
[2013–14 Gib LR 431]

CHEVRON CORPORATION v. DELEON and TORVIA LIMITED

SUPREME COURT (Butler, J.): March 14th, 2014

Tort—conspiracy—lawful means conspiracy—lawful means conspiracy probably not made out if reasonably arguable that defendants' actions not in pursuit of legitimate interests, but likely that predominant purpose obtaining financial benefit, not harming claimant

Tort—conspiracy—unlawful means conspiracy—meaning of "unlawful means" for purposes of unlawful means conspiracy not extended to include conspiracy to commit perjury—rule that no tort of perjury otherwise deprived of effect

Tort—conspiracy—unlawful means conspiracy—meaning of "unlawful means" for purposes of unlawful means conspiracy not extended to acts criminal or actionable in country where committed but not criminal or actionable in Gibraltar—might also not extend to acts which would have been criminal or actionable in Gibraltar had they been committed here

Tort—conspiracy—unlawful means conspiracy—reasonably arguable that requirements of "unlawful means" for tort of unlawful interference with economic interests now different from unlawful means conspiracy—test for unlawful means in conspiracy cases is instrumentality rather than actionability

The claimant alleged that the defendants were combiners in a conspiracy to extract multi-billion dollar payments from it.

The claimant was an oil company and the defendants were a businessman and a company owned and controlled by him. In 1964, the Government of Ecuador allowed a consortium of companies to extract oil from the Oriente region. Texaco Petroleum Co. ("TexPet") and Petroecuador, a state-owned company, were members of that consortium.

In 1992, a class action against Texaco, TexPet's parent company, was commenced in New York on behalf of the indigenous population of the Oriente region, based on allegations of environmental damage, pollution, and damage to health as a result of TexPet's operations ("the Aguinda litigation"). After some dispute as to the appropriate forum for the matter, it was agreed that the case would be heard in Ecuador, subject to an undertaking from Texaco that it would submit to the jurisdiction of the Ecuadorian court, waive any limitation defence, and satisfy any judgment of the Ecuadorian court.

During that dispute, the Government of Ecuador also threatened to sue TexPet for environmental damage, and in 1995 reached a settlement with Texaco and Petroecuador releasing them both from any further liability for environmental damage (excluding personal injury and individual property damage) if certain remedial and mitigation work were completed and compensation paid. In 1998, the parties entered into a final release in respect of the remedial work and compensation, though the effect of the settlement and release were still under consideration in arbitration proceedings.

There was then a change of government in Ecuador, which in 1999 passed new legislation allowing individuals to bring claims arising from injury or damage for violation of environmental rules. This new government, the claimant alleged, was breaching the terms of the settlement and release.

In 2001, one of the claimant's subsidiaries merged with Texaco.

In 2003, another set of proceedings ("the Lago Agrio litigation") was commenced in Ecuador in the names of 48 individuals, many the same as involved in the Aguinda litigation. These claims were made under the new 1999 legislation (whereas the Aguinda litigation had been based on the common law), and were for remediating environmental damage, not for personal injury or property damage.

The claimant argued that the Lago Agrio claims, being based on the 1999 legislation, were different from the Aguinda litigation and that it had not submitted to the jurisdiction of the Lago Agrio court or agreed to Ecuador as the appropriate forum for deciding those claims. The defendant said that the claims were effectively the same.

In 2011, judgment was given in favour of the Lago Agrio plaintiffs for some $18bn. The judgment also dealt with some allegations of fraud made by the claimants against the plaintiffs concerning the expert evidence presented. The claimants alleged, *inter alia*, that the judgment was ghost-written on behalf of the plaintiffs for the judge who was, they said,

routinely corrupt and accepted bribes, and conspired in or knowingly accepted false evidence. That decision was upheld by the Lago Agrio Appeal Court. The claimant also sought, in the US courts, to prevent the judgment being enforced outside Ecuador.

The claimant alleged that (a) the defendants were involved in (i) unlawful means conspiracy; and/or (ii) lawful means conspiracy; and/or (iii) unlawful interference with economic interests; (b) they suffered damage through, *inter alia*, the costs of defending the two sets of litigation, US proceedings, the extensive media campaign against it, and the damage to its share price and reputation; (c) the "mastermind" of the conspiracy, a New York attorney named Mr. Donziger, employed a wide range of tactics to secure a payment from the claimant, including conspiracy to pervert the course of justice, malicious prosecution, perjury, intimidation, corruption, deceit, defamation, forgery, fabrication of evidence and abuse of court process (in particular, the claimant alleged that the "Cabrera report," ostensibly written by an independent joint expert, was in fact largely drafted by the conspirators and fraudulently presented as Mr. Cabrera's work); and (d) the defendants were knowingly involved in the conspiracy, and continued to be so.

The defendants applied to the Supreme Court to have the claim struck out. They requested the court to decide the application on its merits, rather than to dismiss the claim as being inappropriate for a strike-out application, given its complexity and importance.

Failure to disclose actionable loss

The defendants submitted that the pleadings should be struck out as the claimant had not sufficiently pleaded any actionable loss, because (a) the Lago Agrio judgment had not been enforced; (b) the appeals process in Ecuador had not been exhausted; and (c) there was no action for defamation.

The claimant submitted that it had disclosed actionable loss (*inter alia*, defending the two sets of litigation, damage to reputation and share price, countering the negative media campaign, *etc*.).

Abuse of process

The defendants submitted that the pleadings should be struck out as an abuse of process because the claim was an attempt to mount an impermissible collateral attack on the decision of the Ecuadorian courts and an attempt to re-litigate issues already properly and finally decided: (a) the appropriate way of challenging the decision of a court was an appeal to a superior court; (b) proceedings brought for the purpose of a collateral challenge to another court of competent jurisdiction should generally be struck out as an abuse of process; (c) new evidence of fraud was required to prevent such a striking out; (d) the test for the introduction of such evidence was higher than in usual circumstances: it must entirely change the aspect of the case; (e) the claimant did not meet this higher standard; and (f) the rule that a collateral attack might in fact be mounted against a foreign judgment was subject to a great deal of criticism.

The claimant submitted that the pleadings did not constitute an impermissible collateral attack, as (a) fraud "unravelled everything" and no judgment obtained by fraud should be allowed to stand; (b) the parties were different; (c) the issues now raised had not been finally determined; and (d) in any event, *res judicata* or issue estoppel did not apply to foreign judgments.

Unlawful means conspiracy

The defendants submitted that the allegations of unlawful means conspiracy could not be made out, as (a) the unlawful means had to be civilly actionable, not merely criminal; (b) perjury could not therefore constitute unlawful means; (c) unlawful acts committed abroad could also therefore not constitute unlawful means; and (d) the freedom of no relevant third party was interfered with.

The claimant submitted that (a) the requirement for the unlawful means to be actionable applied only to the tort of unlawful interference with contractual relations, and in conspiracy cases the unlawful means must instead be instrumental so that criminal acts were therefore sufficient; (b) conspiracy to commit perjury could therefore constitute unlawful means; (c) the conspiracy was committed at least partly from inside Gibraltar, and it should therefore be possible to bring proceedings against the conspirators here; and (d) the primary allegation was of a two-party conspiracy, where the claimant was targeted directly, and not through third parties.

Lawful means conspiracy

The defendants submitted that (a) the means must be lawful to found a lawful means conspiracy, and (b) the sole or predominant purpose of their actions was to pursue their own benefit, rather than to damage the claimant deliberately, and therefore did not constitute a lawful means conspiracy.

The court considered whether it was in fact possible to rely on a sole or predominant purpose if that purpose were entirely illegitimate.

Immunity in relation to evidence given in court

The defendants also relied on the absolute immunity afforded to judges, witnesses and other parties in relation to evidence given in court and in the preparation of that evidence.

The claimant submitted that (a) Gibraltar did not afford such immunity to evidence given in foreign proceedings, and (b) in any event, at least some of the defendants' actions could not attract such immunity as they were committed outside the ordinary course of litigation.

Held, dismissing the application:

Failure to disclose actionable loss

(1) The claim would not be struck out as failing to plead any actionable loss sufficiently. It was clearly arguable that the claimant had suffered relevant loss as a result of the alleged conduct of the defendant, and whether that loss was actionable or not was a separate issue. Given the

range and extent of the damage alleged, it was unsurprising that it had not been fully particularized and quantified. Whilst the claimant would have to set its claim out fully in due course, the claim should not be struck out on the basis that no causative and recoverable loss had been pleaded. Difficulty in quantifying the loss was also not a reason to strike it out: courts dealt with such problems frequently and while the defendants may well challenge particular heads of damage at trial, that would depend on the evidence and arguments put forward at the time (para. 43).

Abuse of process

(2) The claimant's case would not be struck out as an abuse of the court's process. The issues were not *res judicata* or covered by issue estoppel and did not constitute an impermissible collateral attack as, *inter alia*, (a) it was not clear that the Ecuadorian court had purported to decide the issues finally; whilst it had purported to decide on liability and quantum in relation to the extraction works, it was not clear that it had purported to make any decision on fraud; (b) it was not clear that the claimant could have had full opportunity to contest the Ecuadorian decisions if there were indeed wholesale corruption of the judiciary; (c) the Ecuadorian judgment was a foreign judgment and therefore the court was not required to apply the usual rules on collateral attack; (d) the allegation of fraud was that the claimant had induced the court, by fraud, to come to the wrong conclusion, so that the whole case could be reopened; (e) in any event, fraud defeated *res judicata* where the fraud allegations were *bona fide*, and the claimant had at least a *prima facie* case; (f) even if the Ecuadorian decision were treated as a domestic one, it could not be said that the defendant would have failed the more stringent test for admission of fresh evidence as it would be difficult to have any confidence that the decision on the claimant's allegations was correct, as it would have been tainted by the trial judge's own fraud; (g) the scope of the alleged fraud was wider than the Lago Agrio litigation itself; and (h) the Lagio Agrio litigation was not the same as the Aguinda litigation (the former could not have been brought under the legal framework as it existed at the time the latter was commenced) (para. 48).

(3) The general principles concerning collateral attack on another judgment were that (a) proceedings brought for the purpose of mounting a collateral attack on a final decision of another court of competent jurisdiction would be struck out as an abuse of process; (b) allegations of fraud did not necessarily prevent such a striking out when the same allegations had already been considered and ruled upon; (c) the general rule might not apply where there was credible evidence of fraud which had not been available at the time of the previous judgment; (d) the test for admission of such evidence was more stringent than usual, and the evidence would have to entirely change the aspect of the case; (e) the court was not bound to apply these principles where the collateral attack was on a foreign judgment, and fresh evidence was not necessary—it was sufficient to show that there was a triable issue of fraud; and (f) the failure

of the law to apply the same principles on collateral attack to domestic and foreign decisions had been criticized but had not been overruled (para. 47).

(4) The claimant could not be said at this stage to have submitted to the jurisdiction of the Lago Agrio court, nor could it be said that it was bound by the undertakings given in New York as regards jurisdiction. In any event, in the undertaking Texaco had expressly reserved the right to challenge the jurisdiction of the Lago Agrio courts (not limited to Ecuador—the right to challenge that court within the jurisdiction would not need to be reserved) (para. 48).

Unlawful means conspiracy

(5) It was reasonably arguable that the requirements of "unlawful means" for the tort of unlawful interference were now different from those of unlawful means conspiracy, and the test for what constituted unlawful means in conspiracy cases was instrumentality rather than actionability: (a) in three-party unlawful interference cases (where the claimant was caused economic loss by the defendant's interference with the freedom of a third party), it was still a requirement that the unlawful means alleged gave rise to a civil action against the defendant by the third party; (b) in two-party unlawful interference cases (where the claimant was caused economic loss by the defendant interfering with him directly), the unlawful means *probably* must be actionable at the suit of the claimant; (c) in two-party conspiracy cases, criminal conduct which did not rise to a civil action was sufficient, and the test was not whether the alleged "unlawful means" were actionable, but whether they were instrumental in causing the loss; and (d) it was arguable that the test of instrumentality rather than actionability applied in three-party conspiracy cases as well; but (e) in any event it was at least reasonably arguable that the present case involved a two-party unlawful means conspiracy (paras. 63–65).

(6) The court would not extend the meaning of "unlawful means" (for the purposes of an unlawful means conspiracy) to include conspiracy to commit perjury, or the rule that there was no tort of perjury would be deprived of much of its effect (para. 68).

(7) The court would not extend the meaning of "unlawful means" (for the purposes of an unlawful means conspiracy) to acts which were criminal or actionable in the country in which they were committed, but were not criminal or actionable in Gibraltar. The concept might also not extend to acts which would have been criminal or actionable in Gibraltar had they in fact been committed here, but in any event, the defendant's acts were alleged to have occurred in Gibraltar (paras. 69–71).

(8) It was arguable that (a) in three-party conspiracy cases, the relevant conduct need not exclude or affect a third party's freedom to deal with the claimant; or (b) in the alternative, the claimant had an economic interest in at least some of those who might be regarded as third parties; and (c) the

conduct of these potential third parties could have caused the claimant economic harm (para. 75).

(9) Actions of the defendant which might constitute "unlawful means" for the purpose of founding an unlawful means conspiracy could include (a) contempt of court; (b) abuse of process; (c) malicious prosecution, if that tort were not limited to criminal prosecutions; (d) intimidation; (e) perversion of the course of justice; (f) extortion; (g) bribery; (h) corruption of judges; and (i) fraud. Provided that the act was instrumental in intentionally causing loss to claimant, it was not necessary that all elements of a tort were made out (paras. 90–91).

Lawful means conspiracy

(10) It would not be decided whether a cause of action in lawful means conspiracy was disclosed, as (a) lawful means conspiracy would be established where the sole or predominant purpose of the defendant's actions was to harm the victim, whether those actions were lawful or not; and (b) it was reasonably arguable that the defendants' actions in pursuing the Lago Agrio litigation were not for the purpose of pursuing their *legitimate* interests; but (c) it was likely that the sole or predominant purpose of the defendants' actions was to obtain a financial benefit, not to harm the claimant (paras. 81–85).

Immunity in respect of evidence given in court

(11) The principle of immunity in relation to evidence given in court and the preparation of such evidence did not apply universally to foreign judgments. The point had not been decided in England and Wales, and it would be inappropriate to decide it in Gibraltar in a strike-out application (para. 93).

(12) Even if the same principles of immunity in relation to evidence given in court and the preparation of such evidence in domestic courts were to apply to evidence in foreign courts, the application would not be struck out on that basis. While the gravity of the conduct was not relevant in determining whether it attracted immunity, as long as the conduct was "in the ordinary course of proceedings in a court of justice," the concoction of primary evidence, as opposed to giving false evidence, did not attract immunity, and it was reasonably arguable that, *inter alia*, the Cabrera report, *Crude*, and various other false analyses had been created by the defendants outside the ordinary course of litigation and later used within it, so that immunity would not in any case apply. The precise scope of the immunity of witnesses was unclear, and the line between fabricating primary evidence and giving false evidence was fine, and a case should not therefore be struck out on the basis of immunity except in the clearest of cases (paras. 95–103).

(13) It was not necessary, in light of the decision not to strike out the application on the basis of witness immunity, to decide whether such immunity extended to all other alleged conspirators (para. 106).

(14) It was clearly arguable that the Cabrera report was not written by him for the purpose of presenting it as evidence, but by others for the purpose of falsely presenting it as his work. The true authors were not intending to give evidence, and it could not be correct that they would be protected by any immunity Mr. Cabrera might have (para. 107).

