IN THE MATTER OF AN ARBITRATION

UNDER THE CHARTERED INSITUTE OF ARBITRATION RULES

BETWEEN:

Broadsheet LLC

Claimant

- and -

(1) The Islamic Republic of Pakistan

(2) The National Accountability Bureau

Respondent

PART FINAL AWARD
(Liability Issues)

Sir Anthony Evans

24 Lincoln's Inn Fields

London

WC2A 3EG

CONTENTS

INTRODUCTION

Parties

1. The Claimant is Broadsheet LLC a company incorporated in the Isle of Man. It is currently in liquidation and the proceedings are brought on behalf of and with the authority of the Liquidator, Roger Harper Esq. The Claimant will be referred to as "Broadsheet" or occasionally as "Broadsheet IoM" when the context so requires.

2. The Respondents are, first, The Islamic Republic of Pakistan ("**the State**") and, secondly, it's National Accountability Bureau, hereinafter "**NAB**". NAB was established in October 1999 by the incoming government of Pakistan, headed by General Musharraf, the Chief Executive and later the President of Pakistan.

3. Issues were raised in the pleadings as to whether the State was properly made a party to the proceedings and in particular whether it was entitled to claim sovereign immunity from them. However, these contentions were not pursued at the hearing on the issue of liability held in London on 18-29 January 2016. For the purposes of this Part (Liability) Award, it is unnecessary to distinguish between the two Respondents and where convenient they will be referred to as "**NAB**" throughout.

Representation

4. Broadsheet was represented by Mr. K.B.Reisenfield of Paton Boggs LLP until August 2014 when the firm was disbanded, and from 29 September 2014 by Mr. Stuart Newberger of Crowell and Moring LLP of Washington, D.C; Mr. Stuart Newberger assisted by Ms Ashley R. Riveira, Mr Edward Norman, Mr John R Laird, and Mr Gordan McAllister appeared on behalf of Broadsheet at the Liability Hearing.

5. The Respondents are represented by Mr. David Wilson of Sherman & Howard LLC and from November 2015 by Allen & Overy LLP of London and Singapore. Their counsel at the Liability Hearing were Ms. Judith Gill QC and Mr. Mark Levy from Allen & Overy and Sam Wordsworth QC of counsel.

The Arbitration Agreement

6. The Arbitration Agreement is contained in the "*Asset Recovery Agreement between The President of the Islamic Republic of Pakistan and Broadsheet L.L.C. June 2000*" (hereinafter "**the A.R.A.**").

7. The Preamble reads:

> *"This Agreement is entered into this 20[th] day of June 2000 between the President of the Islamic Republic of Pakistan through the Chairman National Accountability Bureau, Chief Executive's Secretariat, Islamabad, Pakistan (hereinafter called as NAB the 1st Party) and Broadsheet LLC of P.O.Box 66, Suite 1, Empress House, Empress Drive, Isle of Man, IM99 1EE, British Isles a compay duly incorporated under the laws of Isle of Man (hereinafter called as Broadsheet the 2nd party)."*

8. Clause 7 of the A.R.A. provides:

> *"7. Arbitration*
>
> *7.1 Any dispute, arising out of this Agreement, shall be finally resolved by arbitration with the right of appeal hereby agreed to be excluded and waived by the parties hereto. This arbitration shall be conducted under the provisions and in accordance with the rules of the Chartered Institute of Arbitrators London mutually before a single arbitrator agreed by the parties.*
>
> *7.1.1. This arbitration agreement shall be governed by the substantive law of this principal Agreement as set out hereinabove.*
>
> *7.1.2. The place of arbitration shall be Dublin, Republic of Ireland.*
>
> *7.1.3. The language of the arbitration shall be English.*
>
> *7.1.4. Notwithstanding anything contained above the costs of arbitration, if any, shall be borne by the parties themselves."*

The arbitration

9. By letter dated 23 October 2009 headed 'Second Notice of Intention to Proceed to Arbitration', Dr. William F. Pepper (as counsel) on behalf of Broadsheet requested NAB to agree to the appointment of a single arbitrator pursuant to the C.I.Arb. Arbitration Rules (unless another form of arbitration was preferred). There is an issue in the arbitration as to whether the letter was a sufficient compliance with section 14 of the Arbitration Act 1996 for limitation purposes (see Section H below).

10. Failing a response to the letter dated 23 October 2009 and to subsequent reminders, on 17 January 2012 Mr. Reisenfeld on behalf of Broadsheet applied to the Chartered Institute for an arbitrator to be appointed. On 21 February 2012 I accepted the appointment and on 23 February 2012 the parties were notified.

11. By Procedural Order No.5 dated 11 June 2013 I granted Claimant's Application for bifurcation of the proceedings into liability and (if necessary) damages phases (para.2). The hearing on liability issues took place in London on 18-22 and 25-29 January 2016, both dates inclusive.

12. The following witnesses gave evidence at the hearing:

For Claimants

Mr. Douglas Tisdale

Mr. Kaveh Moussavi

Mr. Robert Byrne

For Respondents

Lt.Gen.(ret'd) Syad Muhammad Amjad

Lt. Gen. Khalid Maqbool

Lt. Gen. (ret'd) Munir Hafiez

Mr. Talat Ghuman

Mrs. C.Jay Munoz

Mr. Hasan Saqib

Mr. Ahmer Bilal Soofi

Mr. Nawid Ahsan

Mr. Ashtar Ausaf Ali (by video conference)

13. Also in evidence were Witness Statements by:

Claimant

Farouk Adam Khan

Respondents

Umer Zaman

H.E. Ambassador Abdul Basit

Ofnavid Rasul Mirza

14. Expert witnesses gave evidence, as follows:

Isle of Man law:	Mr. Paul Beckett (Claimant)
	Mr. Christopher Cope (Respondents)
Colorado law	Mr. John Moye (Claimant)
	Judge Boyd N Boland (Respondents)
History/political background	Dr. Ayesha Siddiqa
	Dr. Aqil Shah

(I should record that this evidence was admitted after objection by the Respondents and that I found it both relevant and helpful in providing the background to events that were directly in issue.)

Seat

15. The arbitration agreement provides for arbitration "*conducted under the provisions and in accordance with the rules of the Chartered Institute of London*" and that "*The place of arbitration shall be Dublin, Republic of Ireland*" (quoted above).

16. By letter dated 17 April 2012 I requested the parties "*to make submissions in writing regarding the place of arbitration....and specifically whether the place might be varied by order and/or agreement to London...*".

17. On May 16 2012 Mr. Reisenfeld on behalf of Broadsheet wrote:

> *"1. Broadsheet proposes that the place of arbitration for this dispute be relocated to London, United Kingdom, from Dublin, Ireland, the seat of arbitration set forth in the [ARA]. If Respondents do not agree with this change, Claimant proposes nonetheless that the hearings should be held in London so as to limit the inconvenience to all parties and the Arbitrator."*

18. On 29th. May 2012 the Respondents replied:

> *"(1)(b) NAB is agreeable to moving the place of arbitration from Dublin to London."*

19. By Procedural Order No.3 dated 25 June 2012 I ordered:

> *"(1) Place of Arbitration*
>
> *BY CONSENT, and notwithstanding Article 7.1.2 of the Asset [Recovery] Agreement dated June 2000, the Place of Arbitration shall be London, England."*

20. I have not been notified of any dispute between the parties as to the Seat of the arbitration and, save as above, I have not ruled on that issue.

21. As I understand it, the parties are agreed that London is the Seat (as well as the place) of the arbitration.

Narrative – outline

22. Broadsheet was incorporated in the Isle of Man on 28 May 2000. Its registered shareholders were two Panamanian companies named Oxford International Holdings

SA ("**Oxford**") and Berkshire International Holdings SA ("**Berkshire**"). Each company contributed £100 and it is common ground that the ultimate beneficial owner was a United States (Colorado) businessman named Jimmy James ("**Mr. James**") and (possibly) his business associates.

23. Mr. James represented that he was 'chairman' of Broadsheet from May 2000 and during the currency of the ARA from June 2000 until December 2003, and he continued doing so notwithstanding that proceedings to wind up the company began in the Isle of Man in February 2005.

24. By letter dated 23 October 2003 ("**the Termination letter**") Kendall Freeman, London solicitors acting for NAB, gave notice (1) to rescind the ARA from inception for material misrepresentations made during pre-contractual negotiations, and in the alternative (2) that Broadsheet had committed repudiatory breaches which NAB was entitled to and did accept as terminating the ARA with effect from that date.

25. The Termination letter was answered on behalf of Broadsheet by its counsel, Douglas Tisdale, on December 11, 2003, saying that that was shortly after it was received by Broadsheet. His letter proposed discussions that took place shortly afterwards.

26. Broadsheet contends that the Termination letter itself was a repudiatory breach of the ARA, by NAB. It also alleges that NAB was in breach of the ARA during the period of its own alleged non-performance or under-performance, and it claims damages and/or sums due in respect of those breaches, as well as damages for the alleged repudiation by NAB.

27. On 5 January 2005, Mr. James in Colorado executed a purported assignment by Broadsheet "of all its right and interest" in the ARA to Steeplechase Financial Services LLC a company incorporated in Colorado, U.S.A. ("**the Assignment**" and "**Steeplechase**" respectively). The assignment was not notified to NAB before winding-up proceedings began in the Isle of Man nor to the liquidator, at any time.

28. On 2-7 March 2005 a winding-up Order was made by the Manx (Isle of Man) High Court in respect of Broadsheet on the Petition of Philip Sinel, a lawyer in Jersey whom Broadsheet had instructed to act on its behalf and who had obtained a default judgment against Broadsheet in the Channel Islands in respect of outstanding fees.

29. On 2 April 2007 by further Order of the Manx High Court, Broadsheet was dissolved.

30. On 20 May 2008 Mr. James and representatives of NAB signed a Settlement Agreement ("**the Settlement Agreement**") under which NAB undertook inter alia to pay US$1.5 million to "BS". Mr. James signed the Settlement Agreement as chairman of "Broadsheet LLC" and as 'Manager' of Steeplechase and also on his own behalf describing himself as "shareholder and beneficiary of Broadsheet LLC under winding up". "BS" referred to "Broadsheet LLC" which was described as a party to the ARA and to the Assignment but with the following rider:

> *"However, BS was also re-incorporated in Denver, Colorado after Broadsheet LLC Gibraltar was under winding-up." (Recital G)*

31. "Broadsheet LLC" was incorporated in Denver, Colorado under the laws of Colorado in December 2007.

32. NAB made two payments under the Settlement Agreement totalling US$1.5 million to accounts which appear to have been controlled by Mr. James (see paragraph 74 below).

33. On 23 October 2009 Dr. Pepper on behalf of Broadsheet IoM (in liquidation) wrote the letter headed "*Second Notice of Intention to proceed to Arbitration*" giving (disputed) notice of these proceedings (see para.9 above).

34. On 27 November 2009 the dissolution of Broadsheet IoM was declared void by the Manx High Court and Roger Harper Esq. was appointed Liquidator.

35. The Liquidator has authorized these proceedings in the name of Broadsheet IoM.

36. After further letters dated 21 July 2010, 28 September 2010 and 21 September 2011, Mr. Reisenfeld of Patton Boggs LLP wrote to the C.I.Arb. requesting the appointment of an arbitrator (para. 10 above).

Issues

37. After the Liability Hearing, the parties agreed a List of Issues (appended hereto as Annex 1). However, their Closing Submissions defined the issues under different headings and demonstrated that they differ as to the priorities of these issues. At the risk of over-simplification, I shall list them as follows:

(A) Interpretation – clause 4 of the ARA

(B) Was NAB entitled to rescind the ARA on 28 October 2003 (for pre-contract misrepresentation)?

(C) Was Broadsheet in repudiatory breach of the ARA on 28 October 2003?

(D) Contractual claims by Broadsheet

(E) Does the Assignment disentitle Broadsheet from maintaining its claim in these proceedings?

(F) Does the Settlement Agreement disentitle Broadsheet from maintaining its claim in these proceedings?

(G) Is NAB liable to Broadsheet in damages for the tort of conspiracy (unlawfully inflicting economic harm)?

(H) Are contractual claims barred by relevant limitation provisions in Isle of Man and/or Colorado law?

Governing Law(s)

38. Clause 6 of the ARA provides:

> "*6. Law and Jurisdiction*
>
> *6.1 This agreement shall be governed by the laws of the Isle of Man .....provided that in respect of the provisions for compensation, (para. 4) the laws of the State of Colorado and the United States of America shall apply.*"

38. It was agreed by the parties and their expert witnesses that there is no material difference between the laws of the Isle of Man and of England and Wales with regard to the interpretation of the ARA and the claim for misrepresentation and other contractual issues. The insolvency and liquidation of Broadsheet IoM are governed by Isle of Man law alone.

39. Limitation issues are governed by Manx and/or Colorado law (section H below).

40. It is agreed that both the Settlement Agreement and the claim for damages in tort (conspiracy to cause economic harm) are governed by English law (the Settlement Agreement was concluded in London).

History

41. The outline narrative (above) has to be expanded into a far more detailed history, not least because it involves many more players than Broadsheet and NAB (representing the State of Pakistan), the parties to these proceedings.

42. The story begins in Pakistan in late 1999. The then Prime Minister, Hawaz Sharif, was deposed after a military coup headed by General Musharraf, who became Chief Executive of the State in October 1999 and President in 2002.

43. A major political issue in Pakistan at that time was the extent of corruption, specifically at high levels in government and in the public service, including the armed forces. A particular cause of concern was the extent to which such persons had been able to acquire public funds for their own use and transfer them abroad for investment in real estate and other assets. Huge sums were said to be involved.

44. As one of his first acts in government, General Musharraf established NAB with wide ranging powers to investigate allegations of corruption, to prosecute offences where they were uncovered and to recover public funds improperly acquired or assets into which they had been converted, including funds and assets outside Pakistan. He appointed Lt. Gen. Amjad, a senior officer of undoubted integrity and ability, to be the first chairman of NAB and to pursue its objects with vigour. There is no reason to doubt the determination of both men that Pakistan through NAB should recover misappropriated assets, wherever they were situated, as effectively as it could.

45. In Pakistan, NAB established a country-wide organization including investigators and prosecutors with the necessary expertise in fraud and related e.g. banking matters. Apart however from existing diplomatic relationships between Pakistan and other states and international organisations, there was no machinery through which NAB could carry out its investigations and, where necessary, take steps to recover property situated abroad.

46. Mr. James at that time represented and was part-owner of a Colorado (U.S.A.) company named Trouvons LLC whose business included the kind of investigations and recovery of assets that NAB would require to be carried out. He had some previous business experience in Pakistan. His business associates included Mr. Ronald Rudman ("**Mr. Rudman**"), a Colorado lawyer, and Dr. William Pepper ("**Dr. Pepper**") an English barrister with offices in New York. Mr. James represented to NAB that Trouvons had the necessary expertise and experience to undertake the work of investigation and recovery of assets on behalf of NAB internationally, outside Pakistan.

47. Eventually, on 20 June 2000, the ARA was signed by Dr. Pepper on behalf of Broadsheet and by Gen. Amjad on behalf of NAB. There were two significant

changes from the agreement previously envisaged between Trouvons and NAB. First, and obviously, the contracting party was Broadsheet, not Trouvons. Broadsheet has been incorporated as a 'shell' company in the Isle of Man in May 2000 by lawyers instructed by Mr. James. Secondly, the scope of the ARA was intended to be limited to investigations and recovery of assets in the U.S.A., Europe and Asia, not world-wide. That was achieved, not by express provision, but by limiting its scope to specific 'registered persons or entities', or 'targets', listed or to be listed by mutual agreement in Schedule 1 (Article 1.2). A separate agreement, not involving Broadsheet, was negotiated between NAB and another company, IAR Ltd. (standing for International Assets Recovery) ("**IAR**"), also represented by Dr. Pepper. The IAR agreement was signed on 15 July 2000 and, it appears, was intended to relate to other parts of the world.

48. The suggested and unchallenged reason for the change from Trouvons to Broadsheet as the contracting party under the ARA was that Mr. Rudman had been suspended from his membership of the Bar of Colorado on grounds of dishonesty by Order of the Supreme Court of Colorado for a period of three years from January 1998. Though there is no direct evidence from Mr. James, I am satisfied that he knew of Mr. Rudman's suspension by not later than May 2000 and that he realized that if NAB became aware of it there would be no further negotiations between them; and that he caused Broadsheet to be incorporated so that it rather than Trouvons could enter into the proposed agreement with NAB, as it did on 20 June 2000.

49. The first disputed area of fact is, what pre-contract representations were made to NAB by or on behalf of Broadsheet before the ARA was entered into? This will be considered in Section B (below) but at this stage it may be noted that primarily the alleged representations related to and were made on behalf of Trouvons; it cannot have been suggested that Broadsheet, a newly formed company, itself had any experience or expertise of the kind claimed for Trouvons, and there is no evidence of the explanation given to NAB for incorporating Broadsheet and substituting it as a party. The evidence does support an inference that Mr. James and others represented to NAB that Broadsheet would have the benefit of the experience and expertise that was available to Trouvons, but there is no direct evidence from NAB's witnesses to that effect.

50. As noted above, the Agreement between IAR and NAB was signed on 15 July 2000. IAR is an off-stage character in the Broadsheet story until after the termination of the (Broadsheet) ARA in October/December 2003.

51. Both parties allege that during the currency of the ARA the other party committed breaches of its terms, though with this difference between them. The Respondents allege that by 28 October 2003 Broadsheet's breaches were fundamental i.e. repudiatory, so that they were entitled to accept the breaches and terminate the ARA with immediate effect, but they do not claim damages from Broadsheet for the alleged repudiation or for individual alleged breaches. Broadsheet contends that any shortfall in its own performance of the ARA was caused by NAB's breaches of its own obligations, and it claims damages in respect of those.

52. The second disputed area of fact, therefore, is the story of the performance or alleged non-performance of the ARA during that period (Section C below). During it, a major issue arose between the parties as to the correct interpretation of Article 4 of the ARA regarding the amount of compensation payable by NAB to Broadsheet in accordance with its terms. That construction issue will be considered in Section A below.

53. During the period of the ARA from 20 June 2000 until September/December 2003, Broadsheet was represented by Mr. James and by Mr. Douglas Tisdale, whom Mr. James consulted as a lawyer and a personal friend on 22 June 2000, immediately after the ARA was signed. Mr. Tisdale continued to represent Broadsheet during settlement and other negotiations that took place between Mr. James and representatives of NAB after the termination of the ARA and he gave evidence at the hearing.

54. Lt. Gen. Amjad continued as chairman of NAB until 25 September 2000 when he retired. He was succeeded by Lt. Gen. Maqbool who served until 26 October 2001. Lt. Gen. Hafiez followed, from 1 November 2001 until 31 October 2005. All three gave evidence at the hearing, as did Mr. Nawid Ahsan ("**Mr. Ahsan**") who was chairman from 7 July 2007 until 14 June 2010.

