to authorities stating that where the court could see "without much investigation" or "on brief perusal" that the application is very strong or very weak it was legitimate to do so. After a full summary of each party's submissions at [150] to [188], he decided at [189] that on that approach the Appellants' case on the set aside application "is, at best, very weak".

33. The judge considered at [193] that the Award did not engage the Act of State doctrine but that even if it did it would fall within the *Kirkpatrick* limitation to it (on which see [18] above) and the public policy exception.

34. The judge dealt with the new Iraqi law argument that an administrative decision procured by bribery and corruption is void as a matter of Iraqi administrative law at [194] – [199]. Referring to Mr Hunt's evidence in support of the Appellants' application and to the response to a question

he asked Mr Flynn, the judge stated at [194] that he was provided with no good reason why that argument had not been raised before the DIFC Courts.[4] He appreciated that he was not hearing an application for a *Henderson v Henderson*[5] abuse order, but considered it was appropriate for him to consider whether the Appellants should be permitted to make what (at [197]) he described as "this belated new argument". He relied on Butcher J's conclusion in *Carpatsky Petroleum Corporation v PJSC Ukrnafta* [2020] EWHC 769 (Comm) at [123]. Butcher J stated that it is open to a court to find a *Henderson v Henderson* abuse of its process where a party to a foreign arbitration award raises a challenge to it which it "could and should have raised" in the supervisory court but had not "and that there were no special circumstances which made the application of the principle inappropriate". In the light of that the judge concluded that there was no real prospect of the Appellants being permitted to run the new argument.

35. On the submission that the Award relied on illegally obtained evidence, at [186] the judge summarised the Respondents' submission that Mangatal J's decision in *Meridian Trust Company Limited v Eike Fuhrken Batista Da Silva* FSD, 11 November 2016 showed that under Cayman law illegally obtained evidence is admissible, unless obtained by torture. At [200] he stated that "the Illegally Obtained Evidence ground is also a non-runner". It was, he stated, plain that the tribunal had not relied on the evidence which was said to have been obtained illegally and there was no suggestion that the evidence had been obtained for example by torture.

36. On preclusion, after summarising the Appellants' submission at [225] the judge concluded at [236] that "Article V(2)(b) of the New York Convention is subject to local rules of procedure and it does not override the court's discretion as to whether or not to grant an extension of time to challenge an award". He also stated that there was nothing in the Appellants' arguments which led him to conclude on a discretionary basis, that he should grant the extension of time and permit the set aside application to proceed to a full hearing. He stated at [237] that the public policy considerations raised by the Appellants had not been precluded but were considered in the context of the extension of time application.

37. The judge rejected the Appellants' submission that the prejudice to the Respondents would have been suffered even if the Appellants had applied promptly to set aside the Enforcement Order and obtained a stay pending the outcome of the DIFC proceedings: see [263]. On a scale of 1 to

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4 In response to questions by the judge there was some suggestion that a different expert had been engaged but the judge stated that would not have been a sufficient excuse to prevent the application of the *Henderson v Henderson* abuse principle: see [194]. In fact by the time of the appeal it was clear that the expert was the same expert that had given evidence before the arbitral tribunal where (see Transcript pp 22, 146) the point had not been raised. It was suggested on behalf of the Appellants that the expert had not been asked the right question before the DIFC hearing and that whereas the DIFC was considering Emirati public policy, the Cayman Islands Court considers Cayman public policy: see Transcript p. 53.

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10, he put the further delay and additional costs to the Respondents at about 4; materially more than minimal but not close to significant extreme prejudice: see [264].

38. As to the overriding objective and the justice of the case, at [266] – [275] the judge concluded that although a large amount of money was involved and the case is important to the parties and to the Cayman Islands, the way the Appellants had delayed their application did not ensure "the normal advancement of the proceeding" and significantly increased expense.

IV The Grounds of Appeal

39. The Appellants rely on six grounds of appeal:

(i) Error of law in engaging in a more detailed analysis of the merits of the Appellants' proposed application to set aside the Enforcement Order than permitted when considering an application to extend time to make that application, and by treating the DIFC Court's decisions as effectively dispositive of Cayman public policy in considering those merits: Memorandum of Grounds, paragraphs 9-10.