Cases cited:

(1) *AK Inv. CJSC* v. *Kyrgyz Mobil Tel Ltd.*, [2012] 1 W.L.R. 1804; [2011] 4 All E.R. 1027; [2011] 1 C.L.C. 205; [2011] UKPC 7, considered.
(2) *Abouloff* v. *Oppenheimer & Co*. (1882), 10 Q.B.D. 295, followed.
(3) *Anderson* v. *Gorrie*, [1895] 1 Q.B. 668, considered.
(4) *Bell Group Ltd.* v. *Westpac Banking Corp.*, [2004] WASC 162, referred to.
(5) *Calyon* v. *Michailidis*, 2007–09 Gib LR 321, [2009] UKPC 34, distinguished.
(6) *Crawford Adjusters* v. *Sagicor Gen. Ins. (Cayman) Ltd*., 2013 (2) CILR 135; [2014] A.C. 366; [2013] 3 W.L.R. 927; [2013] 4 All E.R. 8; [2013] UKPC 17, considered.
(7) *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch*, [1942] A.C. 435; [1942] 1 All E.R. 142, considered.
(8) *Customs & Excise Commrs.* v. *Total Network SL*, [2008] 1 A.C. 1174; [2008] 2 W.L.R. 711; [2008] 2 All E.R. 413; [2008] S.T.C. 644; [2008] Lloyd's Rep. F.C. 275; [2008] B.P.I.R. 699; [2008] UKHL 19, applied.
(9) *Darker* v. *Chief Const. (W. Midlands Police)*, [2001] 1 A.C. 435; [2000] 3 W.L.R. 747; [2000] 4 All E.R. 193, considered.
(10) *Evans* v. *London Hospital Medical College*, [1981] 1 W.L.R. 184; [1981] 1 All E.R. 715, referred to.
(11) *Hollington* v. *F. Hewthorn & Co. Ltd.*, [1943] K.B. 587; [1943] 2 All E.R. 35, referred to.
(12) *House of Spring Gardens Ltd.* v. *Waite (No. 2)*, [1991] 1 Q.B. 241; [1990] 3 W.L.R. 347; [1990] 2 All E.R. 990, distinguished.
(13) *Hunter* v. *Chief Const. (W. Midlands Police)*, [1980] Q.B. 283; [1980] 2 W.L.R. 689; [1980] 2 All E.R. 227, considered.
(14) *Irish Response* v. *Direct Beauty Products Ltd.*, [2011] EWHC 37 (QB), distinguished.
(15) *Ladd* v. *Marshall*, [1954] 1 W.L.R. 1489; [1954] 3 All E.R. 745; [1954] EWCA Civ 1, referred to.
(16) *Land Securities plc.* v. *Fladgate Fielder*, [2010] Ch. 467; [2010] 2 W.L.R. 1265; [2010] 2 All E.R. 741; [2009] EWCA Civ 1402, referred to.
(17) *Lazarus Estates Ltd.* v. *Beasley*, [1956] 1 Q.B. 702; [1956] 2 W.L.R. 502; [1956] 1 All E.R. 341, considered.
(18) *Marrinan* v. *Vibart*, [1963] 1 Q.B. 528; [1962] 3 W.L.R. 912; [1962] 3 All E.R. 380, referred to.
(19) *OBG Ltd.* v. *Allan*, [2008] 1 A.C. 1; [2007] 2 W.L.R. 920; [2007] 4 All E.R. 545; [2007] UKHL 21, considered.

(20) *Owens Bank Ltd.* v. *Bracco*, [1992] 2 A.C. 443; [1992] 2 W.L.R. 621; [1992] 2 All E.R. 193, referred to.
(21) *Owens Bank Ltd* v. *Etoile Comm. SA*, [1995] 1 W.L.R. 44, considered.
(22) *Powell* v. *Boladz*, [1998] Lloyd's Rep. Med. 116; (1998), 39 BMLR 35, considered.
(23) *Republic of Ecuador* v. *Chevron Corp*. (2011), 638 F.3d 384, referred to.
(24) *Saif Ali* v. *Sydney Mitchell & Co.*, [1980] A.C. 198; [1978] 3 W.L.R. 849; [1978] 3 All E.R. 1033, referred to.
(25) *Singh* v. *Reading B.C.*, [2013] 1 W.L.R. 3052; [2013] C.P. Rep. 46; [2013] EWCA Civ 909, considered.
(26) *Smart* v. *Forensic Science Service Ltd*., [2013] P.N.L.R. 32; [2013] EWCA Civ 783, referred to.
(27) *Spurlock* v. *Satterfield* (1999), 167 F.3d 995, referred to.
(28) *Suzur Overseas Ltd.* v. *Koros*, [1999] 2 Lloyd's Rep. 611; [1999] C.L.C. 801, considered.
(29) *Tchenguiz* v. *Imerman*, [2011] 2 W.L.R. 592; [2011] 1 All E.R. 555; [2010] 3 F.C.R. 371; [2010] EWCA Civ 908; [2011] Fam 116, referred to.
(30) *Vadala* v. *Lawes* (1890), 25 Q.B.D. 310, considered.
(31) *X (Minors)* v. *Bedfordshire C.C.*, [1995] 2 A.C. 633; [1995] 3 W.L.R. 152; [1995] 3 All E.R. 353; [1995] 2 FLR 276, referred to.

J.P. Corbett, *Q.C.*, *S. Catania* and *R. Rathmell* for the claimant;
Sir Peter Caruana, *Q.C.*, *A. White*, *Q.C.* and *C. Simpson* for the defendants.

1 **BUTLER, J.:** The claimant is one of the world's largest oil companies. The first defendant is a successful and wealthy businessman and a graduate of Harvard Law School, resident for present purposes in Gibraltar. The claimant contends that the second defendant is a company which is ultimately owned and/or controlled by the first defendant, entirely under his control and incorporated and registered in Gibraltar. The claimant alleges that the defendants were combiners in a conspiracy or conspiracies to extract from the claimant billions of dollars by fraudulent and corrupt means, thereby causing immense damage to it. The means alleged include fraudulent, bogus and baseless litigation (including the procuring and enforcement of a fraudulent and bogus Ecuadorian judgment) and a false and corrupt publicity campaign, bribery and intimidation of Ecuadorian judges, fabrication of evidence, ghost-writing of a multi-billion-dollar judgment against the claimant and attempted coercion and intimidation of the claimant into paying a huge sum of money in order to settle the claim. The defendants' part is alleged to have been the provision of very substantial funding for the conspiracy or conspiracies since 2006–2007, together with advice, support and encouragement, knowing that the claims

were false. The defendants' potential share of the profits from these fraudulent and corrupt activities at one point exceeded $760m. The claimant says that new evidence of those activities has been mounting and continued to emerge until very recently. It is right to emphasize that the defendants have not yet filed any defence but have denied any wrong-doing.

The applications

2 The defendants apply now for the action to be struck out (a) under the Civil Procedure Rules, r.3.4(2)(a) as disclosing no reasonable grounds for bringing the claim; and/or (b) under the CPR, r.3.4(2)(b) as an abuse of the process of the court. In considering the application under r.3.4(2)(a), I am bound to assume that the claimant's allegations are true, though they may later transpire not to be so. In principle, the same applies in relation to the application under r.3.4(2)(b), although clearly I must take care not to apply that approach in such a way as to defeat other legal principles designed to prevent litigation proceeding which would amount to an abuse of this court's process. Both parties have referred to and/or filed evidence. Whilst normally on applications such as these I would not consider evidence, I have, at the request of the parties, read the whole of the voluminous documentation presented to me. Particularly grave and far-reaching allegations of fraud are made by the claimant, and it has seemed to me that it was right, in such circumstances, to satisfy myself that there is at least a *prima facie* case to support those allegations before allowing the matter to proceed. Now, however, is not the time to assess the weight or precise significance of the evidence.

3 Litigation associated with this matter has taken place—and is continuing—in courts around the world, particularly in the United States. The claimant has sought and obtained orders which have resulted in discovery of apparently damning evidence against the alleged conspirators. Enforcement of the Ecuadorian judgment has not yet been achieved, though attempts to enforce it have been made in Canada and other countries, mostly in South America.

4 Given the length of the parties' submissions, the complexity of the legal and factual issues, and the obvious importance of this claim to them and to others, it may be thought that it is inherently inappropriate to decide such issues on an application to strike out the claim. Important academic, complex or test points of law should not generally be decided in a vacuum. They may sometimes be decided more appropriately as preliminary points at a later stage when the test would not simply be whether the facts alleged in the particulars of claim disclose an arguable case. Clear and practical directions will be necessary (and one hopes will be agreed) as the case proceeds in order to enable the court to deal with the real issues effectively. The parties should bear in mind the overriding objective

and strive to agree sensible and practical approaches enabling the court to deal with the matter as justly and efficiently as possible. Tactical manoeuvres on either side are likely to result in the court imposing strict timetables and directions with strict sanctions.

5 I have been asked by counsel on both sides to rule on the application on its merits, rather than simply to dismiss it as inappropriate in these circumstances. Having heard and read detailed and extremely extensive submissions on behalf of both parties, I do so. Had I intended to allow the application, I should have set out in more detail the academic arguments and my analyses of the numerous judicial and academic authorities to which I have been referred. Since I propose, however, to rule against the defendants, it would be inappropriate (though tempting) to say more than is necessary to explain my conclusion that the claimant's case is not bound to fail, is arguable, stands a reasonable prospect of success and is not an abuse of the court's process. I resist, too, the temptation to rule on the legal submissions at this stage, save in so far as is necessary to deal with this application. Final rulings on them are more appropriately made by the trial judge, in many cases following determination of the facts.

6 The particulars of claim run to 71 pages. "Skeleton" arguments total nearly 100 pages. The oral part of the submissions supplementing the skeleton arguments spanned four days, during which I was repeatedly assured that they would be completed on the fourth day. I have some 133 pages of transcript of those submissions (I pay tribute to the transcribers, who have, with very few exceptions, provided accurate and well set out and indexed transcript on the morning following each day of submissions). I accepted, with reservations, the suggestion of counsel on both sides that submissions be completed in writing. The result is that I now have a further 34 pages of the claimant's response, 46 pages of single-spaced submissions in reply, and a further 34 pages of the claimant's submissions. The bundles contain thousands of pages of documents, including pleadings, statements, and judicial and academic authorities on a wide range of legal issues. I have read them all at least once. There are 10 or so bundles of legal authorities, including one produced with the claimant's response to the defendants' reply. Given what is at stake, it is unsurprising that preparation by the legal teams on each side has been thorough and extensive.

Background

7 Whilst the story spans many decades and at a final hearing will involve considerable detail, I shall attempt to summarize the position for the purpose of this application. I refrain—deliberately—from including all of the history and details at this stage, but the chronology is of some importance.

8 Between about 1965 and 1992, Texaco Petroleum Co. ("TexPet") was engaged in a consortium, initially with Gulf Oil Corp., for the extraction of oil in the Ecuadorian Amazon in part of the Oriente region, pursuant to a concession granted by the Government of Ecuador in 1964. In 1974, "Petroecuador," by then Ecuador's state-owned oil company, joined the consortium. In 1976, it became the 62.5% majority stakeholder in the enterprise. In 1990, it assumed the operational role in place of TexPet. The concession expired in 1992, when Petroecuador acquired 100% of the consortium's fields and facilities. The scale of the operations and what was at stake is illustrated by figures suggesting that the consortium's turnover up to 1990 was over $23 bn., of which the Republic of Ecuador retained over 97% (more than 50% of Ecuador's then gross national product). The claimant has never itself conducted operations in Ecuador. It is involved because in October 2001, one of its subsidiaries merged with Texaco Inc., which was the ultimate parent company of TexPet. The legal consequences of that merger are in issue. The claimant denies that it thereby assumed the responsibilities and liabilities of TexPet.

9 In 1993, two class actions on behalf of members of the indigenous population in the Lago Agrio region of the Oriente were commenced in New York against Texaco Inc. (the "Aguinda litigation"). That litigation was based upon alleged pollution of the region, environmental damage, and damage to health, etc. In November 1996, the Aguinda litigation was dismissed upon Texaco's submission that the appropriate forum for it was Ecuador. That decision was reversed on appeal in April 1998. On further appeal, in about August 2002, the original decision was restored, subject to an undertaking from Texaco that it would submit to the jurisdiction of Ecuador, waive any limitation defence and satisfy any judgment of the court in Ecuador on the claim (subject to its rights under New York's Recognition of Foreign Country Money Judgments Act). The effect of that undertaking, its precise terms and effect, and the reservations and exceptions to which it was subject, have been the subject of considerable argument in the United States.

10 In the meantime, the Republic of Ecuador had threatened to sue TexPet for environmental damage. On May 4th, 1995, Texaco Inc., Petroecuador and the Government of Ecuador reached a settlement which involved Texaco and Petroecuador undertaking to perform "environmental remedial and mitigation" work in the region and paying some "socio-economic" compensation. In return, the Republic of Ecuador agreed that TexPet and Petroecuador would be released from all potential claims in relation to environmental impact concerning all sites outside the remedial work (and in relation to those sites within the remedial work once the work was complete). I pause: the defendants suggest that this establishes that Texaco's operations had caused environmental damage and that

therefore the Lago Agrio litigation (see below) involved genuine underlying claims. Whilst it may so suggest, I do not accept that such a conclusion necessarily follows. For present purposes, I must accept the claimant's factual case. Much will depend upon the precise terms of the settlement. Parties enter agreements and settlements for many and varied commercial and practical reasons and often without any admission of liability. For the purposes of a strike-out application, however, I do not consider that this submission takes the defendants anywhere.

11 On September 30th, 1998, the Government of Ecuador, Petroecuador, TexPet and a subsidiary entered into a final release in relation to the completed remedial works (save in relation to individual personal injury or property damage). Again, the claimant denies that the remedial works carry the necessary implication that the Lago Agrio litigation was thereby accepted by them as non-bogus. As I understand it, the claimant's case is that the whole litigation was trumped up and based on no legitimate evidence. In so far as there was ever any damage caused by TexPet, however, the claimant says that the agreement with the Government of Ecuador was binding and finally settled the claimant's liabilities relating to its drilling operations in Ecuador. The effect of the agreement and the final release are currently being considered in arbitration proceedings in the Permanent Court of Arbitration in The Hague, in which the claimant seeks a declaration that it is not liable for any damages relating to its drilling operations in Ecuador and an indemnity from the Government against any such liability.

12 There was a change of government in Ecuador. The new government, says the claimant, has acted in breach of the settlement and release agreements. In 1999, it passed legislation allowing claims to be brought by individuals in Ecuador arising from injury or damage for "violation of environmental rules."

13 One of the claimant's subsidiaries merged with Texaco in 2001. No issue has arisen before me as to whether the claimant is liable under Ecuador or US law as successors. Though I understand that it denies such liability, little emphasis has been placed on this for the purposes of this application. It has some relevance, however, particularly to issues of *res judicata*, issue estoppel and abuse of process.

14 In 2003, proceedings were commenced in the Provincial Court of Justice of Sucumbios in Lago Agrio in the names of 48 plaintiffs who were mostly (but not entirely) the same as in the Aguinda litigation. The claims were made under Ecuador's Environmental Management Act, 1999, and did not include claims for damages for personal injury or property damage. Damages were claimed based on the alleged cost of "remediating environmental damages." I pause again: the claimant says that this contrasts with the claim in the Aguinda litigation, which was

based on common law. Until the 1999 Act in Ecuador, it is said that these plaintiffs had no justiciable claim in Ecuador. The claims are therefore different. The claimant now says, therefore, that neither it nor its predecessor (assuming that TexPet is its predecessor) had submitted to the jurisdiction of the Lago Agrio court, or at least that it had not chosen that court as the appropriate forum for the litigation which was commenced there. The defendants say that the claims were effectively the same as those in New York. My initial impression is that, though they were related, the claims were different.

15 The Lago Agrio litigation progressed slowly. Prior to the judgment in Lago Agrio, the claimant applied for disclosure in relation to the plaintiffs' conduct and that of their representatives in Ecuador, and applied in the USA under 28 US Code, § 1782 in various district courts for testimony and documents for use in the foreign proceedings.

16 In 2010, the claimant sought in the Ecuadorian court rejection of an expert report referred to as "the Cabrera report," relying upon recently uncovered evidence of fraud in its preparation and to the effect that Mr. Cabrera worked directly for the plaintiffs' counsel prior to his appointment, had secretly colluded with them, and was not the report's true author. I consider this in more detail below.

17 Zambrano, J. gave judgment in Lago Agrio on February 14th, 2011, in favour of the plaintiffs in the sum of $18,156,936,000. The judgment dealt with issues including whether the claimant in these proceedings was the true successor to Texaco Inc., and arguments concerning jurisdiction. It also included rulings in relation to allegations of fraud made by the present claimant against the plaintiffs and their representatives concerning the expert evidence. It is the claimant's case that the judgment was ghost-written on behalf of the plaintiffs for Zambrano, J., who was a routinely corrupt judge and had accepted bribes from the co-conspirators, and engaged in or conspired in or knowingly accepted false expert evidence being placed before the court, and other steps being taken, amounting to a wholesale and sophisticated abuse of the legal process in Lago Agrio. It included deliberate errors inserted into the judgment by the conspirators with a view to later "clarification" purportedly being sought by the plaintiffs, thus giving credibility to the false and fraudulent judgment. The allegation now made is of judicial corruption and conspiracy of exceptional severity.

