ADGM COURTS
محاكم سوق أبوظبي العالمي

In the name of
His Highness Sheikh Mohamed bin Zayed Al Nahyan
President of the United Arab Emirates/ Ruler of the Emirate of Abu Dhabi

COURT OF FIRST INSTANCE
COMMERCIAL AND CIVIL DIVISION

BETWEEN

(1) NMC HEALTHCARE LIMITED

(in administration) (subject to a deed of company arrangement)

(2) NMC HOLDING LIMITED

(in administration)

(3) RICHARD DIXON FLEMING

(in his capacity as Joint Administrator of the First and Second Claimants)

(4) BENJAMIN THOM CAIRNS

(in his capacity as Joint Administrator of the First and Second Claimants)

Claimants

and

(1) BAVAGUTHU RAGHURAM SHETTY

(2) PRASANTH MANGHAT

(3) BANK OF BARODA

Defendants

AND

COURT OF FIRST INSTANCE
COMMERCIAL AND CIVIL DIVISION

IN THE MATTER OF NMC HEALTHCARE LTD (in administration) (subject to deed of company arrangement) AND THE COMPANIES LISTED IN SCHEDULE 1 TO THE ADMINISTRATION APPLICATION

AND IN THE MATTER OF THE INSOLVENCY REGULATIONS 2015

BETWEEN

(1) NMC HEALTHCARE LIMITED

(in administration) (subject to a deed of company arrangement)

(2) NMC HOLDING LIMITED

(in administration)

(3) RICHARD DIXON FLEMING

(in his capacity as Joint Administrator of the First and Second Applicants)

(4) BENJAMIN THOM CAIRNS

(in his capacity as Joint Administrator of the First and Second Applicants)

Applicants

and

(1) BAVAGUTHU RAGHURAM SHETTY

(2) PRASANTH MANGHAT

(3) BANK OF BARODA

Respondents

JUDGMENT OF JUSTICE SIR ANDREW SMITH

Neutral Citation:	[2024] ADGMCFI 0007
Before:	Justice Sir Andrew Smith
Decision Date:	8 July 2024
Decision:	1. The preliminary issues are determined as follows: a. **Issue 1**: Can an order be made under sections 251 and 253 of the [IR 2022] in respect of the fraudulent carrying on of the business of a company prior to the time at which that company was continued in the ADGM? **Yes**. b. **Issue 2**: Can an order be made under section 252 of the [IR 2022] in respect of the wrongful carrying on of the business of a company prior to the time at which that company was continued in the ADGM? **Yes**. c. **Issue 3**: Can a claim be brought under section 251 and/or section 252 in respect of the fraudulent and/or wrongful carrying on of business before the date when sections 251 and section 252 first came into effect in the ADGM (… pursuant to the [IR 2015], which was the predecessor of the [IR 2022])? **Yes**. d. **Issue 4:** Can a claim successfully be brought under section 251 and/or section 252 absent a sufficient connection between the defendant and the ADGM? **Yes**; and e. If not, assuming (for present purposes only) the facts pleaded by the Claimants, including in their proposed Re-Re-Amended Particulars of Claim, to be true, would there be a sufficient connection between the relevant Defendant and the ADGM? **This does not arise, but if it did, I would answer, Yes**. 2. The parties are invited to make submissions about costs, permission to appeal and any other consequential matters within 21 days of this judgment.
Hearing Dates:	3 June 2024 and 4 June 2024
Date of Order:	Order giving effect to this Judgment to be drafted by the Claimants' representatives.
Catchwords:	Preliminary issues. Fraudulent trading. Wrongful trading. Continuance of bodies corporate in the ADGM. Statutory interpretation, retrospective legislation, the common law presumption. Presumption against double penalisation. Federal Constitution, article 112. Interpretation Regulations, section 25. "*Sufficient connection*" with the jurisdiction.
Cases Cited:	NMC Healthcare Ltd v Dubai Islamic Bank PJSC [2023] ADGMCFI 0017 In re Overnight Ltd [2009] EWHC 601 (Ch) In re Farmizer Products Ltd [1997] BCC 655

	Bilta (UK) Ltd v Tradition Financial Services Ltd [2023] EWCA Civ 112 Morphitis v Bernasconi [2003] EWCA Civ 289 Base Metal Trading Ltd v Shamurin [2004] EWCA Civ 1316 In re Howard Holdings Inc. [1998] BCC 549 Stocznia Gdanska SA v Latreefers Inc [2001] BCLC 116 Re Gerald Cooper Chemicals Ltd [1978] Ch 262 Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg A G [1975] AC 591 R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] AC 349 Spillers Ltd v Cardiff (Borough) Assessment Committee and Pritchard [1931] 2 KB 21 R (O) v Secretary of State for the Home Department [2022] UKSC 3 In re CS Holidays Ltd v Secretary of State for Trade and Industry v Gash [1997] BCC 172 In re Hawkes Hill Publishing Ltd [2007] BCC 937 Marina Towage Pte Ltd v Chin Kwek Chong [2021] SGHC 81 R v Sutcliffe-Williams and Gaskell [1983] Crim L R 225 Wilson v Secretary of State for Trade and Industry [2003] UKHL 40 L'Office Cherifien des Phosphates v Yamishita-Shinnihon SS Cl Ltd [1994] AC 486 Yew Bon Tew v Kenderaan Bas Mara [1983] 1 AC 553 R v Field [2002] EWCA Crim 2913 Tradition Financial Services Ltd v Bilta (UK) Ltd [2023] EWCA Civ 112 Bogdanic v Secretary of State for the Home Dept [2014] EWHC 2872 (QB) ESS Production Ltd v Sully, [2005] EWCA Civ 554 para 78 In re Paramount Airways Ltd (in administration) [1993] Ch 223 Orexim Trading Ltd v Mahivir Port and Terminal Pte Ltd [2018] EWCA Civ 1660 Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536 AWH Fund Ltd v ZCM Asset Holding Co Ltd, [2019] UKPC 37 Jyske Bank (Gibraltar) Ltd v Spjiendnaes [2000] BCC 16 Avonwick Holdings Ltd v Azitio Holdings Ltd [2018] EWHC 2458 (Comm) Suppipat v Narongdej [2020] EWHC 3191 (Comm) Suppipat v Narongdej [2023] EWHC 1988 (Comm) Raymond v Honey [1983] AC 1 Iraqi Civilians v Ministry of Defence [2016] UKSC 25

	Byers v Saudi National Bank [2022] EWCA Civ 42 Marina Towage Pte Ltd v Chin Kwek Chong [2021] SGHC 81 Case No. 632 of 22 (26 October 2003), UAE Federal Supreme Court Case No. 6 of 16 (7 April 2016), Dubai Court of Cassation Case No. 1118 of 2019 (30 October 2019), Dubai Court of Cassation Case No. 136 of 2021 (26 October 2021), Abu Dhabi Court of Cassation Case No. 2 of 2020 (27 January 2021), Dubai Court of Cassation Case No. 87 of 2022 (25 April 2022), Abu Dhabi Court of Cassation Case No. 493 of 18 (26 October 1997), UAE Federal Supreme Court Case No. 340 of 6 (19 April 2012), Abu Dhabi Court of Cassation Case No. 493 of 2018 (26 October 1997), UAE Federal Supreme Court Case No. 1/ 14 (3 February 1993), UAE Federal Supreme Court Case No. 632/ 22 (26 October 2003), UAE Federal Supreme Court
Legislation Cited:	Insolvency Regulations 2015 Insolvency Regulations 2022 ADGM Court Procedure Rules 2016 Companies Regulations 2020 Constitution of the United Arab Emirates Insolvency Act 1986 (UK) Interpretation Regulations 2015 Companies Regulations 2015 Companies (Amendment No 1) Regulations 2020 Application of English Law Regulations 2015 Commercial Companies Law 2021 (Federal Law 32/2021) (UAE) Court, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations 2015
Case Numbers:	ADGMCFI-2022-299; and ADGMCFI-2020-020
Parties and representation:	***Claimants/ Applicants*** Mr Tom Smith KC and Mr Adam Al-Attar KC Instructed by Quinn Emanuel Urquhart & Sullivan UK LLP ***First Defendant/ Respondent*** Ms Ruth den Besten KC and Mr Kajetan Wandowicz Instructed by Farrer & Co

	Second Defendant/ Respondent Ms Sophia Hurst Instructed by Kobre & Kim (GCC) LLP ***Third Defendant/ Respondent*** Mr Harish Salve KC, Ms Georgina Peters and Ms Maria Kennedy Instructed by Baker & McKenzie LLP

TABLE OF CONTENTS

JUDGMENT

INTRODUCTION

1. This is my judgment on preliminary issues in proceedings brought by NMC Healthcare Ltd ("**NMCH**") and NMC Holding Ltd ("**Holding**") and their Joint Administrators, Mr Richard Dixon Fleming and Mr Benjamin Thom Cairns (the "**JAs**") against Dr Bavaguthu Raghuram Shetty, Mr Prasanth Manghat and Bank of Baroda ("**Baroda**").

2. On 27 September 2020, this Court appointed the JAs to be the administrators of NMCH, Holding and many of NMCH's operating subsidiaries, the Court being satisfied that they were, or were likely to become, unable to pay their debts, as that expression is used in the Insolvency Regulations that were then applicable, the Insolvency Regulations 2015 (the "**IR 2015**"): see sections 7 and 200. The IR 2015 have now been replaced by the Insolvency Regulations 2022 (the "**IR 2022**"), but the changes are not material for present purposes.

3. The companies had previously been incorporated variously in Abu Dhabi, Dubai and Sharjah as limited liability companies, and had been registered in the Abu Dhabi Global Market ("**ADGM**") earlier in September 2020. NMCH and Holding are still in administration. The operating subsidiaries came out of administration in March 2022, after they and NMCH had entered into a scheme of interlinked deeds of company arrangement, whereby, as the Claimants maintain, the operating companies and their administrators assigned to NMCH various rights and actual and prospective claims arising out of their insolvencies and events leading to it. The claims of NMCH and the JAs in their capacity as its administrators include claims that are said to have been assigned to NMCH by the operating subsidiaries. I shall refer to NMCH, Holding and the operating companies whose claims are said to have been assigned collectively as the "**ADGM Companies**".

4. The insolvencies are said to have resulted from a fraud against NMCH, Holding and their associated companies (the "**NMC Group**"), including NMC Health PLC ("**NMC PLC**"), the NMC Group's parent company incorporated in England. The Claimants' case is that the fraud was carried out from 2012, if not earlier, until it came to light after a report in December 2019 by Muddy Waters Capital LLC, an American investment firm. The value of the claims in these proceedings is put at "*at least*" US$5 billion. I gave a short description of the Group and the alleged fraud in my judgment in *NMC Healthcare LTD (in administration) and associated companies v Dubai Islamic Bank PJSC and ors,* [2023] ADGMCFI 0017 at paragraphs 42-51, and I need not repeat it.

5. The Claimants allege that the fraud was "*perpetrated by certain of the former management of [NMCH] …with the knowledge and collusion of [Baroda]*". The managers involved in the wrongdoing are said to include Dr Shetty, the founder of the NMC Group, a major shareholder in NMC PLC, the Chief Executive Officer ("**CEO**") of NMC PLC from about July 2011 until about March 2017 and thereafter its Non-Executive Vice-Chairman until about February 2020; and Mr Manghat, who was the Chief Financial Officer of the NMC Group from about 2011 until December 2014, its Deputy CEO from January 2015 until about March 2017 and its CEO thereafter until February 2020. They are said to have been involved in wrongdoing since April 2012 at the latest. Baroda, a State Bank incorporated in India, which had many branches in the United Arab Emirates ("**UAE**") and was regulated by the Central Bank of the UAE, but which had no presence in the ADGM, provided banking facilities to the NMC Group throughout the relevant period. It is alleged to have been party to the fraud from around April 2012.

6. The claims against each of the Defendants fall into two categories, which have been labelled the "*Civil Claims*" and the "*Insolvency Claims*". The Civil Claims are brought by the corporate Claimants under the law of the UAE. The Civil Claims against Dr Shetty and Mr Manghat include claims in tort for fraudulent conduct and for failing to act with proper care (under articles 282 and 285 of *Federal Law No 5 of 1985 on the Civil Transactions Law of No.5 of the United Arab Emirates (*the "**Civil Code**"*)*; in breach of duties as a director or manager of NMC Group companies (under various articles of Federal Law No 8/1984 and Federal Law No 2/2015 on Commercial Companies); in extortion (under article 304 of the Civil Code); and, against Dr Shetty, in unjust enrichment (under articles 318-319 of the Civil Code). The civil claims against Baroda allege that it acted fraudulently or without proper care, and they are made in contract (under article 246 of the Civil Code) and in tort (under articles 282 and 285 of the Civil Code). The Insolvency Claims are made by the JAs in fraudulent trading under section 251 of the IR 2022 against Dr Shetty, Mr Manghat and Baroda, and in wrongful trading under section 252 of the IR 2022 against Dr Shetty and Mr Manghat.