(ii) Error in the treatment of the argument that a defence founded on public policy and Article V(2)(b) of the New York Convention should not be subject to preclusion by national procedural rules or that the public policy character of the defence should be a weighty factor in the exercise of the Court's discretion: Memorandum of Grounds, paragraphs 11-12.

(iii) Error in the treatment of the absence of a good reason for delay as a near determinative factor rather than part of a multi factorial balancing exercise re-weighing that finding against countervailing factors: Memorandum of Grounds, paragraphs 13-14.

(iv) Error of law in concluding in an application for an extension of time that the appellant's new Iraqi law argument would be barred by the *Henderson v Henderson* abuse of process principle and/or a wrong exercise of discretion in prejudging a matter that required full argument at the substantive hearing of the set aside application: Memorandum of Grounds, paragraphs 15-16.

(v) Error in the exercise of discretion in giving insufficient weight to the magnitude of the prejudice to the Appellants by being permanently shut out from challenging the enforcement of the Award in the Cayman Islands, the availability of alternative proportionate remedies,

and the public interest character of the set aside grounds where the prejudice to the Respondents was moderate: Memorandum of Grounds, paragraphs 17-18.

(vi) Error in the exercise of discretion in the evaluation and weighing of evidence and/or procedural unfairness in applying a materially more critical standard to the evaluation of the affidavit evidence filed by the Appellants' legal representatives than to the evidence filed by the Respondents' legal representatives: Memorandum of Grounds, paragraphs 19-20.

V Examination of the submissions and conclusions:

(a) The approach to the merits of a proposed application when considering an application to extend time to make it:

40. I start with the correct approach to the merits of the Appellants' application to set aside the Enforcement Order when the Court is considering only an application to extend time to make that application. It is common ground that it is what Mr Flynn described as a summary one and Mr de Verneuil Smith as a high level one. The judge recognised this for instance at [9], [150], and [204] - [205]. At [189] he stated that on that test it was clear the Appellants' case on the merits of the set aside application is, at best, very weak. As stated at [28] above, he adopted the statements of Moore-Bick LJ in *R (Hysaj) v Secretary of State for the Home Department* and of Popplewell J (as he then was) in *Terna Bahrain Holding Co WLL v Bin Kamil Al Shamsi* that regard can be had to merits only where the court can see "without much investigation" or "on brief perusal" that the application is "very strong or very weak" or "intrinsically weak".

(b) Ground 1: Error of law in engaging in a more detailed analysis of the merits of the Appellants' proposed application to set aside the enforcement order than permitted when considering an application to extend time to make that application:

41. At an early stage of his oral submissions,[6] when introducing his main points, Mr Flynn stated that it was wholly out of proportion permanently to shut out a public policy challenge in the Cayman Islands to a US$ 1.1 billion award for a procedural defect caused by a delay which held the ring while the Appellants' challenge to it was determined by the DIFC Courts. This was particularly so where the delay was in fact co-terminus with the time it took to challenge the award in the seat and the assets in Cayman were protected by freezing and Receivership orders. Mr Flynn submitted that,

[6] Transcript, pp 10-15. See also his Reply, at p. 187.

had the Appellants applied in time, they would have been in exactly the same position because there would have been a stay pending the outcome of the challenge in the DIFC. He also relied on the fact that the act of state and public policy point had not been determined at a substantive hearing in the Cayman Courts, its importance to the parties, and the benefit to litigants and courts from having the issue decided after a full hearing.

42. I address ground 1 primarily by considering the two questions which in my judgment lie at the heart of this appeal. One is whether the judge in fact applied the summary approach to the merits of the Appellants' proposed application to set aside the Enforcement Order. The second is whether, applying that summary approach, the judge was entitled to conclude that the merits of the act of state, public policy and illegally obtained evidence arguments relied on by the Appellants in their set aside application are very weak.