18 In February 2011, the claimant filed proceedings against some of the conspirators in New York, alleging violations of the Racketeer Influenced and Corrupt Organisations Act ("RICO"). The claimant secured a temporary restraining order and preliminary injunction restraining enforcement of the Ecuadorian judgment outside Ecuador, and an injunction restraining the conspirators from funding, commencing, prosecuting, advancing or

receiving benefit from any action or proceedings (outside Ecuador) for recognition or enforcement of the Ecuador judgment. That order was overruled on appeal, but without interference with the first instance judge's comments on the claimant's allegations of fraud. It was simply held (unsurprisingly as it seems to me) that US legislation did not give the courts there power to make such a worldwide restraining order. The time to consider the claimant's point was when, if at all, there was a final Ecuadorian judgment which the plaintiffs sought to enforce in the United States.

19 Zambrano, J. delivered his "amplification" decision on March 4th, 2011. Both sides appealed. The Lago Agrio Appeal Court (three judges) gave judgment on January 3rd, 2012. It dismissed all appeals, save that it corrected an error in relation to findings about mercury contamination. On January 13th, the Appeal Court delivered a "further clarification ruling," which, the claimant says, is riddled with serious errors and omissions. The defendants say that it is the appeal judgment which is the final, enforceable judgment, and that whatever may be said about Zambrano, J.'s judgment, the appeal decision is unimpeachable. They point out that the particulars of claim in the present case do not (at least expressly) seek to challenge the integrity of the appeal judgment. The claimant alleges, however, an extraordinary degree of corruption, unlawful interference with the judicial process, intimidation of the judiciary and others, and a plan to extort from the claimant a huge payment from which the conspirators would reap huge financial benefit. It claims that the Government of Ecuador and the judiciary as a whole are effectively parties to the conspiracy. The Government has reneged on its agreements with Texaco Inc., and has passed legislation to enable the Lago Agrio litigation to be pursued. It has publicly supported both the campaign against the claimant and the litigation itself. The judicial system is such that judges are in fear, intimidated and corrupt. The claimant says that its particulars of claim do include the appeal judgment in the framework, in that the "Lago Agrio court" is defined as including the Appeal Court. In any event, I am certain that it would be wrong to strike out the claimant's claim on a pleading point or on the basis of a failing which can be cured by amendment. It would not, however, be right to allow a collateral attack to proceed on such a basis unless there were at least a *prima facie* case to justify it.

20 On January 20th, 2012, the claimant filed a further appeal to the National Court of Justice (the "Cassation Appeal"). It appears that this may be an appeal on law only rather than a rehearing. I have no expert evidence on that issue. It remains pending, but the claimant suggests that the whole system is so flawed that no reliance could be placed on any rejection of its appeal. The trial process has been irretrievably tainted and corrupted. The effect of the claimant's allegations is that it has been a sham from start to finish, and the court and the Government have been

party to the sham. After initial preparation of this ruling, I received from the defendants in January of this year—without application for its admission in evidence—a copy of a transcript of the Cassation Appeal judgment. I directed that enquiries be made as to whether the claimant had any comments or submissions on that judgment. This resulted in correspondence in which the defendants made it clear that they were not seeking to make further submissions or to put the transcript in evidence. It was, they said, sent to me because I had enquired about it during the course of the oral part of the application. The claimant objected to my taking the transcript into account and indicated that there were other judicial developments in the United States to which they would wish to refer if the judgment were to be admitted before me. By this time, I had begun reading the transcript but had not read beyond the submissions made. Neither party has asked me to read more, and I have refrained from doing so. The upshot, however, is that the judgment against the claimant has been reduced to a total of $8,646,160,000 in damages.

21 On August 3rd, 2012, the judgment was increased to $19,014,414,529, including costs. Almost one-half of that figure consisted of punitive damages, which the claimant suggested the court has no power at all to award under Ecuadorian law. I anticipate that that is the basis for the reduction made by the Court of Cassation.

22 There are suggestions in the material that I have read that the plaintiffs in the Lago Agrio litigation may not even know what has been taking place in their names, that some of their signatures have been forged and that arrangements have been made for any moneys recovered to be paid into a fund to be operated by the conspirators and most likely for their benefit. Individual plaintiffs, it is said, will not personally receive any damages recovered. The emotive suggestion that the claimant is holding the plaintiffs out of their rightful payments is therefore said to be misguided.

23 The present proceedings were commenced on December 17th, 2012. On January 28th, 2013, the "Guerra declaration," to which I shall refer again, was filed in the RICO proceedings and on April 4th, 2013, Zambrano, J. filed his declaration (in which he denies the allegations against him) in those proceedings. The defendants attack the testimony of Guerra, J. as being the word of a self-confessed corrupt and dishonest judge who received payment from the claimant prior to making his declaration. Having read the material before me, I find for present purposes that his evidence has *prima facie* validity.

24 As the US Second Circuit court put it, the alleged plan was "wresting control of the judicial process by political pressure to obtain a judgment not based on the rule of law." The claimant had presented evidence of fraud to the Ecuador court, persuading it to purport to dismiss the Cabrera

Report's interpretations but not its data, from the final decision (see further below). The Ecuador court rejected the claimant's intimidation claim, making extensive findings of fact and detailed conclusions of law, holding that the claimant was liable for widespread environmental degradation in the Lago Agrio region. The claimant's appeals were dismissed "on the merit of the record." In a judgment of the US Court of Appeals for the Second Circuit it is recorded that "the claimant does not dispute that this statement of review is similar to the American standard of *de novo* review and is applicable to questions of fact and law," but it is said that Ecuador's highest court will only review questions of law. I could not and should not attempt to decide such issues on the present applications. I note, however, that that US court, in those US proceedings (in which the parties were different from those in this action) did not interfere with the findings of the first instance court that the claimant was likely to show that the system in Ecuador was entirely incapable of producing a judgment which the New York courts could enforce since it "no longer acts impartially, with integrity and firmness in applying the law and administration of justice" and that the system had been "plagued by corruption and political interference for decades" and that there was ample evidence of fraud in the Ecuador proceedings.

The particulars of claim

25 The defendants have concentrated, as this application requires, on the matters pleaded in the particulars of claim. As have I indicated, I would not be inclined to strike this claim out on the basis of pleading deficiencies which can be cured by amendment. The particulars of claim must, nevertheless, be the central focus for the application.

26 The claimant's primary allegation is of a conspiracy to use unlawful means to obtain a judgment against the claimant by fraud and/or to force the claimant to settle the claim in order to obtain financial benefit for the parties to the conspiracy ("unlawful means conspiracy"). The allegation is that the conspirators intended the claimant to suffer damage and that it has done so as a result of the conspiracy. At the very least, it is said, it has suffered the costs of defending the Lago Agrio litigation, the Aguinda litigation, and of the extraordinarily extensive RICO and other proceedings in the United States, of the arbitration proceedings, of attempting to defend itself against the conspirators' prolonged and intensive media campaign and attempts to use persons in high places to exert pressure on Chevron, its successful attempt to influence adversely institutional and other investors in the claimant and its shareholders and directors, so affecting its share price and reputation, all with the aim of bringing pressure on the claimant to capitulate and pay up in order to avoid further incessant and damaging publicity, the risk of a judgment being given and enforced against it and the costs of resisting attempts to enforce it. The

campaign included arranging public demonstrations outside the court in Lago Agrio, causing false propaganda to be broadcast widely around the world and promoting a film, *Crude*, in which a false and defamatory case is made against the claimant, bribery and blackmail of the judiciary, bringing pressure on federal and state officials, *etc*. The mastermind of the campaign, both in relation to the litigation and the other methods of bringing pressure upon the claimant, is said to have been a New York attorney named Donziger. The claimant's case is that his motivation throughout has been to secure a huge payment from the claimant—from which he would achieve huge rewards—by almost any means, including conspiracy to pervert the course of justice, malicious prosecution, perjury, intimidation, corruption, deceit, defamation, forgery, fabrication of evidence and abuse of the court's process. The defendants are said to have been knowingly involved and joint participants, and to continue to be so involved. It is not necessary in this ruling to set out all the details, but their involvement is claimed to go beyond financing the litigation and to include financing of the media campaign and *Crude*, and giving advice and active assistance. The lead Ecuadorian attorney for the plaintiffs was a Sr. Fajardo, who is said to have acted under Donziger's direction. Other alleged conspirators include "Stratus Consulting" (a Colorado incorporated body providing environmental consulting services, who were the predominant lead scientific advisers for the plaintiffs), the plaintiffs themselves (though the claimant seems to suggest that the plaintiffs may have been mere pawns and nominees who have themselves played little part in the conspiracies, if any, and who personally stand to gain nothing from them and that some of them are not even genuine parties to the Lago Agrio litigation, their signatures to the claim having been forged), Mr. Cabrera (purportedly appointed by the Lago Agrio court as its own independent expert during the litigation), and Rainforest Action Network (a non-profit organisation engaging in campaigns including campaigns against those associated with oil production in the Oriente region of Ecuador in the 1960s and 1990s). Other alleged conspirators are named in the particulars of claim. During the course of submissions, it was made clear that the claimant includes the judiciary and the Government of Ecuador as alleged conspirators. If that is not a proper interpretation of the particulars of claim, it is a defect curable by amendment. The suggestion could hardly have come as a surprise to the defendants.

27 It is significant to note that no operations have been carried out by the claimant or, during the last 20 or so years, by Texaco or TexPet. The Government of Ecuador has continued during that period to be engaged in oil operations, through Petroecuador. That Government is said to have been recruited into the campaign and conspiracy against the claimant with agreements that no action would be taken against Petroecuador and that the Government would share handsomely in the proceeds of the campaign. The claimant alleges that Petroecuador is responsible for large-scale

contamination and pollution during the years since TexPet ceased its operations in Ecuador.

28 During the litigation in Ecuador, the court made orders relating to expert evidence concerning environmental damage alleged to have been caused by the consortium's operations. In 2003, it ordered each party to nominate experts ("judicial inspection experts"), who were then appointed by the court to report on conditions at certain sites (the "judicial inspection process"). It then appointed a third set of "independent" court "settling experts" to resolve differences between the party nominated experts. In January 2007, the plaintiffs persuaded the court to substitute a different process (the "global assessment") whereby a single court expert was appointed to report on conditions at various sites. In August 2010, again at the plaintiffs' request, the court ordered that the parties file "supplementary expert reports," ostensibly to assist in the process of assessing the global damages. In short, the claimant's case is that the conspirators had full control over the court and the processes and the court took improper steps and made unlawful orders because it was involved in the conspiracy and/or because the judges were subjected to intimidation, bribery and other pressures from other conspirators, including the Government.

29 One of the plaintiffs' judicial experts was Dr. Calmbacher. Reports bearing his signature were filed in February and March 2005, relating to two sites previously operated by the consortium. The conspirators are said to have falsely represented to the claimant and to the court that the reports were genuine (it is not clear to me whether it is said that the judge was aware of this or whether the claimant is at this stage unable to say whether he was). The report suggested that the sites were contaminated by "highly toxic chemicals" and that the remedial work carried out by TexPet had been inadequate or insufficient. It is now said the Calmbacher reports were false, and that not only were the conspirators aware that as presented they did not reflect his opinions (and indeed were contrary to his opinions), but they had by trickery persuaded him to sign pages which enabled them so to present the reports.

30 The "single court expert" appointed in March 2007 for the global assessment was Mr. Cabrera. His report ("the Cabrera report") suggested that the claimant was liable for damages quantified at about $16 bn., including $8.3 bn. for unjust enrichment. The claimant says, effectively, that he was an inadequately qualified and corrupt individual, appointed (as the corrupt Zambrano, J. was aware) as part of the conspiracy, as the conspirators' puppet, to present false evidence, in their pay and acting upon their instructions from the start, purporting to rely upon analyses which were false and statistics and material produced by other conspirators; he signed a report which was not his work and referred to bogus "annexes" produced by other conspirators.

31 In September 2008, the plaintiffs submitted questions and comments purporting to ask Mr. Cabrera to consider other documents, and suggesting that he had been too lenient to the claimant. This too was part of the alleged plot, and had been planned in order to give credibility to his ostensible independence as a neutral court-appointed expert. In his supplemental report, he duly increased his figure to $27 bn.

32 In December 2008, Stratus (again corruptly and knowingly falsely and acting on the direction mostly of Mr. Donziger) produced a document supporting Mr. Cabrera's reports, approach and conclusions as sound, reasonable and "consistent with approaches used in other environmental damage cases around the world." The truth, it is alleged, was that Stratus had secretly drafted the Cabrera report itself and was aware that it could not be justified by the evidence which it had seen.

33 The plaintiffs filed seven new supplemental expert reports in September 2010, purportedly to aid the court in assessing damages and each dealing with a specific part of the Cabrera report. The plaintiffs increased the claim to $113 bn. The claimant's case is that these reports, too, are misleading and largely based upon material in the Cabrera report itself and its appendices.

34 Steps have been taken by the alleged conspirators (so far unsuccessfully) to enforce the eventual judgment of $19 bn. in various jurisdictions around the world.

35 The defendants are also said to have provided funding for *Crude*, and from 2006 for the litigation, all in order to bring pressure upon the claimant to make a large payment. The first defendant is claimed to have provided strategic advice in relation to public relations and settlement strategies. Further details of the allegations and some of the evidence relied upon are set out in the particulars of claim. They include suggestions from the first defendant that pressure be put on a former US senator, who was a member of the claimant's board, by threats of adverse publicity (including false television and internet coverage and the film *Crude*), that the former senator might be "financially incentivized" and that a proposed documentary be "cannibalized." The first defendant was willing to use his contacts to assist in "promoting" a settlement. I need not set out the remaining allegations in full, but in summary, the claimant's case is that the first defendant was fully and intimately involved in the global campaign against the claimant. During 2009, he became more involved. As his contributions increased, his potential personal return was increased by agreement. In July 2009, he agreed to provide funding for Rainforest Action Network's campaign against the claimant. In October 2010, funding began to be provided by the second defendant company. The agreement with that company was to supersede all previous agreements with the first defendant, and provided for increased returns for them from

the litigation. In May 2011, further funding and a yet further increase in potential returns were agreed.

36 In short, the claimant avers that the Ecuador litigation and other parts of the campaign were prosecuted pursuant to a conspiracy, the predominant aim of which has been to injure the claimant, thereby procuring unjustified financial benefit for the conspirators, who have all acted for their own personal benefit. The claimant pleads that there many instances of fraud underlying the Lago Agrio judgment, but particularizes at this stage principal (though not exclusive) examples to which the defendants are alleged to have been parties.

37 The particulars of claim then set out further details of the alleged conspiracy, which I summarize:

The "expert" evidence

38 The claimant pleads a series of covert steps (which I have partly dealt with above) to "subvert" the expert evidence and to ensure that truly independent or accurate expert evidence was not given to or relied upon by the courts in Ecuador:

(i) In addition to concocting their own false version of reports ostensibly prepared by Dr. Calmbacher, they then overtyped their reports on to paper signed by Dr. Calmbacher and/or forged his signature on the reports and presented them to the court. This was all done because Dr. Calmbacher had refused to produce reports in accordance with Mr. Donziger's wishes (or edited by him or others) and had threatened to produce his own reports to the court despite Mr. Donziger purporting to dismiss him. He neither wrote nor authorized the reports produced to the court. Indeed, his findings did not support the plaintiffs' case at all. When he was served with a subpoena in subsequent discovery proceedings, Mr. Donziger tried to coerce him into not testifying by threatening him with legal and professional consequences if he did.

(ii) The conspirators procured Mr. Cabrera's appointment as single "independent" court expert (and the cancellation of the "judicial inspection process") by threat of corruption allegations against the judge. Mr. Donziger and other conspirators met Mr. Cabrera, and lined him up before his appointment, planning the conspirators' control and preparation of this report. The defendants provided additional funding shortly thereafter. A work plan submitted to the court by Mr. Cabrera was drafted by the conspirators, using their own team, including Stratus employees. He falsely claimed that he had acted impartially and independently at all times and denied any relationship or agreements with or assistance from the plaintiffs. In fact he was bribed by the conspirators. Their written questions and critical comments on his report were a ruse to give him credibility and the conspirators' answers were drafted by the conspirators'

team. The Stratus report, which formed the basis of most of the Cabrera report, was dishonest and false.