PROCEDURAL HISTORY

7. By my judgment in these proceedings of 29 December 2023 ([2023] ADGMCFI 0024), I refused an application by Dr Shetty to restrain the progress of these proceedings so as to allow parallel proceedings brought in England by NMC PLC against the same Defendants to be heard first. (I understand that the English proceedings are now stayed.) In my judgment, I referred to the so-called "*Retrospectivity Defences*", which I explained as being that sections 251 and 252 of IR 2022 "*are not applicable [to the Defendants' conduct] because the alleged wrongdoing was done (i) before the claimants*, [the ADGM Companies] *were incorporated in the ADGM, and (ii) before the ADGM Insolvency Regulations 2015* (the *"**IR 2015**"), the predecessor of the IR 2022, were enacted and came into force. The claimants allege wrongdoing between 2012 and 2019....[The ADGM Companies] were registered in the ADGM only on 15, 16 and 17 September 2020, shortly before they were put into administration on 27 September 2020*" (at para 46). I went on to observe (at para 47) that: "*On the face of it, these arguments about whether sections 251 and 252 apply (as it was put) "retrospectively" …would, if the ADGM proceedings are not restrained, be suitable for determination as preliminary issues. During the hearing, [Counsel for Baroda] made clear that the Bank of Baroda would apply for preliminary issues of this kind if the Shetty Restraint Application is refused*".

8. Accordingly, at a Case Management Conference on 14 February 2024, I laid down a timetable for Baroda to apply for the preliminary determination of the Retrospectivity Defences, and for hearing the application. Baroda properly consulted the other parties about the formulation of the preliminary issues, and by an order of 27 March 2024 I endorsed a formulation which was agreed between Baroda, the Claimants and Dr Shetty, and to which Mr Manghat did not object. As Ms Ruth den Besten KC, who represents Dr Shetty, sensibly observed in her skeleton argument, "*It is fair to say that the formulation of the Preliminary Issues is complex, perhaps an inevitable result of multiple parties seeking to agree. Their essence is, however, simple*". They were simplified in the course of the hearing, and are essentially those referred to in my judgment of 29 December 2023.

9. The timetable in my order of 14 February 2024 provided for the parties to apply for permission to adduce expert evidence or to apply for permission to deal with questions of UAE law by way of legal submissions under the ADGM Court Procedure Rules 2016, r.117(2). The Claimants applied for permission to adduce evidence of UAE law from Mr Ali Al Aidarous about (as it was put in the witness statement in support of the application made by Mr Nicholas Marsh, a partner at Quinn Emanuel Urquart & Sullivan, the Claimants' legal representatives) "*what relevant claim(s) may be brought under UAE law at various times in the circumstances of the case pleaded by the … Claimants*". By an order of 13 May 2024, I refused their application, and permitted the parties to deal with questions of UAE law by legal submissions. In the event, the expert evidence that the Claimants wished to introduce would not have been relevant to any contentious issue of UAE law.

10. I heard the preliminary issues on 3 and 4 June 2024. Baroda were represented by Mr Harish Salve KC, Ms Georgina Peters and Ms Maria Kennedy; Dr Shetty was represented by Ms den Besten KC and Mr Kajetan Wandowicz; and the Claimants were represented by Mr Tom Smith KC and Mr Adam Al-Attar KC; Mr Manghat did not make oral submissions, but he was represented by Ms Sophia Hurst. At the end of the hearing, I invited the parties to make further written submissions about one question relating to the impact, if any, of article 112 of the Federal Constitution of the UAE (the "**Constitution**"), and they all did so. The Claimants and Dr Shetty appended to their submissions letters of advice from UAE lawyers: the Claimants from Global Advocacy and Legal Consultants, and Dr Shetty from Ibrahim & Partners. (They had not sought, and I had not given, permission for expert evidence of this kind, but no party objected to me receiving the letters. They largely comprised matters that might have been presented by way of submissions, and were in large part repeated in submissions. I have therefore read and considered them: while helpful, they have not been decisive on any issue that I determine.)

THE PRELIMINARY ISSUES

11. The preliminary issues, therefore, concern legal questions relating to the Insolvency Claims. Essentially, the Defendants maintain, and the Claimants dispute, that the provisions of sections 251 and 252 of the IR 2022 do not apply (i) to conduct before a company is registered in the ADGM, or (ii) to conduct before the IR 2015, the predecessor of the IR 2022, were enacted. (Mr Manghat does not specifically plead in his defence that sections 251 and 252 do not apply to conduct before the IR 2015 came into effect, but he denies that the JAs are entitled to bring any claims under the IR 2022: no pleading point was taken against him.) Further, Baroda and Dr Shetty argue that, in order for the Court to make an order under section 251 or section 252 of the IR 2022, it is necessary for the JAs to establish that there is a "*sufficient connection*" between the relevant Defendant and the ADGM. The Claimants dispute that this is mandatory for the exercise of the powers, arguing that it is only a consideration going to whether the Court should make any, and if so what, order; and arguing in the alternative that, if there be any such requirement, a connection between the relevant Defendant and the UAE would suffice.

12. Thus, Issue 1 is concerned with whether there can be liability for fraudulent trading under section 251 of the IR 2022 in respect of business carried on by the ADGM Companies before they were registered in the ADGM. The relevant question is formulated as follows: "*Can an order be made under sections 251 and 253 of the [IR 2022] in respect of the fraudulent carrying on of the business of a company prior to the time at which that company was continued in the ADGM?*". The relevant part of Issue 2 is similarly formulated, and it is about whether there can be liability for wrongful trading under section 252 of the IR 2022 in respect of business carried on by the ADGM Companies before they were registered in the ADGM. It therefore does not directly concern Baroda. It is as follows: "*Can an order be made under section 252 of the [IR 2022] in respect of the wrongful carrying on of the business of a company prior to the time at which that company was continued in the ADGM*?".

13. For completeness, I add that Issues 1 and 2, as originally formulated and ordered, continued as follows:

> *"If so, for such an order to be made is it necessary for the applicant to demonstrate that, prior to continuance, either: (i) a claim based on some or all of the same facts as support the section 251 claim [or 252 claim] could have been brought by the company under the pre-continuance law or by an officeholder appointed to the company under the pre-continuance law or (ii) an equivalent claim to section 251 [or section 252] could have been brought on some or all of the same facts as support the section 251 claim [or section 252 claim] by the company under the pre-continuance law or by an officeholder appointed to the company under the pre-continuance law? In either case, could any such claim have been brought under UAE law (as the pre-continuance law)? If it is not necessary for the applicant to demonstrate either (i) or (ii), what is the relevance (if any) of the presence or*

absence of a pre-continuance claim to the power to make an order under section 251 [or section 252] of the [IR 2022]?".

However, at the hearing all parties agreed that I need not engage with those contingent questions, and I do not do so.

14. Issue 3 concerns both fraudulent and wrongful trading, and is about whether a claim can be based on conduct that antedates the commencement or enactment of the IR 2015: "*Can a claim be brought under section 251 and/or section 252 in respect of the fraudulent and/or wrongful carrying on of business before the date when section 251 and section 252 first came into effect in the ADGM (3 March 2015 pursuant to the [IR 2015], which was the predecessor of the [IR 2022])?*". The formulation, agreed by the parties, reflected their understanding that the IR 2015 took effect and came into operation on the day that they were enacted, 3 March 2015, and the hearing proceeded on that assumption. In responsive post-hearing submissions, Ms den Besten said that in fact the IR 2015 were published only on 14 June 2015 and so, by section 306(3), came into force only on that date. Because this point was not raised earlier, the other parties have had no opportunity to comment on it, but it does not affect any of my conclusions.

15. Finally, Issue 4, as originally formulated, concerned the requirements of a claim for fraudulent trading (and not wrongful trading), and was directed to the position of Baroda (and not of Dr Shetty or Mr Manghat). During the hearing, it became clear that these were unhelpful limitations, and I suggested some revisions, which were not controversial. So revised, Issue 4 reads: "*Can a claim successfully be brought under section 251 and/or section 252 absent a sufficient connection between the defendant and the ADGM? If not, assuming (for present purposes only) the facts pleaded by the Claimants, including in their proposed Re-Re-Amended Particulars of Claim, to be true, would there be a sufficient connection between the relevant Defendant and the ADGM?*".

ISSUES 1 AND 2: CAN AN ORDER BE MADE UNDER SECTIONS 251 AND 253 OF THE IR 2022 IN RESPECT OF THE FRAUDULENT TRADING, AND UNDER SECTION 252 OF THE IR 2022 IN RESPECT OF THE WRONGFUL TRADING, CARRIED ON BY THE ADGM COMPANIES BEFORE THEY WERE CONTINUED IN THE ADGM?

The Relevant Provisions of the IR 2022

16. Both the IR 2015 and the IR 2022 were made by the Board of Directors of the ADGM under their powers under article 6(1) of the Founding Law, Abu Dhabi Law No 4 of 2013 (the "**Founding Law**"), which provides that the Board, the supreme authority in the ADGM, shall *"[i]ssue the Global Market Regulations relating to the organization of its work and the achievement of its objectives*". The objectives of the ADGM are "*to promote the Emirate as a global financial center, to develop the economy of the Emirate and make it an attractive environment for financial investments and an effective contributor to the international financial services industry*": article 3.

17. Sections 251 and 252 give a company's liquidator or administrator a statutory discretion to apply to the Court for relief by way of a declaration of liability to contribute to the assets of the company. Thus, they do not provide for a cause of action that accrues at the time of the impugned conduct or resultant damage, but on the commencement of the winding-up or administration, when the office-holder may apply to the Court for relief: see *In re Overnight Ltd* [2009] EWHC 601 (Ch) (fraudulent trading) and *In re Farmizer Products Ltd* [1997] BCC 655 (wrongful trading).

18. Section 251 of the IR 2022 is headed "*Fraudulent trading*", and it provides as follows:

> "(1) *If in the course of the winding-up of a Company or while it is in administration it appears that any business of the Company has been carried on with intent to defraud creditors of the Company or creditors of any other person, or for any fraudulent purpose, subsection (2) applies.*
>
> *(2) The Court, on the application of the liquidator or the administrator, as the case may be, may declare that any persons who were knowingly parties to the carrying on of the business in the manner mentioned are liable to make such contributions (if any) to the Company's assets as the Court thinks proper*".

19. Section 298 provides that the word "*Company*" has the meaning given in Section 1 of the *Companies Regulations 2020* (the "**CR 2020**"), which is that "*unless the context otherwise requires … a company formed or registered under these Regulations (whether or not it was incorporated under these Regulations)*".

20. Thus, section 251 provides for a cause of action vested in a liquidator or administrator of a company formed or incorporated under the IR 2022, which may be brought only by a liquidator or an administrator, and may be brought in relation to the carrying on of the company's business with the intent to defraud or for a fraudulent purpose. It empowers (but does not oblige) the Court to order any person who was knowingly party to doing so to make such contribution to the company's assets as the Court thinks proper.

21. Section 252 is headed "*Wrongful trading*", and it provides as follows:

> *"(1) Subject to subsection (3) below, if in the course of the winding-up of a Company or while it is in administration it appears that subsection (2) applies in relation to any person being a past or present Director of the Company, the Court, on the application of the relevant Office-holder, may declare that person is to be liable to make such contribution (if any) to the Company's assets as the Court thinks fit.*
>
> *(2) This subsection (2) applies If —*
>
> *(a) the Company has gone into an insolvent liquidation or has entered insolvent administration;*
>
> *(b) at some time before the commencement of the winding-up of the Company or before the Company entered administration, as the case may be, the person knew or ought to have concluded that there was no reasonable prospect of the Company avoiding going into insolvent liquidation or entering insolvent administration; and*
>
> *(c) the person was a Director of the Company at that time.*
>
> *(3) Subsection (1) shall not apply to any person if the Court is satisfied that after the Director first knew or ought to have concluded that there was no reasonable prospect of the Company avoiding going into insolvent liquidation, he took every step with a view to minimising the potential loss to the Company's creditors as (on the assumption that the person had knowledge of the matter mentioned in subsection (2)(b)) he ought to have taken.*
>
> *(4) For the purposes of this Section, the facts which a Director of the Company ought to know, the conclusions which he ought to reach and the steps which he ought to take are those which would be known, or reached or taken, by a reasonably diligent person having both—*
>
> *(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that Director in relation to the Company (including functions which he does not carry out but which have been entrusted to him); and*
>
> *(b) the general knowledge, skill and experience that Director has.*

(5) This Section is without prejudice to Section 251 (Fraudulent trading).

(6) In this Section, Director includes a shadow director".

22. It is not disputed that the JAs are "*relevant Office-holders*" for the purpose of section 252(1). Further, Dr Shetty accepted, and Mr Manghat did not dispute, that the word "*Director*", in itself, could extend to a manager of a foreign company: it includes "*any person occupying the position of director by whatever name called*": section 298 of the IR 2022 and CR 2020 section 146. It is in issue whether such a person is included in the term "*Director of the Company*".

23. I also refer to section 253 of the IR 2022:

> *"Where the Court makes a declaration under either Section 251 (Fraudulent trading) or Section 252 (Wrongful trading), it has wide powers to give such further directions as it thinks proper for giving effect to the declaration"*.