43. Answering these questions will substantially address ground 1; that the judge did not confine himself to a summary "high level" approach to the merits of the application to set aside the Enforcement Order which the Appellants wished to bring. It will also substantially address whether the judge reached a plainly wrong decision as to the strength of the public policy objection to enforcement. It was suggested by Mr de Verneuil Smith that it is not open to the Appellants to argue that the judge reached a plainly wrong decision because the stated ground of appeal is in essence that he said one thing and did another thing.[7] Mr Flynn accepted that the words used are not as clear as they might have been but submitted that it is implicit in ground 1 that the judge was plainly wrong in his conclusion. He also pointed to paragraph 45 of his skeleton argument which states that taken cumulatively the errors carry the Appellants over the "plainly wrong" threshold.[8] Although paragraphs 9-10 of the Memorandum of Grounds support Mr de Verneuil Smith's submission, I consider the two questions on the assumption that it is open to the Appellants to argue that the judge reached a plainly wrong decision as to the strength of the public policy objection to enforcement.

(1) *Did the judge in fact apply the summary approach to the merits of the proposed application to set aside the Enforcement Order?*

44. The judge recognised at [206] that he considered the merits "in a little more detail than would otherwise normally be the case" in view of the Appellants' arguments on preclusion but that the position remained the same after what he described as "a slightly deeper dig": [206] – [207]. Mr Flynn submitted that this showed that the judge had gone beyond the standard he had identified as

[7] Transcript, p 114.
[8] Transcript, pp 175-6.

the correct one when considering whether to extend time as opposed to at a full hearing on the merits. He had not confined himself to a brief perusal but traversed in detail and at length the issues canvassed before him. These included the scope of the act of state doctrine, the application of *Henderson v Henderson,* and the admissibility of illegally obtained evidence. The set aside application had originally been listed for 4 days and Mr Flynn observed that in many ways the judgment reads as if it was one rendered after a trial applying a test of high degree of success or failure rather than the summary "brief perusal" approach.

45. As part of ground 1, Mr Flynn also submitted that the judge erred in treating the DIFC Court's decisions as in substance dispositive of Cayman public policy in his consideration of the merits rather than by independently assessing whether the same underlying facts engage the distinct public policy of the Cayman Islands under section 7(3) of the FAAE Act. That question, he maintained, required independent *de novo* consideration by a Cayman court at a substantive hearing. He argued that the judge's approach constituted reliance on a legally impermissible consideration (the DIFC Courts' conclusions) as if it answered the different question of the distinct public policy of the Cayman Islands which was in fact before the Grand Court.

46. Notwithstanding the force of Mr Flynn's advocacy, I have concluded that the judge did not adopt an improper approach. This is seen from his summary of the submissions about the test, his citation of the decisions, and his statement of the correct test: see [41] above. The number of paragraphs spent summarising the submissions on the merits and analysing those submissions reflected the nature of the arguments and the number of issues raised. I accept the submission on behalf of the Respondents that the fact that a comprehensive judgment was given on the merits does not mean that an impermissible standard of analysis or improper approach was used.

47. I also reject the submission that the judge treated the DIFC Court's decisions as effectively dispositive of Cayman Islands public policy. He stated at [191] that while "it is the public policy of the Cayman Islands that the court must have regard to in considering the public policy arguments raised", "in this area of wrongdoing, bribery and corruption", the public policy of England and Wales and the Cayman Islands are "significantly aligned". That was the reason he rejected the Appellants' submission that the decisions of the DIFC Courts were of no relevance in respect of the Act of State ground. He stated that the DIFC Court of Appeal had "conducted an impressive review of the relevant law and principles and relied on many English authorities which would be followed in the Cayman Islands" and that it had applied the English legal principles to the specific context of this case: [190] – [191]. His statement that for those reasons the DIFC Courts' decisions were relevant did not mean that he treated them as dispositive. At

[209] he stressed that in his consideration of the merits he had regard to the public policy of the Cayman Islands and at [211] stated that "there are strong public policy considerations in the Cayman Islands against corruption and bribery".

(2) *Was the judge, applying that summary approach, entitled to conclude that the merits of the arguments relied on by the Appellants in their proposed application to set aside the Enforcement Order were very weak?*

48. The question is whether the judge, applying that summary approach, was entitled to conclude that the merits of the act of state, public policy and illegally obtained evidence arguments relied on by the Appellants in their set aside application are very weak. This question is closely intertwined with other grounds of appeal, in particular grounds (ii) – (iv).