(iii) Supplemental reports, filed in September 2010 for the plaintiffs pursuant to permission which the conspirators had corruptly obtained from the court, were filed because by then the claimant had exposed the fraud in relation to the Cabrera report, and in order to "cleanse" or "cure" it. The plaintiffs' new experts were supplied with copies of the Cabrera report and data, but performed no independent analysis of the report or data. They were unaware that the Cabrera report had been written by Stratus, they gathered no further data and never visited the Lago Agrio area. A report on "cultural damage" was submitted anonymously, having been written at least in part by one of the plaintiffs' Ecuadorian lawyers. Mr. Donziger and the named experts have since sworn depositions in November and December 2010 confirming that they did no site inspection, or sampling, or environmental testing, and made no effort to verify the underlying data supplied to them. Their depositions indicate that they in fact could not support the plaintiffs' case and that parts of some of the reports were drafted by or on behalf of the conspirators. The reports nevertheless increased the claim by about $86 bn. from Mr. Cabrera's already increased figure. The defendants provided substantial funding for those supplemental reports, knowing that it would be so used.

Corruption of the judiciary in Ecuador

39 (i) I bear in mind that the claimant's primary case includes the trial judges as conspirators. It is nevertheless alleged that "the court" was deceived and that judgment could not have been given, even with corruption of the judges, without the false evidence to back it up. The claimant includes the appeal judges in the frame of conspirators (or at least suggests that the whole of the judicial process involved in the case in Ecuador hitherto is tainted and unreliable). In so far as such suggestions are not expressly pleaded, they were made clear during submissions.

(ii) The conspirators persuaded Yanez, J. to terminate the judicial inspection process, to substitute for it the global assessment process and to appoint Mr. Cabrera as single expert. They secured this through numerous covert meetings with him and threatening to make a complaint against him if he did not co-operate.

(iii) They then ghost-wrote the judgment of Zambrano, J., which was not his work at all. He accepted substantial bribes in order to find in favour of the plaintiffs. Guerra, J. also accepted bribes to work on the judgment in order to present it in a form which better reflected the style of Zambrano, J.

Other conduct designed to coerce the claimant into settling the Ecuador litigation

40 (i) The conspirators brought pressure on the claimant to settle the litigation by launching false and unfounded public attacks on its conduct in order to damage its reputation. The first defendant is said to have been heavily involved in this campaign. Again, the claimant pleads—at this stage—examples, which it says are not exclusive.

(ii) The core of the public attacks was that the claimant is responsible for environmental damage to the Oriente region, and that the Lago Agrio court's findings are legitimate and based on independent evidence.

(iii) The conspirators have repeatedly claimed that the Cabrera report is independent, and that the claimant's suggestion that he was co-operating with the plaintiffs was false. They have done so outside the ambit of the litigation itself. They described the Stratus report as independent and confirming the claimant's liability. They have created and/or supported numerous websites attacking the claimant in relation to the Ecuador litigation, and have arranged public demonstrations against the claimant, disrupted shareholders' meetings, and planned personal attacks on its directors. They procured, funded and were involved in the production (including editing) and distribution of *Crude*, which presents a false and damaging picture of the claimant and falsely purports to be independent. They conspired to keep their involvement secret, knowing that if the truth were known "the entire case will simply fall apart on us."

Other alleged fraudulent behaviour in pursuit of the conspiracy

41 (i) Several conspirators are alleged to have made knowingly false and misleading statements to US Federal and State Government officials, largely relating to the independence and genuineness of the Cabrera report. They have sought to manipulate and depress the claimant's stock price, targeting shareholders, potential investors and stock analysts with false statements of a similar kind. They have misled and lied to various US courts in proceedings brought by the claimant to obtain disclosure.

(ii) The particulars of claim set out at some length the chain of the claimant's discovery of the alleged conspiracy. Having uncovered some evidence of Mr. Cabrera's collusion with the conspirators, the claimant sought discovery in several US states pursuant to 28 US Code, § 1782, which authorizes district courts to order persons residing or found in their districts to give testimony or statements or produce documents "or other things" for use in a proceeding in a foreign or international tribunal. The conspirators, it is said, have resisted and sought to delay such proceedings, particularly until after judgment in Ecuador, and have given false testimony to the US courts. At least six US courts have made *prima facie* findings of fraud against the conspirators. Uncovered and unused footage

for *Crude* shows the conspirators' involvement in fraudulent conduct of the Ecuador litigation, Mr. Donziger's plan to intimidate and corrupt the judiciary, the pre-court appointment meetings with Mr. Cabrera and the plan for drafting of his report, Mr. Donziger's conduct of the proceedings and causing the film to be edited, and the Colorado meeting with Stratus to discuss the Cabrera report.

(iii) It is claimed that the first defendant knew, at the latest by about July 2007, of the conspirators' fraudulent conduct. If not, he was recklessly indifferent to such frauds or turned a blind eye to them, thereby becoming a conspirator himself. Further, he had actual knowledge of allegations of fraud made by the claimant against Mr. Donziger and other conspirators, in some detail, with *prima facie* evidence thereof. Details supporting the first defendant's knowledge and participation (so far as they are known to the claimant, before the filing of any defence and prior to disclosure and inspection of documents) are pleaded. Suffice it to say that on the face of it, and without seeing or hearing any defence, they do support the conclusion that he, and through him the second defendant, were conspirators and fully involved in the conspiracy, continuing to fund it well after they were aware of the fraudulent activities. Indeed, it is alleged that the stronger the case of fraud became, the more involved the defendants became. In October 2010, after four US courts had made *prima facie* findings of fraud against the conspirators, the second defendant entered into a funding agreement to invest in the Ecuadorian litigation. In May 2011, following the injunction granted in the RICO proceedings, it entered into a further substantial funding agreement in return for an additional stake in moneys recovered in the Ecuadorian litigation. It is true that some of the material pleaded may indicate that the defendants were not at earlier stages entirely aware of the whole of the fraudulent conduct but that must be a matter of evidence and for pleading in the defence.

The legal issues

42 It is against the above background that the claimant now claims damages against the defendants. The primary cause of action alleged is conspiracy to injure the claimant by unlawful means ("unlawful means conspiracy"). In so far as the conspirators' acts may not have been inherently unlawful, the claimant alleges the tort of conspiracy to injure ("lawful means conspiracy"). Finally, the claimant alleges unlawful interference with economic interests. Confusion arises in the reported authorities and academic texts from the use of varying terminology and semantics relating to these three torts. At this preliminary stage of the case, I shall set out my reasoning as simply as possible. During the course of submissions, Mr. Corbett raised the additional possible cause of inducing breach of contract (in particular he referred to the inducement of the Government of

Ecuador to breach the 1995 and 1998 settlement and final release agreements).

Damage to the claimant

43 The defendants allege that the claimant has not sufficiently pleaded any actionable loss arising out of the alleged torts, each of which requires damage to be suffered by the claimant. The Lago Agrio judgment has not been enforced. The Cassation appeal has not been exhausted (since initial preparation of this judgment, it now has, see above). There is no action for defamation. I confess that I find this suggestion without merit. I conclude that it is clearly arguable that the claimant has suffered substantial relevant loss as a result of the alleged conduct of the defendants. Whether that conduct is otherwise actionable involves separate issues. The claimant claims to have suffered loss in terms of the costs of defending the Aguinda and Lago Agrio litigation, and of the US investigations and proceedings for discovery, the costs of countering the allegedly false and unlawful media campaign and other conduct which I have summarized, the damage to the claimant's reputation and the cost of taking steps to protect it, the financial cost of the enormous time and effort which the claimant's officers and employees have had to expend on dealing with the alleged conduct, the disruption to shareholders' meetings, attempts to manipulate the claimant's share price, defending attempts to enforce the judgment, *etc*. I find it unsurprising that the claimant is not yet able to particularize and quantify that loss fully. Whilst it will have to set out its case fully in due course, it cannot be said that the claim should be dismissed now on the basis that no causative and recoverable loss has been pleaded. Damages in this type of claim are at large. It is no answer that it will be very difficult to quantify such loss. That is a problem with which courts deal frequently. It will depend on the evidence. The defendants may well challenge some of the heads of loss at trial, on factual or legal grounds, but that will depend upon the evidence and the legal arguments put forward at that time. It has been said before that a well-run smear campaign can have a profound and long-lasting effect upon an organisation.

Abuse of process

44 In so far as the defendants' abuse of process submission is founded on their suggestion that the particulars of claim disclose no reasonable grounds for bringing the claim, it adds nothing to the application under the CPR, Part 3.4(2)(a). This includes the defendants' submissions that the claimant has not pleaded specifically any loss or damage and that the conduct alleged by the claimant is covered by absolute witness or legal proceedings immunity. The two main additional limbs of the abuse of process argument, however, relate to the defendants' claim that the

claimant is, in these proceedings, attempting to mount an impermissible collateral attack upon the decisions of courts of competent jurisdiction in Ecuador, and to re-litigate issues which have been properly and finally determined in the courts of Ecuador. The defendants concede that the claimant's allegations can be raised in any jurisdiction where enforcement of the judgment is attempted.

45 They suggest that the claimant's allegations of fraud relate to the first instance proceedings, and that there is no express attack upon the integrity of the Provincial Court of Sucumbios, which heard and rejected the claimant's appeal, and purported to have reconsidered the evidence and law and to have concluded that the first instance decision was sound in fact and in law. Nor is any attack upon the Court of Cassation pleaded.

46 Mr. Corbett, for the claimant, submits that—

(i) fraud on the part of the Ecuador judiciary "unravels everything," according to Lord Denning in *Lazarus Estates Ltd.* v. *Beasley* (17), in which it was held that a judgment obtained by fraud was void ([1956] 1 Q.B. at 712):

> "No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever."

(ii) the parties in Ecuador were different;

(iii) the issues now raised were not finally determined; and

(iv) in any event, *res judicata* or issue estoppel does not apply to a foreign judgment, or at least this foreign judgment.

47 I accept the following propositions:

(i) At least in domestic cases, the starting point is that the appropriate method of correcting a decision of a competent court of justice reached after a contested hearing is by appeal to a superior court (see *Saif Ali* v. *Sydney Mitchell & Co.* (24)).

(ii) Proceedings in a court for the purpose of mounting a collateral attack upon a final decision of another court of competent jurisdiction against the intending claimant generally will amount to an abuse of process, and should be struck out if the claimant had full opportunity of contesting the decision in that other court (see *Hunter* v. *Chief Const. (W. Midlands Police)* (13)).

(iii) The fact that fraud is alleged does not in itself prevent striking out on the ground of abuse of process, if the same allegation of fraud was

considered and ruled upon in the first court (see *Owens Bank Ltd.* v. *Etoile Comm. SA* (21)).

(iv) The general rule may not apply where there is credible (though not necessarily decisive) fresh evidence of fraud not available to the claimant at the time of the previous judgment, and which could not reasonably have been available to the claimant. Where a collateral attack is mounted upon a previous final decision however, the test for admission of fresh evidence is more stringent than the well-known *Ladd* v. *Marshall* (15) test for admission of fresh evidence on appeal (that it would probably have an important effect on the result). It must be such that it "entirely changes the aspect of the case." To my mind, that is a less clear or easily applied test, but the bar is clearly intended to be set somewhat higher. In many cases, the fact that the evidence would probably have an important effect on the result will itself entirely change the aspect of the case but each case will depend upon its own facts and circumstances.

(v) The failure to apply the *Hunter* principles to previous foreign decisions has been the subject of criticism in more recent times (for example, *obiter* in *House of Spring Gardens Ltd.* v. *Waite (No. 2)* (12)).

48 I reject the defendants' submission that it can be said, at this stage, that this claim clearly constitutes an impermissible collateral attack, or that the issues raised in the claim are covered by the doctrine of *res judicata*, for the following reasons:

(i) It is not clear to me, without further evidence, that the Provincial Court of Sucumbios did purport to decide finally the issues now raised by the claimant. Clearly it purported to decide the issues of the claimant's liability in relation to the relevant oil extraction works and the facts necessary to establish quantum of damages. As to the claimant's allegations of fraud (which the defendants claim were fully considered at first instance and on appeal), however, I am not convinced that it did. It said specifically that it stayed out of the accusations of fraud, preserving the parties' rights to present a formal complaint to the Ecuador criminal authorities or to continue the actions that had been filed in the United States.

(ii) The authorities to which I have been referred do not support the proposition that I am bound to apply the above principles where there is a collateral attack upon a foreign judgment. The starting point is the simple rule established in *Abouloff* v. *Oppenheimer &* Co. (2) that a collateral attack upon a foreign judgment may be mounted in England and Wales. There has been judicial criticism of the failure to apply the same principles to foreign judgments as govern domestic judgments, but in no case has it been held that they must always be applied in the same way to those judgments.

(iii) In *Vadala* v. *Lawes* (30), it was held that if a fraud on a foreign court consists in the fact that the claimant has induced that court by fraud to come to a wrong conclusion, the whole case can be reopened, even though it will be necessary to go into the very facts investigated and in issue in the foreign court. Fresh evidence is not necessary to mount an attack on a foreign judgment (see *Abouloff* v. *Oppenheimer & Co.*). It is sufficient to show that there is a triable issue of fraud.

(iv) In *Owens Bank Ltd.* v. *Etoile Comm. SA* (21), the bank alleged that a guarantee of debts had been obtained by concealing the debtor's financial position. That claim was rejected by the Commercial Court of Paris at first instance and on appeal. Subsequent proceedings in St. Vincent and the Grenadines, in which the bank claimed damages for fraud on the basis that a forged guarantee had been produced to the French court, were struck out as an abuse of process. In yet further proceedings, the Privy Council upheld the decision of St. Vincent and the Grenadines Court of Appeal overturning an order for production of the original guarantee on the same or a similar basis as had been alleged in the French proceedings. In that case, however, there was no plausible evidence disclosing at least a *prima facie* case of fraud. Lord Templeman found that there was no *bona fides* in the bank's fraud allegation. Fraud does, however, defeat *res judicata* where there is *bona fides* in the fraud allegation. I am satisfied that in the present case there is plausible evidence disclosing such a *prima facie* case and in such a case I do not accept that the matter should be struck out. It is not possible to determine that issue at this stage. Lord Templeman also considered the principle that an English judgment is impeachable on the ground that it was obtained by fraud only if the evidence of the fraud was not available to the victim at the time of the trial and was not reasonably discoverable before the trial. He found, however, that where a judgment is obtained by fraud of a party to a suit in a foreign country, he cannot prevent the question of fraud from being litigated in the courts of England when he seeks to enforce the judgment so obtained. Otherwise ([1995] 1 W.L.R. at 48), "we should have to disregard . . . that no man shall take advantage of his own wrong." The Privy Council dealt with the matter on the basis of abuse of process in that there was no apparent basis for the allegation of fraud. It was not, therefore, necessary to consider previous criticisms of *Abouloff* v. *Oppenheimer & Co.* (2).

(v) The rule in *Abouloff* v. *Oppenheimer & Co.* was criticized *obiter* in *House of Spring Gardens* v. *Waite (No. 2)* and in *Owens Bank Ltd.* v. *Bracco* (20). Lord Bridge of Harwich said that there *might* be a very strong case in the 1990s in favour of according the same finality to overseas judgments as to English ones but the House of Lords declined to overrule *Abouloff*. In the *Bracco* case, *Abouloff* was distinguished on the basis that the issue of fraud had been decided in a second and separate

action in Ireland but the court declined to overrule the rule in *Abouloff*. I accept that the rule is not regarded with enthusiasm, especially when applied to countries whose judgments the UK has agreed to register and enforce. It nevertheless remains.