The background to the legislation

24. Section 251 of the IR 2022 is based on similar legislation in the United Kingdom about fraudulent trading and wrongful trading, now in the *Insolvency Act 1986*. Liability for fraudulent trading was introduced by the *Companies Act 1928*, section 75. It initially applied only to directors of companies, but when it was re-enacted in the Companies Act 1947, section 101, it was extended to apply to "*any persons who were knowingly parties to the carrying on of the business*" fraudulently. Criminal liability for fraudulent trading was introduced by section 630 of the *Companies Act 1985*.

25. The purpose of enacting civil liability for fraudulent trading extends to "*secur[ing] compensation for those who have suffered loss as a result of the fraudulent trading*": *Bilta (UK) Ltd v Tradition Financial Services Ltd* [2023] EWCA Civ 112 at para 109 per Lewison LJ. It does so by requiring wrongdoers to "*make contribution to the assets of a company with limited liability which they could not otherwise be required to make*": *Morphitis v Bernasconi* [2003] EWCA Civ 289 at para 55 per Chadwick LJ.

26. Liability for wrongful trading was introduced in the United Kingdom by section 214 of the *Insolvency Act 1986*, after the Review Committee on Insolvency Law & Practice, the "Cork Committee", had reported that the existing law did not provide sufficient incentive to directors of insolvent companies to prevent further loss to their creditors. Wrongful trading is not, and never has been, a criminal offence. The 1986 Act also introduced the procedure for insolvent companies to go into administration, and empowered administrators to seek orders in respect of fraudulent and wrongful trading.

The re-registration of the ADGM Companies in the ADGM, and liability for earlier conduct

27. It is convenient that I next say something about the regime under which and the process whereby the ADGM Companies came to be registered in the ADGM. Part 7 chapter 2 of the *ADGM Companies Regulations 2015* ("**CR 2015**") enacted a regime whereby companies incorporated outside the ADGM might apply to the Registrar of Companies (the "**Registrar**") that a certificate be issued that it should continue as a company registered under the CR 2015. The effect of a certificate being issued is explained in section 107: the company becomes registered under the CR 2015, and then:

> *"(a) all property and rights to which the body corporate was entitled immediately before the certificate of continuance is issued are the property and rights of the company,*
>
> *(b) the company is subject to all criminal and civil liabilities, and all contracts, debts and other obligations, to which the body corporate was subject immediately before the certificate of continuance is issued, and*

(c) all actions and other legal proceedings which, immediately before the issue of the certificate of continuance, were pending by or against the body corporate may be continued by or against the company": section 107(2).

28. Under the CR 2015 as originally enacted, a company could not apply for a certificate if, inter alia, it was being wound up or in administration, it was insolvent or a receiver, manager or administrator had been appointed in respect of any of its property: section 101. An application had to be accompanied by a "*statement of solvency*" by the company's directors, stating that they reasonably believed that it was able to discharge its liabilities as they fell due and that it would be able to continue to carry on business and to discharge its liabilities as they fall due for the following 12 months: section 102. Thus, the regime was directed to solvent companies, although, at least in theory, an insolvent company might have been re-registered, even if a statement of solvency was given in good faith by truthful directors: they might have been mistaken.

29. These provisions were re-enacted unchanged in the CR 2020 on 29 April 2020. By the *Companies (Amendment No 1) Regulations 2020* (the "**Amendment Regulations**"), enacted on 9 July 2020, the Registrar was given a power to disapply, inter alia, the prohibition on insolvent companies applying for a certificate for continuance and having to provide a statement of solvency to do so, provided that he considered, in his "*reasonable discretion*", that "*public policy grounds exist*". However, the Registrar might disapply the requirements of section 101 and 102 only if he was provided with satisfactory evidence that the "*relevant governmental authority*" of the jurisdiction where the company was registered permitted the application for continuance.

30. On 9 April 2020, the English High Court had put NMC PLC into administration, after its shares had been suspended from trading on the London Stock Exchange at the request of the directors and it had disclosed enormous indebtedness. By a letter of 9 June 2020, before the CR 2020 were amended, Mr Fleming, in his capacity as an Administrator of NMC PLC, wrote to the ADGM Registration Authority on behalf of the ADGM Companies and two other companies in the NMC Group (the "**NMC Applicants**"). He explained the alleged fraud and the public importance of the NMC Group, the largest healthcare provider in the UAE, particularly during the then current Covid-19 pandemic; and said that the ADGM Companies intended to issue applications to transfer their corporate seats to the ADGM, as a first step to seeking "*the urgent protection of insolvency filings within the ADGM*", which he described as "*by far the best venue which has the power to oversee the effective administration of the NMC Applications and restrain the Purported Creditor Actions [brought by "certain purported creditors of NMC group … in UAE Onshore and the DIFC courts"], enabling the NMC group to continue providing care".* Accordingly, he appealed to the ADGM authorities *"to approve the NMC Applicants' re-registration and continuation as ADGM companies on the basis of the overriding UAE public policy concerns*", which he summarised.

31. By a letter dated 15 July 2020, the JAs and two executives of the NMC Group sought a direction from the Registrar to disapply the requirements of sections 101 and 102 in respect of the ADGM Companies (and one other company). On 14 September 2020, the Registrar, having exercised his power to disapply those requirements, issued certificates of continuance, and the ADGM companies became private companies limited by shares registered under the CR 2020. Accordingly, they were subject to the IR 2015 and administration orders were made on 27 September 2020.

32. Thus, as Ms den Besten submitted, the ADGM Companies sought continuance into the ADGM and exemption from the solvency requirements to do so on the basis that they might thereby support and restructure their legitimate healthcare business, including obtaining protection from claims by purported creditors. It was said in the letter of 15 July 2020 that the NMC Applicants considered that "*it is not possible to remain onshore and achieve an effective rescue of the healthcare operations and restructuring of their debt under the [onshore insolvency regime"];* that "*the Applications will give the Applicants the breathing room which they need to pursue the perpetrators of the Fraud*"; and that "*[a]ny restructuring will benefit from giving creditors with valid claims an opportunity to recover their lending*

from stolen property and losses which the Applicants hope to recover from the Alleged Perpetrators of the Fraud". Ms den Besten pointed out that it was not said that registration in the ADGM would enable administrators of the NMC Applicants to pursue claims for fraudulent trading or wrongful trading or to bring proceedings of a kind that would not have been available under the on-shore regime.

33. For their part, the Claimants emphasise that the nature of continuance of companies under the CR 2015 is not that a corporate entity ceases and transfers its assets and liabilities to a new corporate entity. A certificate of continuance has the effect that the same legal person continues in existence, keeps its assets after continuance, and remains subject to its liabilities and obligations, and all actions and pending proceedings continue against it.

34. Under the continuance procedure, therefore the company remains subject to its liabilities before continuance incurred under the then applicable law(s), and it is not made subject to other or additional liabilities that would have been incurred had ADGM law applied before the continuance. This was not changed when insolvent companies were allowed to be re-registered in the ADGM in some circumstances. It was argued that the legislators of the CR 2015 and the Amendment Regulations cannot have intended to introduce a regime where the company or persons associated with it might be liable under two different legal systems: if that had been intended, there would have been provision for the position if the two systems were in conflict. More specifically in relation to insolvent companies, it was submitted, it cannot have been intended that re-registered companies and persons associated with them should be subject to the civil liabilities that apply to other companies that enter into an ADGM insolvency process. Mr Salve drew my attention to the Consultation Paper that preceded the CR 2015, Consultation Paper No 2 of 2015 dated 6 January 2015: it states in relation to what became section 107(3)(c) that it does not allow foreign companies to be re-registered as unlimited liability companies, so as to protect members from facing unlimited liability in the ADGM when they had only limited liability elsewhere.

35. It was also submitted that the ADGM includes in its insolvency regime policies on fraudulent trading and wrongful trading that derive from English law and English concepts of commercial morality. Elsewhere in the UAE, a different approach has been adopted, and there is no remedy available against those involved with fraudulent trading. The legislature, it was argued, should not be understood to have intended to impose English concepts of proper commercial behaviour on those conducting business affairs under a different legal system.

36. There is another related strand of argument. As Baroda submitted, the general principle of English private international law is that the law of the place of incorporation governs questions about a company's capacity, internal management, and directors' duties: *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316 at paras 67-69 per Arden LJ. It was submitted that this principle would be offended if liabilities of directors or others concerned with a company's management were subject to a different law. It would also offend, as Mr Salve submitted, the principle of territoriality, as explained by Lewison LJ in *Orexim Trading Ltd v Maharava Port and Terminal Pte Ltd* [2018] EWCA Civ 1660: "*The general principle of international law is that each sovereign state makes laws which apply to its own territory and to no other. One legislature does not have power to make laws for a territory outside its jurisdiction in such a way that what it enacts becomes the law of that external territory. ...There is, therefore, a presumption that Parliament will not seek to intervene in matters that are legitimately the concern of another country. Countries respect one another's sovereignty and the right of each country to legislate for matters within their own boundaries. However, a legislature does have power to make legislation that attaches significance to matters occurring outside the territory for which it is law. This is, in broad terms, what we mean by the principle of territoriality*" (at para 22).

37. I am not convinced by these arguments. They are inconsistent with English law in this area, and the ADGM law should follow the English approach. In *In re Howard Holdings Inc* [1998] BCC 549, Chadwick J considered a claim in wrongful trading against directors of a company incorporated in Panama, the

directors being resident in Monaco. He rejected the argument that it would be wrong "*for foreign directors of a foreign company to be judged in accordance with principles of English common law; principles of law with which the task that they were engaged had no connection at the time*" and that *"[i]n effect ... a declaration under section 214 would be to impose on the directors a liability to the company which was alien to the duties which they undertook when they became directors*". I set out at some length, and respectfully adopt, Chadwick J's response to this submission:

> "*In my view, on a true analysis of s.214 of the Insolvency Act 1986, the court is not enforcing any liability owed by directors or former directors to the company. The court is empowered, in cases where it thinks it proper, to declare that those who were in a position to take steps to minimise potential loss to creditors at a time when they knew there was no reasonable prospect that insolvent liquidation would be avoided, should be under an obligation to contribute to the assets which the court is administering under the insolvency code and, through the liquidator, for the benefit of the creditors. The section is not concerned to enforce some past or existing liability. It enables the court to impose a new liability to contribute; in circumstances in which that is just and appropriate.*
>
> *Accordingly, it is, as it seems to me, irrelevant whether that liability already exists or could arise under any system of foreign law. I accept that, when deciding whether or not to make a declaration under s.214 of the Act, the court will take into account what the obligations of the director to his company were at the time when he had the opportunity to minimise the potential loss to the company's creditors. And I accept that it might well be that, in circumstances where the relevant governing law imposed no obligation on directors to have any regard to the interests of the company or its creditors in the course of their management of its affairs, the English court would decide that a declaration was not appropriate.*
>
> *For my part, I find it difficult to envisage any developed system of corporate law which does not impose some obligation on those charged with the responsibility of the management of a company's affairs to pay regard to the question whether or not it is, from time to time, solvent and, if insolvent, to consider what should be done about it*" (loc cit at pp.554F-555A).

This last point was endorsed by the Court of Appeal in *Stocznia Gdanska SA v Latreefers Inc* [2001] BCLC 116: "'[W]*e agree with Chadwick J in Re Howard Holdings Inc (at p.555), that it is difficult to envisage any developed system of corporate law which does not impose some obligation on directors to consider whether the company is solvent and, if not, to consider what should be done about it*", at para 38 per Morritt LJ, giving the judgment of the Court.

38. I add only that this reasoning applies the more forcefully to fraudulent trading: in the words of the oft-cited dictum of Templeman J in In *Re Gerald Cooper Chemicals Ltd* [1978] Ch 262, 268: "*a man who warms himself with the fire of fraud cannot complain if he is singed*".

The approach to interpretation of sections 251 and 252

39. Under section 1(1) of the *Application of English Law Regulations 2015* (the "**English Law Regulations**"), the general rule is that "*[t]he common law of England …, as it stands from time to time, shall apply and have legal force in, and form part of the law of, the [ADGM]*", and accordingly the ADGM Courts generally adopt the same approach to statutory interpretation as the English Courts. More specifically, in this case, the ADGM legislation relevant to these issues largely resembles the UK legislation in the *Insolvency Act 1986*, and I accept the Claimants' submission that it is a reasonable inference that it was modelled on the UK statute. Accordingly, the purpose of this Court when interpreting statutory language is the same as that of the English Courts: to ascertain the objective meaning of the words used by the legislators in their context, rather than the legislator's subjective intention: *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg A G,* [1975] AC 591,

613 per Lord Reid; *R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd* [2001] AC 349, 396 per Lord Nicholls.