49. It may be true that the scope of the act of state doctrine and the public policy issue have not been substantively considered by a Cayman Islands court whose public policy it is. It is, however, clear from the decisions of the UK Supreme Court in *Belhaj v Straw* [2017] UKSC 3, [2017] AC 964 and "*Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela* [2021] UKSC 57, [2023] AC 156 that the act of state doctrine does not apply where the validity of a foreign act of state is not in issue. Those cases make it clear that, although the *Kirkpatrick* limitation is based on a decision of the United States Supreme Court applying a different constitutional framework, it applies in the United Kingdom, albeit with a different effect.[9] In my judgment, on these issues it is also clear that Cayman law is likely to follow the jurisprudence of the United Kingdom jurisdictions. Accordingly, the judge was entitled so to conclude on a summary or "high level" approach.

50. In the *Central Bank of Venezuela* case, at [136] Lord Lloyd-Jones summarised seven limitations and exceptions to the foreign act of state doctrine in English law. The fifth of these is that "the doctrine does not apply where the only issue is whether certain acts have occurred, as opposed to where the court is asked to inquire into them for the purpose of adjudicating on their legal effectiveness". At [151] – [152], referring *inter alia* to Lord Neuberger's judgment in *Belhaj,* he stated that the authorities support an exception to the act of state doctrine where the allegations of unlawfulness or invalidity arise incidentally or collaterally rather than directly. In *Belhaj*, at [240] Lord Sumption appeared to apply what might be a conceptually narrower test, stating that the doctrine only applies

9 In UK jurisdictions the act of state principle is one grounded in international comity that prevents courts from deciding cases but the US Supreme Court has made the doctrine a source of rules of decision rooted in the strict separation of powers and denied that it prevents resolution of the merits of a dispute: see Harrison, (2016) 47 Geo. J. Int. Law 507, 556 and 558.

"where the invalidity or unlawfulness of the state's sovereign acts is part of the very subject matter of the action in the sense that the issue cannot be resolved without determining it".

51. In this case, on either approach it is clear that the *Kirkpatrick* limitation to the act of state doctrine applies here. The arbitral tribunal did not make a finding that the regulator's decision was invalid or unlawful. It took that decision to be effective and concentrated on whether the Appellants had procured it by corruptly bribing regulatory officials and whether that gave rise to tortious liability. *Kirkpatrick* itself allowed an act of a foreign state procured by bribery to be impugned.

52. Since it is clear that the *Kirkpatrick* limitation applies to the facts of this case and displaces the act of state doctrine, it is not necessary to consider whether it would also be displaced by the second limb of the second of Lord Lloyd-Jones's list of limitations and exceptions which displaces it where the acts "are contrary to English principles of public policy": [136(2)]. The relationship between the two was referred to in *Crane Bank Ltd v DFCU Bank Ltd* [2023] EWCA Civ 886. In that case (see [41]), the *Kirkpatrick* limitation did not apply to displace the doctrine because the claim required the court to adjudicate on the validity and lawfulness of the actions of Ugandan officials in Uganda, so the Court of Appeal of England and Wales had to consider whether there was jurisdiction under one of the other exceptions to the act of state doctrine.

53. In the context of the present appeal, the significance of *Crane Bank* lies in what was said about the bribery and corruption of foreign public officials. Phillips LJ, with whom Popplewell LJ and Sir Julian Flaux C agreed, stated at [62] that it is at least arguable that corruption of foreign public officials is contrary to English public policy or that such a policy is developing. He also stated that, because the scope of this exception is not settled, what is required and the precise formulation of the policy are matters for trial rather than determination on the summary basis.

54. The judge may well turn out to be justified in stating at [210] – [211] that there are strong public policy considerations in the Cayman Islands against condoning bribery and corruption and in favour of bringing wrongdoers to justice and requiring legal entities to discharge their legal liabilities. But in the light of the statements in *Crane Bank,* he should not have found this on the summary "high level" approach used when considering an application for an extension of time. However, since he was entitled to conclude on the summary or "high level" approach that the act of state doctrine had been displaced by the *Kirkpatrick* limitation, this made no difference to the result.