(vi) In *Owens Bank Ltd.* v. *Etoile Comm. SA*, the Privy Council distinguished *Owens Bank Ltd.* v. *Bracco* because (a) in *Bracco* there was an issue estoppel, so that the issue of fraud could not be raised again (see *House of Spring Gardens* v. *Waite (No. 2)*), and (b) in *Etoile* there was no reciprocal arrangement between France and St. Vincent and the Grenadines. Further arguments concerning *Abouloff* v. *Oppenheimer & Co.* were left open. Lord Templeman made it clear that no strict rule can be laid down; in every case the court must decide whether justice requires the further investigation of an alleged fraud, or require that the claimant, having obtained a foreign judgment, shall no longer be frustrated in enforcing that judgment. In *Etoile*, the defence of fraud was struck out as an abuse because (a) the bank should have been alive to the alleged fraud as soon as *Etoile* demanded payment under the guarantee—they did not then complain about the authenticity or contents of the guarantee; (b) the fraud allegations made by the bank from time to time after the Paris judgment "have never been consistent or easy to follow;" and (c) the allegations were investigated and rejected by the French appeal court in a comprehensive judgment after a comprehensive hearing. The *ratio decidendi* of *Etoile* is that there was no plausible evidence to establish even a *prima facie* case of fraud. In the present case, I know insufficient of the appeal proceedings in Ecuador at this stage, but note that the court appears specifically to have declined to make any detailed findings on that issue, and expressly stated that it remained open to Chevron to make such allegations in the courts of other countries. If the Appeal Court in Ecuador had before it anything like the evidence which has been put before me, it is indeed surprising on the face of it that at the least a rehearing was not ordered.

(vii) I therefore conclude that in the case of foreign judgments, each case must depend on its own facts. In this case, it would, in my opinion, be contrary to justice and to authority to strike out the claimant's case as an abuse of the process on this ground and there is no reason to distinguish *Abouloff* v. *Oppenheimer & Co.*

(viii) The defendants rely also on *Hunter* v. *Chief Const. (W. Midlands Police)* (13). But that was a domestic case. On its facts, the decision is unsurprising. The issue raised in civil proceedings had been decided against the plaintiff in a criminal trial by the judge and a jury. The evidence relied upon to support the allegation of fraud had been available to the plaintiff at the time of the criminal trial (in this case fresh evidence has emerged). The appropriate course for him to take if he wished to pursue the allegation was to appeal the judge's decision and/or the jury's

verdict. Further, it was relevant that the action was predominantly for purposes other than the obtaining of damages (*i.e*. to procure his release from prison). *Hunter* is not authority for a general proposition that re-litigation or a collateral attack can amount to abuse. It was recognized that there might not be abuse if the fresh evidence ([1980] Q.B. at 347) "entirely changes the aspect of the case" and "could not have been obtained by reasonable diligence." It was important to consider (i) the nature and extent of the earlier judgment; (ii) the nature and basis of the claim in the later proceedings; and (iii) the grounds relied upon for the attack. There is nothing in *Hunter* which undermines the rule in *Abouloff* v. *Oppenheimer & Co*. (2).

(ix) Nor is it clear to me at this stage that the claimant had a full opportunity of contesting the decisions in Ecuador. Chevron was represented and did make submissions. But it is difficult to envisage how it could properly and fairly have contested the proceedings if its allegations of wholesale corruption of the judiciary and Government are true. Certainly that applies to the trial at first instance. Was it cured by the appeals? I should need to hear much more evidence and argument before concluding that it was in the circumstances of this case.

(x) Though it is unnecessary for me to decide at this stage, I reject the defendants' submission that the claimant would not even satisfy the test for reopening the issue of fraud even if the judgment had been that of an English court. I have read in particular the "Guerra declaration," and make observations about it later. In my judgment, the fresh evidence in this case must be considered in the context of the whole of the evidence at a hearing. It would not be right now to rule that the claimant would not satisfy the stringent test for admitting fresh evidence. In para. 22 of the defendants' skeleton argument, developed in oral submissions, they set out the evidence of fraud which was known to the claimant before delivery of the Lago Agrio judgment, and which was raised in the Lago Agrio litigation. Even if it was fully considered by the courts in Ecuador, any decision would be tainted by the trial judge's own involvement in the conspiracy. The decision of the appeal court seems at the least surprising. The courts also appear to have deliberately avoided making final decisions on the claimant's allegations. If the claimant's case is correct, it is difficult to see how it could have had a fair trial in such circumstances but it would be wrong to make any final decision on that issue at this early stage. It would be difficult to have confidence in an appeal court which made the findings which it did, and upheld the first instance decision, if the claimant's allegations are correct.

(xi) As Lord Diplock found in *Hunter* v. *Chief Const. (W. Midlands Police)* (13), the circumstances of abuse of process are very varied. The purpose is to prevent misuse of procedure in a way which, though not inconsistent with a literal application of its procedural rules, would be

manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. That decision does not assist the defendants in this case. It is an unsurprising decision that it was not open to convicted defendants in a criminal case to sue in respect of alleged assaults by the police leading to false confessions and their conviction, in circumstances in which the trial judge had ruled against them on the same issue in the criminal trial and they had not raised it again in front of the jury or on appeal against conviction. It was clear that their dominant purpose was not recovery of damages but to secure a finding which would put pressure on the Home Secretary to authorise their release. The court emphasized that it should be slow to strike out a claim but I do accept that if the Lago Agrio judgment had been an English judgment, the defendants' abuse of process argument might have have considerable strength in the absence of fresh evidence since the judgment which may entirely change the aspect of the case.

(xii) In *AK Inv. CJSC* v. *Kyrgyz Mobil Tel Ltd.* (1), Lord Collins discussed the rule in *Abouloff* v. *Oppenheimer & Co.* (2), and said ([2012] 1 W.L.R. 1804, at para. 116) that "even if the rule in *Abouloff* v. *Oppenheimer & Co.* were no longer to represent the law, simply to apply the English rules to foreign judgments might lead to real injustice," and that (*ibid.*)—

> "extremely important issues of policy would be involved in a decision whether to change a rule which has stood for almost 120 years. In particular . . . a nuanced approach might be required depending on the reliability of the foreign legal system, the scope for challenge in the foreign court and the type of fraud alleged."

(xiii) The Gibraltar decision of *Calyon* v. *Michailidis* (5) is of limited assistance but it did confirm that in cases where the parties are different from those in the original action there is a heavy burden of proof to show that it would be manifestly unfair and bring the administration of justice into disrepute if the issue were to be re-litigated. It is an exacting test. The Privy Council held that there could be no *res judicata* because the relevant party had not even had notice of the original Greek proceedings and the relevant issue had not been fully considered in those proceedings. There could be no abuse of process since the defendant could produce no evidence to support its case. It seems to me that it is hardly likely to bring the administration of justice into disrepute to allow issues to be tried which the courts in Ecuador appear to have accepted could be litigated elsewhere. Closer examination may reveal that those courts did not intend to suggest that its underlying findings should be open to challenge but now is not the stage at which to consider such submissions. Reference was made to the rule in *Hollington* v. *F. Hewthorn & Co. Ltd.* (11) that a criminal court's judgment and findings are not evidence of the matters in issue in a subsequent action. That rule was abrogated by s.11 of the Civil

Evidence Act 1968, but it is notable that the section only applies in relation to any court in the United Kingdom or a court martial.

(xiv) In their reply, the defendants refer to *Anderson* v. *Gorrie* (3) in which the defendants were judges of the then colony of Trinidad and were sued in England. The immunity was held to apply. The Governor of a colony was entitled to direct the removal of a judge for gross dereliction of duty, representing the Sovereign. Above the Governor was the Secretary of State for the Colonies. Thus, there was a real sanction against corrupt judges. I am not at all persuaded that this decision can or should be extended to apply to all foreign judgments.

(xv) The claimant has lodged a further appeal to the Court of Cassation in Ecuador. I was initially concerned by this fact, but on further consideration, I do not believe that it affects the current applications. If the claimant's final appeal were successful, clearly this might affect the damages which they may be able to claim against the defendants (the Court of Cassation has now ruled, as I have mentioned above). In any event, those damages would be affected by failure to secure enforcement of the Ecuador judgment. As I have indicated, however, the damages claimed are not limited to the judgment itself and the scope of the conspiracy is significantly wider than the litigation alone. The claimant points out that even in domestic law cases there appears to be no case indicating that it is necessary to exhaust local remedies.

(xvi) I am not impressed with the defendants' submissions that the court at first instance disregarded the Calmbacher and Cabrera reports. If the claimant is correct, that court or judge was party to the conspiracy or had acted under the influence of intimidation or bribery. The logic of the claimant's case is that the judgment was pre-determined. If the fraud had not been discovered by the claimant, the court would no doubt have purported to rely upon the Calmbacher reports, whether or not it fully knew the extent of their falsity. The same applies in relation to the Cabrera report and its appendices. It cannot be said with confidence at this stage that the Lago Agrio judgment was not obtained by any of the frauds alleged by the claimant.

(xvii) For the sake of completeness, I mention that I am not convinced that the Lago Agrio litigation is the same as the Aguinda litigation. The former is litigation under Ecuador's subsequent Environmental Management Act. It appears to be very different from the Aguinda litigation and that it could not have been brought when the Aguinda litigation was commenced.

(xviii) Nor can I find at this stage that the claimant submitted to the jurisdiction of the Lago Agrio court or that it was or is bound by the undertakings given to the Second Circuit Court of Appeals in New York in relation to jurisdiction. This is a matter for determination at a later

stage, if at all. In any event, Texaco's undertakings were subject to relevant express reservation of rights to challenge any judgment in Lago Agrio (not necessarily in Ecuador—that would hardly need to be reserved) on the grounds that the Ecuadorian judicial system does not provide impartial tribunals or procedures compatible with the requirements of due process of law or that the judgment was obtained otherwise than by law or contrary to an agreement between the parties.

(xix) I deal with the defendants' submissions based upon immunity below.

(xx) I do not accept for present purposes the defendants' submission that *Abouloff* v. *Oppenheimer & Co.* (2) applies only to *res judicata* and issue estoppel and not to abuse of process. In *House of Spring Gardens Ltd.* v. *Waite (No. 2)* (12), *Abouloff* was distinguished on the basis that the same allegations had been considered in a second, 22-day trial in the High Court in Ireland. There is no equivalent feature of the present case which persuades me that it should be struck out. The question was whether it was in the interests of justice and public policy to allow the issue of fraud to be litigated again in the English court. There has been no separate action in Ecuador in this case. Nor am I satisfied that the same allegations were extensively dealt with or investigated in Ecuador; nor that they were clearly decided against the claimant, with the claimant having full and proper opportunity to call and put its case. Unlike the position in *House of Spring Gardens Ltd.* v. *Waite (No. 2)*, the defendants concede that the claimant's allegation can be raised in enforcement proceedings. There seems to me to be a *prima facie* case of fraud. I do not accept that *House of Spring Gardens Ltd.* v. *Waite (No. 2)* is authority for a general rule that an attack on a foreign judgment is objectionable *per se* as a collateral attack and is therefore an abuse.

(xxi) Furthermore, the above arguments do not apply in relation to the claimant's allegations outside the arena of the litigation itself. They certainly seem not to have been decided by the courts in Ecuador.

(xxii) If the claimant's allegations are accepted, there is credible fresh evidence which arguably might fundamentally change the nature of the case in Ecuador.

(xxiii) The Cassation appeal is not alleged by the defendants to be a merits-based appeal. Any argument based upon the result of that appeal, says the claimant, is tainted by the above-mentioned facts and does not bind this court. It should not, at least without further evidence and argument about the nature, circumstances and effect of that decision, prevent the claimant's case against the defendants from proceeding.

The defendant's application under the CPR, r.3.4(2)(a)

49 The primary cause of action alleged is conspiracy to injure the claimant by unlawful means (unlawful means conspiracy). In so far as the conspirators' acts may not have been inherently unlawful, the claimant alleges the tort of conspiracy to injure (lawful means conspiracy). Thirdly, the claimant alleges unlawful interference with economic interests. During the course of submissions, Mr. Corbett, for the claimant, also mentioned inducement of breach of contract as a possible cause (the *Anderson* v. *Gorrie* (3) tort.) The academic texts and reported authorities to which I have been referred reveal a history of some confusion arising from varying terminology relating to these torts. As Lord Nicholls observed in *OBG Ltd.* v. *Allan* (19) ([2008] 1 A.C. 1, at para. 139)—

> "These are much vexed subjects . . . There are many areas of uncertainty. Judicial observations are not always consistent, and academic consensus is notably absent . . . the law is in a 'terrible mess'."

Lord Brown said "this whole area of economic tort has been plagued by uncertainty for far too long" and in *Customs & Excise Commrs.* v. *Total Network SL* (8) Lord Neuberger referred to these torts as a "very tricky area."

50 The necessary elements of the tort of *unlawful* means conspiracy are (i) a conspiracy; (ii) to cause injury to the claimant; (iii) by unlawful means; (iv) thereby causing damage to the claimant. There must be an intention to harm the claimant, though it need not be the sole or predominant purpose of the conspiracy. The required elements of *lawful* means conspiracy are (i) a conspiracy; (ii) to cause injury to the claimant; (iii) with the predominant purpose of causing damage to the claimant; and (iv) thereby causing damage to the claimant. There is no requirement of unlawful conduct. Unlawful interference requires (i) an intention to cause economic loss to the claimant; (ii) by unlawful means; (iii) causing actual loss to the claimant.

51 Several of the issues raised in this application centre on interpretation of the judgments in the two leading cases of *OBG Ltd.* v. *Allan* (19) and *Customs & Excise Commrs.* v. *Total Network SL* (8). The defendants' submissions are that the facts pleaded by the claimant do not support all of the essential requirements of any of the torts alleged.

Unlawful interference and unlawful means conspiracy

52 *OBG Ltd.* v. *Allan* (19) was a case of alleged unlawful interference with contractual relations. No conspiracy was involved. It was a two party case. In fact it was found that there had been no breach of contract or

unlawful act. Strong opinions were, however, expressed by their Lordships. It was confirmed that inducing breach of contract and unlawful interference are distinct torts. The former is a form of accessory liability; the latter is a form of primary liability. There was agreement that for unlawful interference the unlawful means must be intended to cause loss to the claimant by interfering with the freedom of a third party in a way which is unlawful against the third party. Acts which are unlawful against a third party but which do not affect his freedom to deal with the claimant are not included.

53 Their Lordships' comments in relation to conspiracy cases were clearly *obiter.* Lord Hoffmann suggested that at least in three-party conspiracy cases, the third party should have a civil right of action against the conspirators. Save for the dissenting speech of Lord Neuberger on this point, the other members of the House of Lords appear to have agreed. He expressed a need for caution in such cases. Nothing in the speeches in *Customs & Excise Commrs.* v. *Total Network SL* (8) persuades me that their Lordships intended to overrule Lord Hoffmann's observations so far as they related to unlawful interference.

54 *Customs & Excise Commrs.* v. *Total Network SL* was a conspiracy case. It was a two-party example, the act being aimed at the claimant directly. The claimant was not targeted through a third party. The issue was whether it was necessary for the allegedly unlawful conduct to be actionable at the suit of the party against whom it was committed. It was held unanimously that the criminal offence in that case (conspiracy), which did not give rise to civil actionability, was sufficient to amount to unlawful means.

55 It is apparent that their Lordships wished to give real teeth to the economic torts in appropriate circumstances but were anxious for there to be some control mechanism for preventing the floodgates opening to allow claims which were never intended to be included. In *OBG Ltd.* v. *Allan* (19), the control mechanism suggested by the majority was the requirement for "actionability." In other words, it was necessary, at least in three-party non-conspiracy cases, for the acts to give rise to a civil right of action at the suit of the third party through whom the claimant was struck or targeted (or that there would have been such a right of action if the third party had suffered damage). The views expressed, of course, were *obiter* in relation to conspiracy cases, since *OBG* was a two-party unlawful interference (not conspiracy) case in which the claimant failed on the facts in any event.

56 It is at least strongly arguable that in *Customs & Excise Commrs.* v. *Total Network SL* (8) the unanimous view was that there is no such actionability requirement in two-party conspiracy cases and probably in three-party conspiracy cases. The control mechanism propounded by Lord

Neuberger in that case, with which the other speeches accorded, was one of "instrumentality." It was the clear view that actionability was not a universal requirement, at least for the two-party version of the tort of unlawful means conspiracy. The criminal act involved in that case gave rise to no civil actionability. Their Lordships, in differing ways, laid emphasis in that case upon the facts that the crime in question existed for the specific protection of the claimant and that the crime was committed directly against the claimant. But nowhere is there a clear indication that this was a universal requirement. Future development of the law in this regard was left open.