40. Ms den Besten also cited the judgment of the Court given by Lord Hewart CJ in *Spillers Ltd v Cardiff (Borough) Assessment Committee and Pritchard* [1931] 2 KB 21, 43: "*It ought to be the rule, and we are glad to think that it is the rule, that words are used in an Act of Parliament correctly and exactly, and not loosely and inexactly. Upon those who assert that that rule has been broken the burden of establishing their proposition lies heavily. And they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred*." As I read the authorities, the modern approach to statutory interpretation is rather more relaxed, and the Courts perhaps adopt a less rigid or literal interpretation in order to ascertain the meaning of statutory language in its particular context. But that said, certainly the starting point is the statutory language itself. In *R v Secretary of State for the Home Department* [2022] UKSC 3, Lord Hodge explained the position as follows (at paras 29, 30):

> *"Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme, p.397: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.*
>
> *"External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or uncertainty:…But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity."*

Natural meaning of the words of section 251

41. Consistently with this, the starting point of Baroda's argument on Issue 1 is that, on its plain and natural meaning, section 251 of the IR 2022 applies only in respect of fraudulent trading of a company if it is an ADGM company; and that, if a company has been continued into the ADGM, section 251 does not cover fraudulent trading that occurred before it was re-registered as an ADGM company. Before then, it would not then have been a Company within the definition applicable to section 251: otherwise, as Baroda put it, "*section 251 would operate retrospectively*". The definition of "*Company*" can be displaced only if "*the context otherwise requires*", and it does not do so. Dr Shetty makes a similar submission: "*a claim under s.251 requires that the entity in relation to which the claim is brought is 'a Company' at two points in time: both at the time when the claim is issued, and (critically) at the time of the conduct is complained of*".

42. The Claimants contend that this argument puts too much strain on the reference to "*the Company*" in the phrase "*the business of the Company*", and that the phrase is simply intended to stipulate that the entity whose business was being carried on fraudulently, and does not impose a temporal requirement about when the entity was a Company.

43. I agree with the Claimants' contention. To my mind, it gives the term "*of the Company*" a perfectly natural meaning, and the interpretation of Baroda and Dr Shetty burdens the expression with a connotation that is neither necessary in order to give it meaning nor naturally understood. The ADGM Companies are the same persons as they were before they were re-registered, just as adults are the same people as when they were children. If we say "*As for the life expectancy of adults in the UAE, that of a male adult is now 80 years and that of an adult woman rather longer*", we refer to the length of their whole life, not their lives after becoming adults; and if it were legislated that "*On applications for citizenship made by an Adult, regard shall be had to any criminal offences committed by the Adult whether in the country or abroad*", the requirement would naturally be understood to include offences committed before maturity; and it would make no difference if the legislation defined an "*Adult*" as a person over the age of 21 years. Similarly, a requirement that a "*Candidate*" shall declare all professional complaints made against the "*Candidate*" or by any person employed by the "*Candidate*" would include complaints made before the candidate submitted his candidature, and a definition of "*Candidate*" as one who had submitted a written application in a prescribed form would not affect the natural meaning.

44. I add that Ms den Besten placed reliance on other sections of the IR 2022 in which it is specifically provided that they apply not only to Companies in the defined sense (sc. Companies registered in the ADGM), but also other corporate bodies. This point does not seem to me to support her argument: the Claimants' interpretation does not require that Company be used in anything other than the defined sense. As Mr Smith pointed out, the definition of "*Company*" expressly extends to all Companies registered in the ADGM "*whether or not it was incorporated under these Regulations",* that is to say, under the CR.

Natural meaning of the words of section 252

45. I next consider the natural meaning of the wording of section 252. If, as Dr Shetty argued, it is to be understood to apply only to conduct after a company is registered in the ADGM, I would regard it as a persuasive argument that section 251 is similarly restricted in its application. It is logically conceivable that the two sections are different in this respect, and the Court might properly so conclude if the wording of the sections demanded it. But Mr Smith accepted, indeed submitted, that this conclusion would be "*very odd*" when arguing that section 251 should influence the interpretation of section 252 (although he was reluctant to accept that, contrariwise, section 252 might influence the interpretation of section 251).

46. Dr Shetty argued that he held no office after the ADGM companies were re-registered into the ADGM, and he was not a Director of them even within the expanded definition of "*Director*": the term "*Director*" includes "*any person occupying the position of director by whatever name called*": IR 2022 s.198 and CR 2020 s.146. Further, he argued, he was never a "*Director of the Company*" in that the ADGM Companies were not then Companies in the defined sense. Section 252(2)(c) stipulates that a person can be liable in respect of wrongful trading only if the person was a "*Director of the Company at that time*", namely at the time when he "*knew or ought to have concluded that there was no reasonable prosect of the Company avoiding going into insolvent liquidation or entering into insolvent administration*".

47. I do not find that submission persuasive, for reasons similar to those that I have explained with regard to section 251: Dr Shetty was at the relevant time a director of the corporate entities that became the ADGM Companies. The use of the word "*Company*" in the expression "*Director of the Company*" can readily be understood to be identifying the relevant legal person, and does not import a requirement that he be a Director of what was "*Company*" (in the defined sense) at the time of the alleged wrongdoing.

48. Dr Shetty has a second, more powerful, argument about the natural meaning of the wording of section 252. It is based on the requirement in section 252(2)(b). It is not enough that the director knew or ought to have concluded that the company was or would become insolvent: see *In re CS Holidays Ltd v Secretary of State for Trade and Industry v Gash* [1997] BCC 172, 178, and *In re Hawkes Hill Publishing Ltd* [2007] BCC 937, para 28. The section requires that, at the relevant time, the director either knew that there was no reasonable prosect of the Company avoiding going into insolvent liquidation or entering into insolvent administration (a subjective condition), or that he ought to have so concluded (an objective condition). This, Ms Den Besten argued, refers to an insolvency process in the ADGM Court, citing section 299 of the IR 2022:

> *"….*
>
> *(2) A Company goes "**into liquidation**" if it passes a resolution for voluntary winding-up or an order for its winding-up is made by the Court at a time when it has not already gone into liquidation by passing such a resolution.*
>
> *(3) A Company goes "**into insolvent liquidation**" if at the time the Company goes into liquidation its assets were insufficient for the payment of its debts and other liabilities and the expenses of the winding-up.*
>
> *(4) References to a Company being "**in administration**" or that a Company "**enters administration**" shall be construed in accordance with Section 1(2) (Administration).*
>
> *(5) A Company enters "**insolvent administration**" if it enters administration at a time when its assets are insufficient for the payment of its debts and other liabilities and the expenses of the administration*."

It would be a most unusual case where a director knew or ought to have concluded that a non-ADGM corporate body would become subject to an ADGM insolvency process, the more so because until 2020 (that is, after section 252 was enacted in the IR 2015) the continuance regime was designed to apply only to solvent corporate bodies. Unsurprisingly, it is not alleged that Dr Shetty or Mr Manghat knew this or ought so to have concluded.

49. Mr Smith responded that this argument cannot be right because it is inconsistent with the application of the wrongful trading provision to unregistered foreign companies. He relied on *In re Howard Holdings* (cit sup): it apparently was not argued in that case by leading insolvency counsel for the directors that the wrongful trading provision did not apply when a foreign company was being wound-up. Section 266 of the IR 2022 provides that unregistered companies may be wound up in the ADGM, and "*all the provisions of these Regulations about winding-up shall apply to an unregistered company with the modifications set out in this Part 6* …": there is no material modification. Thus, it is to be expected that section 252 of the IR 2022 bears a meaning that might realistically apply to directors of a company registered outside the ADGM.

50. I accept the force of this submission, but does the wording of section 252 accommodate it? Here Mr Smith advanced two arguments. I can reject one of them shortly: Mr Smith disputed that section 252(2)(b) refers exclusively to an ADGM insolvency procedure and it was said that the wording of the section should be glossed and interpreted as referring to both ADGM insolvent liquidation and ADGM insolvent administration and to an equivalent process under the law applicable to the body corporate at the relevant time. This stretches the language of the section too far.

51. Mr Smith's other, more persuasive argument did not challenge Dr Shetty's contention that the terms "*insolvent liquidation*" and "*insolvent administration*" refer to the ADGM insolvency processes. He submitted that (assuming, as would almost inevitably be the case, that the Director did not actually know that the company would be continued into the ADGM and later go into insolvent liquidation or insolvent administration), on the proper interpretation section 252(2)(b), the question is whether a Director of an ADGM company in the position of the defendant ought to have concluded that there was no reasonable prospect of avoiding an ADGM insolvent liquidation or insolvent administration.

52. I am prepared to accept that Dr Shetty's interpretation might be preferable if the words of section 252 were to be construed in isolation, but they are to be interpreted in their legislative context, and, if they can be given a meaning that covers the position when an unregistered company is being wound up under section 266, without straining the wording unacceptably, that meaning should be adopted. In my judgment, the Claimants' interpretation does not so strain the language, and I accept it.

The argument that sections 251 and 252 do not operate retrospectively

53. Although the term "*Retrospectivity Defences*" has been used as a convenient label for both the argument under Issues 1 and 2 that the provisions do not apply to conduct before the ADGM companies were re-registered and the argument that they do not apply to conduct before the IR 2015 came into operation, only Issue 3 is concerned with whether the IR 2022 has "*retrospective*" operation in the sense that the term is commonly used: that is to say, in the sense of statutory provisions applying to conduct or events that took place before they (or their predecessors) come into force. In English law, there is a presumption that, unless a contrary intention appears, legislation is not intended to apply retrospectively in that sense, which Ms den Besten in her skeleton argument, labelled "*true retrospectivity*". Issues 1 and 2 do not raise a question of "*true retrospectivity*", and the presumption does not apply exactly to Issues 1 and 2. This leads to the question whether the presumption about "*true retrospectivity*" applies by analogy in that considerations of fairness and certainty, which underlie the presumption, apply similarly where foreign companies are re-registered into the ADGM.

54. On its face, the presumption would apply to Issue 3, but here a different question arises. Baroda and Dr Shetty relied not only on the presumption but also on the Constitution and the English Law Regulations. The general rule in section 1(1) of the English Law Regulations is subject to section 1(2): "*In the event of any conflict or inconsistency between (a) a provision, rule or principle of the common law of England ... and (b) any provision, rule or principle of any Applicable Abu Dhabi Law or Abu Dhabi Global Market enactment, the latter shall prevail*": section 1(2). The term "*Applicable Abu Dhabi Law*" includes the Constitution and the term "*Abu Dhabi Global Market enactment*" includes regulations made by the Board of Directors, and so includes the *ADGM Interpretation Regulations 2015* (the "**Interpretation Regulations**"): section 7. Hence, the question arises whether the presumption of English common law is relevant to Issue 3 or whether it is squeezed out by UAE or ADGM statutory provisions.

55. I shall leave this second question until I come to Issue 3 later in my judgment. Further, two authorities relied upon by Baroda, *Marina Towage Pte Ltd v Chin Kwek Chong* [2021] SGHC 81 and *R v Sutcliffe-Williams and Gaskell* [1983] Crim L R 225, are about true retrospectivity and do not apply to issues 1 and 2: I also come to them later. Here, I observe only that article 112 of the Constitution and the Interpretation Regulations do not bear upon Issues 1 and 2: they are both about whether legislation applies to conduct and events before it comes into effect. In its written submissions after the hearing, Baroda argued otherwise, and sought to support its submissions on Issue 1 by reference to article 112. For reasons that will become apparent when I come to Issue 3, I reject that argument.

56. In *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553, Lord Brightman (at p.558,559) described the presumption as "*a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A*

statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past". Dr Shetty and Baroda argue that they should not be held to be subject to a new obligation in respect of their past conduct, or (to put the point a little differently) treated as if they were under a duty which did not apply to them at that time.

57. The policy considerations on which the English law presumption against retrospectivity are the concepts of fairness and legal certainty: *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40 at para 98 per Lord Hope. Baroda cited the explanation for the presumption found in Bennion, Bailey and Norbury on Statutory Interpretation (8th Ed, 2020) at para 7.13: "*If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backwards adjustment of it*". This in turn reflects the principle identified by Lord Nicholls in the *Spath Holme* case, cited by Lord Hodge in the passage of his judgment from *R v Secretary of State for the Home Department*, which I have already set out at para 40 above. Similar complaints underlie the submissions of Dr Shetty and Baroda, and the question whether or not Issues 1 and 2 are properly to regarded as being about "*retrospectivity*" is largely semantic. In either case the Court's task, as I see it, is to weigh any unfairness against the purpose and policy of the statutory provision that is to be interpreted, adopting the approach explained in Lord Mustill's judgment *in L'Office Cherifien des Phosphates v Yamishita-Shinnihon SS Cl Ltd* [1994] AC 486, 525F-H, which was cited by Mr Salve:

> "*Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say*".

58. The Claimants dispute that it would be unfair to apply sections 251 and 252 to conduct before the ADGM companies were registered in the ADGM, and argue that to do so would not involve imposing liability retrospectively or removing any accrued rights that the Defendants have. The rights of liquidators and administrators are new rights that arise upon their appointment. I accept that contention. For the reasons to which I have referred by reference to the judgment in the *In re Howard Holdings Inc* case (cit sup), the *Stocznia Gdanska SA* case, and the dictum of Templeman J in *In re Gerald Cooper Chemicals Ltd* (cit sup), I am not persuaded by the complaints of unfairness advanced by Baroda and Dr Shetty. In the *Wilson case* (cit sup), having said that the presumption is based on concepts of fairness and legal certainty, Lord Hope continued (at para 98): " … *the mere fact that a statute depends for its application in the future on events that have happened in the past does not offend against the presumption*", citing the case of *R v Field* [2002] EWCA Crim 2913, in which it was held that the making of a disqualification order under section 28 of the *Criminal Justice and Court Services Act 2000* against a defendant from working with children in the future did not offend against the presumption where the offending behaviour had occurred before that Act came into force.