55. I turn to the position of reliance on illegally obtained evidence. Mr Flynn's written submissions state at paragraph 55 that "whether Cayman public policy is engaged by the act of state and illegally obtained evidence grounds is a question that has never been determined in this jurisdiction" and at paragraph 81 that the challenge to the award is on grounds that "the act of state doctrine and reliance on illegally obtained evidence which on the Appellants' case, engage the public policy of this jurisdiction directly … have never been the subject of independent Cayman Islands adjudication". The position of illegally obtained evidence, however, differs from that of the act of state doctrine.

56. In *Meridian Trust Company Limited v Eike Fuhrken Batista Da Silva* FSD, 11 November 2016, to which the judge referred, Mangatal J at [99] - [105] applied the principles governing illegally obtained evidence summarised by the English Court of Appeal in *Imerman v Tchenguiz & ors* [2010] EWCA Civ 908. Lord Neuberger MR stated at [170] that:

> "… the use in court as evidence of material which has been improperly obtained (whether in breach of confidence, tortiously, or even criminally) is permissible, though such use may be refused by the court or permitted only on terms. Subject to certain exceptions, notably information obtained by torture, the common law does not normally concern itself with the way evidence was obtained when considering admissibility. … However, just because it is admissible, it does not follow that the court is obliged to admit it."

At [171] Lord Neuberger stated that it was quite clear from the reasoning in *Jones v University of Warwick* [2003] EWCA Civ 151 that the court has power to exclude evidence in the light of the way in which it had been obtained.

57. In *Meridian Trust Company,* after citing these two paragraphs of *Imerman v Tchenguiz,* Mangatal J stated at [100] that the fact that evidence had been obtained as a result of criminal actions under foreign law did "not render such evidence inadmissible, but the Court can exclude such evidence or attach less weight to it because of its provenance". She accepted the submission that even if the obtaining of the information relied on constituted a criminal offence it was admissible and persuasive. In this case the arbitral tribunal had stated that it did not rely on the evidence which the Appellants contended had been obtained illegally. In these circumstances, even leaving aside the Respondents' submission in paragraph 21(b) of their skeleton argument that the factual findings in the Award and the DIFC Courts give rise to an issue estoppel, the judge was entitled

to conclude on the summary approach at [200] that "even if the evidence was illegally obtained it is plain that it was not relied on and the [Appellants] do not suggest that it was obtained by, for example, torture".

58. I turn to the other grounds of appeal. I first consider those with substantive components, Grounds 2 and 4, and then Grounds 3, 5 and 6.

(c) Ground 2: Error in relation to whether a party can and should be precluded from raising a public policy defence under Article V(2)(b) of the New York Convention, as reflected in Section 7(3) of the FAAE Act:

59. The Appellants' primary submission was that the judge was wrong to conclude that a public policy defence under Article V(2)(b) of the New York Convention was capable of preclusion by national procedural rules. Their secondary submission was that, even if the operation of those procedural rules is not absolutely barred, the special character of a public policy defence should be given very substantial freestanding weight within the discretionary balancing exercise: skeleton argument, para. 59. The judge accurately summarised these alternatives at [225].

60. Although Mr Flynn did not formally abandon the absolutist approach of his primary submission, he did not advance it with any degree of conviction. He was correct to accept that it would be an extraordinary thing if this jurisdiction simply followed the civil law approach and adopted such an approach.[10] He accepted that Article III of the New York Convention means that the substantive rules of the Convention are to be applied within the framework of national procedural rules.[11] He also accepted the difficulty with the analogy he had sought to draw between the position of Article V(2)(b) and state immunity cases because the clear direction in section 1(2) of the State Immunity Act 1978 to give effect to immunity required capability to override procedural rules.[12]

61. Mr Flynn's focus before this court was the submission that the non-waivable character of the public policy defence should carry substantial weight in the exercise of any discretion and the judge did not give the public policy arguments such weight. I reject the submission at paragraph 60 of the Appellants' skeleton argument that the judge did not engage with this narrower, alternative formulation. He did, albeit briefly, do so. It was because he concluded at [237] that

10 Transcript, pp 57 and 59
11 Transcript, pp 62-63
12 Transcript, p 63, on which see *Royal Embassy of Saudi Arabia (Cultural Bureau) v Costantine* [2025] UKSC 9 at [47] *per* Lord Lloyd-Jones.

there was nothing of substance in the Appellants' public policy grounds that he had stated at [236] that there was nothing in their arguments which led him to conclude on a discretionary basis that he should grant the extension of time and permit the set aside application to proceed to a full hearing.