57 Lord Scott said ([2008] 1 A.C. 1174, at para. 56) that "the circumstances must be such as to make the conduct sufficiently reprehensible to justify imposing on those who have brought about the harm liability in damages for having done so." Accordingly, crime could be sufficient. He did not indicate that he was limiting his opinion to two party conspiracies or to cases where the claimant is attacked directly.

58 Lord Walker understood Lord Hoffmann as having been concerned (*ibid*., at para. 99) to "limit the intentional harm tort to cases where the claimant has been 'intentionally struck at through others'." Lord Hoffmann had observed that "two party intimidation" raised entirely different issues.

59 Lord Mance recognized that there is a distinction between inflicting harm through a third party and where two wrongdoers join and act together to inflict injury directly upon another (*ibid*., at para. 124):

> "and to do so, moreover, by committing an offence integrally related to the revenue and . . . specifically to protect it from such injury. This in turn assists to delimit the liability for conspiracy by unlawful means which the House is recognising by its present decision."

60 It is arguable that their Lordships intended to extend the ambit of unlawful means conspiracy only to a very limited extent. They were clearly agreed that there needs to be a control mechanism of some sort. The scope of "instrumentality" was left unclear. Nowhere are any specific restrictions on the concept laid down, though there are suggestions as to possible restrictions. It is possible that the scope of unlawful means may be extended to include any unlawful conduct which was intended to be and was in fact the instrument which caused economic damage to the claimant.

61 It does not appear to me that their Lordships were intending necessarily, as suggested by the defendants, to restrict their reasoning to two-party conspiracy cases. I accept that they intended to overrule *Powell* v. *Boladz* (22) (see *e.g*. Lord Scott, [1998] Lloyd's Rep. Med. 116, at paras. 56–57, where he indicates that no tortious or criminal conduct is

necessary: what is necessary is a combination of people intent on causing harm to the victim. Lords Hope and Walker reserved their positions in relation to three-party conspiracies).

62 The claimant suggests that their Lordships in *Customs & Excise Commrs.* v. *Total Network SL* (8) did not suggest that there is a distinction between two-party and three-party conspiracies, though they did indicate that unlawful means has a wider meaning in conspiracy cases than in relation to unlawful interference. My view at this stage, subject to further argument in the context of final hearing, is that it is reasonably arguable whether there is a subsisting difference between two- and three-party conspiracies (see Lord Neuberger ([2008] 1 A.C. 1174, at para. 225), where he recognized the possibility of a difference; compare Lord Mance (*ibid*., at para. 123), where he recognized the difference between conspiracy and non-conspiracy cases, and Lord Walker (*ibid*., at para. 104)). It is true that Lord Hope (*ibid*., at para. 43—see also Lord Mance (*ibid*., at para. 123) with whom Lord Walker agreed; Lord Scott does not mention the point; Lord Neuberger (*ibid*., at para. 223) warned against a single approach in relation to all unlawfulness) expressed sympathy with Lord Hoffmann's view in *OBG Ltd.* v. *Allan* (19) that caution is needed in non-conspiracy cases where the unlawful act is directed against a third party at whose instance it is not actionable because he suffers no loss—but as to that, he reserved his opinion. Lord Mance thought that *Total Network* is unlikely to be the last word in relation to three-party conspiracies. Not every criminal act would suffice—where, for example, the defendant has done something which is wrongful for reasons which have nothing to do with the damage inflicted on the claimant.

63 It seems likely to me that the requirements for unlawful interference are now different from those in conspiracy cases. In the former, *OBG Ltd.* v. *Allan* still applies. In three-party non-conspiracy cases, the claimant must prove that the alleged unlawful means were actionable at the suit of the third party; in two-party cases they probably must be actionable at the suit of the claimant (with the proviso in either case that it is not necessary to prove that the third party suffered loss). It is likely that in three-party cases the claimant must be struck at through the third party, the claimant must have an economic interest in the third party and the claimant must have suffered intended loss as a result of the unlawful means.

64 In conspiracy cases, *Customs & Excise Commrs.* v. *Total Network SL* (8) is the prevailing authority. The test in those cases is now whether the alleged unlawful means were instrumental in bringing about the loss to the claimant. Applying that test, criminal conduct which does not give rise to civil liability may suffice, at least in two-party cases in some situations (such as where the crime exists for the protection of the claimant and the act is committed directly against the claimant and there is no statutory prohibition on the act giving rise to civil liability). How much further *Total*

Network is intended to go and will be taken is unclear. But there is no indication that the test is other than "instrumentality." It is clear, however, that the act must still be unlawful in some sense. The test of "instrumentality" does not itself solve that issue, though it does justify the admission of some non-actionable criminal acts as unlawful means. It may be that some other means are now capable of being considered unlawful. I suspect that there may be situations which are obvious where seen. It may include, for instance, fraudulent acts intended to harm the claimant which in fact do so, even though all of the essential elements of the civil tort of deceit are not present. In many such cases, however, there may well be no instrumentality in any event.

65 In the present case, however, the claimant's primary allegation is of a two-party conspiracy, in which judges, government and other conspirators all acted in various roles wrongfully to secure the extortion of money from the claimant. I am not at all convinced that unlawful means conspiracy or the concept of actionability is restricted to two- or three-party conspiracies. It is reasonably arguable that "instrumentality" reaches further than crime or actionability to include any acts the conspirator is not at liberty to commit. This would echo some views expressed previously, particularly by Lord Denning.

66 *Suzur Overseas Ltd.* v. *Koros* (28) involved a conspiracy to deceive a court in order to achieve a variation of a *Mareva* injunction. There was no allegation that the court or a judge was party to the conspiracy. The warehousing agreement could not have been for the purpose of deploying it before a court. The issue was whether unlawful means for unlawful means conspiracy must be actionable at the suit of the claimant. Lords Brandon, Goff and Jauncey agreed that "it is eminently arguable that in an unlawful means conspiracy the unlawful means do not have to be actionable at the suit of [the claimant]." *Suzur* was mentioned in *Customs & Excise Commrs.* v. *Total Network SL* (8) without criticism. Lord Walker approved it. It was not mentioned in *OBG Ltd.* v. *Allan* (19). The defendants submit that *Suzur* cannot survive *OBG*. But *Suzur* was a conspiracy case, unlike *OBG*. It was a three-party conspiracy case. I do not accept the defendants' submission that as *Total Network* was a two-party conspiracy case, the opinions were all directed solely at the two-party situation and do not apply to three-party conspiracies. The claimant's case in this regard is at least reasonably arguable. It is also reasonably arguable that the present case is one of two-party conspiracy. All of these points, in my judgment, should be considered fully in the context of a final hearing.

67 I am not persuaded, however, that it is for this court to extend *Customs & Excise Commrs.* v. *Total Network SL* to include, for example, perjury in conspiracy cases. The defendants submit that even if a crime can be unlawful means, it is not a crime in Gibraltar to commit an offence

in Ecuador. Accordingly, there can be no unlawful means conspiracy based on a crime in Ecuador (or in the United States). That submission has superficial attraction. Surprisingly little time was taken on it. The defendants are resident and/or domiciled in Gibraltar. In *Irish Response* v. *Direct Beauty Products Ltd.* (14), the alleged conspiracy was to commit perjury in Denmark. Perjury is not an actionable tort in England, though it is in Denmark. A submission that conspiracy to commit perjury in Denmark is an actionable tort in England was rejected by Judge Seymour, Q.C. in a carefully reasoned judgment. It was not argued that *Total Network* affected the principle in *Marrinan* v. *Vibart* (18). It had never been decided in England whether the immunity which applies to witnesses in England applied in relation to evidence given in a foreign court. Judge Seymour decided that it does, at least in relation to courts within the European Convention. For immunity to apply, the relevant proceedings must be in a court "recognised by law" ([2011] EWHC 37 (QB), at para. 147):

> "Such a court is manifestly '*recognised by law*', at least where the court is a competent court of a Member State of the European Union, for it is recognised by the Judgments Regulation, which has the force of law in England and Wales."

The question of whether the immunity applies in relation to other courts was not decided, though the logic of the judgment is that if a judgment of the other court would be recognised for the purposes of enforcement, then it may be recognised for the purposes of immunity. Judge Seymour said (*ibid*., at para. 135):

> "That submission seemed to me to conflate two areas of law with a view to constructing something which could be wholly artificial. Read at its widest, the speech of Lord Walker in *Total Network* only went so far as contemplating that 'criminal conduct (at common law or by statute)' might form the basis of a cause of action in conspiracy. What Lord Walker was plainly contemplating was that conduct which was criminal in England might form the basis of a cause of action in conspiracy, not that conduct which was criminal somewhere other than in England, *and not criminal in England itself* might form the basis of a cause of action in conspiracy in England." [Emphasis supplied.]

I have no evidence as to whether the conspirators' actions would give rise to a crime or a civil cause of action in Ecuador (and the particulars of claim do not refer to the point). For the reasons which I have given elsewhere in this ruling, I find that it is arguable that they would give rise to a cause of action in Gibraltar if committed in Gibraltar. The claimant alleges that the conspiracy was committed at least partly in and from Gibraltar. The defendants' argument is that the commission of a crime in Ecuador is not necessarily a crime in Gibraltar. There may be exceptions

to that principle but none which are alleged to apply here. But, in this case, it is not only crimes which are alleged by the claimant. It alleges an international campaign against the claimant by the conspirators, with the defendants playing their part in and from Gibraltar. I have not been referred to any authority which establishes that it cannot be an actionable conspiracy for persons in Gibraltar to conspire with others outside Gibraltar to commit an act which would be a crime if committed in Gibraltar.

68 On balance, I would not extend *Customs & Excise Commrs.* v. *Total Network SL* (8) to include conspiracy to commit perjury. To rule that it is possible for perjury to found a civil claim based on conspiracy to commit perjury would deprive the rule that there is no tort of perjury of much of its effect.

69 A more difficult issue is whether now it may suffice that an act is criminal or actionable in the country in which it is committed. On balance, I would not extend *Total Network* that far. In this case, however, the defendants say that commission of a crime in Ecuador is not a crime in Gibraltar (or at least the commission of the crimes alleged in this case are not). If they are acts which would clearly be criminal or actionable in Gibraltar if committed here and which are criminal or actionable in the country in which they are committed, it seems to me that there are strong policy considerations both ways. My starting point is that a wrong should not be without a remedy. It is not sufficient and is too easy simply to say that nothing done abroad should be considered a wrong for these purposes. It is clearly undesirable that victims of international fraudulent conduct of the type alleged in this case should be deprived of a remedy. It would be a startling proposition to the lay person that residents of Gibraltar engaged in such conspiracies should be immune from suit from those they have deliberately harmed. That, surely, is the *raison d'être* of the economic torts. As Lord Hope asked in relation to the facts in *Total Network* ([2008] 1 A.C. 1174, at paras. 43, 44 and 93):

> "Why in this situation should the law not provide a remedy? . . . This is a gap that needs to be filled . . . unlawful means, both in the intentional harm tort and in the tort of conspiracy, include both crimes and torts . . ."

He reserved his opinion in relation to the parasitic case where the unlawful act is against a third party at whose instance the act is not actionable because he has suffered no loss. Lord Mance agreed (*ibid.*, at para. 119) that "caution is nonetheless necessary about the scope of the tort of conspiracy by unlawful means. Not every criminal act committed in order to injure can or should give rise to tortious liability to the person injured." The other side of the coin is that the floodgates might be opened for extensive litigation which might be extremely expensive and complex and

that it is for the courts of foreign countries where the acts occurred to deal with any claims arising out of them. That, after all, is generally the situation in criminal law. But the floodgates argument was the reason for the requirement of actionability, which was the control mechanism confirmed in *Powell* v. *Boladz*. That mechanism has now been replaced in conspiracy cases by that of instrumentality and I do think that on balance the change can reasonably be argued to include the acts alleged in this case.

70 The argument may go further, to include acts which would have been actionable or criminal in Gibraltar, irrespective of whether they were actionable or criminal in the country where they were committed, but it is unnecessary for me to consider that further. A fuller analysis of the many differing opinions expressed in the judicial authorities as to what may amount to unlawful means is to be found in Carty, *An Analysis of the Economic Torts*, 2nd ed., at 78–101 and 188–196 (2010).

71 In this case, the defendants' own acts are alleged anyway to have been committed in Gibraltar. In those circumstances, it is reasonably arguable that provided the acts are instrumental in the chain of causation leading to the claimant's loss, it should be possible to bring proceedings against them here. I conclude that these arguments should be developed and considered in the context of the whole facts and circumstances at a final hearing. I am not persuaded that *Irish Response* v. *Direct Beauty Products Ltd.* (14) is determinative of the issue. It is not binding on this court and does not deal with the issue which arises in this case. The claimant does not allege in this case that perjury is actionable in Ecuador. I do not dissent from the conclusion in *Irish Response* on the specific facts of that case.

72 The main unlawful means relied upon by the claimant are perjury, conspiracy to pervert the course of justice, intimidation and corruption of the judiciary, civil abuse of the process of the courts in Ecuador, attempted intimidation of the claimant, malicious prosecution and attempted fraudulent extortion from the claimant of a huge amount of money by means of the bogus judgments against it and the other means which I have mentioned which are outside the scope of the litigation. That conduct was committed largely in Ecuador but also in the United States and in Gibraltar. It is being continued by virtue of enforcement proceedings in other countries, allegedly with the continuing support of the defendants.

73 The argument as to conspiracy based on foreign crimes or torts may well necessitate detailed consideration of the relevant principles of conflict of laws which have not been addressed before me.

74 Whilst I shall consider some of the discrete arguments relating to whether the individual aspects of the unlawful means relied upon by the claimant are sufficient to constitute unlawful means for the purpose of

unlawful means conspiracy following *Customs & Excise Commrs.* v. *Total Network SL* (8), it is far more satisfactory that they be considered at trial following evidence and full argument.

75 I further find that whether in three-party conspiracy cases the relevant conduct must be conduct which excludes or affects the third party's freedom to deal with the claimant is an arguable point. Further, it is clearly arguable (if necessary) that the claimant has an economic interest in at least some of those who might be regarded as third parties in this case. This may depend on the meaning of "economic interest" for this purpose but that may be developed, if necessary, at a later stage. The conduct or actions of any of the potential third parties in this case had the potential to cause the claimant economic harm. The fatal point for this application is that the claimant alleges (and it is eminently arguable) that this is a two-party case.

76 The claimant alleges that the conspirators targeted the claimant and committed numerous criminal acts directly against it (even if some were also against third parties). It seems to me that, following *Customs & Excise Commrs.* v. *Total Network SL* (8), it is eminently arguable that at least some of those acts were sufficient unlawful means for the purpose of the tort of unlawful means conspiracy. Again, I find it inappropriate to examine each allegation with a view to making preliminary findings at this stage. I recognize that in *Marrinan* v. *Vibart* (18) it was held that a conspiracy to commit perjury is not actionable, for otherwise the policy reasons for the rule protecting witnesses from action would be circumvented. *Marrinan* was cited without criticism in *Total Network*. This supports the conclusion that *Total Network* is not intended to apply to all crimes. But perjury is arguably a discrete example in which particular policy considerations come into play. In my view, the general extent of actionability remains unclear following *Total Network*.

77 In the present case, the conduct alleged by the claimant is wide-ranging and not limited to actions within the scope of litigation. Principles which may apply in relation to proceedings in a court do not protect the defendants in relation to other aspects of the alleged conspiracy.

78 The defendants argue that it is not unlawful to fund litigation. It must surely, however, be unlawful knowingly to fund bogus litigation in order to procure money wrongfully and without any good cause from a victim.

79 The claimant suggests that some of the conduct of the conspirators is actionable by the claimant in any event, for example in defamation or malicious falsehood, for breaches of the Ecuador Government's 1995 agreement and 1998 release (induced by the conspirators) or abuse of the civil process (by using it for the collateral object of extorting money from or oppressing the claimant).

Lawful means conspiracy

80 The defendants say that "everything turns on the distinction between the case where the purpose is the legitimate benefit of the combiners and the case where the purpose is deliberate damage without any just cause to someone else." Applying that reasoning, it would clearly be arguable, and a fact-sensitive matter, that the defendants' purpose was not their own *legitimate* benefit and that they had no just cause for harming the claimant.