59. The essential answer to the complaint of unfairness is the discretionary nature of the remedies for fraudulent and wrongful trading: if it would work unfairness, the Court will not exercise its discretion to grant the office-holder relief. On the other hand, in some circumstances, it would be odd and unfair to creditors for the Court to have no power to grant relief in respect of conduct before continuance: for example, if an English company (such as NMC PLC) that had operated under a regime where such

remedies were always potentially available were continued into the ADGM, on the face of it there would be nothing unfair to defendants if orders were made against directors and others under the similar regime of the ADGM, and it might be unfair to creditors if they were not. Ms den Besten observed that office-holders might be able to have the ADGM insolvency proceedings recognised by the English Court and pursue ancillary proceedings there, but there seems to me no good reason in principle that the ADGM legislature should have intended such a convoluted procedure to achieve justice for creditors.

60. The purpose and policy behind sections 251 and 252 extend beyond considerations of the private rights of a company's creditors and the liabilities of potential defendants. As Baroda and Dr Shetty recognised, the insolvency regime, including these sections, engages a public interest in proper and orderly resolution of the affairs of an insolvent company. In the *Wilson case* (loc cit), Lord Hope observed that, when deciding whether a statutory provision operates retrospectively, *"there is an important distinction to be made between legislation which affects transactions that have created rights and obligations which the parties seek to enforce against each other and legislation which affects transactions that have resulted in the bringing of proceedings in the public interest by a public authority*" (para 59). Liquidators and administrators are not public authorities in that sense, but they are office-holders appointed by the Court to act in the public interest. As I shall explain later when considering Issue 3, under UAE law the distribution of an insolvent estate is considered to pertain to a matter of public order.

61. These considerations lead me to reject the argument that it would be unfair, or would offend principles underlying the presumption against retrospectivity, to interpret sections 251 and 252 as applicable where there has been fraudulent trading or wrongful trading before a company has been continued into the ADGM.

The criminal offence of fraudulent trading, and the presumption against doubtful penalisation

62. Section 857(1) of the CR 2020 provides that fraudulent trading is a regulatory offence, punishable with a fine: "*If any business of a company is carried on with intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose, a contravention of these Regulations is committed by every person who is knowingly a party to the carrying on of the business in that manner*". The offence is committed whether or not the company has been or is in the process of being wound up: section 857(2). Dr Shetty argued that the same circumstances give rise to this regulatory offence and potential liability under section 251; and that, therefore, the Claimants' case necessarily leads to one of two improbable results: either quasi-criminal liability is imposed retrospectively, or divergent interpretations are to be given to the similar wording of section 251 of the IR 2022 and section 857 of the CR 2020.

63. In *Tradition Financial Services Ltd v Bilta (UK) Ltd* [2023] EWCA Civ 112, the English Court of Appeal rejected a similar argument. In his judgment, with which the other members of the Court agreed, Lewison LJ referred to the relevant authorities and continued, "*Although it might be anomalous for criminal liability to be wider than civil liability, it is not necessarily anomalous for civil liability to be wider than criminal liability, particularly where the statutory provisions are now contained in different sections and different Acts of Parliament. Moreover, as noted, the criminal offence may be committed even if the company is not in the course of winding up. Quite apart from that, a person with no managerial or controlling role within a company can be convicted of aiding and abetting fraudulent trading. If there is no objection to a person committing a criminal offence by aiding and abetting fraudulent trading, it is hard to see why there should be any objection to such a person incurring civil liability for the same actions*" (para 108).

64. Baroda invoked another general principle governing the statutory interpretation that is well established in English law, the so-called presumption against "*doubtful penalisation*". Again, the rationale of the presumption is that "*the legislator intends that a person subject to a penal regime should have been given fair warning of the risks he might face of being made subject to penalty*": *Bogdanic v Secretary of State for the Home Dept* [2014] EWHC 2872 (QB) at para 47 per Sales J. It is explained in Bennion, Bailey and Norbury on Statutory Interpretation (8th Ed) (2020) at para 7.16 as follows: "*It is a general principle of*

legal policy that no one should be penalised by the application of a doubtful law. Where the general presumption against retrospectivity applies, the fact that one of the possible constructions would involve retrospectivity makes that construction doubtful. If the construction would also penalise the person, that is a second factor against it as the principle against doubtful penalisation is engaged. The strongest case against retrospective penalisation relates to the act of making something an offence which was not so when committed: nullum crimen sine lege. …". Bennion also explains, at para 26.4, that "*The rationale is that the legislature is presumed to intend that a person on whom a hardship is inflicted should be given a fair warning… The presumption against doubtful penalisation is not limited to the imposition of criminal liabilities. It applies whenever a particular construction of an enactment can be described as inflicting a detriment of any kind, whether criminal or civil*…". Judicial authority that the principle applies to civil liability is found in *ESS Production Ltd v Sully, [2005] EWCA Civ 554,* para 78, per Arden LJ.

65. In my judgment, the answer to this point is the same as that to the overlapping presumption against retrospectivity. The ADGM legislature prevented the oppressive operation of sections 251 and 252 by giving the Court wide discretion as to their application in any particular case.

The status and objectives of the ADGM

66. I should refer to one further argument of Baroda and Dr Shetty on Issues 1 and 2. As I have said, the IR 2022 were made under the powers given to the Board of Directors to further the statutory objectives of the ADGM: "*to promote the Emirate as a global financial centre, to develop the economy of the Emirate and make it an attractive environment for financial investments and an effective contributor to the international financial services industry*": see Article (3) of the Founding Law. The Board operates under the Constitution, and sections 251 and 252 must be construed in light of the status of the ADGM as a financial free zone in the UAE, established and operative under the Constitution. The Constitution provides that the Federal Authorities have exclusive jurisdiction in some matters including "*Major legislation relative to the penal, civil and commercial codes, company law, civil and procedural codes*" and *"regulation of free financial zones, the manner in which they are established, and how far they are excluded from the scope of application of the federal legislative provisions"* (article 121), the Emirates having jurisdiction over all matters not conferred exclusively upon the Federal Authorities (article 122). Federal law allows Emirates to permit financial free zones in their territory, which are subject to all provisions of Federal law with the exception of the Federal civil and commercial laws. However, Dr Shetty argues, the unqualified exemption of financial free zones from the Federal law with regard to company matters is qualified by article 5(1) of the *Commercial Companies Law 2021* (Federal Law 32/ 2021) (the "**CCL 2021")**, which provides that, while the statute "*shall not apply to companies that are incorporated in the free zones of the State where a special provision is stipulated to this effect is contained in the laws or regulations of the relevant free zone*", *"[n]otwithstanding the foregoing, these companies shall be governed by the provisions of this Decree-Law if such laws or regulations permit them to conduct their activities outside the free zone in the State*". Thus, as Ms den Besten argued, the relationship of a company incorporated in a free zone with its officers may not be governed by a single law in respect of all matters.

67. Baroda and Dr Shetty argued that, when enacting the IR 2022 and in particular sections 251 and 252, the Board should be understood to be striking a balance between efficiency in achieving the objectives of the ADGM and avoiding overstepping the limits of the proper remit of the ADGM. This being so, it was submitted that, while it is consistent with the statutory objectives of the ADGM to allow a foreign company to be re-registered in the ADGM so as to avail itself of the ADGM insolvency regime with its opportunities for restructuring, it would go beyond the proper remit of a financial free zone to allow re-registration (consequent upon a decision of the Registrar, which is not subject to challenge in the Court) to expose directors of non-ADGM companies to potential liability for fraudulent and wrongful trading before re-registration.

68. I am not persuaded by this argument. First, it does not distinguish between the financial free zones (namely, to date, only the ADGM and the Dubai International Financial Centre, or "*DIFC*") referred to in article 121 of the Constitution, and free zones, referred to in CCL 2021. In any case, it does not, in my judgment, take proper account of the nature of the relief for which sections 251 and 252 provide, and is answered by the reasoning explained by Chadwick J in the *In re Howard Holdings Inc.* case: when exercising its powers under these sections, the Court is not enforcing a liability of directors or other persons, but is exercising a power to minimise the losses of creditors where it is just and proper to do so.

Conclusion on Issues 1 and 2

69. I therefore reject the arguments of Baroda and Shetty that the language of sections 251 and 252 of the IR 2022 is inconsistent with them applying to conduct before the ADGM companies were re-registered in the ADGM. I conclude that, consistently with the purpose of the legislation and the insolvency regime, they should be understood to apply to such conduct. Otherwise, office-holders of foreign companies wound-up in the ADGM, as well as companies re-registered here, would lack important powers to make good for creditors' estates that had been wrongfully depleted. I cannot accept that the legislators intended the powers to be restricted as Baroda and Dr Shetty contend.

ISSUE 3: DO SECTIONS 251 AND 252 COVER CONDUCT BEFORE THE IR 2015 WERE ENACTED?

70. I come to issue 3, and the question whether the powers under sections 251 and 252 of the IR 2022 cover claims in respect of the carrying on of business before the IR 2015 came into effect. Indeed, the claims cover conduct before the ADGM was established on 19 February 2013.

71. Many of the arguments of Baroda and Dr Shetty were the same as those advanced about issues 1 and 2, and I reject them for the reasons that I have explained. However, they had three further points that are relevant to Issue 3: (i) an argument introduced by Dr Shetty, which was based on article 112 of the Constitution; (ii) another argument introduced by Dr Shetty, which was based on section 25 of the Interpretation Regulations; and (iii) two further common law authorities cited by Baroda. I observe that no Defendant has pleaded either article 112 of the Constitution or the Interpretation Regulations, but the Claimants said that they take no point on that.

The Constitution

72. As I have said, after the oral hearing, I received written submissions from the parties about the meaning and effect of article 112 of the Constitution. It provides: "*The provisions of laws shall apply only to what occurs after the date on which they became effective, and they shall be deemed have no effect on what occurred before that date. The law may, however, stipulate the contrary in matters other than criminal matters, if necessity so requires*." Here I have cited the translation by the Oxford University Press Constitute Project ("**OUP**"): at the hearing, all the parties were content that I should take this to be authoritative. I also had before me at the hearing a translation that is published on the UAE Government's legislation portal, where English translations of UAE legislation are found together with the original Arabic. It reads as follows: "*A Law shall only apply from the date it comes into force and shall not apply regressively. In non-criminal matters, a Law may, when necessary, provide otherwise*". Other translations were presented in the post-hearing submissions. However, no party relied on any differences between the various translations, and according to Ibrahim & Partners, the OUP translation "*is more accurate and delivers a more literal and precise translation*" than that on the portal.

73. Both Baroda and Dr Shetty relied on the Constitution in support of their contention that Issue 3 is to be answered "No", but they presented the argument differently. Dr Shetty submitted that "*it would serve as a final check*" on the interpretation of sections 251 and 252 for which he contended. Baroda's contention was that article 112 is the starting point for interpreting the sections, and that "*[b]eing enshrined in the written constitution of the UAE, it directly governs and operates as a constitutional limitation which applies*

to all laws of the Emirates and Financial Free Zones within the UAE, and the laws of any Emirate or Financial Free Zone are required to be interpreted so as to apply in a manner that is compliant with Article 112". Thus, in effect, Dr Shetty appeared to present the Constitution as something akin to foreign law. Baroda recognised that it is the law of the whole of the UAE, including the ADGM. I agree with Baroda: if article 112 does apply to sections 251 and 252, its impact is decisive: a provision of the Constitution is not merely a device for checking conclusions reached independently of it.

74. I do not understand the Claimants to dispute that the Constitution is directly applicable in the ADGM, but I agree with Baroda's submissions about this, and shall summarise them. The Constitution reserves to the Federal Government the "*regulation of the free financial zones, the manner in which they are established, and how far they are excluded from federal legislative provisions*"; and the English Law Regulations expressly provide that, if there is any conflict between the Constitution and English common law, the Constitution prevails: sections 1(1)(c), 1(2) and 7. Accordingly, sections 251 and 252 are to be given effect and interpreted consistently with the Constitution. It might be said, as Dr Shetty submitted, that this follows from the principle that subordinate legislation is construed so as to be compliant with the power under which it is made: *Raymond v Honey* [1983] AC 1, 13B per Lord Wilberforce. But the essential point is not about interpretation of sections 251 and 252 but that the Constitution takes precedence over the IR 2022. This also means that article 112 leaves no room for the presumption or prima facie rule against retrospectivity.

75. That said, the interpretation of the Constitution requires consideration of how its provisions have been interpreted and applied by other Courts in the UAE: this Court should respect and follow them, not only out of comity but because the legislature intended the Constitution to be interpreted according to UAE law. The approach of this Court to the issues between the parties, therefore, should be that which it takes to issues of foreign law: the essential question is what a UAE Court would decide to be the meaning and effect of the Constitution: see *NMC Healthcare Ltd v Dubai Islamic Bank PJSC (cit sup)* at para 24, citing *Iraqi Civilians v Ministry of Defence [2016] UKSC 25* at para 24 and *Byers v Saudi National Bank [2022] EWCA Civ 42* at para 104.