62. As the Respondents submitted, the weight to be given to the public policy defence depends on the strength and quality of the public policy arguments. Mr Flynn accepted that, if the court, applying the summary approach, concluded that the public policy objection was very weak it did not have to give it discretionary weight.[13] For the reasons given at [49] to [58] above, I have concluded that the judge was entitled to decide that those arguments were very weak. Accordingly, he did not err in stating at [239] that the preclusion argument carried no weight in the discretionary balancing exercise.

(d) Ground 4: error in the treatment of the Henderson v Henderson point in relation to the new Iraqi law argument:

63. It was submitted on behalf of the Appellants that the judge erred in concluding on the summary approach appropriate in the context of an application for an extension of time that their new Iraqi law argument would be barred by the *Henderson v Henderson* abuse of process principle because they had not raised it in the DIFC Courts. There was, they argued, no issue estoppel in the Cayman Islands because the DIFC Courts were concerned with Emirati law and public policy.

64. The Appellants also argued that the judge overlooked the significance of Butcher J's "absent special circumstances" qualification to the position he set out in *Carpatsky Petroleum Corporation v PJSC Ukrnafta* at [124], to which I referred at [34] above. Butcher J stated that the *Henderson* abuse principle applies to a challenge to the enforcement of a foreign arbitration award which could and should have been raised before the supervisory court "absent special circumstances". Mr Flynn submitted that the qualification necessarily contemplates a fact-sensitive inquiry into whether such circumstances exist. He submitted that such an inquiry calls for the kind of considered assessment informed by full submissions and evidence which an application for an extension of time does not permit. He also submitted that in the context in which the new Iraqi argument arose, a fresh expert opinion, was capable of constituting a special circumstance for this purpose.

[13] Transcript, p 173.

65. I reject these submissions. It is clear from the judgment that the judge was not making a definitive finding that to deploy the new Iraqi law evidence was *Henderson* abuse: see [195] and [197] of his judgment and my summary of it at [34] above. The evidence adduced by the Appellants and the explanations by their legal representatives did not explain why that evidence and the argument that an administrative decision procured by bribery and corruption is void as a matter of Iraqi administrative law had not been deployed in the arbitration or the DIFC Court proceedings. The judge had to determine the matter on the basis of the material the parties put before him. Given the limitations of that material, and that it was for the Appellants to show that there were special circumstances, the judge was entitled, using a high level approach, to conclude that the special circumstances defence to *Henderson* abuse was weak and likely to fail.

66. I turn to Grounds 3, 5 and 6. There are similarities between grounds 3 and 5. Ground 3 is that the judge gave near determinative weight to the absence of a good reason for the Appellants' long delay. Ground 5 is that he gave inadequate weight to prejudice and proportionality. In both the question is whether they ultimately boil down to being submissions as to the weight given to a discretionary factor rather than demonstrating an error falling within the principles identified in *Hadmor Productions v Hamilton* and the other decisions referred to at [6] – [10] above.

(e) Ground 3: Error in treating the absence of a good reason for the delay as a near determinative factor rather than part of a multi factorial balancing exercise:

67. The Appellants have not challenged the judge's findings that there was no good excuse for the long delay and that there was a deliberate decision not to comply with the 14-day period in the Enforcement Order pending the outcome of the proceedings in the DIFC Courts. The complaint is that he treated the absence of a good excuse for the delay as nearly determinative. That is an example of their saying that the judge said one thing but did another.

68. The judge referred at [62] – [63] to the observations of Smellie CJ in *Streeter v Immigration Board* 1999 CILR 264 at 270 in the context of an application for an extension of time to appeal. He set out Smellie CJ's statements that "even the absence of a good reason for any delay, is not in itself sufficient to justify the court's refusal to exercise its discretion … to grant an extension"; that the court is required "to look at all the circumstances and to be guided by the overriding principle that justice has to be done"; and that "the test of doing justice requires a consideration of whether, in refusing the extension, a just claim might be shut out and whether, in granting the extension, prejudice might result to a respondent because of the failure on the part of an appellant to observe the time-limits imposed".