55. It may be noted that the difference between the parties as to the precise date on which the ARA was ended is of no practical importance for the purposes of this Part (Liability) Award. It is sufficient to say that the ARA terminated in October/December 2003.

56. Following the termination of the ARA, various negotiations and attempts at settlement took place between the two parties, namely Broadsheet and NAB, but the story is complicated, for two reasons. First, there were parallel negotiations regarding IAR's

claim that the same solicitors' letter dated 28 October 2003 was a repudiation of its separate agreement with NAB. IAR's representatives were Dr. Pepper and Kaveh Moussavi ("**Mr. Moussavi**") who had funded IAR previously and was willing to fund its claims against NAB. Secondly, as noted above there were significant changes in the corporate status of Broadsheet in the Isle of Man, and issues arise as to who was entitled to act for and represent Broadsheet at different times.

57. Mr. Moussavi is Iranian by birth and comes from a prominent and wealthy family. He qualified as a barrister in Iran and has lived in England for many years. He practiced as an academic lawyer specializing in international human rights law and other fields, and from 2004 until 2009 he was Head of the Public Interest Law and Policy Program at the Faculty of Law at Oxford University. His credibility as a witness was severely attacked and effectively, barring corroborative evidence, destroyed by the findings of two High Court Judges in previous (unrelated) proceedings which resulted in him serving a sentence of imprisonment for contempt of Court. But in the result there are few, if any, issues where his evidence is controversial.

58. He was first involved as an associate of Dr. Pepper in connection with the affairs of IAR and he provided substantial six-figure funding for IAR. When IAR's agreement was terminated, as he saw it wrongfully, by NAB's solicitors' letter dated 28 October 2003, he was concerned to assist IAR in its claim against NAB. He attended a conference at the offices of Kendall Freeman, NAB's solicitors, in about November 2003 where he met Lt. Gen. Hafiez, and later he introduced Dr. Pepper to other London solicitors, Hunton Williams, who would act for IAR.

59. Until that time, Mr. Moussavi was not involved in the affairs of Broadsheet in any way. However, having learned that Mr. James might be pursuing a claim against NAB on behalf of Broadsheet, he arranged a dinner party meeting with him at which Dr. Pepper and his son, Liam Pepper, were also present. Subsequently, he introduced Mr. James to Hunton Williams, the solicitors handling IAR's claim, and although he did not meet Mr. James again he understood that Mr. James would provide documentary evidence so that Messrs. Hunton could pursue Broadsheet's claim against NAB also. He understood that Mr. James had agreed on behalf of Broadsheet that, if he (Mr. Moussavi) and Dr. Pepper funded Broadsheet's costs of bringing a claim against NAB, they would share the proceeds 50/50 with Mr. James.

60. IAR instructed Hunton Williams to bring proceedings against NAB in December 2005 and Notice of Arbitration was given in about May 2006. Settlement discussions took

place on 19 April 2007 in London between Mr. Moussavi, Dr. Pepper and Liam Pepper representing IAR and Ahmer Bilal Soofi ("**Mr. Soofi**") a consultant lawyer representing NAB. Settlement terms were agreed shortly afterwards and on 3 January 2008 the government of Pakistan paid IRA US$ 2,250,000 or its sterling equivalent under the Agreement.

61. Meanwhile, there were dramatic developments regarding the affairs of Broadsheet in the Isle of Man. During the currency of the ARA, Broadsheet had employed a Jersey lawyer, Philip Cowan Sinel, to act on its and NAB's behalf in relation to assets that were believed to be situated there. Fees claimed by Mr. Sinel amounting to (net) £29,090.65 plus interest were not paid and on 19 May 2003 the Royal Court of Jersey entered default judgment against Broadsheet for that sum. The judgment was registered in the Isle of Man 1 April 2004 but it remained unpaid. Mr. Sinel petitioned the High Court (Chancery Division) on 3 February 2005 and a winding-up Order was made against Broadsheet on 7 March 2005 appointing Andrew Paul Shimmin as the Provisional Liquidator. By a further Order dated 2 April 2007 made on his application, Broadsheet was dissolved.

62. But that was not the end of the story. On 27 November 2009 it was further ordered that "*the dissolution of the Company ... on 2 April 2007 be and is hereby declared void*". A new liquidator was appointed, Roger Harper, who was expressly authorized to appoint lawyers in other jurisdictions "*to assist in any legal matters arising in the course of the winding up*" (para.3) with specific reference to the Company's claim against the Government of Pakistan under the ARA (para. 5). The Petitioner, who was IRA, undertook to provide for the Liquidator's costs and expenses (para.2).

63. The background to the restoration of Broadsheet was described by Mr. Moussavi. He discovered when he met Mr. Soofi in London in April 2007 in connection with IAR's claims (see above) that the latter was also meeting Mr. James in order to discuss Broadsheet's claim. This made him realise, he said, that despite what he thought was their earlier agreement (that Mr. Moussavi would fund Broadsheet's claim and in return would receive 50% of the proceeds), Mr. James was pursuing the claim independently and without reference to him, presumably for his own benefit.

64. Mr. Moussavi and Dr. Pepper had previously tried to persuade the first liquidator, Mr. Shimmel, to authorize proceedings by Broadsheet against NAB, but he had refused because of the potential for an adverse costs award. In that context, they discovered that there was another unpaid creditor of Broadsheet, Oakfield Corporate Services

Ltd., whose claim was for a relatively modest sum of about £4000. IAR, funded by Mr. Moussavi, had acquired the debt from Oakfield on terms which included paying the balance of the debt from the proceeds of any recovery from NAB. That gave IAR the necessary status to petition the Court for the dissolution of Broadsheet to be declared void. In a further transaction IAR, again funded by Mr. Moussavi, acquired the beneficial interest in Broadsheet from the two Panamanian companies that were its original members.

65. From November 2009, therefore, Broadsheet has been controlled by Mr. Moussavi and is beneficially owned by him and by Liam Pepper, Dr. Pepper's son. He stated in evidence that he has acted throughout on the advice of Isle of Man lawyers.

66. Meanwhile, Mr. James was following his own, independent path. According to Mr. Moussavi's evidence, Mr. James told him when they met in London in 2004 that he would not finance claims by Broadsheet against NAB, and that they could share the proceeds if Mr. Moussavi/IAR was willing to do so. Nevertheless, Mr. James did pursue the claims in his own fashion, and with considerable success. First, on 4 January 2005 in Colorado he executed a written assignment between Broadsheet as assignor and Steeplechase Financial Services LLC as assignee of all "*his right, title and interest in ... connection with the agreements entered into with the Government of Pakistan ... through the Chairman of [NAB] dated 20 June 2000*". The assignment was said to be "*for valuable consideration in hand paid by [Steeplechase]*". Mr. James signed the Assignment for both parties, as Chairman of Broadsheet and 'Manager' of Steeplechase.

67. On the same day, 4 January 2005, Mr. James acknowledged the Assignment before a duly authorized Notary Public in Denver, Colorado, Mrs. C. Jay Turner. She so certified in writing on 3 March 2008 and she gave evidence at the arbitration hearing confirming that she had done so Mr. James told her no more of the circumstances than appeared from the Assignment itself.

68. The Assignment therefore pre-dated (just) the Sinel petition to wind up Broadsheet and the winding-up order made on 7 March 2005. Mr. James had controlled and acted on behalf of Broadsheet since its incorporation in May 2000. Steeplechase was a company incorporated in Colorado, U.S.A. On the evidence, there is no reason to doubt that Mr. James, until the winding-up Order was made, had actual or apparent authority to describe himself as chairman of Broadsheet and as "Manager" of Steeplechase.

69. Mr. James claiming to represent Broadsheet met Mr. Soofi representing NAB in London in April 2007. These negotiations resulted in the Settlement Agreement dated 20 May 2008 on which NAB relies as a defence to the claim. It was signed in London by the Deputy High Commissioner for Pakistan in London, Mr. Abdul Basit, on behalf of the government of Pakistan and NAB, and by Mr. James who signed three times:

(i) on behalf of "Broadsheet LLC" as Chairman;

(ii) on behalf of Steeplechase Financial Services LLC as Manager; and

(iii) personally, as "*Shareholder and beneficiary of Broadsheet LLC (under winding up)*".

70. But by this time, in another twist to the story, Mr. James had incorporated another Colorado company which he also named "Broadsheet LLC". A clue to Mr. James' reasons for doing this is given in Recital G which, after referring to the Assignment dated 4th.January 2005, continues –

> *"However, BS was also re-incorporated in Denver, Colorado, after Broadsheet LLC Gibraltar was under winding-up."*

It is agreed that there was no such company as "Broadsheet LLC Gibraltar". NAB submits that this was a misnomer for Broadsheet IoM, explaining that IAR was a Gibraltar-registered company and the previous IAR/NAB agreement was used as a precedent for this one, hence the mistaken reference to it. However that may be, the Recital stands as a clear statement by Mr. James that he had incorporated "Broadsheet LLC" in Colorado as what he described as a re-incorporation of an earlier Broadsheet company.

71. The Settlement Agreement will be considered in detail below. It records in Recital D –

> "*D. BS claims a sum of US$ 515.6 million from NAB/GOP on the basis of its interpretation of clause 4 of the [A.R.A.] and in this regard target wise calculations are enclosed. NAB disagreed with the amount of the claim.*"

73. The Settlement Agreement provides:

> "*7. Settlement Amount*
>
> *The Parties agree that in full and final settlement of its claims BS shall receive a total payment of US Dollars one million and five hundred thousand ($1,500,000).*
>
> *8. Payment Schedule*

The parties agree that the settlement payment referred to in clause "7" above shall be made in two instalments to BS through demand drafts drawn in the name of BS and handed over to its representatives.

The first instalment of USD (figures in manuscript) 654,070 (£370,622.55) shall be paid to the representative of BS, on (manuscript) 20th. Day of May 2008 through the High Commissioner of Pakistan in London.

The second instalment (manuscript - $845930.00) shall be paid to the representative of BS, at a venue to be mutually agreed by the Parties, on or before 30th September, 2008."

72. Thereafter $1,500,000 was paid by or on behalf of NAB under the Settlement Agreement, but not to Broadsheet IoM or its liquidator or with its knowledge. Payment details were as follows:

(i) Cheque dated 20 May 2008 for £320,622.55 payable to M/S Broadsheet LLC Gibraltar, a misnomer. Cheque re-issued to a payee named by Mr. James (probably Broadsheet LLC (Colorado)) pursuant to an agreement between Mr. Soofi and Hasan Saqib and Tariq Malik on behalf of 'BS'); and

(ii) Cheque dated 29 September 2008 for $845,928.00 payable to an account of Broadsheet LLC at Compass Bank (Northglen) Colorado.

73. Mr. Moussavi said in evidence that there was no communication between him and Mr. James after mid-2005 and that he had no knowledge of Mr. James' negotiations with NAB (save in 2007 the fact that some negotiations were taking place) or of the Settlement Agreement and the payments made under it. I can see no reason to disbelieve this evidence and I so FIND.

74. As stated above, IAR, as an unpaid creditor of Broadsheet in place of Oakfield petitioned the Court to restore Broadsheet to the Isle of Man register. On 22 October 2009, Mr. Sinel did consent to the appointment of a new liquidator, Mr. Roger Harper, and it was agreed that IAR (Mr. Moussavi) would fund and pursue the claim against Broadsheet on his behalf. The Court made a consent Order (above) on 27 November 2009.

75. Meanwhile on 23 October 2009 Dr. Pepper on behalf of Broadsheet wrote to NAB under the heading "*RE: Second Notice of Intention to Proceed to Arbitration*" (paragraph 9 above).

(A) ARA Interpretation

76. A central and significant issue is the correct interpretation of Clause 4 of the ARA regarding the compensation to be paid to Broadsheet for its services. It reads:

> *"4. Compensation*
>
> *4.1 NAB and Broadsheet agree that any assets recovered as a result of the efforts of Broadsheet or as a result of a settlement between NAB and any person registered in accordance with the provisions of Clause "1.2" hereinabove shall be jointly shared as set out below. For the removal of any doubt, the share of the assets recovered as set out in this Clause "4" shall also apply to any settlement reached by NAB and any registered person or entity with or without the involvement of Broadsheet, provided that such persons or entity had been registered before the settlement.*
>
> *4.2 Broadsheet shall receive twenty per cent (20%) of the amount available to be transferred plus bonus if any, as may be allowed by Chairman NAB and NAB shall receive the balance eighty per cent (80%) of said amount thus recovered, less bonus if any, should the case so be."*

(Clause 1.2 referred to in Clause 4.1 incorporates Schedule 1 containing the agreed list of registered persons and provides that the list "may be amended from time to time with the mutual consent of both parties" (clause 1.2.1). Clause 5 also is relevant:

> *"5.2 NAB and Broadsheet hereby agree that an Escrow Account shall be opened with a mutually agreed Bank branch, that shall be jointly controlled by NAB and Broadsheet, and it is agreed that all assets proceeds thereof and funds recovered by Broadsheet shall be deposited in the Escrow Account and in no other place.")*

77. The governing law for clause 4 is expressly stated in clause 6:

> *"6. Law and Jurisdiction*
>
> *6.1 This agreement shall be governed by the laws of the Isle of Man and in case of there being no conflict. [sic] in accordance with the laws of the Islamic Republic of Pakistan, provided that in respect of the provisions for compensation, (para.4) the laws of the State of Colorado and the United States of America shall apply."*

The 'General Principles of Contract Interpretation under Colorado Law' are helpfully set out in section VII of the Expert Witness Statement by Boyd N. Boland (former Lead Magistrate Judge of the United States District Court for Colorado) who was called by the Respondents, and they were not dissented from by John Moye of Moye White LLP, Denver, Colorado, called by the Claimant (Response para.15).

78. The authorities quoted by Judge Boland are concerned with general principles of interpretation, including the circumstances in which extrinsic evidence may be admitted to resolve ambiguities in the written agreement, and with the specific

question of the relevance of Recitals in interpreting the agreement ("*they are not strictly any part of the contract*" (para.132)). Although the language is different, the authorities state similar principles to those formulated in leading English (and Isle of Man) judgments, and it is not suggested that there is any relevant difference between them. I note, however, that neither party has raised the question of possible rectification of the written agreement (a remedy that might be available under English Law if the document mistakenly failed to record what was in fact agreed).

79. The ARA was approved by lawyers acting for the respective parties. This is recorded in Clause 12:

> *"12. Status and Authority of the parties*
>
> *12.1 NAB and Broadsheet confirm that they have consulted with their respective legal advisers before entering into this Agreement and that the parties signing this Agreement have done* so with the full authority necessary to bind the NAB and Broadsheet."

80. It is common ground that Broadsheet undertook to perform its services under the ARA on a 'contingency basis' meaning that its work had to be done initially at its own expense and that it was to be remunerated ("compensated") out of funds that were recovered. There was no obligation on NAB to fund Broadsheet's efforts or to make any payment from its own resources, at any stage.

81. The overall scheme of the ARA was reflected in clause 4.1, quoted above. Its object was to locate and recover assets of "registered persons" (clause 1.1) and registration was a matter for mutual agreement between the parties, whether initially in the list agreed as Schedule 1 or by agreed additions under clause 1.2.1. Its scope therefore was defined by reference to that list and there were no geographical limits save that Broadsheet's obligations were defined by reference to "the subject assets" (clause 3.1). That could only refer back to clause 1.1 which states that the object was "*to trace, locate and recover such assets as described above, wheresoever secreted or transferred by the registered persons*". This expressly refers back to the Recitals which in summary relate to "funds and other assets" of the Government of Pakistan held "outside Pakistan" after being "*fraudulently obtained, converted and/or secreted*" from Pakistan. (It is, I believe, not disputed that the Recitals may be referred to for this limited descriptive purpose, but if it is I HOLD that it is not incorrect to do so.)

82. All the evidence confirmed that that was the intended scope of the ARA as regards defining the assets that Broadsheet was required to 'trace, locate and recover" under clause 13.1. NAB did not have the resources needed to pursue assets outside Pakistan, although it could assist through diplomatic channels where necessary, whilst Broadsheet undertook to use "*its best efforts, at all times, to recover the subject assets" (Clause 3.1). That was on the basis that it was "a Company specializing in the recovery of such assets/missing funds*" (Third Recital").

83. That did not mean that Broadsheet would operate only outside Pakistan. It occupied an office in NAB's headquarters at Islamabad in Pakistan and there was active cooperation between NAB personnel and Broadsheet's representatives there. Broadsheet however was only concerned with assets outside Pakistan.

84. The issue arising under Clause 4.1 is whether Broadsheet's entitlement to 20% of assets recovered from a registered person (plus a bonus, if allowed by the NAB chairman) is limited to assets recovered from that person that were 'foreign assets' as described in the Recitals and elsewhere in the ARA, or whether it might include other recoveries, including domestic assets, from a registered person under the ARA.

85. NAB contends that "*any assets recovered*" in clause 4.1 is limited to assets recovered from outside Pakistan, essentially because that is the scope of the ARA itself and Broadsheet was not concerned with assets inside Pakistan. Broadsheet however relies on the dichotomy in the first sentence of the clause between "*any assets recovered as a result of the efforts of Broadsheet*" – which, given the limited scope of Broadsheet's undertaking, can only mean assets situated outside Pakistan – and on the other hand the words which follow, "*or as a result of a settlement between NAB and any [registered person]...*", emphasizing the disjunctive "or". Such a settlement, Broadsheet contends, might include the transfer of assets inside as well as outside Pakistan.

86. After long and careful consideration, I have come to the conclusion that Broadsheet's contention is correct. Assuming in NAB's favour that full reference may be made to the Recitals and that Broadsheet's activities were expressly limited to foreign assets i.e. assets situated outside Pakistan, both in clause 1.1 (Objectives – "*such assets as described above*") and clause 3.1 ("*recover the subject assets*"), it is immediately striking that the corresponding reference in clause 4.1 is not qualified in that way. Rather the formula is "*any assets recovered either as a result of the efforts of Broadsheet or as a result of a settlement between NAB and [any registered person].*"

[underlining supplied]. The latter applies when a recovery has been made by NAB rather than Broadsheet, under a settlement agreed between it and a registered person, and the question arises, does that include assets recovered in that way without any involvement by Broadside? The question occurred to the draftsman and was answered in the following sentence, beginning "*For the avoidance of doubt ...*": such involvement was not necessary.

87. But that fails to define the "assets" in which Broadsheet is entitled to a share. On NAB's interpretation, they are limited to foreign assets, in line with the preceding clauses and with the objectives and scope of Broadsheet's undertakings stated in them. Broadsheet relies on the fact that clause 4.1 was worded differently – "*any assets*" recovered by NAB under a settlement with a registered person.

88. The fact is that "assets" in clause 4.1 is unqualified save that they have been recovered under a settlement with a registered person. They have been recovered by NAB from a person who had or might have had assets outside Pakistan, hence his or her agreed registration under the ARA. Should they be limited to "foreign assets", either because that was the intended meaning in the context of the ARA as a whole, or because there is relevant extrinsic evidence that makes it the correct interpretation of the clause?