Article 112

76. Baroda submits that, on its true interpretation and in accordance with UAE judicial authorities, article 112 "*should be interpreted such that a law cannot have any effect on acts which occurred before the date on which it comes into effect*". I accept that submission. It is the natural meaning of the English translations that have been put before the Court, and is amply supported by authority. I shall confine myself to citing this statement of principle by the Federal Supreme Court from case *632/22 (26 October 2003)*, a case about the impact of article 112 on Federal Law 40/1992, for the Protection of Intellectual Work and Copyright:

> *The provision of Article 112 of the Permanent Constitution of the United Arab Emirates and Article 4 of the Federal Civil Transactions Law indicate that the provisions of laws apply only to events occurring from the date of their enforcement and do not have retroactive effect on events that occurred before that unless the law states otherwise. This is because laws do not become effective merely upon issuance; they must be communicated to the public and brought to their attention so that they can conform their behavior accordingly. There is no obligation without knowledge, and thus, legislation cannot be enforced against those it addresses, nor can it produce effects against them, until the date of its publication, their notification, or their awareness of its content. This ensures that individuals are not held accountable for matters they could not have known about, which would be contrary to the principles of justice, legality, and the necessity to protect the acquired rights. Furthermore, the public interest*

requires the stability of individuals' transactions and the maintenance of trust and confidence in their rights, necessitating that laws do not have retroactive effect, so they do not have effects on the past and do not apply to past events".

It is apparent from this citation that the policy behind article 122 is similar to the considerations of fairness and certainty that underlie the English presumption against retrospectivity; and the principle that *"[t]here is no obligation without knowledge*" appears to express a similar principle to that explained by Lord Nicholls in the *Spath Holme* case (see para 40 above).

77. Baroda and Dr Shetty therefore argue that it would be inconsistent with article 112 to apply sections 251 and 252 to conduct before the IR 2015 came into effect. The Claimants' response was similar to their argument about Issues 1 and 2: that, since claims for fraudulent trading and wrongful trading arise only on the commencement of a winding up or upon the appointment of administrators, therefore, even if the impugned conduct was before the IR 2015 was operative, liability under section 251 or 252 based on it would not involve applying the IR 2015 regressively, or contravene article 112 of the Constitution. I cannot accept this response about article 112: as Ms den Besten put it, it attempts to apply English law constructs to an article of the Constitution. The Claimants cited no authority that supports the contention that its application depends on when the cause of action arises. Although the judgment in case 632/22 refers (in translation) to "*what had accrued before [the legislation's] enactment*", to my mind the word "*accrues*" cannot be understood to refer to the accrual of a cause of action. The weight of authorities, as I read them, focus on whether the impugned conduct or the events on which the claim is based took place. For example, in *case no 6/016 (7 April 2016)* the Dubai Court of Cassation said "...*according to article 112 of the UAE Constitution and as established by the rulings of this Court, the provisions of laws apply only to events occurring from their effect date and have no effect on events prior to that date, unless stipulated by law* ..."; and in *case no 1118/2019 (30 October 2019)* the Dubai Court of Cassation said, "*It is ... well-established in the jurisprudence of this Court that laws generally do not have retrospective effect and only apply to events occurring from the date of their entry into force, without impacting past events or legal relationships that arose before its effectiveness or to effects resulting from such past relationship*".

78. I should also refer to a case in the Abu Dhabi Court of Cassation, *136/2021 (26 October 2021)*, that was brought to my attention by Ms Hurst. The appellant was the widow of a man who had given her a plot of land in 2002. The respondent, the late husband's daughter by a previous marriage, challenged the gift on the basis of *Federal Law 28/2005 concerning Personal Status*, which operated from 30 November 2005: it required estates to be distributed to provide for widows and children and for dispositions that circumvented that requirement to be null and void. The Court of Cassation held that the law did not apply to the gift because "*it is a fundamental constitutional principle that the provisions of laws shall not apply except to all occurrences as the date of their application and they shall not have any retroactive effect on all occurrences before that date*". This was so although, as I understand it, the husband died and any cause of action accrued after the law came into effect.

79. Mr Smith had another argument. Article 112 does not prevent the retrospective application of statutory provisions where the matter pertains to public order. Ibrahim & Partners consider that this is covered by the words "*if necessity so requires*" in the second sentence of the article. However that might be, the authorities about a public policy exception are clear. Thus, by way only of example:

    a. In *case 2/2020 (27 January 2021)* the Dubai Court of Cassation said, *"[a]lthough it is a fundamental principle that the provisions of laws only apply to actions or contracts that occur after their enactment and do not have retroactive effects on actions or contracts that took place prior to their enactment, pursuant to the principle of non-retroactivity of laws, this principle ceases to be applicable in cases where there is a provision in the law stipulating retroactive effect or when the provisions of the law pertain to public order. In these two cases, the law regains its direct authority over the effects resulting from these facts, actions, and contracts as long as they remain*

in effect at the time of the law's implementation, even if they were concluded before the law came into force", and

b. In *case 87/2022 (25 April 2022)* the Abu Dhabi Court of Cassation said, "*Although it is established—according to Article 112 of the Constitution of the United Arab Emirates—that the provisions of laws apply only to matters occurring from the date they come into effect and do not have retroactive effect unless the law explicitly states otherwise, except in criminal matters, meaning that contracts concluded under the old law and their effects are generally subject to that law without applying the provisions of the new law retroactively, it is also established that when the new law pertains to public order, it must be applied immediately and directly from the date it comes into effect to the effects resulting from those contracts under the new law, without affecting the consequences that were completed before the new law came into force*".

80. Accordingly, UAE law recognises that public order, or public policy, considerations will override private interests, not unlike the recognition in English law that the fact that the presumption against retrospective legislation might be displaced where proceedings are brought in the public interest: see para 60 above. In *case 87/2022*, the Abu Dhabi Court of Cassation expanded on the concept of public order in these terms: "*If the wording or indication of a legislative text shows the legislator's intention to regulate a general situation in a specific manner, deviation from it is not allowed, adhering to the requirements of public interest over any contrary private interest*".

81. Baroda disputes the Claimants' argument about this. Mr Salve observed that the judgment in the Dubai Court of Cassation case 2/2020 did not refer to article 112, nor to the position with regard to criminal law. However, the Abu Dhabi Court of Cassation 87/2022 expressly referred to article 112, and I am not impressed by the criminal law point: see paragraph 63 above. Baroda argued that the public order exception to article 112 is narrower than the Claimants contend.

82. Mr Salve also cited the ruling in the Dubai Court of Cassation in case no 6/2016, which held new legislation did not apply to proceedings brought before its enactment, and where the Court referred to the different position where new legislation relates to public order. I set out in full the passage cited (with Mr Salve's emphases):

> *"It is established according to Article 112 of the UAE Constitution and as established by the rulings of this Court, the provisions of laws shall only apply to what occurs from the date they come into effect, and they shall have no effect on what occurred before that date. The law may, stipulate the contrary in matter other than criminal matters, when necessary, which means that the procedure for filing cases and grievances that are filed under the old law, and their effects- as a general principle - are subject to this law without the provisions of the new law, in implementation of the general rule that it does not apply retroactively,* ***unless the new law is related to the public order, in which case it is applied with immediate direct effect from the date it is applies on the effects that resulted from filing the cases under the new law, that is, the effects that took place after implementing the new law, without the effects that took place and were completed before implementing its provisions*** *[…]*
>
> *…Since this decry is not correct, it is decided in accordance with that is stipulated in article 112 of the constitution of the United Arab Emirates- and according to the precedents of this court, that the provisions of laws apply only to what occurs from the date of their implementation and do not have any effect on what occurs before this date unless the law stipulates otherwise in matters other than penal matters, which means that* ***procedures*** *for filing cases and grievances that are filed under the old law and its effects – as a general principal – are subject to this law without the provisions of the new law, in implementation of the general rule of its invalidity retroactively unless the law is related to public order* ***in***

which case it is applied with immediate direct effect from the date of its implementation *on the effects that resulted from filing cases under the new law. That is, the effects that took place during the new law* ***without the effects that took place and were completed before the implementation of its provisions****...".*

83. Although I do not find it easy fully to understand the ruling in translation, it does not seem to me relevant to what I have to decide. The Court made observations about how new legislation might affect the procedural law applicable to cases that had already been brought before it was introduced, and about the public order exception in those circumstances. Nothing that the Court said suggests that the public order exception does not apply in other circumstances, in particular about whether and how it affects the position where a claim is based on conduct or events before the new legislation.

84. In UAE law, the bankruptcy and insolvency regime is considered to pertain to public order: the interests of creditors in a fair and orderly distribution of the insolvent estate prevail "*over any contrary private interest*". Thus, the Federal Supreme Court said in *case 493/18 (26 October 1997)* that *"[t]he provisions of the bankruptcy rules are considered part of the public order as they relate to credit activation. This means that they, without any need for special provision, govern the effects that have not been determined and that result from the time of entry into force, even if they arise from legal positions that proceeded them, in implementation of its immediate and direct effect*". Similarly, in case 340/6 (19 April 2012) the Abu Dhabi Court of Cassation said that that "*the bankruptcy provisions are considered part of public order as they relate to credit activation*". The Claimants therefore submit that insolvency and bankruptcy law is an exception to the general principle under article 112, and article 112 has no application to sections 251 and 252 of the IR 2022. I accept that argument.

85. The statements about insolvency rules being matters of public order are made in general terms as matters of principle. Dr Shetty and Baroda responded to them by reference to the facts of the cases that were before the Courts and argued that their application should be restricted accordingly, the Federal Court case being about how a state of bankruptcy is to be determined and the Abu Dhabi case being about an application for a declaration of bankruptcy. I accept the cases can readily be distinguished on the facts from these proceedings, but they lay down wider principles, which, in my judgment, UAE Courts would respect and apply. They would not adopt the common law methodology of exploring the facts of the case in order to ascertain a *ratio decidendi*: see *NMC Healthcare Ltd v Dubai Islamic* Bank (cit sup) at para 219.

86. Baroda cited article 3 of the Civil Code in support of its contention that, in the context of insolvency, the public order exception is confined to entry into an insolvency process. Article 3 defines public order as "*provisions relating to personal status such as marriage, inheritance, lineage, provisions relating to* ***systems of governance****, freedom of trade, circulation of wealth, private ownership and other rules and foundations on which the society is based provided that these provisions are not inconsistent with the imperative provisions and fundamental principles of the Islamic Shari'a*" (in the translation on the UAE Government legislation portal, and with Baroda's emphasis). It is argued that entry into an insolvency process falls into the category of "*systems of government",* being a public process or a "*procedural 'system of governance' controlled by the Court"*. I am not persuaded. First, the Civil Code's definition does not limit or define the meaning and application of the Constitution. Secondly, if article 3 is relevant, it does not seem to me the public order consideration in the insolvency context is to be categorised as "*relating to systems of government"* (or, in the respected Whelan translation, "*relating to sovereignty*"), rather than relating to (say) "*circulation of wealth*".

87. Therefore, in my judgment, article 112 of the Constitution provides no support for the contentions of Baroda and Dr Shetty on Issue 3. It follows that it cannot provide any support for their contentions on Issues 1 and 2, on the basis that the position there is analogous to that covered by article 112.

The Interpretation Regulations

88. I come next to the Interpretation Regulations, section 25 of which is headed "*Commencement of subordinate legislation*" and provides as follows:

> *"(1) Subordinate legislation made under the ADGM Founding Law or under any enactment or other lawful authority shall -*
>
> *(a) be published; and*
>
> *(b) unless it is otherwise provided in the subordinate legislation, take effect and come into operation on the date of its publication.*
>
> *(2) Any such subordinate legislation may be made to operate retrospectively to any date not being a date earlier than the commencement of the enactment or the establishment of the authority by or under which the subordinate legislation is made*".

The IR 2015 and IR 2022 are "*subordinate legislation"* within the meaning of section 25, and they expressly incorporate the Interpretation Regulations: "*In these Regulations, unless a contrary intention appears, the rules of interpretation and construction of the Interpretation Regulations 2015 shall apply*": section 297(2).

89. I also set out section 24 of the Interpretation Regulations, on which the Claimants relied. It is headed "*Anticipatory exercise of powers*":

> "*Where an enactment or any part thereof does not come into operation immediately on its passing and the enactment or that part confers power to make subordinate legislation or to make appointments or to issue notifications or to prescribe forms or to do any other thing for the purposes of the enactment or that part, then, unless the contrary intention appears, the power may be exercised and any subordinate legislation, appointment, form or thing made, issued, prescribed or done under the power may be made, issued, prescribed or done so as to take effect at any time after the passing of the enactment so far as may be necessary or expedient for the purpose of –*
>
> *(a) bringing the enactment or that part into operation; or*
>
> *(b) giving full effect to the enactment or that part on or after the day on which it comes into operation*".