69. At [119] the judge stated that he accepted that "the absence of a good reason for the delay is not in itself sufficient to justify a refusal of an extension of time". He also stated that "all other factors and relevant circumstances must be considered together with the overriding principle that justice must be done". I referred at [31] above to the judge's recognition after concluding that no proper explanation had been given for the long delay that that was not the end of the matter. He stated: "I now consider the other factors I must hold in the balance before reaching a decision". He did so in his consideration of the merits of the Appellants' application, the prejudice to the Respondents, and, albeit briefly, see [265] and [272], the effect on the Appellants of losing their ability to challenge the enforceability of a very large arbitral award in these Islands and their submissions as to the importance and complexity of the case.

70. The Appellants submitted that the judgment's consideration of those matters did not disclose an independent re-weighing of the delay finding against three countervailing factors to the long delay. The first was that the strategy of awaiting the outcome of the DIFC Court proceedings was rational and not dishonest. The second was that the Respondents were prepared to defer execution of the Enforcement Order until then. The third was that Mr Mustafa's shareholding in Korek International, the only asset in the Cayman Islands (which held shares in International Holdings), was restrained by the freezing and receivership orders. The judge referred to all these factors either in his summary of the positions of the parties or in the decision sections of his judgment.

71. There is considerable force in the points Mr Flynn made in his introduction to ground 1, that the court would have had to consider the public policy arguments if the Appellants had applied in time, and that the Financial Services Division of the Grand Court would almost certainly have deferred its consideration of them until the outcome of the DIFC proceedings was known. Let me say that if I had been the first instance judge I would have given more weight to those points because they take a lot of the sting out of the delay. However, it is not argued that the judge was not entitled to conclude on the evidence before him that the delay was not properly explained; that the need for the application to extend time caused delay and expense beyond what would otherwise have been the case; or that he was not entitled to find that there was some prejudice to the Respondents in the form of the further delay and additional costs.

72. In those circumstances, the complaint is in substance that the judge gave the countervailing factors insufficient weight. Unless, however, he reached a plainly wrong decision as to the strength of the objections to enforcement, one that no reasonable judge could have reached, it is clear from the authorities to which I have referred that insufficiency of weight is not a valid ground of appeal.

For the reasons given in particular when considering ground 1, I concluded that the judge was entitled to conclude that the merits of the arguments relied on by the Appellants in their proposed application to set aside the Enforcement Order were very weak; i.e. that his decision was not plainly wrong. Absent success on that ground, this is, as the Respondents submitted, in substance an attempt by the Appellants to reargue the exercise of the discretion.

(f) Ground 5: error in giving insufficient weight to the magnitude of the prejudice to the Appellants and the availability of alternative proportionate remedies:

73. There are four strands to the Appellants' submissions on ground 5. The first is that the judge failed to give adequate weight to the severe prejudice to the Appellants in comparison to his assessment of the prejudice to the Respondents. The prejudice to the Appellants was being shut out permanently from challenging the enforceability of the Award in these Islands. The prejudice to the Respondents consisted mainly of further delay and additional costs. The second strand, in what may well only be a reformulation of the "inadequate weight" strand, is that the difference in his treatment of the prejudice of the parties is disproportionate and this was not properly addressed in the judgment. The third strand is that the judge failed to explain how justice was served by shutting out the Appellants in the circumstances of the case. The fourth strand is that the judgment's failure to refer to the right to a fair and public hearing in section 7 of the Cayman Islands Constitution's Bill of Rights constitutes the omission of a material consideration to the exercise of the court's discretion.

74. Apart from the failure to refer in the judgment to section 7 of the Bill of Rights, the Appellants do not suggest that the judgment fails to consider relevant factors or considers irrelevant ones. It is therefore primarily directly concerned with weight and has to overcome the difficulty of having to show that it is not simply an attempt to reargue the exercise of the discretion.