89. I am not persuaded that it is necessary to imply or hold, as a matter of construction, that only "*such assets*" or "*subject matter assets*" was intended in clause 4.1. "Assets" was used without the qualification, in two other places; first in clause 3.3 where there was an express reference back to "subject assets" in clause 3.1, and secondly in clause 3.5 where it was unnecessary. Moreover, clause 4.1 itself reveals that it was not intended to be limited to assets recovered by Broadsheet. The second sentence was added "*For the removal of doubt*" and to show that Broadsheet might or might not have been involved in recovering the assets referred to.

90. Should the restriction nevertheless be implied, for that is the effect of admitting extrinsic evidence to justify the limited meaning? A number of issues arise. The settlement would not necessarily distinguish between foreign assets and those inside Pakistan at any material time. And what was a material time? Suppose the registered person had assets outside Pakistan but transferred them to Pakistan before the settlement was made and they were recovered by NAB. Or that a compromise was agreed whereby foreign assets were kept (such as real estate in London) but cash or other property in Pakistan was surrendered. What would the position be when the

proceeds of a bank loan were transferred abroad but it was due to be repaid in Pakistan, and the settlement terms related to it? Counsel for NAB suggested that these and other issues could be resolved by an inquiry or otherwise, if they were to arise, but that hardly justifies adding a qualification to the meaning of the general words used.

91. I note also that the words in clause 4.2 "*the amount available to be transferred*" do not assist NAB's argument. They refer to the Escrow Account into which all recoveries by Broadsheet have to be paid, under clause 5.2. It cannot be said that Broadsheet's only right is to receive a payment from the Escrow Account, because it is entitled even on NAB's interpretation of Clause 4.1 to recover a share of a recovery under a settlement between NAB and a registered person, that is to say, of a recovery by NAB which there is no obligation to pay into the Escrow Account.

92. Lt. Gen. Amjad was the only witness with firsthand knowledge of the negotiation and signing of the ARA, as the first Chairman of NAB. He was not personally involved in the negotiations or in drafting its terms, which he delegated to a senior NAB official, Mr. Farouk Khan. Lt. Gen. Amjad was clear in his mind that Broadsheet would receive 20% "only when there was an asset recovery that was repatriated to Pakistan". But clause 4.1 even on NAB's interpretation gave Broadsheet an additional right over settlement recoveries made by NAB in which it was not involved. Asked about this, Lt. Gen. Amjad said "Although I would agree that it was a very loose area which is not even covered by the contract, neither in our favour nor in Broadsheet's favour." He was a responsible and honest witness. Of course, he could not give evidence as to the correct interpretation of the ARA. But this was evidence that he had no knowledge of the negotiation or drafting of Clause 4.1, or of the genesis of the 'settlement' provision in it, and I accept it entirely.

93. I should add by way of comment that I am doubtful whether defining "any assets" in the first line of clause 4.1 as "such assets" or similar would achieve the result for which NAB contends. That would at least arguably limit the meaning to 'foreign assets' recovered by Broadsheet and therefore within the scope of the ARA, but that would not be wide enough to include 'foreign assets' recovered by NAB under a settlement with a registered person. If this is correct, it demonstrates that a wider re-writing would be necessary than NAB suggests.

94. In conclusion, therefore, I HOLD (a) the literal meaning of "*any assets recovered as a result of ... a settlement between NAB and [a registered person]*" in clause 4.1 of the

ARA is not limited to assets that were or had been assets outside Pakistan; (b) there is no justification either in the ARA itself or in any extrinsic evidence for limiting their meaning in that way; and (c) that literal meaning is their correct interpretation in law.

(B) Was NAB entitled to rescind the ARA on 28 October 2003 for pre-contract misrepresentation?

95. NAB's claim to rescind the ARA for pre-contract misrepresentation was first raised in the letter dated 28 October 2003 from London solicitors, Kendall Freeman, which purported both to rescind the contract and, in the alternative, to accept Broadsheet's alleged fundamental (repudiatory) breaches and terminate it on that ground. There was no suggestion before that letter that NAB was contemplating or might seek to exercise either remedy.

96. In NAB's Defence to Broadsheet's claims in the arbitration, there was a passing reference in paragraph 17 –

> "*17. Further or alternatively, by a letter dated 28 October 2003, the Government exercised alternative rights of: (i) rescission for misrepresentation; or (ii) termination for repudiatory breach of contract and/or pursuant to clause 18.3 thereof. The Agreement has accordingly been brought to an end and is no longer operative.*"

(Note – the clause 18.3 claim has not been pursued.)

97. There was no further reference to the misrepresentation allegation in the following 168 paragraphs of the Defence except in paragraph 154 ("*For the reasons set out in this Defence, the Government was entitled to exercise alternative rights of rescission or termination [on] 28 October 2003*") and in paragraph 163 ("*The Agreement was rescinded or terminated...as a result of Broadsheet's material misrepresentations ...*").

98. The Defence alleged that representations were made to NAB and/or the Government during its negotiations with five individuals who were representing "Trouvons Company LLC, Colorado USA ("**Trouvons**")" (para.33). The five individuals were Mr. James, Mr. Ronald Rudman, Dr. William Pepper, Mr. Ghazanfar Ali and Mr. Tariq Fawad Malik ("Mr. Rudman", "Dr. Pepper", "Mr. Ali" and "Mr. Malik", respectively). Trouvons and they "held themselves out to be well-resourced and experienced in the international recovery of misappropriated assets" (para.39). Then it is alleged –

> "*41. Broadsheet was substituted for Trouvans as the counterparty to the Agreement only at a late stage of the negotiations.*"

99. There was no counterclaim for declaratory or other relief in respect of the claimed rescission.

100. In the Skeleton Arguments exchanged before the hearing, the Claimants made short reference to the misrepresentation/rescission issue (paragraphs 230-244) but the Respondents expanded it enormously (pages 102-120). It is common ground that the issue is governed by Manx law and that "*the applicable principles are materially the same as those in England and Wales*" (para. 241). It was alleged that "*the representations made on behalf of Trouvons LLC and those standing behind it were adopted by Broadsheet before entering into the ARA*" (para. 245) and that "*Broadsheet did not ever inform the Respondents of the reasons behind the last minute change of corporate identity*" (para.246). Apart from documentary evidence, the Respondents relied only on the evidence given by Gen. Amjad.

101. Gen. Amjad's Written Statements described how in October 1999 he met Mr. Malik and Mr. Ali as the representatives of Trouvons LLC ("**Trouvons**") and GSA Investment Corporation Ltd. ("**GSA**"), respectively. They asked whether NAB was interested in hiring a foreign company to assist with the supply of information and the speedy recovery of assets corruptly taken and held outside Pakistan. Gen. Amjad followed this up with Trouvons, received a brochure from them and visited their offices in Colorado USA so that he could assess the proposals they were putting forward. That was in April 2000. There he met Mr. James who was introduced as their Manager, and Dr. Pepper their legal advisor. They assured him that they had the requisite capabilities and resources to assist NAB. They said that Trouvons would be prepared to contract on a contingency basis and agreed that NAB would have no financial exposure.

102. When he returned to Pakistan, Gen. Amjad directed Mr. Farouk Khan to undertake the negotiations on behalf of NAB. He invited Mr. James and Dr. Pepper to Pakistan but he does not recall meeting them except when Dr. Pepper signed the ARA on behalf of Broadsheet in his office on 20 June 2000.

103. With regard to the 'substitution' of Broadsheet for Trouvons, Gen. Amjad said:

> "*The company structures that would ultimately be adopted for the purposes of the contract with the Government of Pakistan and to undertake the work was not something that I concerned myself with… It was my clear understanding that Broadsheet [and IAR] were companies set up to focus on NAB's work by the representatives of Trouvons. The company structure that was adopted would not affect the commitments that Trouvon ... Acting through*

representatives such as [Mr. James and Dr. Pepper] had made to NAB". (para.28)

104. In his Second Witness Statement, Gen. Amjad said this:

> "*10. At the time of the negotiations I was not particularly interested in precisely how the representatives of Trouvons wanted to divide up the work that they would do for NAB. I was aware that two companies, Broadsheet and IAR, had been established and that they would be the companies with which NAB and the [Government] would contract. From my perspective the representatives that we had been dealing with had remained the same. So far as I was concerned, the structure of the companies would not affect the representations that had been made during our negotiations with those representatives…*" (para.10).

105. In his oral evidence, Gen. Amjad was not asked about these passages in his Witness Statements. In another context, he said that [he] "*was dealing with two faces, that's Jerry James and Dr. William Pepper, basically*".

106. Mr. Farouk Adam Khan made a Witness Statement that was produced by the Claimants, but he did not give evidence on grounds of ill-health. His evidence is consistent with Gen. Amjad's (above) in confirming that he arranged Gen. Amjad's visit to Colorado *"so that he could be meet the people he would be working with*". He said that Gen. Amjad on his return to Pakistan reported that "*he was satisfied with the results of his trip, and that he thought the representatives of Trouvons whom he had met appeared to have the necessary capability to help the NAB with its mission*".

107. There was no direct evidence to support the contention in the Respondents' Skelton Argument that "*the representations made on behalf of Trouvons LLC and those standing behind it were adopted by Broadsheet before entering into the ARA*". That can only be alleged as a matter of inference from the evidence cited above. It does not identify any occasion when any person made any statement to that effect, or to whom.

108. Before considering what inference, if any, should be drawn, I should refer to what seems have been the reason for 'substituting' a new company, Broadsheet, for Trouvons. It is entirely discreditable to Mr. James, and perhaps less so to Dr. Pepper. It was because the managing director of Trouvons, Mr. Ronald Rudman, a Colorado lawyer, was suspended from practice by order of the Supreme Court of Colorado dated 8 December 1997, for dishonest misappropriation of a client's funds. The period of suspension was for three years from 5 January 1998. Dr. Pepper later suggested to Mr. James that Broadsheet was "*formed in order to cover the Rudman*

disability" and all the evidence suggests that it was. Clearly, the information was concealed from NAB and the Government's representatives because it was assumed, correctly, that if they knew they would break off negotiations with Trouvons. Except that they were not told the true reason, it is entirely speculative what explanation they were given for the substitution.

109. There is no allegation of misrepresentation relating specifically to Mr. Rudman and his disability, nor is it contended that the concealment from NAB was in breach of any duty of disclosure.

Representations as to Broadsheet

110. As stated above, there is no direct evidence to support the Respondent's contention that representations made regarding Trouvons' experience and capacities were "adopted" by Broadsheet before entering into the ARA, in other words, between the date Broadsheet was incorporated (28 May 2000) and the date the ARA was signed (20 June 2000).

111. The third Recital of the ARA contains an express representation that Broadsheet was "*a Company specializing in the recovery of such assets/missing funds*". But that was patently incorrect, and known to NAB to be incorrect. Broadsheet was a newly formed Isle of Man company with negligible assets, no experience and, apart from the ARA, no current business activity.

112. The Respondents' submission is that Broadsheet was represented by the persons who until the substitution took place were negotiating on behalf of Trouvons. In May/June 2000 those persons were Mr. Ali and Mr. Malik and on 5 June 2000 the former reported to Mr. James and Dr. Pepper:

> "*5. From [Gen. Amjad's] point of view he was dealing with an American company, which has turned into a British Isle of Man company. We spent a number of hours explaining this point.*"

113. There is no evidence from either Mr. Ali (who has died) or Mr. Malik. The Claimant's failure to call the latter as a witness could possibly justify drawing inferences against the Claimant, as the Respondents submit I should do. But that does not justify drawing inferences in favour of the Respondents when no evidence exist to support them. There is no such evidence: NAB's representatives during the negotiations were Gen. Amjad who, as quoted above and perhaps understandably, was unconcerned

by the corporate structures. Mr. Farouk Khan to whom he delegated these matters was unable to say anything about them –

> *"...I cannot remember any specific details about the corporate entities. In particular, I do not recall at what point in the negotiations Broadsheet replaced Trouvons in drafts of the Agreement we were discussing with Dr. Pepper and his associates, nor do I remember why the change was made"* (Witness Statement, filed by the Claimant, para.29.)

114. The Respondents do not contend that Dr. Pepper and/or Mr. Malik represented on behalf of Trouvons that Broadsheet was a satisfactory substitute for it as the contracting party, or that Broadsheet in some way would perform the contract on its behalf. Rather, it is submitted that they gave assurances on behalf of Broadsheet that it, the new company, would have the same resources as Trouvons and in particular had access to the same experienced personnel.

115. The fact that NAB agreed to accept the substitution might be said, in other circumstances, to justify that inference being made, but here it is contradicted by the evidence from Gen. Amjad and Mr. Malik that they were unconcerned by the change of 'corporate structure'.

116. The facts were that Trouvons according to its promotional material had a number of wealthy financial backers, one of whom was Mr. James, and had extensive international experience and success. Broadsheet was a newly formed 'shell' company funded by Mr. James alone, and claiming to "specialize" in that field. The most that can be inferred, in my judgment, is that NAB was told these facts and that the new company would be able to operate in the same way as Trouvons did. The evidence does not support the Respondent's assertion that 'Broadsheet' represented that it had the same existing financial and other resources as Trouvons, or those which Trouvons claimed to have.

117. In my judgment, essentially what was said was a promise for the future, not a statement of existing fact, and the misrepresentation allegation should fail for that reason alone. But that ground was not specifically argued and I shall consider shortly other issues that were.

118. First, was the representation false? There is no ground for supposing that NAB was told that Broadsheet was financed by any of Trouvons' backers, apart from Mr. James. He gave the impression of being a successful and wealthy businessman, and soon after the ARA he employed Matrix at a cost of $(even £)500,000, although he

was already involved in financial disputes with his former partners or associates in Trouvons, including Dr. Pepper, and he appears to have fallen out with them soon afterwards. There was independent evidence, from the notary public from Denver who gave evidence regarding the Steeplechase Assignment, who knew Mr. James personally, that he appeared to be a successful businessman "*he had companies, he had money, he had a nice house*". The evidence I have heard suggests that he was financially stretched after May 2001, when his relations with Matrix ended, but it does not prove that in June 2000 he was unable to support Broadsheet's activities under the ARA or to employ similar experienced personnel.

119. It seems that a misrepresentation is alleged concerning the ability of Trouvons to perform the ARA, which may be part of the Respondents' case ("*These representations had been adopted from similar statements (also untrue) made about Trouvons in the early stages of the negotiation*" (Respondents' Closing Submissions para.132)). That allegation is answered, in my judgment, by the fact that Gen. Amjad made a special visit Denver in April 2000 to satisfy himself that Trouvons was a suitable bidder, and he was satisfied that it was (see above).

120. Gen. Amjad also said this –

> "*I was only in office for about three months after the signing of the Broadsheet Agreement. However, I had sufficient opportunity to observe that Broadsheet ....seemed to have grossly misrepresented and exaggerated their competencies and resources with respect to their asset recovery programme.*" (First Witness Statement para.42)

121. Gen. Amjad left office in October 2000. The first mention of the possibility of rescission was in the Termination Letter from London solicitors (Kendall Freeman) dated 28 October 2003. His successor, Gen. Maqbool, said in evidence that in early 2001 "*We had a wonderful relationship [with Broadsheet]*" and that after May 2001 "*we didn't want to indicate that we were unhappy, we wanted to move on and allow each other to perform*". I accept Respondents' submission that the lapse of time itself may not constitute a waiver of the right to rescind, but I have no hesitation in holding that they lost their right to rescind the ARA, if they ever had one, by reason of their continuing relationship with Broadsheet under the ARA after 2001.

122. At the hearing, I raised the possibility that the Respondents could have no right to rescind the ARA, first claimed on 28 October 2003, because it was impossible to restore the parties to their pre-contract situations, even financially, at that date. The Respondents contend inter alia that this is not available to the Claimant because it

was not pleaded. That is ironic, when the claim for rescission itself although referred to was not pleaded in the Defence and was developed only in the Respondents' Skeleton Argument.

123. It is now submitted that restitution in integrum in fact was and is possible, but I do not accept this. By 2003, both parties had accepted the ARA as governing their relationship for more than three years, many third party rights had been affected (including the recovery from Admiral Haq) and even restoring the parties to their pre-contract financial situations would be complex, if possible at all. I hold, therefore that this does operate as a further bar to the claimed right to rescind.

124. For these reasons, the claim must be dismissed.

(C) Was Broadsheet in repudiatory breach of the ARA on 28 October 2003?

Scheme of the ARA

125. The scope of the ARA was well expressed in the Recitals:

> "*WHEREAS, NAB believes that certain persons and entities have fraudulently obtained, converted, and/or secreted funds and other assets belonging to the Government of Pakistan and are holding such assets outside Pakistan;*
>
> *AND WHEREAS NAB wishes to recover such funds and other assets wheresoever situated and is willing to issue a mandate to a company specializing in recovery of such assets/missing funds on behalf of NAB;*
>
> *AND WHEREAS Broadsheet, a Company specializing in the recovery of such assets/missing funds, is ready and willing in exchange for participating in a share of the profits to undertake the tracing, locating and recovery and transfer of such funds and other assets secreted or transferred or removed from Pakistan by such persons and/or entities;*
>
> *AND WHEREAS NAB and Broadsheet, subject to the terms here-in-after mentioned are ready, willing, and able to enter into an Agreement with each other, ...*".

126. The words in the third recital "*in exchange for participating in a share of the profits*" were important. It was an essential feature of the Agreement for NAB, even described as 'a matter of principle', that it should not have to remunerate Broadsheet, except out of the proceeds of any recoveries. On the evidence before me, Broadsheet was the only party interested in entering into the Agreement on a contingency basis.

127. The purpose of the ARA, therefore, was the tracing and recovery of assets representing State-owned property that had been fraudulently etc. removed from Pakistan and was being held "outside Pakistan". But Broadsheet was required "*to focus on the persons and/or entities registered by mutual agreement between NAB and Broadsheet with said names attached hereto as Schedule 1.... and shall not apply to any other person or entity not so registered.*" (Article 1.2), although Schedule 1 might be amended from time to time "*with mutual consent of both parties*" (Article 1.2.1).

128. So, although Broadsheet undertook to recover only assets that were situated outside Pakistan, there was no other geographical restriction imposed on its activities. Broadsheet might conduct its search etc. activities anywhere in the world, and in the event it did establish a representative office in Islamabad, which was accommodated rent-free in NAB's headquarter offices there. But its objectives were confined to the recovery of assets outside Pakistan of such persons and entities as were registered by mutual consent in Schedule 1.

129. The ARA included express obligations on both parties regarding the provision of information to the other. NAB was required by Article 2.1.1 to "*Deliver to Broadsheet such information as may be available with NAB in respect of the registered persons and entities [but].....subject to Chairman NAB's discretion*", and by Article 2.1.3 to "*provide such information and documentation in its possession about the acts of misfeasance or malfeasance and wrongful acts of the registered persons/entities involved and their identities and locations as requested and assist the asset recovery efforts of Broadsheet in every possible way...*". Broadsheet for its part undertook that it would "*keep Chairman NAB regularly informed about the progress of the search for assets and the status of legal proceedings related thereto*" (Article 3.5).