90. Dr Shetty's argument was that section 25(1)(2) of the Interpretation Regulations distinguishes between when legislation "*take(s) effect"* and when it "*come[s] into operation"*; and *"[i]n the context of legislation establishing a cause of action one must mean that the claim can be made from that date; the other can only refer to the date to which the cause of action reaches back".* It is said that this interpretation is reinforced in that section 25(2) refers to legislation being made to "*operate retrospectively to"* (emphasis added) an earlier date, this being a reference to "*a backwards 'reach' of the scope of the legislation"*.

91. I am not persuaded by this argument. It gives the expression "*come into operation"* an unnatural meaning. In the context of sections 251 and 252, which confer on office-holders the right to apply for a discretionary remedy, the legislation "*comes into operation*", on any natural meaning of the expression, when the office-holders become entitled to make an application: the expression does not naturally refer to the time of (some or all of) the conduct or events on which an application might be based.

92. I therefore would not be persuaded by Ms den Besten's submission even if it meant that there is little or no distinction between the terms "*take effect*" and "*come into operation*". In fact, however, as Mr Smith argued, the wording can be readily understood in light of section 24, which distinguishes between the time of enactment and the operation of the legislation: for example, if the operation of the legislation is postponed for further subordinate legislation to be prepared, article 24 allows powers in the primary legislation to be exercised in anticipation of it coming into operation.

93. I do not consider that the Interpretation Regulations assist Dr Shetty and Baroda.

Baroda's further authorities

94. It remains to consider two authorities that Baroda invoked in support of its argument, which are about "*true retrospectivity*" and therefore relate to Issue 3. First, Mr Salve cited *Marina Towage Pte Ltd v Chin Kwek Chong* [2021] SGHC 81, a decision in the High Court of Singapore on a claim of fraudulent trading based on conduct between July 2015 and March 2018. The proceedings were brought in 2019 under legislation in the Companies Act 2006, which was repealed in 2020 and replaced by the provisions of the *Insolvency, Restructuring and Dissolution Act 2018*. Coomaraswamy J said that "*it would be in principle wrong for right and liabilities which arose in or around July 2015 to be governed retrospectively by legislation which did not come into effect until more than five years later*" on the basis of "*simple fairness*" (at para 14). The context of this statement was that the defendant had argued (very ambitiously, in my view) that the repeal of the 2006 legislation defeated the claim, which would surely, on any view, have been unfair. Coomaraswamy J decided the issue on the basis that the Interpretation Act ensured the continuance of the relevant provisions of the 2006 Act (loc cit at para 15). The case does not assist Baroda.

95. The other case cited by Mr Salve was *R v Sutcliffe-Williams and Gaskell* [1983] Crim L R 255, a decision of the Criminal Division of the English Court of Appeal concerning a prosecution under section 332 of the *Companies Act 1948* in respect of conduct of the directors of a company between 1 September 1979 and 31 January 1981. The 1948 Act confined the criminal offence of fraudulent trading to cases where the company had been or was being wound up, but this requirement was removed by section 96 of the *Companies Act 1981*. The case was about whether this amendment applied retrospectively, and the Court of Appeal held that it did not. It did not concern whether the prohibition on fraudulent trading itself operated retrospectively, and further, as explained by Lewison LJ in the *Bilta* case (see para 63 above), the position about the criminal offence does not govern the position as to civil liability.

Conclusions on Issue 3

96. I therefore am not persuaded by any of these further arguments about Issue 3, and therefore and for the reasons that I have considered in relation to Issues 1 and 2, I conclude that claims in respect of business carried on before 3 March 2015 (or 14 June 2015) can be brought under sections 251 and 252.

97. I note that Mr Smith advanced a further argument about issue 3: that the *Insolvency Act 1986* expressly provides that relief for wrongful trading might not be granted where the time when the director knew or ought to have concluded that there was no reasonable prospect that the company would avoid insolvency proceedings was before 28 April 1986. I was invited to attach significance to the absence of a comparable restriction in the ADGM legislation, given that it is generally modelled on the English statute. For my part, I regard this inference as pretty speculative, but in view of my other conclusions the Claimants do not need this argument.

98. It remains to mention another point advanced by Ms den Besten. She submitted that the Court has no jurisdiction to apply ADGM law to acts or omissions in the ADGM that occurred before 17 December 2015, when the *Court, Civil Evidence, Judgments, Enforcement and Judicial Appointments Regulations*

2015 (the "**Courts Regulations**") came into force. She cited section 230(4)-(8) of the Courts Regulations. The point is not only unpleaded, but falls outside the Preliminary Issues. I therefore shall not engage with it, save to observe that, on the face of it, here too Dr Shetty would need to overcome some of the argument of the Claimants that I have upheld in this judgment, including the submissions supported by the *In re Howard Holdings Inc.* case (cit sup) and considerations of the public policy of the UAE.

ISSUE 4: IS A "SUFFICIENT CONNECTION" WITH ADGM MANDATORY?

In re Paramount Airways Ltd: a "sufficient connection"

99. Baroda and Dr Shetty argue that a claim for fraudulent trading or wrongful trading depends upon the applicant showing a sufficiently close connection between the defendant and the ADGM, the jurisdiction of the Court. This argument is based upon a line of English authorities that derive from the judgment of Sir Donald Nicholls V-C in *In re Paramount Airways Ltd (in administration)* [1993] Ch 223. The Claimants accept that it is relevant to the Court's decision whether to exercise its powers under sections 251 and 252 to consider whether there is a connection between the defendant and the Court's jurisdiction, but it was argued: (i) that a connection is not necessary in order for the Court to have jurisdiction under the sections and properly to exercise its power; and (ii) in the circumstances of this case, the Court should consider whether there is a sufficient connection between the defendant and the UAE (rather than the ADGM). No party suggested that, with regard to these questions, there might be a relevant difference between a claim for fraudulent trading under section 251 and a claim for wrongful trading under section 252.

100. In her skeleton argument, Ms den Besten took a pleading point: that, in their Replies, the Claimants "*have conceded that in order for the ADGM to exercise its discretion to make an order under s.251, there must be a sufficient connection with its jurisdiction, save that they contend that the relevant connection is between the defendant and the UAE, rather than the defendant and the ADGM*". She did not develop this argument in her oral submissions. Having examined the pleadings, I cannot find such a concession, express or implicit. Certainly, the Claimants specifically plead that a relevant connection would be between the defendant and the UAE, rather than the ADGM, but I do not understand them to admit that any connection is necessary.

101. *Like Lewison LJ in Orexim Trading Ltd v Mahivir Port and Terminal Pve Ltd* (*loc cit* at paras 20,21), I shall here avoid using the term "*jurisdiction*" as far as I can because it can bear different meanings. As Pickford LJ said in *Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB 536, 563*, "*The first and, in my opinion, the only really correct sense of the expression that the court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e. that although the court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances*." The argument on issue 4 really concerned the second sense.

102. The *Paramount Airways* case concerned an application against a bank registered and carrying on business in Jersey (and not in England and Wales) for an order under section 238 of the UK Insolvency Act 1986 on the grounds that a transaction had been entered into at an undervalue. The issue before the Court of Appeal was whether the English Court might make such an order although the defendant was not within the jurisdiction. The leading judgment was given by Sir Donald Nicholls, and Taylor and Farquharson LJJ agreed with it. It is necessary to refer to the judgment at some length. Sir Donald Nicholls observed that, on the face of it, the statutory language was "*of unlimited territorial scope*" (at p.235F), and said that, this being so, "*one is predisposed to seek for a limitation which can fairly be read as implicit in the scheme of the legislation*" (at p.235H); and that, while Parliament might possibly have intended the jurisdiction to apply to transactions entered abroad in respect of foreign property and in

good faith, *"self-evidently, in some instances, such a jurisdiction, or the exercise of such a jurisdiction, would be truly extraordinary*" (at p.236B). He went on to say that, while the case for interpreting section 238 as being subject to some limitation was powerful, there was no "*single, simple formula which is compelling, save for one expressed in wide and loose terms (e.g. that the person [against whom the order was sought], or the transaction, has a 'sufficient connection' with England) that would hardly be distinguishable from the ambit of the sections being unlimited territorially and the court being left to display a judicial restraint in the exercise of the jurisdiction*" (at p.237G/H). He therefore rejected the argument that the legislature intended the power under the section to be subject to an implied limitation.

103. Having so concluded, Sir Donald Nicholls continued that this was "*not so unsatisfactory as it might appear at first sight*" (at p.239F), and that Parliament might have considered that the difficulties created by a section of such wide ambit would be sufficiently overcome by two safeguards. The second was that proceedings could only be served upon a defendant who was not within the jurisdiction with the leave of the Court: that is, of course, not the case in the ADGM. The argument of Baroda and Dr Shetty is founded on the first safeguard, which Sir Donald Nicholls considered under the heading "*The court's discretion: a sufficient connection with England*". The power under section 238 is discretionary, he said, and confers a discretion that is "*wide enough to enable the court, if justice so requires, to make no order against the other party to the transaction or the person to whom the preference was given. In particular, if a foreign element is involved the court will need to be satisfied that, in respect of the relief sought against him, the defendant is sufficiently connected with England for it to be just and proper to make the order against him despite the foreign element*" (at p.239H.). He gave examples of what might provide a sufficient connection, and examples of what might not do so. Having identified potentially relevant considerations, Sir Donald Nicholls said, "*The importance to be attached to these factors will vary from case to case. By taking into account and weighing these and other relevant circumstances, the court will ensure that it does not seek to exercise oppressively or unreasonably the very wide jurisdiction conferred by the sections*" (at p. 240E). Sir Donald Nicholls concluded this section of his judgment as follows: "*I pause to observe that this would not be the first time that, in this field, Parliament has conferred on the English court a jurisdiction of unlimited territorial application. Section 221 provides that an unregistered company may be wound up under the Act. This embraces all overseas companies, but in practice this has not given rise to difficulties. Despite the width of the statutory provision, the English court does not exercise its jurisdiction to wind up a foreign company unless a sufficient connection with England and Wales is shown and there is a reasonable prosect of benefit for the creditors from the winding up*: …" (at p.870G).

104. Thus, as Lewison LJ put it in the *Orexim* case, having cited the *In re Paramount Airways Ltd* judgment, "*The effect of the legislation, therefore, is that it confers on the court power to make orders against persons or property outside England and Wales, subject to the court being satisfied that there is a close enough connection with England and Wales*" (loc cit at para 30). Similarly, in the judgment of the Privy Council in *AWH Fund Ltd v ZCM Asset Holding Co Ltd,* [2019] UKPC 37, on an appeal from the Bahamas Court of Appeal, Lady Arden cited the *In re Paramount Airways Ltd* case and said, "*The real protection for the foreign respondent is that there has to be a sufficient connection between the respondent and the jurisdiction of the Supreme Court of the Bahamas before the court has jurisdiction to entertain the claim for avoidance of the payment of the redemption proceeds under section 160 [which provided for the Court to set aside undue and fraudulent preferences] if the respondent is outside its jurisdiction*" (at para 55).

105. In *Bilta (UK) Ltd v Nazir (No 2)*, the Supreme Court, decided that section 213 of the *Insolvency Act 1986* has extraterritorial effect to allow a claim in fraudulent trading to be brought against persons outside the jurisdiction. Lord Sumption described "*unanswerable*" observations of Sir Donald Nicholls that he formulated as follows: *"(i) that current patterns of cross-border business weaken the presumption against extraterritorial effect as applied to the exercise of the courts' powers in conducting the liquidation of a United Kingdom company; (ii) that the absence in the statute of any test for what would constitute presence in the United Kingdom makes it unlikely that presence there was intended to be a condition of*

the exercise of the power; and (iii) that the absence of a connection with the United Kingdom would be a factor in the exercise of the discretion to permit service out of the proceedings as well in the discretion whether to grant the relief, which was enough to prevent injustice" (at para 110).

106. In this case, the Claimants have not identified any connection (sufficient or otherwise) between any of the Defendants and the ADGM. Accordingly, it is submitted by Baroda and Dr Shetty, despite there being no wording in section 251 or section 252 that suggest a territorial limitation on the powers therein, the Court does not have any jurisdiction, at least in the sense of a power that it could properly exercise, to entertain a claim for fraudulent or wrongful trading. Hence, the issues for me to decide are: (i) whether it is a requirement of a claim of fraudulent trading or wrongful trading that the claimant show that the defendant is sufficiently connected with the Court's jurisdiction; and (ii) if so, whether it suffices in this case for the Claimants to show a connection with the UAE, rather than specifically with the ADGM. The first of these issues itself raises two sub-issues: (a) whether under English law a sufficient connection of this kind is mandatory; and (b) if so, whether ADGM law and English law are the same in this respect.

English law

107. Is a sufficient connection necessarily required under English law? Here I accept the Claimants' submission that a sufficient connection is not mandatory but is ultimately a consideration, albeit usually an important consideration and sometimes a decisive consideration, that bears upon the exercise of the Court's discretion whether to make an order. Indeed, I observe that in its skeleton argument Baroda acknowledged that there might be "*exceptional circumstances*" in which the Court might exercise its power despite there being no "*connecting factor*".