81 The only issue in considering lawful means conspiracy in this case is whether, on the facts alleged by the claimant, the defendants' sole or predominant purpose could be said to be to harm the claimant. The concept is not easy. In *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch* (7), it was suggested ([1942] A.C. at 445) that the question is "what is the real reason why the combiner did it?" or "what is the real purpose of the combination?" The test is not—

> "what is the natural result to the plaintiffs of such combined action, or what is the resulting damage which the defendants realize or should realize will follow, but what is in truth the object in the minds of the combiners . . . It is not consequence that matters, but purpose."

In commercial situations, it may be rare to find that acts legitimately designed to secure financial benefit for the combiners do not have that as their sole or predominant purpose. It is irrelevant that they have the inevitable collateral result of damage to the claimant. It will depend upon the evidence at trial and the trial judge's findings. It is, I find, arguable that the pursuit of the Lago Agrio litigation has not been for the purpose of the combiners' legitimate interests at all.

82 I note that at para. 18 of the particulars of claim, it is pleaded that "the conspirators . . . engaged in the conspiracy . . . in order to obtain a financial benefit for the conspirators."

83 The defendants suggest that lawful means conspiracy can only exist where the means are lawful. I prefer to say that lawful means conspiracy may be established where the sole or predominant purpose of the conspirators' acts is to harm the victim, irrespective of whether the acts are lawful or not. It matters not that both lawful means conspiracy and unlawful means conspiracy may arise from the same facts. For that reason it would be preferable if this tort were referred to simply as "conspiracy to injure."

84 It seems likely to me that the predominant purpose of the defendants on the alleged facts of this case was to obtain a financial benefit for the conspirators (hence para. 18 of the particulars of claim). That harming the claimant was the inevitable consequence does not detract from that conclusion. Some of the language used in the authorities, however, suggests that for a purpose to be the sole or predominant purpose it must

be a legitimate purpose (hence the inclusion of "legitimate" in the defendants' description of the issue). In some cases, it is impossible to separate two purposes. It may be said in this case that the purpose of the conspiracy was to cause harm to the claimant because that would result in benefit to the conspirators (that being their motive). However just the result may be in this case, nonetheless, I think that that may well be a strained and unjustifiable interpretation of "purpose." It is arguable that it would be odd that the conspirators should escape liability by reliance on a purpose which is entirely illegitimate but there is no case to which I have been referred in which such a principle has been recognized.

85 Given that I have ruled that there is a reasonably arguable case based upon unlawful means conspiracy, I prefer not to decide at this stage whether a cause of action in lawful means conspiracy is disclosed. Had that been the only cause of action, I might have ruled in favour of the defendants but it will not add materially to the costs of this action to allow the matter to be reconsidered along with other submissions at trial and I find it reasonable and sensible to allow the alleged causes to proceed.

The non-conspiracy torts

86 On the face of it, the facts alleged by the claimant are, if anything, conspiracies. Unlawful interference could hardly be established on the facts of this case save in the context of conspiracy. I accept that the claimant may find it more difficult to establish unlawful interference, in the light of their Lordships' observations in *OBG Ltd.* v. *Allan* (19), than to establish unlawful means conspiracy. The range of acts relied upon is wide. Mostly the acts are two-party acts committed directly against the claimant, assuming that all concerned were conspirators. In those cases the requirement for the claimant to have an economic interest in a third party or that the third party should have a civil right of action does not arise. It is difficult to see, however, how the defendants in this case could be liable in relation to any of the acts alleged save as conspirators. If they were liable as joint tortfeasors, for example, they would almost certainly also be liable as conspirators.

87 It may be found upon detailed consideration of the evidence that some of the allegations are three party. If the judges or the Government of Ecuador are not found to be conspirators, they may be third parties through whom the conspirators struck at the claimant. But it is difficult to see what cause of action the judges or the Government of Ecuador might have. It may be straining the tort further to suggest that the claimant had an economic interest in those third parties or that the defendants' acts affected the third parties' freedom to deal with the claimant. All these, however, are factual issues which can be considered along with the claim based upon unlawful means conspiracy. Deterring potential customers from dealing with the claimant or influencing US state officials against the

claimant or defamation of the claimant are not likely to give rise to actionability at the suit of the third parties. It is possible, however, that they would amount to crimes which would be sufficient for the purposes of *OBG Ltd.* v. *Allan*. Close examination of the actual facts is, in my opinion, essential. I am bound to say, however, that the primary cause of action disclosed in this case is unlawful means conspiracy.

88 The claimant's pleaded case does disclose facts which could amount to inducement to breach of contract or to some other relevant wrong. The breach of contract alleged is breach of the 1995 settlement and 1998 final release agreed between the claimant and the Government of Ecuador. Other allegedly induced wrongdoing is the persuasion of the judges and the Government of Ecuador to act corruptly against the claimant.

Miscellaneous

Acts alleged by the claimant to have been unlawful

89 I have heard detailed submissions as to whether individual acts relied upon by the claimant are unlawful within *Customs & Excise Commrs.* v. *Total Network SL* (8). The claimant's allegations are wide-ranging and various. Now is not the right time to engage in a detailed analysis of each act and whether it is capable of constituting unlawful means, unless it were clear that none could do so. In recognition of the submissions made, however, I shall deal briefly with some of the points made.

90 For reasons I have mentioned, I think it unlikely that this court would extend *Total Networks* to include perjury in a foreign court as unlawful means, though the point is not entirely unarguable. The same applies to conspiracy to commit perjury. Contempt of court is a *quasi*-criminal act which is plainly unlawful. It may well now be capable of constituting unlawful means. The tort of abuse of the process of the court has rarely been established in England or Gibraltar but its existence is clear. Its limitations have been illustrated in the submissions and authorities presented on behalf of the parties and I find that it is conceivable that it would be established under the law of England and Gibraltar on the facts alleged by the claimant. What is alleged is an exceptional and extreme set of circumstances in which the court process has been used and manipulated in order to extort large sums from the claimant. The claim had no basis in fact or in law. The conspirators used the court in order to obtain an entirely bogus judgment and to cloak it with credibility in the ways which I have mentioned. For these purposes it is arguable that the judges of the court were not the court itself, acting as they were as conspirators and entirely outside their role as independent and genuine judges. I recognize that there are contrary arguments but the authorities are not clear. The main issue is likely to be whether the object of the relevant acts was within the

scope of the process initiated. If the proceedings were a mere stalking horse to coerce the claimant in some way entirely outside the ambit of the legal claim, the tort may be established. If the intention is to secure a proper victory, the consequences which flow and the motive for the litigation may be irrelevant. It is perhaps difficult to imagine a clearer abuse of a court's process than the facts alleged in this case but the law imposes strict limitations on this tort. Applying the instrumentality test in *Total Networks*, however, it is arguable that in extreme circumstances it may not be necessary for all of the essential elements of a tort to be established for a particular act to be regarded as unlawful. The factual matrix of the case will require very careful analysis. Any unlawfulness will have to be established as bearing the necessary instrumentality. The related tort of malicious prosecution would be more difficult to establish. There is no established general tort of malicious prosecution and it has hitherto been restricted to specific limited categories, though its potential is unclear. The difficulties arising in relation to these torts is illustrated by *Crawford Adjusters* v. *Sagicor Gen. Ins. (Cayman) Ltd.* (6) which casts doubt upon the main grounds for the decision in *Land Securities plc.* v. *Fladgate Fielder* (16). I note, for instance, the opinion of Lady Hale (2013 (2) CILR 135, at para. 90) that "bringing a civil claim which you know to be bad and which results in damage to the defendant's reputation, person, liberty, property or finances, comes within the scope of the tort of malicious prosecution," and Lord Kerr found that absolute immunity for things done or said in legal proceedings is not infringed unacceptably by recognition of liability for malicious prosecution in civil proceedings. Manipulation of the legal system lies at the root of the tort but an objective other than success of the litigation is necessary. It must be shown that the action was pursued for a reason other than that ostensibly advanced by way of action or defence. He said (*ibid*., at para. 104) that "the essence of the tort is the illegitimate use by an individual of coercive legal powers to cause harm to another." In my opinion, these statements leave considerable room for argument in the context of the alleged facts of this case.

91 Intimidation, perversion of the course of justice, malicious prosecution, extortion, bribery and corruption of judges are other examples of possible torts or unlawful acts. Fraud, following *Customs & Excise Commrs.* v. *Total Network SL* (8), may arguably be sufficient even if every element of the tort of deceit is not established, provided that instrumentality, intended loss and actual loss are proved. It seems eminently arguable that inducement of potential customers, investors or business partners of the claimant not to deal with the claimant amounts to tortious conduct. The same may apply to inducement of the Government of Ecuador to act in breach of its agreements with the claimant and perhaps even to inducement of judges to breach their duty to try the action in Ecuador fairly, independently and in accordance with the law (though the latter has

not been suggested by the claimant). I mention these merely as examples in order to illustrate again some of the complexities of the potential arguments. I cannot be certain that the claimant will fail to establish any unlawful means and it is not appropriate to isolate particular alleged acts for consideration at this stage.

Immunity

92 The defendants rely upon the absolute immunity which extends to judges, witnesses, parties and others in relation to evidence given in court and in the preparation of evidence to be given in court. The claimant submits that at least some of the conspirators' acts cannot attract immunity and that in any event that immunity does not apply in Gibraltar in relation to proceedings in Ecuador.

Applicability of the immunity to foreign proceedings

93 I reject the defendants' submission that the principle of immunity applies universally to foreign proceedings. Whilst there have been criticisms of this state of the law and there have been exceptions, in no case has it been said that immunity applies to all foreign proceedings in the same way as in domestic proceedings.

94 In *Anderson* v. *Gorrie* (3), the immunity was held to apply in England to the conduct of a judge in Trinidad and Tobago. The claimant says that the distinguishing feature of that case is that Trinidad and Tobago was a British colony. In *Bell Group Ltd.* v. *Westpac Banking Corp.* (4), an Australian judge, taking evidence by video from a witness in England, said that he would be "surprised" if the UK courts were not to extend immunity to the witness. That is of interest but of very little assistance to this court in this case and amounts to no more than an observation. There was no finding, binding or otherwise. Even that observation was not to the effect that the UK courts would be bound to extend immunity to that situation. As I have already mentioned, in *Irish Response Ltd.* v. *Direct Beauty Products Ltd.* (14) it was held that judgments given in Denmark must be recognized in England pursuant to EU legislation. It was said ([2011] EWHC 37 (QB), at para. 147) that it "seems that it has never been decided in England whether the witness immunity rule applies to evidence given before a foreign court." The defendants submit in the present case that there is no reason why foreign courts recognized by law should not be included in the immunity rule, including courts in non-convention states. They ask why the rule should not be recognised, for example, in relation to the courts of the United States. It is suggested that otherwise it is likely that UK witnesses could be sued elsewhere (for example in the United States) and that this would undermine their immunity (though I have no evidence as to the relevant US law). The Court of Appeal, however, has confirmed in *House of Spring Gardens Ltd*. v. *Waite* (12) that the point has

not been directly decided. It would not be appropriate, in my view, to decide it in the context of an application to strike out in the circumstances of this case. It is clearly an arguable point. Absent any decision that this court is bound to apply the same principles to proceedings in Ecuador, it may well be that this court would be reluctant to do so if the facts pleaded by the claimant are established as true. This court would need more evidence and submissions before deciding that the courts of Ecuador are necessarily recognised in Gibraltar for the purposes of enforcement and on what basis.

The immunity in domestic proceedings

95 Even if the same principles were to apply to the proceedings in Ecuador, I would not find it appropriate to strike out this claim on that basis. There are, in my view, serious and arguable issues affecting the defendants' claim to immunity.

96 The degree of gravity or seriousness of the conduct involved is irrelevant so long as the acts were "in the ordinary course of proceedings in a court of justice." The principle extends to preparation of evidence to be given in court proceedings and includes discussions between a party and a witness in relation to the evidence to be given by a witness. The immunity cannot be circumvented by alleging that the conduct formed part of a conspiracy with other witnesses to give false evidence or by alleging malicious prosecution or deceit (see *e.g*. *Singh* v. *Reading B.C*. (25), and the brief summary of the principles of immunity in *Tchenguiz* v. *Imerman* (29) ([2011] Fam. 116, at para. 70). It is necessary for the administration of justice that investigators be able to exchange information freely. The immunity extends to co-conspirators who are not participants themselves in the litigation as parties or witnesses or judges (if it were otherwise, the immunity would lose most of its effect). The acts of police officers which could not fairly be said to form part of their participation in the judicial process as witnesses are not cloaked with immunity.

97 On the other hand, concoction of primary evidence (as opposed to giving false evidence) such as the planting of a brick intending it to be found and used by someone else in evidence against a defendant will not attract immunity. The person planting the brick would certainly not be intending to give evidence of his having done so. In *Darker* v. *Chief Const. (W. Midlands Police)* (9), a distinction was drawn between the stage at which concocted reports were prepared. If it were for use in evidence, the functions of the concocters would be those of witnesses or potential witnesses relating directly to what is required to be done to enable them to give evidence. If it were earlier, for example when the concocters were acting as enforcers of the law or investigators, immunity might not apply. The defendants in this case suggest that all of the

allegedly concocted or dishonest statements were in fact put in evidence in Ecuador. A careful reading of the authorities reveals that the real point is that the police in *Darker* and the defendants in *Suzur Overseas Ltd.* v. *Koros* (28) were not acting in the judicial process. The line is sometimes fine and difficult to determine. False primary evidence was created. In *Suzur* the essence of the alleged wrongdoing related directly to the wrongdoers' functions as parties to litigation preparing for trial. The act was the improper procuring of false evidence, not the coercion of a witness into producing false primary evidence. The defendants were not involved in pre-litigation investigation or other conduct separate from the preparation of witness testimony for the hearing when the impropriety occurred.

98 It is clear that if relevant acts committed outside the ordinary course of litigation are also used within the judicial process, the perpetrators do not thereby acquire or retain the protection of immunity. In the present case, the claimant suggests that the false Cabrera report (and possibly the Calmbacher report), *Crude*, the false analyses produced by the conspirators and many other alleged acts were committed outside the ordinary course of litigation, even if connected also with it. These are reasonably arguable issues which need to be determined in the light of facts found at trial. The threshold for allowing the case to proceed is low. Even if the material was produced or concocted for the purpose of the litigation, the claimant alleges that it was used further afield in order to coerce the claimant, outside the litigation (though in combination with it) to make a large payment. I find it clearly arguable that the use of the material in such ways would not attract immunity.

99 I accept that the same immunity is afforded to the parties, their advocates and judges. The public policy behind the principle is twofold: to protect *bona fide* witnesses (and judges) from the vexation of defending actions, so that they can give evidence and judge without fear of collateral litigation, and to avoid actions in which the value or truth of evidence would be tried over again (the floodgates argument). Honest persons should be encouraged to assist justice, even if dishonest or malicious persons may sometimes benefit from the rule. Extensions of the rule to pre-hearing acts, even where proceedings are only contemplated, have been necessary. The rule applies to proofs of evidence, even if the witness is not called. The preparation of reports with a view to their forming part of the evidence to be given in court may be covered (*e.g. Evans* v. *London Hospital Medical College* (10); *X (Minors)* v. *Bedfordshire C.C.* (31)). But I do not find it possible to be certain that the facts alleged by the claimant would fall within the boundaries of the immunity. There may be a valid distinction between the telling of lies and a deliberate fabrication of facts which had not occurred (as is alleged by the claimant in this case). As was said in the American case of *Spurlock* v. *Satterfield* (27) the attack may

not be upon the investigation of possible realities but the preparation of a fiction. It was there held that where the evidence is fabricated, or statements concocted, it is not clear that protection from attack should be gained by a subsequent presentation of false testimony in court.

100 I note that in *Darker* v. *Chief Const. (W. Midlands Police)* (9), Lord Clyde listed factors which he took into account in deciding whether immunity should apply in that individual case. The indication is that each case may depend on many factors. He said ([2001] 1 A.C. at 461) that "the sole question is whether the claim made is so clearly countered by an absolute immunity as to require it to be struck out." Lord Hunter encapsulated the principles at play (*ibid*., at 469):

> "[T]he immunity in essence relates to the *giving of evidence*. There is, in my opinion, a distinction in principle between what a witness says in court (or what in a proof of evidence a prospective witness states he will say in court) and the fabrication of evidence, such as the forging of a suspect's signature to a confession or a police officer writing down in his notebook words which a suspect did not say or a police officer planting a brick or drugs on a suspect. In practice the distinction may appear to be a fine one, as, for example, between the police officer who does not claim to have made a note, but falsely says in the witness box that the suspect made a verbal confession to him (for which statement the police officer has immunity), and a police officer who, to support the evidence he will give in court, fabricates a note containing an admission which the suspect never made. But I consider that the distinction is a real one and that the first example comes within the proper ambit of the immunity and the other does not." [Emphasis supplied.]