130. It became apparent during the currency of the ARA that its effect was not clear in a number of situations that arose in practice. Increasingly, these became sources of friction and unresolved disagreements between the parties:

(i) There were many cases of bank loan defaults, where customers failed to repay loans from Pakistani banks, sometimes willfully i.e. without a reasonable excuse, and after they had deposited the loan proceeds overseas; in that way it became a method of transferring funds overseas and keeping them there unlawfully. When such cases were resolved, it was likely to be by means of a settlement agreement between the borrower and the Pakistan

bank under which the loan was repaid in Pakistan. That might or might not involve the repatriation of funds from outside Pakistan. When the borrower was a registered target under ARA, Broadsheet claimed the right to recover some part of these recoveries, but NAB raised various objections including, first, that the recovery was by the bank, not by NAB; secondly, the recovery was an internal payment, not involving funds situated outside Pakistan; and thirdly, that that was the case, even where the repayment was funded from assets previously held outside Pakistan. Broadsheet replied that the customer had been registered as a target under the ARA, presumably on the basis that it held or was suspected of holding assets outside Pakistan, and that the recovery was made under a settlement agreement;

(ii) the ARA provided that individuals should be registered as targets by mutual consent; questions arose as to whether NAB was entitled to refuse its consent and, if so, on what grounds, and whether one party was entitled to refuse to de-list a target if the other party sought to do so; and

(iii) whether Broadsheet was obliged to provide NAB with information and evidence to support prosecutions inside Pakistan, not merely about its efforts to recover assets outside Pakistan.

131. As will be seen, the ARA continued in force from its date of signature, 20 June 2000, until it was terminated either by NAB's letter dated 28 October 2003 or by Broadsheet's response to it in about early December 2003.

132. Broadsheet was represented throughout by Mr. James, who acted as its executive chairman, and on occasions by Mr. Douglas Tisdale, a United States (Colorado) lawyer acting on his behalf. Both were based in the USA. Within Pakistan, Broadsheet established a small team who were accommodated (rent free, NAB emphasizes) in NAB's offices in Islamabad. The team was headed initially by Ghazanfar Sadiq Ali ("**Mr. Ali**"), a former banker who introduced Broadsheet to NAB and played a leading part in negotiating the ARA; Tariq Fawad Malik ("**Mr. Malik**") who, it was common ground, was regarded as Broadsheet's 'in-country representative' during the period of the ARA; and, it seems, two assistants.

133. Mention must also be made of Farouk Adam Khan ("**Mr. Khan**") who provided a Witness Statement for the Claimant but in the event was unable to give evidence due to illness. He was appointed the Prosecutor General of NAB by its first chairman,

Gen. Amjad, in November 1999 and he continued in that post until he resigned (under Gen. Maqbool) one year later. Soon afterwards, as he put it, he "met" Mr. Malik "and agreed to act as a consultant for Broadsheet by giving them advice regarding its dealings with the NAB on a consultancy basis".

134. During the period of the ARA there were three chairman of NAB who acted as its principal representatives in its relations with Broadsheet. These were, first, Lt. General (rtd) Syed Muhammad Amjad ("**Gen. Amjad**") from the inception of NAB in October 1999 until September 2000; secondly, Lt. General Khalid Maqbool ("**Gen. Maqbool**") from 26 September 2000 until 26 October 2001; and thirdly, Lt. General (ret'd) Munir Hafiez ("**Gen. Hafiez**") from 1 November 2001 until 31 October 2005. These three therefore covered the whole period of the ARA, including its negotiation and signature (Gen. Amjad) and its termination (Gen. Hafiez).

135. I should say at once that Gen. Amjad, Gen. Maqbool and Gen. Hafiez have all had distinguished careers in the army and public service of Pakistan. They were truthful and helpful witnesses, and I am greatly indebted to them. A later chairman of NAB, Nawid Ahsan, who held office from 6 July 2007 until 14 June 2010, gave evidence concerning the Settlement Agreement reached with Mr. James in May 2008 (section (F) below), as well as the IAR Settlement Agreement that was executed on 2 January 2008. He was not concerned at any time with the negotiation, signing or performance of the ARA.

136. Other witnesses who gave evidence on behalf of NAB concerning the period of the ARA were:

(i) Talat M. Ghumman ("**Mr.Ghumann**") who was Director General of the Financial Crimes Investigation Wing ("**FCIW**") of NAB from 25 November 1999 until 2 August 2004. He did not participate in the negotiation and signing of the ARA and at first he had little to do with Broadsheet or its representatives, but from about January 2001 until mid-2003 he was actively involved in NAB's relationship with them; and

(ii) Navid Rasul Mirza ("**Mr.Mirza**") who was Prosecutor General Accountability ("**PGA**") at NAB from August 2002 until July 2003. He was not called for cross-examination by Broadsheet.

137. Soon after inception of the ARA, Mr. James employed Matrix Research Ltd. ("**Matrix**") who were London-based asset recovery specialists. The co-founder and

managing director of Matrix, Robert Byrne ("**Mr. Byrne**") described them as "a team of industry specialists that worked for a small number of substantial clients". He said that he knew Mr. James from previously working for Trouvons LLC and that Matrix was engaged by Broadsheet, first, to produce a feasibility report on a specific project, namely, an investigation into the financial affairs of Mian Nawaz Sharif ("**Mr. Sharif**") (formerly, and now again, the Prime Minister of Pakistan), and secondly, from about September 2000, to carry out investigations on behalf of Broadsheet into named 'targets' under the ARA. A Matrix employee, Joe Forbes, visited NAB in Pakistan in November 2000, and Mr. Byrne made personal visits in February 2001 and May 2001. Mr. Byrne has long experience and is highly competent in the work of international asset recovery. He was an impressive witness and I accept his evidence without hesitation.

138. There were several important milestones during the period of the ARA. The first was in connection with the affairs of Mr. Sharif. He was deposed when General Musharraf took office in October 1999 and was arrested and charged with various offences. Following high level negotiations involving the government of Saudi Arabia as well as General Musharraf, Mr. Nawaz was released from prison and allowed to travel with his family to exile in that country. There was a financial settlement in about February 2001, the terms of which are in issue in this arbitration. Mr. James on behalf of Broadsheet wrote asking for details, stating that he had received "assurances" that Broadsheet would obtain a share of any assets recovered. Gen Maqbool replied on 24 February 2011 asking Broadsheet to put the matter 'on hold' until outstanding issues were resolved within the government of Pakistan. Broadsheet's claim for a share of assets recovered from Mr. Sharif and his family, who were registered targets under the ARA, is maintained in these proceedings.

139. Second, another registered target, Admiral (ret'd) Mansur Al-Haq, was living in the USA at the time of the ARA. Broadsheet played a part in securing his arrest which led to his voluntary return to Pakistan. He agreed to pay to NAB, under a plea bargain, a sum in excess of US$7.5 million which he repatriated from a bank account in Jersey. Mr. James on behalf of Broadsheet maintained its claim for a share of this recovery, and Gen. Hafiez as chairman of NAB authorized the payment of US$1,500,846 (twenty per cent.) to Broadsheet in December 2001 (Mr. James had demanded 28%). NAB has acknowledged throughout that in this case – it says, the only one – Broadsheet assisted in the recovery of (foreign) assets and was entitled to a 20% share.

140. Third, in May 2001 arrangements were made for Mr. Byrne to travel to Islamabad to give a substantial presentation to NAB officials on five high-profile targets. On 22 May he did this before an audience of 40-50 people and produced hard copies of reports on the individual targets. He said in his Witness Statement –

> "*I felt that the officials' response to my presentation was muted, even disinterested. I don't recall being asked many questions about either the process or the results of the investigations that Matrix had conducted.*" (para.101)

141. He said in evidence that this reaction may have been due to a 'cultural mismatch' and to his method of presentation. However that may be, he heard nothing more from NAB nor was he asked to carry out further work for Broadsheet. The relationship "didn't come to an official end" but at "about this time I understood from Mr. James that matters should be paused". He said from memory that Matrix was paid £(or $) 480,000 by Mr. James for its work for Broadsheet, possibly not including £75,000 for the Sharif project.

142. It is significant, in my judgment, that both Mr. Byrne and Mr. Forbes (as the author of letters and other documents admitted in evidence) found that it was not easy to work with the NAB representatives they met, particularly with regard to obtaining information from them. Mr. Byrne said this:

> "*In addition to the institutional factors that prevented or restricted the flow of information from the NAB, we also encountered difficulties in relation to certain NAB personnel", and*
>
> *"Despite my efforts to do so, I was not able to establish close working relationships with key personnel within the NAB."* (This was ascribed largely to continually changing personnel.)

143. At the conclusion of her cross-examination of Mr. Byrne, leading counsel for the Respondents made it clear that there was no criticism of the work done by Matrix:

> "*(The Arbitrator) … is ... there any allegation against Mr. Byrne's company of failing to do a good job, in what he was instructed to do …?*
>
> *(Ms. Gill) There is no such allegation, sir.*
>
> *… we are not saying that Matrix should have done something different or found something different."*

144. Gen. Maqbool was chairman of NAB from September 2000 until October 2001. He was asked about his relations with Mr. James at the end of 2001/early 2001 and he said *"…that did not mean that* [we] *were unhappy, we had a very wonderful*

relationship and we were keen to move on", and with regard to the situation in 30 May 2001 (after Mr. Byrne's visit) when he approved adding further targets to Schedule 1 of the ARA, he said "we didn't want to indicate that we were unhappy, we wanted to move on and allow each other to perform. We were placing a lot of trust in each other." He explained that NAB was disappointed that Broadsheet had reported on only six or seven targets, probably referring to Mr. Byrne's recent visit, and wanted it to do more.

145. A number of high level meetings took place between Mr. James representing Broadsheet and successive chairmen of NAB. These included one in Washington USA which lasted three days (24-26 April 2002) between Mr. James and Mr. Tisdale on behalf of Broadsheet and Gen. Hafiez (chairman) and Mr. Mirza (PGA) on behalf of NAB. The original purpose was to discuss a number of issues that had arisen under the ARA including whether Broadsheet was entitled to be paid compensation under Article 4 when assets were recovered inside Pakistan (see Section (A) above). Discussion of this and other issues was limited because much of the time was taken up with visits to US Government agencies (which Broadsheet claimed to have organized at NAB's request) and no conclusions were reached.

146. The next meeting was held in London on 21 September 2002. It was attended by Gen. Hafiez (chairman), Mr. Mirza (PGA), Talat Ghuman (Director of the Overseas Wing) and Taher Nawaz on behalf of NAB, and Mr. James, Mr. Tisdale and Tariq Fawad on behalf of Broadsheet. The position with regard to a number of ARA 'targets' was discussed, including ones where Broadsheet alleged that large amounts of cash were waiting to be picked up in Jersey and that NAB's cooperation was necessary. NAB complained about the absence of reports from Broadsheet and it was agreed that these would be provided within one month i.e. by 23 October 2002. At one stage the note of the meetings records this:

> "*JJ (Mr. James) I must say that this agreement is not working for us.*
>
> *CH (Gen. Hafiez) It is not working for us either.*"

147. The promised progress reports were not provided by Broadsheet, and Mr. Ghuman on behalf of NAB made numerous requests for them. But the relationship continued with correspondence on outstanding issues and a number of meetings including one between Gen Hafiez and Mr. Ghuman on behalf of NAB and Mr. Malik representing Broadsheet on 17 February 2003 where Broadsheet proposed a 'briefing meeting' and Gen. Hafiez "insisted that any further meetings b/w BS and NAB be conducted

in Pakistan". On 31 March 2003 Mr. Malik wrote to Gen. Hafiez "to summarise all outstanding issues that have been on hold for a while. This undoubtedly is making it difficult for both parties to move forward. They need to be addressed on an urgent basis in our mutual interest." There followed a list of 12 items including ones where Broadsheet claimed that NAB had failed to respond to previous communications from Broadsheet. Mr. Ghuman replied on behalf of NAB on April 18, 2003. The letter referred to each of the items listed by Mr. Malik and on some issues it said that further communications would follow. Broadsheet's request for payment of what it alleged was a token payment of $480,000 that had been promised by the previous chairman, Gen. Maqbool, was answered with an uncompromising restatement of NAB's refusal to make any payment except in respect of recoveries outside Pakistan:

> "*1. Token Payment. In our considered opinion the matter relating to token payment is a non-issue. We have categorically stated and clarified on several occasions that Broadsheet's share will be subject to recoveries from abroad and consequently confined to the repatriated overseas assets. It may be noted that the intention of the agreement was for both NAB and Broadsheet to trace, locate and recover assets outside Pakistan. It most certainly does not cover bank settlement, plea bargains based on local assets and fines imposed by the local courts."*

148. The letter ended with a further request for a progress report "*on the targets registered with you for nearly two years now. We would very much like to have an update on all the registered targets under investigation at your end*", and:

> "*In conclusion, we trust your queries have been satisfactorily answered and look forward to a mutually beneficial relationship."*

149. I have not seen any reply to this letter. On September 15 2003, Mr. Ghuman wrote a short letter to Mr. Malik:

> *"PROGRESS REPORT*
>
> *Kindly provide us with a progress report pertaining to all the targets registered with Broadsheet.*
>
> *We would appreciate an early response."*

150. During the intervening period, on 19 May 2003, Mr. Sinel, the Jersey lawyer instructed by Broadsheet in connection with the recovery of ARA assets there, obtained a default judgment in the Royal Court of Jersey against Broadsheet for his

outstanding fees amounting to £29,090.65 (£8,265.28 had been paid) incurred between 5 June 2001 and 21 May 2002.

151. On 28 October 2003 Kendall Freeman, London solicitors instructed by NAB wrote to Broadsheet and IAR Ltd. claiming to rescind or terminate the ARA (and the corresponding Agreement between IAR and NAB) on the grounds of material (pre-contract) misrepresentation and/or fundamental breaches of both Agreements.

Termination letter (28 October 2003)

152. This was addressed to both Broadsheet and IAR and it alleged that there were 'Fundamental Breaches of the two Agreements' (page 8). It read:

> "*Under the two Agreements you should have delivered information, evidence and ultimately recoveries to NAB ... In fact almost all of the flow of information and evidence has been the other way – from NAB to yourselves ...*
>
> *In the more than three years that have elapsed since the Agreements were entered into, Broadsheet has achieved only a single recovery ... Even in that case, the key information was compiled by the GOP/NAB and provided to Broadsheet.*
>
> *You have made determined and tenacious efforts to enlarge the number of targets said to be registered under the Agreements and to retain such targets, but have done very little work on any of them ... Rather you have demonstrated beyond any doubt that you are interested only in easy pickings for very little effort ...*
>
> *... Broadsheet has not provided a progress report on its targets for over two years... The reporting obligation is of fundamental importance ... the failure to report on your activities defeats two of the main purposes of the Agreements, namely the gathering and delivery to NAB, of information and evidence ...*
>
> *Throughout the period, visits to NAB in Islamabad by "heavyweight" employees of your companies have been very rare ...*
>
> *Even the pretense of performance by Broadsheet seems now to have been abandoned ...*"

153. Significantly, perhaps, the above passage also referred to judgment obtained by Mr. Sinel in the Royal Court of Jersey:

> "*Moreover, it is embarrassing to the GOP to note that Broadsheet, proclaiming itself the GOP's attorney, has a default judgment outstanding against it from its Jersey lawyers, who appear unable even to trace Broadsheet's whereabouts.*"

154. The letter concluded "*The GOP's damages claims against you" assessed as "many millions of dollars*". It does not say whether the claim was made against Broadsheet or IAR, presumably both, and I should record that there is no claim or counterclaim by NAB against Broadsheet in these proceedings. The sole issue, with regard to alleged breaches of the ARA, is whether Broadsheet was in 'fundamental' i.e. repudiatory breach of the ARA so that NAB was entitled to terminate it by the letter dated 28 October 2003.

155. Breaches alleged in these proceedings

156. These are summarized in the Respondents' Closing Submissions under the following heads:

(i) Failure to provide financial resources;

(ii) Failure to use "*best efforts*" at "*all times*" to recover assets:

  (a) Broadsheet had no professional investigators after May 2001

  (b) Broadsheet had inadequate legal support

  (c) Broadsheet only investigated a handful of targets.

(iii) With regard to Targets that were investigated;

  (a) Broadsheet's narrative regarding the targets is exaggerated and inaccurate

  (b) Broadsheet only pursued one target in legal proceedings

  (c) Broadsheet failed to recover assets from outside Pakistan.

(iv) Failure to keep Chairman NAB regularly informed.

157. NAB alleges that Broadsheet "*was given a further period to perform their obligations*" citing, first, a paragraph in Gen. Hafiez' Witness Statement which relates to the period after he became Chairman in October 2001 ("*I had wanted to give Broadsheet as much time as possible to meet its responsibilities, but as time went on ...*") and secondly the letter dated 15 September 2003 from Mr. Ghuman requesting a progress report on all registered targets, referred to above.

158. NAB's contention is that "*Individually or collectively, these breaches amounted to a renunciation and/or were repudiatory breaches of the ARA that entitled the Respondents to elect to terminate the ARA which they did on 28 October 2003*".

DISCUSSION AND FINDINGS

159. I have referred to a number of ways in which the ARA proved to be unclear or uncertain in its effect (para. 6 above). The main differences which emerged were concerned with (1) Broadsheet's right to compensation under Art.4 when NAB made recoveries of assets which were not "*outside Pakistan*"; (2) the registration and de-registration of targets under the ARA; and (3) the scope of Broadsheet's obligation to provide information to NAB. These differences underlie the allegations made by NAB (above) that Broadsheet was in fundamental/repudiatory breach of the ARA in October 2003. I shall consider them in turn.

Compensation under Article 4

160. This issue first arose in relation to the former Prime Minister, Mr. Sharif, when it was reported that he or his family had made substantial reparations to the government, whether as fines or in some other form, and it was unclear whether there was any recovery by NAB. Mr. Sharif and a number of his family members were registered targets from an early date. Gen. Maqbool initially was not unsympathetic to Broadsheet's request for a share of these proceeds, whatever they were, but he asked for the matter to be deferred. Broadsheet later claimed that he had undertaken to make (or indicated that NAB might pay) a 'token payment' of some $500,000. But when Gen. Hafiez became chairman in October 2001, and Mr. Ghuman was Director of the Overseas Wing, they refused to contemplate any payment, as the letters from Mr. Ghuman in 2002/3 quoted above make clear.