108. First, there are indications in the judgments in *In re Paramount Airways Ltd* (loc cit) and in the *Orexim* case (loc cit) that a sufficient connection might be found where the property that is the subject of the transaction is within the jurisdiction. One of the examples given by Sir Donald Nicholls V-C of a sufficient connection is this: "…*the connection might be shown by the situation of the property [that was the subject of the impugned transaction], such as land, in this country. In such a case, the foreign nationality or residence of the defendant would not by itself normally be a weighty factor against the court exercising its jurisdiction under the sections*" (at p.240B). In *Orexim*, Lewison LJ impliedly agreed that a connection between the property involved might suffice: loc cit at paras 28-30. It is not suggested that in this case there is property connected with the ADGM that might provide a sufficient connection, but these citations indicate that the requirement for a connection between the defendant and the jurisdiction is not as rigid as Dr Shetty and Baroda suggested.

109. More importantly, there are English cases in which the Court has assumed jurisdiction on the basis that the claim under the Insolvency Act is connected with other proceedings in the jurisdiction: *Jyske Bank (Gibraltar) Ltd v Spjiendnaes* [2000] BCC 16, a decision of Evans-Lombe J; *Avonwick Holdings Ltd v Azitio Holdings Ltd* [2018] EWHC 2458 (Comm), a decision of Cockerill J; and *Suppipat v Narongdej* [2020] EWHC 3191 (Comm), a decision of Butcher J. These cases are particularly in point here because the Insolvency Claims are brought together with the Civil Claims and on the basis of the same allegations.

110. I was not referred by counsel to the decisions of Cockerill J and Butcher J. Ms den Besten accepted, as to my mind she was constrained to do, that the decision of Evans-Lombe J is inconsistent with the contention of Baroda and Dr Shetty; that, if it is correct, the *Jyske Bank* case must have been wrongly decided. Neither she nor Mr Salve advanced any specific contended criticism of the reasoning in the judgment: indeed, it was not mentioned in their skeleton arguments, and I was not taken to the judgment itself in oral submissions. I cannot dismiss it so lightly.

111. The judgment in the *Jynske Bank* case is a carefully reasoned reserved judgment, and was given, after full argument by leading counsel for both parties, by a judge with great experience in insolvency matters.

It concerned a claim for a transfer at an undervalue of land in Ireland, and it was one of a number of claims in the proceedings against the defendant, an Irish company, together with other defendants. After considering the judgment of Sir Donald Nicholls in *In re Paramount Airways Ltd*, Evans-Lombe J said, *"I do not read this passage of the Vice-Chancellor's judgment as laying down that a court should never grant an order under s.423(2) in the exercise of its discretion in the absence of any of the sort of connections with England which the Vice-Chancellor set out but it has to be accepted that there are no such connections in this case. I have nonetheless come to the conclusion that I should grant the relief sought*" (at p.34 E/F). He went on to give his reasons for this decision: it is of some interest that one of his reasons was that he was familiar with the background facts of the case.

112. In his judgment in *Suppipat v Narongdej* [2023] EWHC 1988 (Comm) Calver J, having considered among other decisions the *Jyske Bank* judgment, suggested that "*it is open to doubt whether it is correct, after Orexim, to suggest that an English Court is lawfully entitled to exercise its discretion under despite the fact that none of the connecting factors referred to in Paramount and Orexim is present*" (at para 1343). This tentative suggestion does not persuade me that the *Jynske Bank* case does not represent English law. Calver J acknowledged that is is cited as good law in the current edition of leading textbooks: Dicey, Morris & Collins (16th ed, 2022) at para 30-135 fn 426; Gee on Commercial Injunctions (7th ed, 2021) at Ch 7 para 7 fn 129; Sealy and Milman's Annotated Guide to the Insolvency Legislation (25th ed, 2022) part XVI, and Lightman and Moss on the Law of Administrators and Receivers of Companies (6th ed, 2017) at para 30-013 fns 37 and 38. I would add to the list Gore-Browne on Companies, Ch 58 at para 18, and Halsbury, Laws of England Vol 17 (5th Ed, 2017) at paras 748 and 750 fn 10. Further, the *Jyske Bank* decision has been cited and applied in first instance English decisions. It suffices to adopt what was said by Butcher J in his earlier decision in the *Suppipat v Narongdej* litigation (loc cit):

> "*As the Claimants submitted, Jyske Bank had been cited with approval by Tomlinson J in Dornoch Ltd v Westminster International BV, The WD Fairway [2009] EWHC 1782 (Admiralty) at para 134 and by Flaux J in Fortress Value v Blue Skye Special Opportunities Fund LLP [2013] EWHC 14 (Comm) at paras 116-117. It had not been overruled in Orexim" (*at para 65*)*; and
>
> "*The decision in Jyske Bank indicates that the involvement of the relevant defendant in litigation here, even in the absence of other 'initial or standard' connecting factors can, in an appropriate case, mean that there is a sufficient connexion. Jyske Bank has been cited with approval in both Dornoch and Fortress Value. It was not overruled or adversely commented upon in Orexim. Further, in paragraph 56 of her judgment in [Avonwick Holdings Ltd v Azitio Holdings Ltd [2018] EWHC 2458 (Comm)] Cockerill J stated that the existence of litigation in this jurisdiction between the same parties and which is related to the s. 423 claim is itself a connecting factor. I agree with that. It is true that it is likely to be a weightier factor if the impugned transaction is said to have been designed to thwart proceedings here, as was the case in Dornoch, but I do not consider that it can have no weight in other circumstances. How much weight it has will depend on the circumstances of the case. In Orexim, it was considered that it would have little. That, however, was a case in which it appears from the report of the first instance decision ([2017] EWHC 2663 (Comm) (that the only claims which could have been made in this jurisdiction against Zen Shipping and Ports India Pte Ltd and Singmalloyd Marine (S) Ltd, had service out been permitted, were the claim under s. 423 and for a declaration that the impugned transaction was a sham. In the case of Mahavir Port and Terminal Private Ltd there was, it is true, a different claim against it for damages for breach of a settlement agreement which it had entered into with Orexim, but that claim for damages appears to have been legally and, at least in significant part, factually distinct from the claims aimed at impugning the relevant transfer. The s. 423 claims could, therefore, as*

Cockerill J put it at paragraph [68] of Avonwick, be regarded as "in effect a free standing claim" (at para 75).

113. I conclude that in English law a connection between the Defendant and the jurisdiction is not invariably or necessarily required to establish a claim for fraudulent trading or wrongful trading; and would also conclude, even if some connection is required, that the requirement is satisfied where the defendants face other related claims in the jurisdiction, such as the Civil Claims in these proceedings.

114. If I am right about this, I need decide neither whether ADGM law follows English law in requiring such a connection, nor Mr Smith's argument that, if the powers under sections 251 and 252 are restricted by a requirement of this kind, then it is met by the connection between a defendant and the UAE. However, I shall say something about them.

Is ADGM law different from English law?

115. The general rule under the English Law Regulations is that the English common law applies and has legal force in the ADGM is qualified in section (1) in that it applies "*so far as it is applicable to the circumstances of the* [ADGM]", and "*subject to such modifications as those circumstances require*". As I see it, there are three relevant differences between the ADGM insolvency regime and that in England.

116. Firstly, as I have said, the reasoning of Sir Donald Nicholls in the *In re Paramount Airways Ltd* case was that it was understandable that Parliament left it to the Courts to restrain the application of the powers under section 238 because a "*single, simple formula*", such as a requirement of a sufficient connection, would be too loose and vague to be useful legislative language, and he observed that Parliament had taken a similar approach with regard to the wide language of the power to wind up unregistered companies in section 221 of the *Insolvency Act 1986*. The ADGM legislature does not regard the language of a "*sufficient connection with the Abu Dhabi Global Market*" as unsatisfactory, loose or vague: it uses the very expression in relation to the jurisdiction to wind up unregistered companies in section 266 of the IR 2022. Why then, it might be asked, was similar language not used in sections 251 and 252 if it was intended that there necessarily should be a "*sufficient connection*" between the defendant and ADGM if the powers were to be exercised?

117. Secondly, the English law does not provide for continuance of a corporate body registered overseas to become an English company. Accordingly, the English Courts have not had to engage with the position where an English company is being wound up or is in administration in England after having previously, at the time of the conduct impugned as fraudulent or wrongful, been incorporated elsewhere. The English Courts could therefore proceed on the basis that, if defendants had engaged with the company in the jurisdiction in which it was incorporated, there would be a connection between the defendant and the jurisdiction in which the company was being wound up or administered.

118. Thirdly, one reason for the judicial restraint upon the courts assuming and exercising powers extraterritorially, is, as Lewison LJ put it in the *Orexim* case (cit sup, at para 22), "*a presumption that Parliament will not seek to intervene in matters that are legitimately the concern of another country. Countries respect one another's sovereignty and the right of each country to legislate for matters within their own boundaries*". In the case of foreign companies that are insolvent being re-registered in the ADGM, the legislation protects the sovereignty of foreign jurisdictions in that an application for continuance requires that applicant must provide to the Registrar satisfactory evidence "*which is issued from the relevant governmental authority of the jurisdiction under which the person is incorporated and permits that person to submit an application … for continuance within the Abu Dhabi Global Market*".

119. For these reasons, I am inclined to doubt whether, even if under English law a "*sufficient connection*" between a defendant and the jurisdiction be a necessary requirement for the Court to have, and properly to exercise, the power to make an order for fraudulent trading or wrongful trading, there is such a limit

on the powers under sections 251 and 252 or such a rigid fetter on its exercise. However, I need not, and do not, reach a firm conclusion about that.

"Sufficient connection" with the UAE

120. I reject Mr Smith's argument that, if a connection between the defendant and the Court's jurisdiction is required, a connection with the UAE is sufficient. The "*sufficient connection*" referred to in the authorities is with the jurisdiction of the Court that is exercising the power. The weight of the authorities, including the seminal judgment of Sir Donald Nicholls in the *In re Paramount Airways Ltd* case, refer to a sufficient connection with England (or England and Wales). While in the *Bilta (UK)* case Lord Sumption referred to a connection with the United Kingdom (loc cit at para 110, in the passage of his judgment cited above at para 105), I cannot accept that this displaces the overall thrust of the authorities. Indeed, in the same case, Lords Toulson and Hodge referred to a sufficient connection with England (at para 215). Further, even if a connection with the United Kingdom suffices for the purposes of the *Insolvency Act 1986* where the legislature was enacted by the United Kingdom legislature, and so there was no question of offending the principle of territoriality explained by Lewison LJ in the *Orexim* case (see para 36 above), here the principle would be engaged, the legislature that enacted the IR 2022 being the Board of Directors of the ADGM. This conclusion is reinforced by section 266(4)(a) of the IR 2022: sufficient connection with the ADGM is required before the Court may wind up a foreign company.

ANSWERS TO PRELIMINARY ISSUES

121. I therefore answer the preliminary issues as follows:

a. **Issue 1**: *Can an order be made under sections 251 and 253 of the [IR 2022] in respect of the fraudulent carrying on of the business of a company prior to the time at which that company was continued in the ADGM?* **Yes**.

b. **Issue 2**: *Can an order be made under section 252 of the [IR 2022] in respect of the wrongful carrying on of the business of a company prior to the time at which that company was continued in the ADGM?* **Yes**.

c. **Issue 3**: *Can a claim be brought under section 251 and/or section 252 in respect of the fraudulent and/or wrongful carrying on of business before the date when section 251 and section 252 first came into effect in the ADGM (… pursuant to the [IR 2015], which was the predecessor of the [IR 2022])?* **Yes.**

d. **Issue 4**: *Can a claim successfully be brought under section 251 and/or section 252 absent a sufficient connection between the defendant and the ADGM?* **Yes**; and

e. *If not, assuming (for present purposes only) the facts pleaded by the Claimants, including in their proposed Re-Re-Amended Particulars of Claim, to be true, would there be a sufficient connection between the relevant Defendant and the ADGM?* **This does not arise, but if it did, I would answer it Yes**.

122. I invite submissions about costs, permission to appeal and any other consequential matters within 21 days of this judgment. I should be grateful for the parties' views about whether an oral hearing is required about any consequential issues. I should also be grateful if the Claimants' representatives would draft, and seek to agree with other parties, an order giving effect to this judgment.

POST-SCRIPT

123. At the end of the hearing, I gave the parties the opportunity to provide supplementary submissions about the relevance of article 112 of the Constitution. This was required because the Defendants did not give notice that they relied upon it until Dr Shetty and Mr Manghat served their skeleton argument, and no translation of the relevant provision had been agreed. Ms den Besten resisted my suggestion that article 112 should have been pleaded, but, without engaging with that question, in my judgment, some form of notice should have been given, not least because I canvassed at the hearing on 14 February 2024 what questions of UAE law might arise and no mention was made of the Constitution.

124. The general lesson is that, when proceedings before this Court give rise to any significant question of UAE law (or any other foreign law), it is good practice to give proper notice to other parties, and to seek agreement upon a translation of any relevant provisions and authorities.

Issued by:

Linda Fitz-Alan
Registrar, ADGM Courts
8 July 2024