In practice, the distinction is indeed fine. He said later (*ibid*., at 471):

> "The position is different where, as alleged . . . in this case, steps are taken prior to the making of a statement of evidence, not for the purpose of making a statement of evidence which the maker intends to be an accurate and truthful one, but for the wrongful purpose of fabricating false evidence which would be referred to in an untruthful statement of evidence."

101 It has been said that absolute immunity is in principle inconsistent with the rule of law but that in a *few*, *strictly limited*, categories of cases it has to be granted for practical reasons. It should be granted grudgingly and should not be given wider application than is absolutely necessary in the interests of justice. A case should not be struck on the basis of immunity save in the clearest of circumstances. Immunity should only be allowed with reluctance and should not readily be extended (see Lord Clyde in *Darker*, above). In *Smart* v. *Forensic Science Service Ltd.* (26) it was held that the precise scope of the immunity of witnesses is no longer

clear as a result of the speeches in *Darker*, which lay different emphasis on different factors and that whether there is immunity or not will depend on the precise facts of a particular case.

102 *Singh* v. *Reading B.C.* (25) illustrates that the law in this field remains uncertain and is developing in the wake of *Darker* v. *Chief Const. (W. Midlands Police)* (9). See also *Smart* v. *Forensic Science Service Ltd.* ([2013] P.N.L.R. 32, at para. 36):

> "[T]he precise scope of the immunity of witnesses, which may have seemed clear . . . is no longer so as a result of the five speeches . . . in *Darker* . . . whether there is immunity or not will depend on the precise facts of a particular case."

Lewison, J. repeated established principles which I have mentioned elsewhere. But he concluded ([2013] 1 W.L.R. 3052, at para. 46):

> "[I]t can no longer, in my judgment, be said that immunity from civil suit 'attaches to anything said or done by anybody in the course of judicial proceedings whatever the nature of the claim made in respect of such behaviour or statement'."

The tort of malicious prosecution also applies in relation to civil proceedings. No immunity attaches to things done which would not form part of the evidence to be given in the judicial process. Not everything said or done in preparation for judicial proceedings is necessarily immune. In essence the immunity relates to the giving of evidence. There is a distinction between what a witness says in court (or in a proof of what he will say in court) and the fabrication of evidence. He approved the broader objective test in *Suzur Overseas Ltd.* v. *Koros* (28).

103 The line is not always easy to draw. Some of the acts alleged in this case may be such that, if the principle of immunity were held to apply to the proceedings in Ecuador, they should operate in this case. It is arguable that this court should, as a matter of policy, apply the same principles. It would be undesirable for the impression to be given that this court can effectively act as an avenue of appeal by the rehearing of any foreign proceedings, provided that the defendant is resident or domiciled in Gibraltar. Such a general proposition would be difficult to justify. Though the point is not free from argument, the complexities and importance of this case, however, are exceptional and I am satisfied that the public policy issues at stake should be considered in the light of full evidence and argument at trial upon full consideration of evidence, if necessary, about the nature of the proceedings and the law in Ecuador. There is a clear public interest in the finality of litigation and the protection of parties from the burden of re-litigation. I bear in mind that the claimant has the protection that its points can be raised in enforcement proceedings but its case goes beyond the judgment of the court in Ecuador. The defendants in

this case were not parties and the issues raised are not clearly the same as those raised in Ecuador. It is not clear that they were finally determined in Ecuador. I do not rule out that, at final hearing, the defendants may succeed on some or all of the points which they have raised on this application but firmly find that it is not appropriate to strike out the claim now. Nor do I rule out that after close of pleadings or after disclosure and filing of witness statements it may be sensible to decide some points by way of preliminary hearing.

104 I have considered whether I should attempt to isolate some parts of the particulars of claim and strike them out as having no realistic prospect of success. In the circumstances of this case, I find that inappropriate. It would be unlikely to save substantial costs or time. The allegations are so bound up together that it would be necessary to cover much of the same ground anyway. All of the matters raised should be considered in the light of the facts as they emerge at or in preparation for trial.

105 It is not appropriate for me to analyse in full on this application all of the authorities to which I have been referred and which I have considered carefully. I have mentioned some in order to explain my main reasoning.

106 The defendants also suggest that any immunity to which a witness or judge or advocate in this case is entitled must extend to all other alleged conspirators. I am not prepared so to find at this stage, it being unnecessary to do so in view of my conclusion that it is arguable that immunity does not apply to the Ecuador proceedings. I foresee that there may be many ways of presenting the argument on both sides. The claimant has alleged one, all-encompassing conspiracy, though it may transpire that there were a number of conspiracies, all connected. I mention that purely to illustrate the real factual and legal complexities of the situation.

107 In my opinion it is clearly arguable that the Cabrera report was not written by him for the purpose of his giving evidence but by other conspirators for the purpose of his presenting it as his, and that it cannot be correct that the true authors and fabricators of false samples and exhibits, who were not intending to give evidence about it (or anything) should be protected on the basis that Mr. Cabrera might have immunity. If the claimant is correct, the report was not prepared genuinely for its author to give evidence; it was not prepared to reflect evidence which Mr. Cabrera would or intended genuinely to give as his own; no-one intended evidence of what actually happened in the preparation of the report to be put before the court: that was not the plan.

Res judicata and issue estoppel

108 It will be apparent that I am not certain that the same issues which arise in this action have been dealt with finally in Ecuador. Nor am I

certain that they were intended to be dealt with finally in a manner which would exclude their being raised in proceedings such as these. It may later be suggested that some facts are covered by issue estoppel but it is difficult to see that such an argument would be likely to succeed and the defendants' submissions have not concentrated on that assertion. For the reasons which I have mentioned, I certainly find it inappropriate to decide those issues now.

Fresh evidence

109 Whilst I have considered the opinion of Dr. Zevallos in the Provincial Court of Sucumbios, I am not filled with confidence by it. The punitive award and the sanction for Chevron failing to apologize seem to have had no basis in law whatsoever, yet they were upheld. It is true that the claimant's allegations of irregularities in the preparation of the lower court ruling are said to have been "taken into account," and that "no concrete" evidence of any crime was found and that the claimant's allegations "lead nowhere without a good dose of imaginative inventiveness." Therefore, "no merit has been given to those allegations and more space was not dedicated to answering them." The court "rejects and definitively categorizes the affirmations of [the claimant] . . . as baseless" in so far as its allegations that the ruling was based on information not found in the case file, or prepared with secret assistance were concerned. In relation to the allegation that Zambrano, J. received secret assistance, the court found "no evidence of 'fraud.'" Dr. Zevallos claimed to have "considered the allegations of [the claimant] and finds that they do not provide any proof of improper conduct." The opinion appears to be conspicuous in its absence of particularity in relation to these findings. In those circumstances, the fresh evidence relied upon by the claimant must be considered seriously, though I recognize that the defendants may have cause to criticize that evidence as being the evidence of allegedly self-confessed dishonest witnesses. I am no more comforted by the Zevallos ruling dated March 13th, 2013 in response to complaints by the claimant that the appeal judgment did not deal with all the issues raised or give sufficient reasons, contrary to the Code of Civil Practice, seeking clarification and asserting that the claimant had not been able properly to defend itself. The ruling criticizes the claimant for raising in the United States its allegations about Zambrano, J. on the day following the issue of judgment on February 14th, 2011. It suggests that Chevron had not put forward any more evidence to "shore up" its position. The court said that it "stays out of" the accusations. It is a very short judgment which gives very short shrift to the claimant's allegations and, on the face of it, has not dealt with them as one might expect, certainly on a basis which is likely to support any suggestion of *res judicata* or issue estoppel.

110 The main recently uncovered evidence is contained in the declaration of Guerra, J. It contains detailed and ostensibly damning evidence of corruption in the Ecuador legal process, particularly but not only in relation to the Lago Agrio litigation. He gives detailed evidence in support of the allegation of "ghost-writing" and meetings with those ostensibly representing the plaintiffs. He produces evidence in support of his testimony. I shall not repeat it in detail in this ruling. He describes the pressure to which he says he was subjected by other conspirators. He was the judge of parts of the oral summary trial against the claimant. He sets out the chronology of the litigation and the corrupt arrangements for bribery of his replacement (Zambrano, J.) and his own role in ghost-writing Zambrano, J.'s judgments. Payments are said to have been recorded in Guerra, J.'s daily planner. I need not set out further details of his statement. It is, if true, an extremely important, probably pivotal, piece of evidence. Though denied by Zambrano, J., the allegations appear to be supported by other evidence.

111 Other recent evidence includes statements from Mr. Beltman (Executive Vice-President of Stratus) dated March 21st, 2013, Mr. Russell (Environmental Engineer and Principal of Global Environmental Operations, Inc.), and Mr. Fernando Reyes, which again support, in some detail, much of the claimant's case. Mr. Beltman says:

> "From the documents I reviewed, TexPet had remediated all of the pits it was responsible for in accordance with its settlement agreements with the Government of Ecuador. Nonetheless, Donziger never told Stratus or me to attribute any of the contaminated soil samples and open pits to Petroecuador."

On the contrary, Donziger gave instructions that no responsibility should be allocated to Petroecuador. The majority of the sites inspected for the litigation were not sites which had been TexPet's responsibility. Many of the pits covered in the Cabrera report were already remediated or being remediated by Petroecuador. Donziger also gave instructions that an ongoing clean-up in the former concession area must be ignored, though it was clearly relevant and would provide the best evidence of the true cost of any remedial work. Donziger changed figures to inflate the damages figure and provided a pit inventory wrongly attributing certain pits as being constructed by TexPet, which Stratus did not verify but did use. Mr. Beltman's evidence goes significantly further, covering the false work to increase damages by way of comment on the Cabrera report (which he now disavows), false media communications and *Crude.* Mr. Russell says that his investigations did not support the Lago Agrio claims. Donziger wanted a really large number to put pressure on the claimant (it seems not necessarily for the case to reach court, unless that proved necessary). The remainder of his statement, if true, supports the claimant's case in many respects. The true samples taken did not support the Lago Agrio claims.

Donziger made false allegations of illnesses and deaths caused by Tex-Pet's oil operations in order to put further pressure on the claimant by making it feel pain.

112 The findings of the US District Court for the Southern District of New York in relation to the claimant's amended RICO complaint filed on April 20th, 2011 are interesting. Reference is there made to intimidation of Ecuadorian judges, sham criminal charges against the claimant's attorneys, fabricated evidence in the United States, false statements to the US Congress, the Department of Justice, State Federal Agencies, US media, Chevron shareholders, the US courts, *etc*. The conclusion was that in US law the facts constituted common law fraud, unjust enrichment, intentional interference with contract, trespass, civil conspiracy, *etc*. There is reference to the Lago Agrio plaintiffs' having assisted the Government of Ecuador in the enactment of new legislation enabling individuals to bring generalized environmental claims and to the plaintiffs being only nominal and not expected to receive any damages personally. The Government of Ecuador is said to be expecting 90% of the judgment damages and the RICO defendants were planning to control the damages in a trust outside Ecuador. Full reading of the report of those RICO proceedings reveals some of the evidence which has been unearthed against Mr. Donziger and others as a result of the US disclosure applications. It too is apparently damning and impressive. It is said that one US court has already found it established that the Government of Ecuador was supporting the Lago Agrio plaintiffs. Mention is made of the political branch's domination over the judiciary and the widespread corruption of the judicial process in Ecuador. It is a detailed and revealing report. It was said that the Lago Agrio judgment threatened to disrupt the claimant's business operation, sully its reputation and "otherwise" cause the claimant irreparable harm and that it had already had a "lasting and irreparable" effect on the claimant. Millions were spent in attorneys' fees and costs of the litigation and in exposing the alleged frauds. The claimant's interests in contracts, including the 1995 and 1998 agreements with the Government of Ecuador had been impaired. Its reputation and goodwill had been harmed. There had been interference with its funds otherwise to be used for business purposes. Its brand names, in which it had invested heavily, had been damaged. The defendants object to the claimant's reliance now on matters contained in it which may not be expressly pleaded in the particulars of claim. I do find them relevant, however, to whether I should now strike out the claim. The first defendant is mentioned as the major source of funding for *Crude.* I am satisfied that the RICO proceedings in the US have resulted in evidence which supports at least much of the claimant's allegations in this case, though I do not, of course, make findings about those allegations. I emphasize that I am not adopting the above as findings but they are useful in understanding the extent and nature of the claimant's allegations. They support the conclusions which I

have reached and which I would have reached even without the report of the RICO application in New York.

113 An article included in the claimant's bundles, by Mr. Cassell of the Notre Dame Law School, dated April 10th, 2012, is certainly not evidence for this application. It contains, however, a useful "background." If the article is correct, President Carrea in Ecuador brought "what little remained of judicial independence in Ecuador to a new low." If the claimant's allegations are true, that would seem to be an accurate reflection of the situation.

The "BIT" arbitration

114 At the time of oral submissions, the claimant's arbitration claim pursuant to Ecuador's Bilateral Investment Treaty ("BIT") was outstanding. The Republic of Ecuador had failed in its attempt to secure a stay of that claim. In it the claimant seeks various declarations, including that the Government of Ecuador improperly interfered in the Lago Agrio litigation and that the claimant has no liability for environmental damage arising out of TexPet's drilling in Ecuador, that the Lago Agrio judgment violates the settlement agreement with Ecuador and that Ecuador interfered improperly with the proceedings. It also seeks an indemnity from Ecuador and an order that it take all measures at its disposal to suspend or cause to be suspended the enforcement of any judgment in the Lago Agrio case. In the arbitration, the claimant makes many of the claims now made in these proceedings. The result of the arbitration may well resolve at least many issues relevant to the present proceedings. I urge the parties to agree to accept the findings of the arbitration for the purpose of this claim, assuming that the arbitration concludes first, thereby minimizing costs, further delay, uncertainty and the risk of further re-litigation. I note that it was held in the judgment dismissing Ecuador's application for a stay (*Republic of Ecuador* v. *Chevron Corp* (23)) that the claimant had reserved its right to challenge any judgment issued in Lago Agrio on grounds that the Ecuador judicial system does not provide impartial tribunals of procedures compatible with the requirements of due process of law, that the judgment was obtained by fraud or that the Lago Agrio proceeding was contrary to an agreement between the claimant and the Government of Ecuador. It was recognized that a conflict may arise between a final Ecuador judgment and an inconsistent subsequent arbitration award. This could be resolved in any proceedings to enforce. Ecuador failed to show any misrepresentation by the claimant justifying equitable estoppel. So far as collateral estoppel was concerned, there was no identity of issue between the BIT arbitration and the Aguinda litigation.

Conclusion

115 In normal circumstances I should be reluctant to investigate and determine whether a foreign court which claimed to have considered fully and fairly and to have determined a claimant's allegations had in fact done so. This court should not generally act as an appeal court from the decisions of foreign courts. I have been cautious before allowing a matter to proceed which calls into question the whole integrity of another country's judicial and political system. This court will need to keep a close eye on the proceedings in order to ensure that they are not abused, that unjustified fishing exercises are not allowed and that the matter does not escalate out of control. For the above reasons I dismiss the defendants' applications for this action to be struck out. It is right to repeat at this point that my decision is not based upon factual findings against the defendants but upon the assumption (so far as required by law on applications such as these) that the allegations against them are true.

116 Following the close of the pleadings and disclosure, I hope that the parties, through their lawyers, will bear in mind throughout the overriding objective in the CPR and seek ways to narrow and isolate the real issues and assist the court. It seems to me that a running *Scott* schedule of each act alleged by the claimant to amount to unlawful means would be of great assistance to the court and the parties. The columns would include identification of the act, the basis of the claim of unlawfulness, the basis of the claim of instrumentality and the defendants' counter-arguments in each case. The parties' counsel may well find one or two other columns useful. It may be necessary to amend the schedule after close of pleadings and in the run-up to trial but it would be a useful working document at an early stage. A starting point may be Appendix B ("Selected Violations") to the report of the RICO complaint in the US District Court, Southern District of New York, to which I have referred.

Applications dismissed.