161. The same issue arose when 'willful default' bank loans were repaid by persons who were registered targets under the ARA. NAB again, as evidenced by Mr. Ghuman's letters quoted above and confirmed by his evidence in these proceedings, was

adamant that Broadsheet was not entitled to receive compensation in such cases, because no assets "*outside Pakistan*" were involved. There was no recognition that it might be necessary to consider whether, in individual cases, the repayment (to the lending bank) had been funded from assets held abroad. Yet, as I understood the submissions made by counsel for the Respondents, it is now accepted that Article 4 does require that such enquiries should be made.

162. When NAB alleges, therefore, that Broadsheet 'failed to provide financial resources' (paragraph (1) above), it is relevant to bear in mind that from early 2001 its claims for compensation to which, in my judgment, it was entitled under Article 4 were not being responded to, and later were refused; and that this was particularly onerous for Broadsheet, given the contingency nature of the ARA.

Registration and de-registration of targets

163. Disputes that arose regarding the registration and de-registration of targets under the ARA were referred to in the Termination Letter where it was alleged "*You have made determined and tenacious efforts to enlarge the number of targets ... registered under the Agreements*" and that "*you are interested only in easy pickings for very little effort*". I do not understand why this could be an allegation of breach, and it is not repeated in the Closing Submissions (above). Broadsheet could only receive "pickings" if assets were recovered, and if they were likely to be easily recoverable from an identified person or entity, not already a registered target, it is unclear why NAB should resist a Broadsheet proposal to register it. The allegation now is that Broadsheet "*only investigated a handful of cases*" and that it did too little in the cases which it did (paragraphs 2(c) and 3(a) above). The 'registration' issues are not directly involved in this.

164. A specific and revealing dispute arose in January 2003 with regard to a Mr. Jamil Ansari who was believed to have substantial assets in Jersey that might be recoverable by Broadsheet under the ARA. Mr. James wanted to take proceedings and requested NAB (through Mr. Mirza, the PGA) to register Mr. Ansati as a target, having previously been asked to put the request on hold. The short reply from Mr. Ghuman dated 14 January 2003 was "This is to inform you that [he] may not be registered as a target with M/S Broadsheet until further notice from NAB".

165. Gen. Hafiez accepted that he would have authorized this letter and he explained that it was "a conscious decision that we were not giving any more targets until we got

something on the existing targets as well." Asked whether Broadsheet was told about this decision, he replied "I do not recollect circumstances, but I don't think we told them in so many words."

Failure to provide information

166. Similarly, the Termination Letter made sweeping allegations, quoted above, that are not maintained in these proceedings. They were that "*the reporting obligation is of fundamental importance ... the main purposes of the [ARA] [were] the gathering, and delivery to NAB, of information and evidence*". What is now alleged, consistently with the ARA, is "*Failure to keep Chairman NAB regularly informed*" (paragraph (4) above).

167. The reporting obligations in the ARA are these. Under Article 2, NAB undertook to deliver to Broadsheet "*such information as may be available with NAB in respect of the registered persons and entities*" (subject to Chairman NAB's discretion). Broadsheet undertook to use their best efforts to recover assets "*upon receipt of information by [from?] NAB regarding the registered persons*" (Article 3.1), and under Article 3.5 "*to keep Chairman NAB regularly informed about the progress of the search for assets*".

168. It became apparent from the evidence of Mr. Ghuman in particular, and from letters that he wrote, that he expected Broadsheet to provide information about registered targets that would assist NAB in prosecuting them in Pakistan. Obtaining a conviction in Pakistan was relevant to a search for assets outside Pakistan by Broadsheet, because it might help prove that the assets were fraudulently obtained etc. and therefore within the ARA (First Recital). But the express obligation on Broadsheet was limited to keeping the Chairman informed about its search for assets (outside Pakistan) and there was no wider obligation, as Mr. Ghuman appears to have envisaged and as the Termination letter suggests.

THE ALLEGED BREACHES

Failure to provide financial resources

169. Respondents refer, first, to internal Broadsheet documents dating from June/October 2000 to the effect that Mr. James was proposing to run the company "*on a shoestring budget*", and secondly, to the fact that he "*paused*" Matrix' activities in May 2001 after Mr. Byrne's visit to Pakistan and failed to instruct another firm of professional

investigators. They say "*Broadsheet's funding problem is unsurprising given its status as a 'shelf' company*" and submit that Broadsheet had no funds of its own with which to finance the activities it was required to take under the ARA, with the result that, "unsurprisingly, the recoveries did not materialize".

170. Claimants note that Broadsheet's obligation was to "*make available and provide all of the financial resources necessary in its judgment to facilitate the execution*" of the ARA, and that it expended "*substantial sums funding its asset retrieval work*". These included payments to Matrix said to amount to £(or$)480,000, possibly plus $75,000, and to lawyers including Baker & Hostetler, Mr. Tisdale's firm, Mr. Tisdale personally, Mr. Sinel in Jersey and in the Isle of Man where Broadsheet was incorporated. Broadsheet also maintained its 'representative office' in Islamabad, though at what cost is unclear from the evidence. Against this, Broadsheet received $1,500,000 from NAB in respect of the Admiral Haq recovery.

171. It is clear, and I find, that Broadsheet was dependent on Mr. James for its finance. Its original capital was £200 subscribed by Oxford and Berkshire, the two Panamanian companies who were its original members. Mr. James was described as its 'financier' and his associates believed him to be a prosperous businessman though not matching his own claim to be worth many millions of dollars, even a billionaire.

172. I reject the suggestion, if it is advanced as a submission, that because Broadsheet was a 'shell' company it did not have sufficient resources to finance the activities it undertook under the ARA. It was financed by Mr. James and there is no evidence that he was not prepared to support it, as and when he was able. The question is rather whether its activities were limited by a lack of finance, because Mr. James was unable or unwilling to support it. Furthermore, I infer that NAB agreed to the substitution of Broadsheet as the contracting party knowing that it was newly incorporated in the Isle of Man and with no substantial assets. NAB therefore agreed the ARA on that basis.

173. I find that Broadsheet's activities under the ARA were limited, particularly after May 2001 when it ceased to employ Matrix, but there is no direct evidence that that, or the failure to investigate more targets than it did, was caused by a lack of finance. Rather, the question is whether those were themselves breaches of Broadsheet's obligations under the ARA, as alleged in paragraphs (2) and (3) (below).

FAILURE TO USE 'BEST EFFORTS' AT 'ALL TIMES' TO RECOVER ASSETS

Broadsheet had no professional investigators after May 2001

174. There is no evidence that Matrix was replaced by another firm of investigators when it was 'paused' after Mr. Byrne's visit to Islamabad in May 2001.

175. On that occasion, Mr. Byrne presented detailed reports on five targets which Matrix had investigated. He was disappointed with the NAB representatives' reaction although that may have been due to a 'cultural mismatch' (see above). From then until 2003, Broadsheet's dealings with NAB were carried on by Mr. James assisted by Mr. Tisdale, his lawyer, and by Mr. Malik through its office in Islamabad. These concentrated on a small number of cases (nine, but including some with family connections to other targets).

176. I have no evidence as to whether or not Mr. James contemplated or saw a need to replace Matrix. It appears from the correspondence that he continued to manage Broadsheet's business himself, and I have notes of formal meetings between him and the chairman and other representatives of NAB, in April 2002 (Washington) and September 2002 (London).

177. Mr. James was pressed at these meetings to provide progress reports on the work that Broadsheet was doing. He also ventilated concerns about what he alleged was a lack of co-operation in those cases where Broadsheet was pursuing inquiries or intended to do so, for example by securing RLAs (Requests for Legal Assistance) to be addressed by the Government of Pakistan to other states, including the USA and the UK.

178. There is no indication in these notes or in the documents that NAB required or suggested to Mr. James that Broadsheet should employ a replacement for Matrix, except inferentially from the demands for increased activity in relation to existing targets.

Broadsheet had inadequate legal support

179. Mr. Tisdale was engaged by Mr. James to advise Broadsheet immediately after the ARA was signed. He continued to do so until 2003, and thereafter. He is an experienced US lawyer and in 2000 was partner in a leading firm, Baker & Hostetler, practicing from their offices in Denver and Los Angeles. He had wide commercial experience including acting for the Government of Pakistan (when with another firm)

but not of asset recovery investigations in particular. In 2002 he left Baker & Hostetler and established his own firm, Tisdale & Associates LLC.

180. His evidence was marred by some inconsistency and possibly lack of frankness in relation to financial arrangements between himself, Baker & Hostetler and Mr. James. Apart from this, he impressed me as a competent lawyer and articulate witness, and it cannot be suggested, in my judgment, that he lacked expertise or gave Mr. James less than competent advice.

Broadsheet only investigated a handful of cases

181. 'Handful' is an emotive word, and the precise numbers are not easy to establish. That is because wealthy individuals who were registered as targets were in many cases members of the same families as others who were also registered on the basis of their own or their families' wealth. In broad terms, more than 100 targets were registered and Broadsheet (including through Matrix) investigated between 10 and 15 individuals, but that included more than 30 if family members, also targets, were included. (For example, Mr. Sharif was a named target and his affairs were investigated, including those of 8 others who were family members.)

182. During 2002 the differences between the parties revolved around two claims; by Broadsheet, that NAB was failing to cooperate in cases which it was investigating, and by NAB, that Broadsheet was not investigating more, whilst disputing its effectiveness when it was.

183. As an example of the former, Broadsheet requested the cooperation of NAB in seeking to have RLAs issued by the Government of Pakistan to, say, the USA Government, so that the affairs of named individuals might be investigated. NAB responded that that was not a suitable procedure and that Broadsheet's only reason for suggesting it was as a cover for its own inability or unwillingness to investigate the cases itself. Not surprisingly, no or little progress was made.

184. It was against this background that at the London meeting in September 2002 the exchange took place which I have quoted above – Mr. James said "*the agreement is not working for us*" and Gen. Hafiez replied "*It is not working for us either*". Nevertheless, the meeting continued and ended with Mr. James' undertaking to provide progress reports in each case by 23rd October 2002.

185. That deadline was not complied with but the report was made in writing on 31st.March 2003 in an attempt to resolve twelve "*outstanding issues*". Mr. Ghuman replied on 18 April 2003 and "looked forward to a mutually beneficial relationship".

186. Mr. Ghuman wrote next on 15 September 2003 with a brief one-sentence request for "*a progress report pertaining to all the targets registered with Broadsheet*". The letter does not suggest that NAB was contemplating terminating the ARA.

187. Gen. Hafiez said that he took the decision to terminate the ARA and consulted London solicitors "one or two months before" the Termination letter was sent. I asked him "*Did you communicate that to Broadsheet*" and he replied "*No, I don't think so*". I asked "... was there any letter from you or from NAB at any time on the following lines:" "*We must give you a last chance and warn you that if things don't improve we will have to terminate the agreement." Did you ever say anything like that to Broadsheet?*" He replied "*Not to my recollection, no*".

188. It is understandable, therefore, that in October 2003 NAB's solicitors wrote that matters appeared to have reached a standstill. But the letter does not refer to NAB's refusal to contemplate payment of compensation under Article 4 except when assets were recovered "*outside Pakistan*" or to unresolved issues between it and NAB (e.g. with regard to RLAs); and the letter comes close to suggesting that Broadsheet was obliged to provide "information" to NAB for the purposes of prosecuting its claims in Pakistan, as Mr. Ghuman thought that it was.

189. In the circumstances, I find that Broadsheet was in breach of the ARA because it was not achieving the standards of "*a company specializing in the recovery of such assets/missing funds*" (ARA Third recital). But the question whether that breach was repudiatory (or "*fundamental*", as alleged) involves not only the extent and gravity of the breach but also whether NAB was entitled to terminate the ARA on that ground at that time. In my judgment it was not.

190. Both parties were in breach of the ARA and they had tolerated for at least twelve months a situation which came close to a standstill and which was 'not working' for either of them. Their respective breaches were linked both as regards the provision of finance (NAB failed to observe its obligations under Article 4 which was Broadsheet's only source of compensation under the ARA) and in relation to the registration of targets (the Ansari issue, referred to above) and their respective obligations regarding the provision of information.

191. In October 2003, in my judgment, NAB was entitled to give Broadsheet notice to resume full performance of the ARA in accordance with its terms, provided that it was prepared to do the same. But NAB was not entitled to terminate the ARA without such notice and thereby was itself in repudiatory breach.

(D) Contractual claims by Broadsheet

192. The ARA was in effect from 20 June 2000 until terminated by or in consequence of the Respondents' solicitors' letter dated 28 October 2003.

193. The Respondents do not claim damages for the consequences of the alleged repudiatory/fundamental breach of the ARA by Broadsheet nor of the individual breaches of contract which, they allege, contributed to the alleged repudiation.

194. Broadsheet alleges that NAB committed various breaches of the ARA that are relevant because they caused or contributed to, or may excuse its own failure (if that is established) fully to perform its own obligations under already, as considered in Section (C) above. There is no claim by Broadsheet for damages for the consequences of these alleged individual breaches except for the failure to pay compensation due to Broadsheet under clause 4 (below).

195. Broadsheet's claim is for:

> *"(a) ... any and all direct, consequential or incidental damages for their wrongful termination of the ARA, including but not limited to, Broadsheet's twenty per cent (20%) share of (i) all recoveries or settlements obtained from the targets to date; and (ii) the settlements or recoveries that could have occurred but for Respondents' wrongful termination of the ARA;... "*
>
> (Closing Submission p.41)

196. In principle, if as I have found the letter dated 28 October 2003 was itself a repudiatory breach, that is a correct statement of the measure of damages that the Claimant is entitled to recover, and the amount will be assessed (if not previously agreed) at a subsequent hearing. But a question arises with regard to sub-paragraph (i) that has not been clearly addressed by either party. If recoveries were made by NAB during the currency of the ARA, in which Broadsheet was entitled to share under clause 4 of the ARA construed as above, is Broadsheet limited to that contractual right to receive a liquidated sum or may Broadsheet recover damages for NAB's failure to pay? The distinction between the unliquidated (damages) and liquidated (fixed sum) claims may be important in relation to time limitation issues (section (H) below).

197. Broadsheet's contractual claims, therefore, are all concerned with recoveries that allegedly NAB has made from registered 'targets' either before or after termination of the ARA. Some but not necessarily all of the individual cases have been identified and referred to in the evidence on the liability issues which I have heard. With two exceptions, referred to below, I do not find it necessary to refer to these individual cases in this Award or to make specific findings with regard to them. I propose to make the Award as a Declaration of liability and I envisage that the Claimant will formulate its damages claim with reference to such cases as it considers appropriate, with or without the benefit of further disclosure of documents; also that, subject to any further rulings, both parties will be able to rely upon evidence given at this hearing in relation to them.

198. I should record that I have not understood paragraphs 80 and 84 of the Respondents' (Reply) Closing Submissions:

> "...The *Respondents* refer to para.84 below regarding Broadsheet's glaring absence of any pleaded case or submissions on causation or the value of the opportunity alleged to have been lost.....

199. Broadsheet has not, at any point, made any submissions on the Respondents' causation of and responsibility for any alleged missed opportunity as a result of the termination of the ARA or the scope of that opportunity. Basic principles of procedural fairness dictate that such vague allegations at this late stage of the proceedings not be entertained."

200. For the avoidance of doubt, this Award is concerned only with issues of liability, as required by Procedural Direction No. 5. The evidence regarding alleged breaches has included references to individual transactions and targets which I shall consider below, but that has not extended the scope of this stage of the proceedings.

201. The two exceptions referred to above (paragraph 197) are these. Specific issues have been raised in these proceedings regarding the status of two individuals who were the subject of investigation during the period of the ARA. These were, first, Mr. Aftab Sherpao ("**Mr. Sherpao**") and Mr. Jamil Ansari ("**Mr. Ansari**"). The issue in both cases is whether he should be regarded as, a target registered under the ARA. Neither was in fact recorded in Schedule 1, as required by the ARA.

Mr. Sherpao

202. Mr. Sharpeo it appears was registered under the Agreement made between the Respondents and IAR shortly after the ARA. By a Contract Assignment dated 22 August 2002 IAR purported to transfer to Broadsheet its rights under that Agreement "*as it pertains to [Mr. Sherpao]*". Broadsheet accepts that that 'assignment' did not amount to registration to the ARA but it relies on the facts that NAB thereafter issued a POA (Power of Attorney) under the ARA in respect of Mr. Sherpao dated 3 October 2002; that was authorized by Gen. Hafiez at Broadsheet's request. The Respondents say that that was done 'by mistake' and they rely on the agreed fact that there was no formal registration under the ARA. I hold that despite the lack of registration Mr. Sherpao became (strictly, the Respondents cannot deny that he became) a target for the purposes of the ARA.

Mr. Ansari

203. Mr. Ansari came to the attention of NAB and Broadsheet during the investigation into Admiral Haq's affairs, which resulted in the recovery of $7,500,000 from the latter and NAB's payment of $1,500,000 to Broadsheet. There was evidence that Mr. Ansari admitted holding as much as $5 million in Jersey, obtained as the result of corrupt dealings with French government agencies. Broadsheet asked NAB in December 2001 to agree to his registration as a target under the ARA. The Prosecutor General, then Mr. Bashir, replied that he had been directed by the Chairman (Gen. Hafiez) to "*put on hold your notice of registration of MR. Ansari. This person is a witness in the case against Admiral Haq which case has so far not been settled.....your notice shall remain in abeyance.*" A few months later, in February 2002, the Prosecutor General reported "*Competent authority has decided not to register Mr. Ansari as a registered target with Broadsheet for the time being.*" The matter was raised again a number of times during 2002 and in August 2002, remarkably, Mr. Ghuman on behalf of the Chairman asked Broadsheet to investigate Mr. Ansari even without a POA (power of attorney). Asked about this, Gen. Hafiez said "*They were more than keen to do it ... [but] at the moment NAB was not in agreement.*" It was raised at the London meeting in September 2002 and again at a meeting in January 2003 when a letter had been received from the Attorney General in Jersey asking NAB to confirm that "*there is nothing against Ansari and his funds should be released*".

204. Gen. Hafiez gave various explanations for this failure, in effect the refusal to agree to register Mr. Ansari as a target under the ARA. First, that there was insufficient evidence against him; but that was difficult to understand when there was a signed confession of corrupt practices, given in connection with the proceedings against Admiral Haq. Second, that Mr. Ansari was promised an indemnity in return for agreeing to give evidence in those proceedings, but then it appeared that the proceedings were over and the indemnity had expired. Thirdly, he said that in January 2003:

> "*You see, Broadsheet was insisting, of course, but there were so many other targets on the list of Broadsheet and we were asking them to come back and give us progress on those targets.*"

205. He confirmed in later answers that "*that was a conscious decision that we were not giving any more targets until we get something on the existing targets as well.*" Broadsheet raised the matter with Mr. Ghuman again and it was one of the items listed in his letter dated April 18, 2003, which concluded *"[we] look forward to a mutually beneficent relationship*". But approval was never.

206. Clause 1.2.1 of the ARA provides that Schedule 1, the list of registered targets, "*may be amended from time to time with the mutual consent of both parties*". The Respondents have not disputed the Claimant's claim that this carries with it the implication that consent will not be withheld except on reasonable grounds. There were no such grounds, in my judgment, for refusing consent during and after January 2003 in Mr. Ansari's case, and the Respondents thereby were in breach of the ARA.