75. As far as the judge's treatment of the prejudice to the Appellants is concerned, he referred to the significant sum to be enforced, and the impact on them of dismissing their application for an extension of time. He stated at [265] that, although *Soinco* and the other relevant authorities do not refer to prejudice to an applicant whose application for an extension is refused, he took the Appellants' position into account when considering the overriding objective and the overall justice of the case. But the balancing process does not only balance prejudice to the Appellants with prejudice to the Respondents. The judge was entitled to take the view that the Appellants' failure to apply in time was at best unexplained, that the necessity for the application for an extension caused delay and costs beyond what would otherwise have been the case which caused

some prejudice to the Respondents, and that the prejudice to the Appellants in being unable to pursue a weak case against enforcement was insufficient to counterbalance these considerations.

76. I turn to section 7 of the Bill of Rights. The Appellants' skeleton argument below refers to it in a single short paragraph. It first sets out section 7. It then states only that "it would be unjust to deny the [Appellants] the opportunity to be heard on the merits of its Set Aside application, particularly in circumstances where the [Respondents] essentially consented to and contributed to the delay". That was hardly a developed submission. It was, as Mr de Verneuil Smith observed, more a throw away statement that if the Appellants did not get an extension they would not have had a fair hearing. It does not appear to have been mentioned at the hearing before the judge and was not pursued at the hearing before us save that Mr Flynn stated that in *New Frontier Health* the judge had set it out as one of the factors to be taken into account in applications for extensions of time.[14]

77. The judge dealt with the argument that the Respondents had contributed to the delay at [145] of the judgment. Given that no other point had been articulated in relation to section 7, I do not consider that he was required expressly to mention the Bill of Rights. In this case, in the words of Sir James Munby P in *Re F (Children)* [2016] EWCA Civ 546 at [22], the judgment provided sufficient detail and analysis on the points pursued to enable the parties to understand why they had won or lost and to enable an appellate court to decide whether or not the decision is sustainable. To require a reference to section 7 would have undesirable consequences because it would be required in every interlocutory hearing in which there is not going to be a full trial and become a standard judicial incantation of the sort deprecated by Lord Hoffmann in *Piglowska v Piglowski* [1999] UKHL 27, [1999] 1 WLR 1360.

(g) Ground 6: Error and/or procedural unfairness in the differential treatment of the parties' affidavit evidence:

78. The judge was critical of the fact that the parties had chosen to present their evidence on the reason for delay in affidavits by their lawyers which did not comply with GCR Order 41 Rule 5 and in submissions by the lawyers rather than in direct evidence. I summarised his critique of the Appellants' evidence and submissions at [31] above. He made similar criticisms of the Respondents' affidavit for departing from matters of fact and making submissions, arguments

[14] Transcript pp 92-93. See also p 186 where Mr Flynn observed that the Bill of Rights "has got a little bit of more emphasis than I think it deserved".

and comments, and of their skeleton argument for citing a passage in the affidavit which did not in fact support what was said in the skeleton argument: see [243] and [246].

79. In their written submissions, the Appellants argued that having identified parallel evidential defects in the evidence of the two parties, the judge did not treat those defects equally. The defects in the Appellants' evidence were treated as inadequate to explain or excuse the delay and went to the heart of the adverse finding that there had been a deliberate informed failure to comply with the Enforcement Order with no proper explanation or good excuse. But the same evidential defect did not prevent the judge from concluding that the Respondents had suffered some prejudice.

80. Mr Flynn, while not formally abandoning this ground, did not pursue it at the hearing. In my judgment he was right not to do so. The judge applied the same standard to the parties' evidence. Both affidavits were seriously defective. However, the impact of those evidential defects differed. The assessment of whether there was prejudice to the Respondents did not require findings as to their intent and the reasons for their behaviour. It could be made on the basis of objective facts about the progress of the proceedings and submissions of counsel about delay in the past and in the future. The assessment of whether there was a good reason for the delay does require evidence as to the intention and thinking of the party in question. However, the evidence adduced by the Appellants as to the reason for the delay was limited and Mr Flynn had accepted that it was "confusing".

(h) Conclusion:

81. For the reasons set out above, notwithstanding the force of Mr Flynn's submission that had the Appellants applied in time, the parties would have been in the same position because there would have been a stay pending the outcome of the challenge in the DIFC, I would dismiss this appeal.

BIRT JA:

82. I agree.

MARTIN JA:

83. I also agree.