(E) Does the Assignment disentitle Broadsheet from maintaining its claim in these proceedings?

207. The bare facts of the Assignment are as stated above (paragraph 66). It was notarized and is dated 4 January 2005. Mr. James at that date was chairman of Broadsheet and had authority to act on its behalf. He had incorporated Steeplechase Financial Services LLC in Colorado a few days previously, on 27 December 2004, and there is no evidence that he did not have authority to sign the Assignment on its behalf.

208. It is common ground that the Assignment took effect only as an equitable assignment unless and until notice of it was given to NAB, the alleged debtor to Broadsheet. NAB contends that the Assignment was produced by Mr. James to them in February 2008 in the course of the negotiations which resulted in the Settlement Agreement dated

20 May 2008, and that NAB thereby was given notice of it so as to render the Assignment legally binding on the parties. (Perhaps unusually, it is the debtor NAB who asserts that the Assignment became effective in law, because it later agreed to and did pay the debt under its Settlement Agreement, but not to Broadsheet IoM.)

209. At that time (February/May 2008), however, Broadsheet IoM had been dissolved by order of the High Court of the Isle of Man dated 2 April 2007, on the Petition of Mr. Sinel. As a corporate entity, and subject to any further order, it had ceased to exist.

210. NAB contends that Mr. James nevertheless had authority to represent Broadsheet IoM in February/May 2008 and to give notice of the Assignment to NAB as well as to sign the Settlement Agreement on its (Broadsheet IoM's) behalf. Unless that contention is correct, the Assignment never became a legal assignment binding on the debtor, NAB. It is necessary, therefore, to consider at this stage whether Mr. James had authority to, and did act on behalf of Broadsheet IoM when negotiating and signing the Settlement Agreement (Issue F).

211. As will appear below, in my judgment Mr. James had no authority, actual or apparent, to act on behalf of Broadsheet IoM when negotiating and signing the Settlement Agreement, nor did he purport to do so. He claimed instead to be representing a newly-formed Colorado company, Broadsheet LLC, which he described as somehow the "re-incorporation" of Broadsheet IoM. Whether or not such a 're-incorporation' is recognized under Colorado law, it clearly had no effect on the status of Broadsheet IoM under Isle of Man law. In fact, Broadsheet IoM had only the inchoate status of a dissolved company which might be revived by further order and its liquidation proceedings resumed. Mr. James claimed that Broadsheet IoM was 'in liquidation' but not that he had authority to act on behalf of the liquidator. NAB's representatives dealt with him on that basis, knowing that Broadsheet IoM was or might be in liquidation, actual or inchoate, and that Mr. James did not purport to act on behalf of any liquidator.

212. It follows, in my judgment that the Settlement Agreement is not binding on Broadsheet IoM. The present Claimant, and the defences based on it must fail. For the same reasons I FIND AND HOLD that Mr. James had no authority to give notice of the Assignment on behalf of Broadsheet IoM to NAB in May 2008 and that Broadsheet IoM remains entitled to bring the claim.

213. I should add that under clause 12.1 of the ARA any transfer of rights under it required the written consent of the other party (in this instance, of NAB), and no such consent was given. In any event, the Settlement Agreement is equivocal in this respect because NAB undertook to pay 'BS' and in fact paid Broadsheet LLC (Colorado), not Steeplechase. Insofar as NAB contends that the Settlement Agreement took effect as a re-assignment of the claim by Steeplechase to Broadsheet LLC (Colorado) that is not binding on Broadsheet IoM unless Mr. James had authority to act on behalf of its liquidator, which he did not claim to have or have in fact.

214. For these reasons I conclude that the Assignment has not deprived Broadsheet IoM of its right to claim against NAB under the ARA, and it is unnecessary for me to decide whether, as Broadsheet contends, the Assignment was 'void' under the Fraudulent Assignments Act 1736 of the Isle of Man. The Act reads:

> *"Fraudulent Assignments void*
>
> *(4) And that all fraudulent Assignments or Transfers of the Debtor's Goods or Effects shall be void and of no Effect against his just Creditors ...".*

215. Broadsheet claims in these proceedings a Declaration that the Assignment is "void and of no effect" under this provision. NAB raises a 'jurisdiction issue' contending that an arbitrator appointed under the ARA has no power to rule on the application of the section, which rests solely with the Courts having insolvency jurisdiction in the Isle of Man; and there is an issue whether "void" means no more than "voidable". As regards jurisdiction, it would be surprising if an arbitration tribunal duly constituted under the ARA had no power to determine the validity, as between the parties to the ARA, of an assignment raised as a defence in proceedings claiming breaches of the ARA, or if an assignment that by statute was "void against just creditors" could nevertheless be relied upon as a defence to a valid claim against the original contracting party. But as stated above the issue does not arise for decision here. Apart from the Act, the Assignment is not legally binding on Broadsheet in any event.

(F) Does the Settlement Agreement disentitle Broadsheet from maintaining its claim in these proceedings?

INTERPRETATION

216. The parties are described as the Government of Pakistan and NAB "of the FIRST PART" and three other parties "referred to collectively as the "Second Party" "of the

SECOND PART". The three are described individually as "Steeplechase", "Jerry James" (Mr. James personally) and "BS" meaning:

> *"(a) Broadsheet LLC incorporated vide incorporation certificate dated _____(copy enclosed) under the laws of _____ and having its registered office at _____*
>
> *(hereinafter referred to as the "BS" which expression shall mean and include its sponsors [etc. in very wide terms] through its Chairman, Mr. Jerry James, duly authorized vide Board Resolution dated _____ passed by the Board of Broadsheet LLC)."*

217. Remarkably, none of the blank spaces left in (a) (above) was completed when the Agreement was signed. On its face, therefore, the Agreement fails to record the corporate identity of Broadsheet, one of the three parties "*of the SECOND PART*".

218. Certain of its provisions may be quoted here. The Recitals refer to the ARA dated 20 June 2000 (described as the "Commercial Services Agreement") as an agreement between AB and "BS" (Recital B); to the subsequent history of the termination of the ARA (Recital C), to the claim made by "BS" against NAB under clause 4 of the [ARA] (Recital D), to a threat of arbitration made by "BS" (Recital E), to negotiations between "BS" and NAB including a "detailed meeting in London" of which Minutes were enclosed (Recital F) and to the Assignment dated 4 January 2005 between "BS" and Steeplechase (Recital G) which also provides:

> *"However, BS was also re-incorporated in Denver, Colorado after Broadsheet LLC Gibraltar was under winding-up."*

219. Recital H records that further to the negotiations (Recital F) "the terms and conditions of a full and final settlement have been agreed".

220. Clause 7 of the Settlement Agreement reads:

> *"7. Settlement Amount*
>
> *The Parties agree that in full and final settlement of its claims BS shall receive a total payment of US Dollars one million and five hundred thousand ($1,500,000).*
>
> *Clause 8 provides for payment in two instalments "to the representative of BS", the first "through the High Commissioner for Pakistan in London" on the same day, 20 May 2008, and the second "at a venue to be agreed mutually between the parties, on or before 30th. September 2008."*

221. By clause 20 it was agreed that "*this Agreement shall be governed and construed in accordance with the English law*" and by clause 21 that disputes would be referred to arbitration in accordance with the Rules of the [C.I. Arb.] in London.

222. NAB contends that the party to the Settlement Agreement described as "BS" was the present Claimant, Broadsheet IoM, which therefore is bound by its terms. The first question is whether that is clear from the Agreement itself.

223. In my judgment, it is clearly not correct. First, the provision made for identification by leaving blank spaces in clause (a) (above) was never complied with. Secondly, Recital G expressly describes "BS" as a company "*that was also re-incorporated in Denver, Colorado, after Broadsheet LLC Gibraltar was under winding-up*". Even assuming that "Gibraltar" was a misnomer (the Agreement has never been rectified, but this assumption may be made) these words identify "BS" not as the original company that was "under winding-up" but as the successor company that had been re—incorporated in Denver, Colorado; that was Broadsheet Colorado which had been incorporated there by Mr. James shortly before, in 2007.

224. NAB contends that Broadsheet IoM was a contracting party because the recurring references to "BS" as a party to the ARA etc. can only mean Broadsheet IoM. Apart from the question whether Mr. James could lawfully represent Broadsheet IoM as a dissolved company at that time (see below), NAB also contends that the "BS" which was entitled to receive payment, and which did receive payment under clause 8, was Broadsheet Colorado; and if that is correct, "BS" refers either to Broadsheet Colorado or to both entities, Broadsheet Colorado and Broadsheet IoM, without specifying that there were two and without distinguishing between them. And it is clear from clause (a) that only one company was an intended party, which never was identified, and from Recital G that it was an entity that had been "*re-incorporated in Denver, Colorado*". NAB submits that such "re-incorporation" was a recognized procedure under the laws of Colorado. Assuming that, to be correct, even if the Colorado Court could somehow dissolve the Isle of Man company, that entity could no longer be a party to the Agreement and, NAB's argument defeats itself.

225. In these circumstances, in my judgment, it is not necessary to refer to extrinsic evidence in order to identify the party that was intended to be described in clause (a). That party was Broadsheet LLC (Colorado), represented by Mr. James. He did not represent, and was not understood to be representing that Broadsheet IoM, rather than Broadsheet Colorado, was a party to the Settlement Agreement. If that is not

sufficiently clear from the Agreement itself, it is confirmed by the facts that NAB's representatives believed that Broadsheet IoM was or had been in liquidation and they knew that Mr. James was not claiming to represent any liquidator.

Negotiation and signing of the Settlement Agreement

226. Ahmer Bilal Soofi ("**Mr. Soofi**") is a distinguished lawyer and advocate in private practice in Lahore, Pakistan. He has advised and acted for the Government of Pakistan and for NAB on a number of occasions. In 2006, he was engaged by them to negotiate the settlement of the pending disputes with Broadsheet and with IAR. His initial contact was with the London solicitors acting for IAR, who were instructed by Dr. Pepper and Mr. Moussavi, and his first dealings were with Tariq Fawad Malik ("**Mr. Malik**") who was then based in Dubai and introduced himself as a representative of both IAR and Broadsheet. He also communicated with Mr. Tisdale who said that he was "counsel to" and "authorized representative of" Broadsheet.

227. Mr. Soofi said that NAB was anxious to negotiate settlements with both IAR and Broadsheet and that he came to London in April 2007 for what he hoped would be a joint meeting for that purpose. In the result, however, separate meetings took place, one on 17 April 2007 with Mr. James representing Broadsheet (Mr. Tisdale was expected to attend but he did not) and the other on 19 April 2007 with Dr. Pepper and Mr. Moussavi on behalf of IAR. At the first, he agreed $1,500,000 as a settlement figure with Mr. James, and $2,250,000 as a settlement figure for IAR.

228. Following those meetings, Mr. Soofi returned to Pakistan for further discussions with NAB, including its chairman Gen. Hafiez, and meanwhile his negotiations continued with Mr. James (Broadsheet) and Dr. Pepper (IAR). A Settlement Agreement between IAR and NAB was signed on 2 January 2008 and the agreed figure of $2,250,000 was paid by NAB to IAR at that time.

229. The negotiations with Mr. James and with Mr. Malik concerning Broadsheet continued into 2008. They proceeded on the basis that NAB would pay US$1,500,000 the sum agreed previously. Mr. James became more aggressive in his demands for payment and by a letter dated 6 February 2008 he demanded payment within seven days. However, at about that date he told Mr. Soofi during a telephone conversation that Broadsheet was "winding up as a company". Understandably, this caused Mr. Soofi some concern and he asked Mr. James why he had not told him earlier. Mr. James said that it had "slipped his mind" but that Broadsheet's rights in the claim had been assigned to another company, Steeplechase, and that

"Broadsheet's current status therefore did not matter". He produced the Assignment dated 4 January 2005.

230. Following discussions with NAB representatives, Mr. Soofi wrote to Mr. James on 16 February 2008 asking specific questions about the assignment and the winding up, including "*do we need the permission of the liquidator or the winding up Court before we release these funds to you?".* Mr. James replied on 18 February 2008 demanding payment by 29 February (and refusing to contemplate a 'discount' which, Mr. Soofi told him, the President of Pakistan had asked for). Mr. James never answered the questions regarding the liquidation and winding up, and when Mr. Soofi raised them verbally he found Mr. James "evasive".

231. In a further letter dated 22 February 2008 which began "*I grow weary of your back and forth*", Mr. James wrote on behalf of "Broadsheet LLC and Steeplechase" enclosing a document headed "Resolution" signed by himself as "Chairman, Broadsheet LLC" reading:

> "*The management of Broadsheet LLC hereby resolves to reconstitute and reinstate its corporate name in the state of Colorado [U.S.A.] pursuant to [various Colorado statutes]".*

232. The document was undated and it made no reference to the Isle of Man or to liquidation proceedings there.

233. The letter dated 22 February 2008 demanded payment within seven days. It contained two references to the terms of the proposed Settlement Agreement. First, that there would be "full indemnification and releases in place" (for the benefit of NAB), and secondly:

> *"3. Should there be any issues that arise in future, the Settlement Agreement which will be executed on receipt of funds puts all burdens on Steeplechase.*
>
> *4. If you desire, a Joint Settlement Agreement could be executed with both companies."*

234. Further correspondence followed. Mr. James kept up the pressure on NAB by giving notice in a letter dated April 16, 2008 to the chairman of NAB that failing a satisfactory response to Broadsheet's claims within 7 days "*we will proceed with instituting arbitration proceedings in Dublin, Republic of Ireland, pursuant to*" the dispute resolution provisions in the ARA. The letter was written on Broadsheet LLC writing paper from a Denver, Colorado address and signed by Mr. James as Chairman; it purported to make claims on behalf of "Broadsheet" as a party to the

ARA without distinguishing between Broadsheet Colorado and Broadsheet IoM; and it made no reference to the Assignment or to Steeplechase.

235. The Deputy Director of the Overseas Wing of NAB, Hasan Saqib Sheikh, replied on its behalf. He said that the agreed figure would be paid in two instalments and that the draft Settlement Agreement would be forwarded for signature. In the event, the Agreement was signed in London on 20 May 2008 by the Deputy High Commissioner for Pakistan, Abdul Basit ("**Mr. Basit**"), as the representative of GOP/NAB.

236. The agreed sum (US$ 1,500,000) was paid by or on behalf of NAB in London by two sterling cheques payable to Broadsheet LLC Gibraltar (a misnomer) and/or Broadsheet LLC (Colorado) and/or Mr. James personally, but not to Broadsheet IoM (see Introduction paragraph 1 above).

237. Mr. Soofi, Mr. Saqib and the Chairman of NAB, Nawid Ahsan ("**Mr. Ahsan**"), all gave evidence at the arbitration hearing and were cross-examined. Mr. Basit made a witness statement and was not called for cross-examination. Based on their evidence, I FIND the following facts:

(A) Mr. Soofi was instructed as counsel for NAB and negotiated with Mr. James on its behalf. He had direct access to the Overseas Wing of NAB and through it to the chairman;

(B) he was unaware of the liquidation of Broadsheet until Mr. James informed him of it during a telephone conversation in February 2008; he was not told and knew nothing about the Order dated 2 April 2007 dissolving Broadsheet, or that Broadsheet was dissolved, at any material time;

(C) he was unaware of the Assignment to Steeplechase dated 4 January 2005 until Mr. James told him about it in February 2008 and sent a copy to him;

(D) when he learned of the liquidation and the Assignment, he passed on the information to NAB and told them about the winding up and liquidation and about his concerns (his advice to NAB was privileged and not given in evidence);

(E) he accepted Mr. James' assurances that the liquidation of Broadsheet "did not matter" and that he, Mr. James, had authority to act on behalf of 'Broadsheet LLC' meaning the company 'reincorporated' in Colorado in 2007;

(F) he made no attempt to contact either the liquidator or any insolvency court or authority in the Isle of Man;

(G) he asked Mr. James to forward to NAB the documents necessary to complete clause (a) of the Settlement Agreement (relating to Broadsheet LLC (Colorado), not Broadsheet IoM) and expected them to be received by NAB before the Settlement Agreement was signed, but this was never done;

(H) he required from Mr James and insisted upon the indemnity provisions in favour of NAB included in the Settlement Agreement;

(I) following receipt of Mr. James' letters giving notice of arbitration on behalf of 'Broadsheet LLC' under the ARA, an executive decision was taken within NAB to approve the terms of the Settlement Agreement and to pay the agreed sum of $1,500,000 in two instalments under it;

(J) Mr. Soofi was not party to the executive decision referred to above; it was taken by senior executives in NAB, after it was approved by a high level committee including representatives of the Ministry of Finance and the Ministry of Law of Pakistan, and its signature was authorized by the President of Pakistan;

(K) Mr. Soofi personally was not involved in the signing and execution of the Settlement Agreement;

(L) Mr. Basit (Deputy High Commissioner for Pakistan in London) signed the Settlement Agreement on instructions from GOP/NAB; he took no part in negotiating or agreeing its terms;

(M) the NAB personnel who approved the Settlement Agreement on its behalf knew that Mr. James had told Mr. Soofi that Broadsheet IoM, the party to the ARA, either was or had been in liquidation, and that that was a matter of concern for Mr. Soofi; that Mr. James had not answered the questions regarding the liquidation put to him by Mr. Soofi's letter dated February 16, 2008, and that no attempt had been made to contact any liquidator or other authority in the Isle of Man; and

(N) Mr. Soofi and NAB found themselves placed under considerable pressure by Mr. James's letters dated 17 April and 22 April 2008 headed 'Demand for Arbitration in Dublin' and 'Arbitration in Dublin' respectively.

238. Mr. Soofi was an impressive witness, and the question has to be asked: how could a lawyer of his distinction, when he knew that Broadsheet IoM was or had been in liquidation in the Isle of Man, and that its affairs and the interests of its creditors were or had been in the hands of a liquidator, fail to contact the liquidator or make further enquiries about the liquidation before concluding his negotiation of the Settlement Agreement? His evidence, which I accept, is that he relied upon the assurances he was given by Mr. James, that 'Broadsheet LLC' had been "reincorporated" in Colorado and that relevant documents would be forwarded to him or to NAB, which they never were; and he relied on the undertakings to indemnify NAB that were given by Mr. James on behalf of 'Broadsheet LLC' and Steeplechase and, most importantly, by himself personally. These were set out in some detail in Clause 4 (Warranty of Capacity to Execute Agreement) particularly in Clause 4(C) which includes:

> "*It is further warranted that the claim/interest that is subject matter of the present proceedings is not at present a subject matter of winding-up proceedings nor is it listed as a claim before the liquidator*"

Moreover, an express indemnity against third party claims, including any by a liquidator, was given by the parties of the Second Part, who included Mr. James personally, in clause 18.

239. I was told by counsel that some proceedings were brought by NAB against the late Mr. James' estate and that they were compromised, but I do not know on what terms.

Conclusion

240. I FIND AND HOLD that the Settlement Agreement dated 20 May 2008 was and is not binding on Broadsheet IoM (the Claimant) for the following reasons:

(1) Broadsheet IoM had been dissolved and did not exist as a corporate entity at that date;

(2) the Agreement has not been ratified by or on behalf of the liquidator since the company was restored to the Register;

(3) the alleged re-incorporation of Broadsheet LLC under the laws of Colorado did not and could not alter the status of the Isle of Man company; and

(4) Mr. James had no actual or apparent authority to act on behalf of Broadsheet IoM; NAB and Mr. Soofi knew that the company was or had been in liquidation and that no liquidator was involved in the negotiation of the Settlement

Agreement; and Mr. James did not claim that he had authority to act on a liquidator's behalf.

241. It follows from the above that the defences raised under the Settlement Agreement fail.

(G) Is NAB liable to Broadsheet in damages for the tort of conspiracy (unlawfully inflicting economic harm)?

242. This non-contractual claim was pleaded as follows:

> "*103. The Government and Mr. James conspired or combined with knowledge, or wilful ignorance tantamount to knowledge, to attempt or attempt to deprive Broadsheet of its rightful ownership of its claims against the Government by entering into ... (b) the fraudulent and ineffective purported settlement of Broadsheet's claims in May 2008. The conspiracy, combination or complicity of the Government in these schemes was carried out through unlawful means or [sic] to effect unlawful acts.*"
>
> (Particulars of Claim para. 103.)

243. The claim was denied (Defence para.170).

244. In Claimant's pre-trial Skeleton Argument the claim was expanded, as follows:

> "*203. Claimant contends that Respondents entered into a conspiracy with the late Mr. James, in order to cause it economic harm. This conduct constitutes the tort of conspiracy to cause economic harm by unlawful means ...*
>
> *205. "Unlawful means", in this context, has a wide meaning, encompassing civil and criminal wrongs (including fraud) which need not, necessarily, be separately actionable by the claimant ...*".

245. Respondents submitted:

> "*382. ...These claims are abusive and ought to be withdrawn. They are advanced on the false premise that the Respondents acted dishonestly or recklessly by negotiating with Mr. James and his colleagues in 2007 and/or entering into the Settlement Agreement. There is no evidence in support of such an allegation...*
>
> *383 ...The evidence shows unequivocally that the Respondents [entered into the Settlement Agreement] in good faith: ...*
>
> *384. Each of these matters undermines Broadsheet's case and will be explored at the hearing with those witnesses called to give evidence ...*"
>
> (Skeleton Argument)

246. The witnesses called by the Respondents at the hearing who gave direct evidence of the negotiation and signing of the Settlement Agreement were, as stated above, Nawid Ahsan, Chairman of NAB from 6 July 2007 until 14 June 2010; Mr. Ahmer Billal Soofi, who acted as independent counsel for NAB and the Government during the negotiations; and Hassan Saqib, Deputy Director of NAB's Overseas Wing from May 2006. A fourth witness, H.E. Abdul Basit, who signed the Settlement Agreement, was not called for cross-examination. In his Witness Statement he said that he was given instructions to proceed and sign the agreement after completing all necessary formalities and checking the affidavits. "I therefore followed these instructions." NAB's representatives had full opportunity at the hearing to explore with the witnesses the matters identified and relied upon by the Respondents, as foreseen in their Skeleton Argument quoted above.

247. Respondents' Closing Submissions included:

> "*232. Regrettably, Broadsheet has refused to withdraw its claims for causing economic harm by unlawful means or conspiracy. This is abusive and embarrassing. It is abusive because neither of these claims were put (properly or at all) to any of the Respondents' witnesses. Nor is there any evidence of dishonesty or intentional wrongdoing on the Respondents' part.*"

248. Their Reply Closing Submissions repeat their suggestions of "Improper pleading" and "Improper cross-examination" and they assert that there is no evidence of dishonest conduct by any of the persons concerned on their behalf.

249. The Respondents acknowledged initially that the allegation was of "*dishonest or reckless*" conduct (Respondents' Skeleton Argument supra) (emphasis supplied) and the Claimants have made it clear throughout that they do not allege that the Respondents or any of their representatives was dishonest. The issue is whether their conduct was unlawful so as to give rise to liability in damages for the alleged tort. The claim is that they made a deliberate decision to ignore the fact that Broadsheet was in liquidation, as they believed it to be, knowing that the liquidator was not involved in the negotiations nor a party to the Settlement Agreement, and that they "turned a blind eye" when Mr. James told them of it (Claimant's Closing Submissions).

250. I am satisfied that the Claimants made clear the nature of their case and that the Respondents had full opportunity to respond to it.

251. It is common ground that the matter is governed by English law, the Settlement Agreement having been signed and executed in London.

252. I have found (above) that the Settlement Agreement was negotiated by Mr. Soofi as independent counsel and Mr. Saqib of NAB's Overseas Wing; that they reported to Mr. Ahsan, the Chairman of NAB; that its terms were approved by the Ministry of Law and Order; and that its signature was authorized by or on behalf of the President of Pakistan.

253. I FIND as stated above that Mr. Soofi was informed in February 2008 by Mr. James himself that Broadsheet IoM was or had been in liquidation in the Isle of Man and that the company had been somehow 'reincorporated' in Colorado, as stated in the Settlement Agreement. Mr. James did not claim that he was acting for a liquidator. As Respondents themselves say in their Reply Closing Submissions "*The short point is that – by the time the Settlement Agreement was executed – both Mr. Soofi and NAB believed that Broadsheet was in liquidation proceedings.*" They knew also that the supposed liquidator was not involved in the negotiations nor a party to the Settlement Agreement.

254. The issues for decision are whether NAB agreed with Mr. James and the Colorado companies he claimed to represent, Broadsheet LLC and Steeplechase, to inflict economic harm on Broadsheet IoM and whether it did so 'recklessly', thereby incurring tortious liability in damages to that company.

255. The evidence establishes that those who took the executive decision on behalf of NAB to enter into the Settlement Agreement (1) believed that Broadsheet IoM was in liquidation; (2) knew that the supposed liquidator was not a party to the negotiations or the Agreement and that Mr. James did not claim to represent a liquidator; (3) accepted Mr. James' explanation that Broadsheet IoM had been 'reconstituted' in the form of Broadsheet LLC in Colorado which at best was a doubtful legal concept and, if correct, could only mean that Broadsheet had ceased to exist; (4) knowingly took the risk that the affairs of Broadsheet IoM remained in the hands of a liquidator whom Mr. James did not represent; and (5) were induced to take that risk by the undertakings to indemnify NAB against possible consequences of doing given by Mr. James and the Colorado companies he claimed to represent and contained in the Settlement Agreement.

256. There was, in my judgment, a deliberate decision by NAB to disregard the known risk of economic harm to Broadsheet IoM or, as Claimant submits, to turn a blind eye to damage that would or might be caused to it by entering into the Settlement Agreement with Mr. James and his Colorado companies and/or in making payments to them under it. I HOLD that that was 'reckless' conduct by NAB which gives rise to tortious liability, as alleged.

257. Questions were raised in the later stages of the hearing as to the extent of the economic harm to Broadsheet IoM that could be foreseen when the tort was committed and which may be recoverable as damages in these proceedings. It was suggested that entering into the Agreement and making payments under it to parties who ex hypothesi were not representing Broadsheet IoM caused no damage to it. The Claimant responded that the costs of bringing the proceedings might be regarded as sufficient harm. In my judgment, those questions raise issues as to the correct measure of damages for the tort to be determined in later proceedings. At this 'liability' stage of the proceedings I HOLD that some economic harm was foreseeable even if it was only the loss of the chance which a liquidator would have had of establishing his right to recover the payment which at that time NAB was willing to make to Broadsheet IoM under the ARA or as damages for its breach. That may indeed prove to be the correct measure of damages when that is established in due course but I express no concluded view at this stage.

(H) Are contractual claims governed by limitation provisions under Isle of Man/Colorado law?

258. Many issues arise – what law applies? when did the claim(s) accrue? how long is the limitation period? was the period extended? and were proceedings commenced in time?

259. Expert witnesses gave oral as well as written evidence in respect of the laws of the Isle of Man and of the State of Colorado, USA. They were:

Isle of Man (Claimants) Paul R Beckett M.A. M.St.(Oxon), advocate and solicitor with Quinn Legal

(Respondents) Christopher Cope, a barrister in England and Wales (1989) and the Isle of Man (2002) and a member of the firm Appleby (Isle of Man) LLC.

Colorado (Claimants) John Edward Moye P.C. a partner with Moye White LLP in Denver, Colorado

(Respondents) Boyd N. Boland, a former partner in Holme Roberts & Owen in Denver, Colorado (1985-2000) and Magistrate Judge for the United States District Court for the District of Colorado (2000-2015, Lead Magistrate from 2011) and currently in practice as a mediator and arbiter associated with the Judicial Arbiter Group Inc. at Denver, Colorado.

260. I am most grateful to them all, not just for their evidence but, especially, for meeting and preparing valuable Joint Reports before the hearing. They recognized and complied with the requirements of independence and impartiality that the law requires of them, and they presented their evidence in a constructive and helpful way.

261. The Respondents contend that all the claims made against them under or for breach of the ARA are time-barred under Manx and/or Colorado law. A measure of the importance they place on this issue is that they deal with it first and in detail in both their Closing and Reply Closing Written Submissions.

262. The preliminary question is, which of the two laws applies? It is common ground that this governed by the Foreign Limitation Periods Act 1984 which provides that the law of limitation is the law of the cause of action (section 1).

263. The relevant contractual claims are those (1) for damages for the repudiatory breach of the ARA by the Respondents, by reason of their London solicitors' letter dated 28 October 2003; and (2) for compensation payable under Article 4 of the ARA whether before or after termination of the ARA in October/December 2003 and/or damages in lieu (my summary).

264. Some of the difficulties are avoided, in my judgment, if the nature of these claims is examined carefully at the outset. As a matter of English law and (as I understand the evidence) of Manx law also, claims by Broadsheet under Article 4 are claims for the agreed percentage (20%) of asset recoveries from registered 'targets' made either by Broadsheet itself (and intended to be paid into an 'escrow account: Article 5.2) or by NAB under settlements agreed between it and the targets. Subject to the possibility of an additional bonus agreed between Broadsheet and the Chairman NAB, that claim is for the agreed percentage of 'the amount available to be transferred' (Article

5.2). When the ARA was wrongly repudiated, however, Broadsheet became entitled to recover damages to compensate it for the loss of its share of future recoveries made from registered targets, whether by Broadsheet itself (had it been able to continue its activities under the ARA, and would in fact have done so) or from future settlements between the targets and ARA. Broadly, and in principle, future losses would be calculated only for whatever period the ARA would have continued in effect had it not ended when it did.

Limitation – governing law

265. Article 6 provides that the ARA is governed by Manx law "*provided that in respect of the provisions for compensation, (para.4) the laws of the State of Colorado and the United States of America shall apply*". Judge Boland advised the Respondents that the reference to USA can be ignored, and the Claimant has not suggested otherwise.

266. Colorado law therefore applies "*in respect of the provisions for compensation*" in Article 4 and on the face of it that is the law of the cause of action for the purposes of section 1 of the 1984 Act. The expert witnesses (Mr. Moye and Judge Boland) disagreed as to whether that was the effect of Article 6.1 of the ARA, interpreted as a matter of Colorado law, Mr. Moye contending that it did not import the limitation provisions as a matter of contract. It is sufficient, however, that under Article 6.1 Colorado law governs the claim for compensation; section 1 makes it the 'law of limitation' also. However, if that is wrong, I hold that Article 6 does not have the effect of incorporating the Colorado law of limitation; that is not a matter "in respect of the provisions for compensation". Rather, it is concerned with proceedings to recover compensation, and although I agree with Judge Boland's assertion that *"The remedy available through suit is tied to the compensation to which a party may have been entitled absent breach*", the tie, in my judgment, does not make them the same thing, and restrictions on the right to claim compensation do not limit the scope of the contractual right to receive a share of "the amount available to be transferred" under Article 4.2.

The limitation period

267. Under Manx law, the period is six years. Under Colorado law, the general rule for "*All contract actions*" is three years (section 13-80-101(1)(a)) subject to the exception contained in section 13-80-103.5(1)(a) which reads:

> *"(1) The following actions shall be commenced within six years after the cause of action accrues and not thereafter:*
>
> *(a) All actions to recover a liquidated debt or an unliquidated, determinable amount of money……".*

268. The likely rationale for this exception to the general rule is that the public interest in requiring claimants to bring proceedings within strict time limits is less pressing when the claim is for a sum of money that is either "liquidated" (where the defendant has agreed to pay a specified amount) or, if unliquidated, "determinable" by the Court.

269. The leading authority is *Portercare Adventist Health System v. Lego* 286 P.3d.525 where the Supreme Court of Colorado reversed the Appeal Court's holding that "Because the hospitals recovery was limited to quantum meruit, its claim was limited to the three-year statute of limitations" (p.206). The Supreme Court held

> *"We disagree with this narrow interpretation. Instead, we hold that "a liquidated debt" may be ascertained either by reference to the agreement, or by simple computation using extrinsic evidence as necessary……..A debt is "liquidated" if the amount due "is capable of ascertainment by reference to an agreement or by simple computation."* (p.528)

270. In a later case, *Farley v. Family Dollar Stores Inc.* 2013 LEXIS 18073 *7-8 (Feb.11,2013) the U.S. District Court distinguished Portercare holding that there was "*a dispute as to the mutual understanding of the parties*" and the damages could not be easily computed; therefore, they were not liquidated or easily ascertainable.

271. In support of his conclusion that Broadsheet's claim is subject to the three year limit, Judge Boland lists the breaches of contract alleged by Broadsheet against NAB including, for example, "*failed to use its best efforts*" to provide information to Broadsheet as required by the ARA. I would agree with his view that those are not "liquidated etc" claims to which the six year period applies. But those claims are raised in connection with and as part of the Claimant's defence to NAB's claim that it was in repudiatory breach of its obligations under the ARA, and in that context the issue of limitation does not arise.

272. Judge Boland does refer to Broadsheet's claim that "*NAB failed to pay the mandated … 20% share of all recoveries …*" including, but not limited to, "*all recoveries from Targets in which Broadsheet had provided assistance etc.*", claims which could involve, as he says, detailed factual enquiries, making them *"substantially more complex*" than the Portercare case. I do not disagree with his opinion regarding those wider allegations.

273. In my judgment, a claim by Broadsheet under Article 4 is for the agreed share of assets recovered and "available for transfer" to Broadsheet. Those by definition are identifiable assets which are or have been received and held by NAB or on its behalf. They could well be 'liquidated' sums within the Portercare (and Farley) definitions, and certainly they are claims for "*an unliquidated, determinable amount of money*" within section 1(a). If sums of money have been recovered from a registered person, the amount due to Broadsheet clearly is 'determinable' even if some calculations are necessary. If they are physical assets, assessing their value is likewise a straightforward exercise in valuation which can be compared with the "simple computation" envisaged by the Supreme Court.

274. I hold, therefore, that the six-year period applies in the case of claims for compensation made by Broadsheet under Article 4. I should add two cautions: the claims must be carefully defined, if they are not already, so that they relate to identifiable assets recovered from registered persons, even if the process of identification requires disclosure of documents or information by NAB. Secondly, I express no view on the application of Article 4 to recoveries made in 'loan default' cases, and for the avoidance of doubt that issue is reserved for further consideration in the projected quantum proceedings.

275. The claim for loss caused by the Respondents' repudiatory breach is a claim for damages representing payments to Broadsheet that would have become due to Broadsheet under Article 4 after October/December 2003 in respect of registered targets, if the ARA had continued after that date. That claim in my judgment is governed by Manx/English law and is not subject to a three-year limitation period under Colorado law.

Concealment/equitable tolling

276. Under both English/Manx law and Colorado law there is a principle, known to the latter as equitable tolling, that accrual of the cause of action may be delayed for limitation purposes when the defendant to the claim has deliberately concealed the existence of material facts from the claimant. Both parties rely in their Closing Submissions on evidence given by Judge Boland at the hearing. Respondents say that "*in order for a statute of limitations to be tolled because of equitable considerations, it is the plaintiff's burden to establish that the defendant's actions prevented him or her from filing a timely claim*", and *"[it] is an extraordinary remedy and only available if the party was prevented from asserting its claim*". Claimant

describes the above as a "second category" and relies on the first – "*Judge Boland confirmed that equitable tolling arises where the defendant is under an obligation of disclosure which they failed to fulfil to the prejudice of the claimant*".

277. I can accept Claimant's submission that NAB was under a duty to inform Broadsheet of asset recoveries which it was obliged to share under Article 4. But during the currency of the ARA and long before its termination in October/December 2003, NAB made no secret of its view that its obligation was limited to assets recovered from "outside Pakistan" nor of the fact that recoveries were being made from or negotiated with persons who were registered targets under the ARA, including most prominently the case of (then) ex-Prime Minister Sharif. This was frequently referred to both in correspondence and at meetings between their representatives. The Claimant knew that NAB was withholding information from it and therefore was in breach of its duty to keep it informed.

278. In these circumstances in my judgment both the plea of 'concealment' and the claim for 'equitable tolling' must fail.

Acknowledgement

279. On 20 May 2008 NAB concluded the Settlement Agreement with Mr. James who signed it on behalf of "Broadsheet LLC" and another company, Steeplechase, as well as on his own behalf (see Section (F) above).

280. The Settlement Agreement included Recital D reading as follows:

> "*D. BS claims a sum of US $ 515.6 Million from NAB/GOP on the basis of its interpretation of clause 4 of the [ARA] and in this regard target wise calculations are enclosed. NAB disagreed with the amount of the claim.*"

281. Under clause 7 NAB agreed to pay "BS" $1,500,000 "in full and final settlement of its claims", and that sum was paid, but not to Broadsheet IoM.

282. Broadsheet contends that the above constituted an acknowledgment in writing of its liabilities to Broadsheet under the ARA, sufficient to revive its claims with effect from that date.

283. The Respondents contend, first, that to have that effect an acknowledgement must be clear and unambiguous, and it points to the concluding words of Recital D ("NAB disagreed with the amount of the claim") and to Recital F (which records that the claims had been negotiated, including at a meeting in London, where they were

"contested" by NAB). Secondly, they refer to clause 3 the Settlement Agreement which records the 'final release and discharge' of and from liability for Broadsheet's claims.

284. The issue was considered by the expert witnesses under both Manx and Colorado laws. Mr. Cope and Mr. Beckett disagreed "*on the issue whether the settlement agreement, and payment under its terms, could constitute an "acknowledgment" of the claim or a "payment ... in respect of [it]" within the meaning of s.27 [Limitation Act] 1984. Mr. Cope does not believe they could be so construed.*" (Joint Report para.17). Mr. Moye and Judge Boland agreed that *Van Diest v. Towle* 179 P.2d.984 (Supreme Court of Colorado, 1947) correctly states Colorado law, including "*A new promise to pay is created by a clear and unqualified acknowledgment of the debt ... an implied promise to pay is created by a clear, explicit and unequivocal acknowledgement of the debt; ...the efficiency of a payment to avert the effect of the statute rests in the conscious and voluntary act of the defendant, explicable only as a recognition and confession of the existing liability;...an acknowledgment of the existence of the debt removes the bar of the statute, because such acknowledgement carries with it an implied promise to pay ...*" (pp.211-212). They disagreed however as to whether the Settlement Agreement [contained] an acknowledgment sufficient to revive Broadsheet's claim(s).

285. In his oral evidence, Mr. Beckett (called by the Claimant) felt unable to commit himself to either view, as to whether the Settlement Agreement contained a sufficient 'acknowledgement' or not, but he recognized that both were 'arguable'. In his written Report he referred to House of Lords authority for the proposition that to acknowledge a claim a debtor in effect "must admit his legal liability to pay the debt" but he "need not identify the amount of the debt" (per Lord Hope of Craighead in *Bradford & Bingley plc v. Rashid* (FC) 2[2006] UKHL 37. He was unwilling to express a view because he had not construed or reviewed the terms of the Agreement, which it was common ground are to be construed under English, not Manx law.

286. Mr. Cope was not cross-examined on his evidence that the Settlement Agreement and a payment made under it do not constitute an acknowledgment of Broadsheet's claim.

287. Mr. Moye said in evidence that applying the Van Dienst principles he believed that the Settlement Agreement could be interpreted as a new implied promise. Judge Boland was not asked any questions about his view that it could not.

288. Given the terms of Recital D – where NAB limited its disagreement to the amount of the claim – and of clause 7 – where NAB/GOP agreed to pay the stated amount in full and final settlement of BS' claims, together with the fact of payment to persons whom NAB/GOP say that they accepted as being authorized by Broadsheet, I find it impossible not to hold that there was an acknowledgment that the debt was due to Broadsheet under the ARA, whether for the purposes of Manx or Colorado law. The essential issue is raised by NAB's further contention, that "*the acknowledgment or part-payment [must] be made to the entity bringing the otherwise time-barred claim*".

289. That is the statutory requirement in the Isle of Man – the acknowledgment or payment must be "*made to the person, or the agent of the person, whose title or claim is being acknowledged or, as the case may be, in respect of whose claim the payment is being made.*" (Limitation Act 1984 (IOM) section 28(2)(b)). Mr. Moye told me that there is no such requirement in Colorado law, as stated in the Van Dienst judgment, and that he did not know whether there was any authority on the acknowledgment is made to somebody who the debtor believes is the creditor.

290. As a matter of principle, I would hold that the acknowledgment must be made to the creditor or his agent, as the Manx statute provides and under Colorado law, because as stated in the Van Dienst judgment it must create a new promise by the debtor to the creditor. But I would also hold that if the promise is made to an agent or supposed agent, the normal rules agency apply. Therefore, if the supposed agent has no authority, the principal may elect to ratify what the agent has purported to do on his behalf. But that raises further issues regarding the extent to which, if at all, Broadsheet IOM might ratify the Settlement Agreement without becoming bound by all its terms including the validity of the payments made by NAB under it.

291. NAB's Closing Submission includes a passing reference to that possibility, namely, that if the Settlement Agreement contains an acknowledgment, as Broadsheet contends, that would operate as a bar to Broadsheet's claims in the arbitration. But the issue has not been raised formally or explored in the arbitration, and I therefore reserve it to a further hearing, if Broadsheet seeks to raise it in the light of this Part Final Award.

Valid Notice of Arbitration?

292. The final question regarding Limitation is whether a letter written by Dr. Pepper on behalf of Broadsheet dated 23 October 2009 was a valid notice of arbitration under section 14(4) of the Arbitration Act 1996 which defines the commencement of

arbitration proceedings as the time when "one party serves on the other party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter."

293. At the date of the letter, Broadsheet IOM was dissolved by order of the Manx Court and it remained so until the order was declare void by further Order dated 27 November 2009. At the time, Dr. Pepper was negotiating to revive it and I may suppose that the date of the letter, a few days before the expiry of six years from NAB's Termination letter dated 28 October 2003, is not a coincidence. (Dr. Pepper did not give evidence.) It appears from correspondence that Mr. Roger Harper agreed to become liquidator of Broadsheet on the previous day, 22 October 2009.

294. The letter was headed "*RE: Second Notice of Intention to Proceed to Arbitration*" apparently because a previous notice was sent by Mr. James to the Chairman of NAB dated April 17,2008, when they were negotiating the Settlement Agreement. Dr. Pepper must have known about it, it is not clear how. The letter was headed "*Demand for Arbitration in Dublin*".

295. The letter dated 23 October 2009 in summary read as follows:

> "I represent Broadsheet LLC (In Liquidation)("Broadsheet")
>
> Further to our previous notice, served upon you, and in the absence of a response from yourselves, on behalf of Broadsheet I hereby provide you with my client's Final Notice of Intention to proceed to arbitration pursuant to our claim against the Government for its breach on 28 October, 2003, of our commercial services Agreement dated 20 June 2000.
>
> I call your attention to the Arbitration Agreemet contained in Clause 7 of that Agreement which is hereby invoked bythis Notice and which vests jurisdiction in the Chartered Institute of Arbitrators , in London, and, in our failure to agree upon an Adjudicator, conveys the authority of the Institute to appoint a single Adjudicator for proceedings to take place in DDuublin, Ireland."

The next paragraph raised the possibility of arbitration under the ICSIT rules and offered that as an alternative possibility, "If Pakistan would prefer" it.

The letter continued:

> "*We invite you to comment on these suggestions, and look forward to hearing from you at your earliest convenience. Should we not receive your response in a reasonable period of time we will move ahead unilaterally in accordance with the Rules of the Chartered Institute.*"

296. Respondents submit that this letter does not satisfy the requirements for a valid notice of arbitration set out in section 14 of the Arbitration Act 1996, giving these reasons:

(i) the letter is framed as an 'intention' to arbitrate in the future and not of a reference of a dispute to arbitration at that time;

(ii) it does not submit any defined dispute to arbitration or even mention the claims contemplated against the Respondents; and

(iii) it does not call upon the Respondents to appoint or agree an arbitrator.

Respondents say that the position is "*analogous to Taylor Woodrow Construction v. RMD Kwikform Ltd. [2008] EWHC 825*".

297. Claimant submits that the letter gave notice of arbitration as required by section 14(4) because it required NAB "*to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter*" and in terms it "invoked" the agreement to arbitrate. It refers to Commercial Court authorities where it has been held that the notice must make it clear 'that the sender is invoking the arbitration agreement and is requiring the recipient to take steps in response to enable the tribunal to be constituted" (per *Moore-Bick J. in The Baltic Universal* [1999] 1 WLR 2117 at 2126, repeated in *Atlanska Plovida v. Consignaciones Asturianas* SA [2004] EWHC 1273 (Comm.)), and that it must "demonstrate that an arbitration clause is being invoked" (per *Eder J. in Finmon Ltd. v. Baltic Reefers etc.*[2012] EWHC 1273 (Comm.).

298. In my judgment, the letter gave a clear notice of arbitration under Clause 7 of the ARA, requesting NAB to agree upon an arbitrator failing which the Claimant would request the Chartered Institute to make the appointment: that is in the second paragraph. It then offers ICSIT as a possible alternative "*if Pakistan would prefer*" and asks for a prompt reply. Failing that, "*we will move ahead unilaterally in accordance with the Rules of the Chartered Institute*", a direct reference to the arbitration agreement in Clause 7 of the ARA.

299. Respondents raised a contention in their Closing Submissions that the letter failed to satisfy Art.2.2 of the CIArb Rules 2000 because it was not accompanied by copies of contractual documents etc. In my judgment, however, that finding would not support their contention that the letter was invalid and of no effect under section 14(4) of the Act.

300. Respondents submit, secondly, that at the date of the letter Broadsheet was a dissolved company in which Dr. Pepper had no legal interest and no authority to act on its behalf. In *Baytur SA v. Finagro Holdings SA* [1992] QB 610, Lloyd LJ observed "*There cannot be a valid arbitration when one of the parties has ceased to exist*".

301. Mr. Beckett in his evidence explained that the Order voiding the dissolution of Broadsheet was made under section 35 of the Limited Liability Companies Act 1996 and that "*it was restored as if it had been in existence ... for the purposes of its winding up*". On that basis, he said, the company clearly had capacity to give notice of arbitration "if that can be characterized as leading towards the winding up of the company".

302. In my judgment, the question whether Dr. Pepper had authority to act on behalf of the company when the letter was written does not arise. Rather, the letter was authorized retrospectively by or on behalf of the liquidator after the company was restored, provided only that it was for the purposes of the winding up, as it was. Proceedings against NAB were authorized in order to realise the company's major, and apparently its only asset.

303. For these reasons I hold that Broadsheet gave valid notice of arbitration by the letter dated 23 October 2009.

Conclusion on limitation

304. It follows that in my judgment the limitation defence fails with regard to contractual (including damages) claims where the cause of action arose after 23 October 2003. It succeeds, however, with regard to claims that arose before that date but that is subject to the possibility that the Liquidator may be entitled to ratify the Settlement Agreement and succeeds in doing so (paragraph 291 above, and Conclusions paragraph 1 below).

CONCLUSIONS

305. This is a PART FINAL AWARD dealing with liability issues (including Limitation) save that I reserve for further consideration upon the application of either party (1) my findings as to the Seat of the Arbitration (Introduction paragraph 21), and/or (2) whether Claimant's Liquidator is entitled to ratify the Settlement Agreement dated 20 May 2008 and the consequences of such ratification, if he seeks to do so.

306. Any application relating to the issues reserved in paragraph 1 (above) shall be made in writing and on notice to the other party on or before 15 September 2016 or such later date as may be agreed by the parties or as may be ordered on an application made in writing before that date.

307. Subject as aforesaid, **I HOLD, FIND, DECLARE AND AWARD**:

(A) The Claimant is entitled to recover damages from the Respondents for their wrongful repudiation of the ARA dated 20 June 2000 by their solicitors' letter dated 28 October 2003;

(B) The Claimant is entitled to recover sums due as compensation under Article 4 of the ARA dated 20 June 2000 interpreted as stated in Section (A) above and/or damages in lieu (if permitted in law) except when the relevant cause(s) of action arose before 23 October 2003;

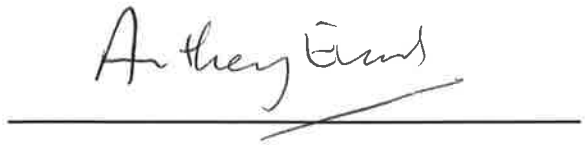
(C) The Claimant is entitled to recover damages from the Respondents for the tort of conspiring to cause unlawful economic loss to the Claimant by entering into the Settlement Agreement dated 20 May 2008 with Mr. James and companies controlled by him and/or in making payments to him or them thereunder;

(D) All questions as to the amount of any compensation due under Article 4 of the ARA and/or as to the measure and assessment of damages are reserved for further consideration hereafter; and

(E) I make **NO ORDER** in respect of the claim for a Declaration declaring void (i) the purported Assignment to Steeplechase in January 2005, and (ii) the purported Settlement Agreement dated 20 May 2008, save that **I HOLD AND DECLARE** that Mr. James had no authority actual or apparent from the Claimant after March 2005 either to notify the Respondents of the said purported Assignment or to enter into the Settlement Agreement insofar as he purported to do so on behalf of the Claimant; and

(F) All questions as to Costs including the costs of the arbitration are **RESERVED FOR FURTHER ORDER.**

Dated: 1 August 2016



Sir Anthony Evans, Sole Arbitrator

Annex 1

Parties List of Issues

Annex 1

Parties List of Issues

BROADSHEET LLC – V. – PAKISTAN AND ITS NAB

LIST OF ISSUES

A. LIMITATION

1. Which of Manx or Colorado law governs the limitation periods in respect of the claims listed in the Claimant's Skeleton at Section X (Relief)?

2. What is the relevant limitation period applicable to the claims mentioned in paragraph A.1 as a matter of Manx or Colorado law?

3. When did the causes of action accrue for the claims described in paragraph A.1? In particular:

   3.1. Which principles apply to determining when the causes of action accrued for the claims described in paragraph A.1?

   3.2. Do the principles of concealment or equitable tolling operate to delay accrual of any of the causes of action?

   3.3. When did the limitation periods begin running for the claims mentioned in paragraph A.1?

4. Were any periods of limitation restarted by the Settlement Agreement entered into on 20 May 2008 (the **Settlement Agreement**)?

5. When did the applicable periods of limitation stop running?

6. Was a valid and properly authorised notice of arbitration served on 23 October 2009?

7. Are any of Broadsheet's claims accordingly time-barred?

B. SETTLEMENT

8. Was the Assignment Agreement dated 4 January 2005 entered into between Broadsheet LLC (Isle of Man) and Steeplechase Financial Services LLC (the **Assignment Agreement**)?

9. Did Mr James have authority to execute the Assignment Agreement on behalf of Claimant?

10. What is the effect of clause 13.1 of the ARA on the validity of the Assignment Agreement?

11. Does the Tribunal have jurisdiction to declare the Assignment Agreement void or voidable for purposes of these proceedings?

12. If yes, should the arbitrator exercise his jurisdiction in this case?

13. If the Tribunal does have jurisdiction, is the Assignment Agreement void *ab initio* as a matter of Manx law?

14. If the Tribunal does not have jurisdiction, is the Assignment Agreement valid until avoided by a Manx Court?

15. Alternatively, if the Assignment Agreement is valid until avoided, can Broadsheet LLC (Isle of Man (in liquidation)) now avoid the Assignment Agreement before this Tribunal and, if so, what would the consequences be?

16. If the Assignment Agreement is valid, (a) were all rights under the ARA assigned, and (b) to the extent rights were assigned, have all disputes arising under the ARA been fully and finally settled by the Settlement Agreement?

17. With respect to the Settlement Agreement:

    17.1. Who were the parties?

    17.2. What is its legal effect?

C. INTERPRETATION OF THE ARA

(1) General Principles

18. What is/are the governing law(s) applicable to the Claimant's claims for breach of the ARA?

19. What are the applicable legal principles to contractual interpretation of the ARA under Manx law and/or Colorado law?

(2) Registration and POAs

20. On the true construction of the ARA under its governing law(s), what were the respective obligations of the parties as to the registration of targets pursuant to clause 1.2 of the ARA?

21. Were both parties obliged to consent to the registration (or delisting) of a target?

22. On the true construction of the ARA under its governing law(s) what were NAB's obligations in respect of powers of attorney, pursuant to clause 2.1.2 of the agreement?

23. On the true construction of Schedule 1 to the ARA, which individuals and/or entities were registered as targets pursuant to clause 1.2 of the agreement?

(3) Broadsheet's Obligations

24. On the true construction of the ARA under its governing law(s), what were Broadsheet's obligations pursuant to clauses 1.1, 3.1, 3.3, 3.4 and 3.5 of the ARA?

(4) NAB's Obligations

25. On the true construction of the ARA under its governing law(s), what were NAB's obligations pursuant to clause 2 of the ARA?

26. What was the extent of Chairman NAB's discretion in respect of information and/or documentation to be provided by NAB?

(5) Compensation

27. On the true construction of the ARA under its governing law(s), what was Broadsheet's entitlement to compensation under clauses 4.1 and/or 4.2 of the agreement?

(6) Termination

28. On the true construction of the ARA under its governing law(s), what is the effect (if any) of clause 18 on the Respondents' election to terminate the ARA on grounds of: (i) repudiatory breach; or (ii) termination on notice?

D. MISREPRESENTATION

(1) Misrepresentations

29. What representations of fact and/or intention were made or adopted by or on behalf of Broadsheet as to the ability of the company and/or its representatives to (amongst other things): (i) perform the ARA; and/or (ii) finance performance of the ARA?

30. Were any or all of the above representations false at any material time prior to the execution of the ARA?

(2) Inducement / Reliance

31. Were the Respondents (or either of them) induced to enter into the ARA as a result of a material misrepresentation?

(3) Election to Rescind

32. Was the Respondents' election to rescind the ARA on grounds of material misrepresentation pursuant to their letter dated 28 October 2003 legally valid?

E. PERFORMANCE, BREACH AND TERMINATION

(1) Broadsheet's alleged breaches of the ARA

33. Did Broadsheet breach clause 1.1 of the ARA by failing to trace, locate and recover assets held outside Pakistan by registered targets; and/or by failing to provide professional, financial and other resources of whatsoever kind required to achieve the same?

34. Did Broadsheet breach clause 3.1 by failing to use its best efforts at all times to recover assets held outside Pakistan by registered targets?

35. Did Broadsheet breach clause 3.3 by failing to organise, coordinate and manage the investigative and legal efforts to locate, seize and recover assets held outside Pakistan by registered targets?

36. Did Broadsheet breach clause 3.4 of the ARA by failing properly to finance its performance of that agreement?

37. Did Broadsheet breach clause 3.5 of the ARA by failing to provide full and complete information as to its searches, tracing and recovery of assets and/or failing to respond promptly to NAB's queries about the same?

(2) The Respondents' alleged breaches of the ARA

38. Did the Respondents' purported termination of the ARA in October 2003 itself constitute an anticipatory repudiatory breach by the Respondents?

39. Did the Respondents breach clause 1.2 of the ARA by: (i) by attempting to deregister certain registered targets from Schedule 1; and/or (ii) not registering Mr Jamil Ansari as a target?

40. Did the Respondents make recoveries from registered targets prior to their termination letter dated 28 October 2003 to which the Claimant is entitled to a share pursuant to clause 4 of the ARA?

41. Is Claimant entitled to a share of recoveries from any of the registered targets either made by Respondents or foregone after Respondents' termination of the ARA?

42. Did the Respondents breach clauses 2.1.1 and/or 2.1.3 by not providing such information available within NAB in respect of registered targets to Broadsheet?

(3) Assignment of Targets

43. Was the assignment of Mr Sherpao as a registered target by IAR to Broadsheet effective to register him pursuant to clauses 1.2 and/or 9.1 of the ARA?

(4) Termination

44. Did any or all of Broadsheet's alleged breaches of the ARA constitute a repudiation or renunciation of the contract, entitling the Respondents to terminate the same?

45. Was the Respondents' letter dated 28 October 2003 effective to terminate the ARA on grounds of: (i) repudiatory breach of contract and/or renunciation; or (ii) termination on notice.

F. NON-CONTRACTUAL CLAIMS

(1) Conspiracy to cause economic harm by unlawful means

46. What is the governing law applicable to the Claimant's non-contractual claim?

47. Is liability established?

48. Did Respondents and Mr James enter into the 20 May 2008 Settlement Agreement appreciating that a probable consequence of their agreement would be that Claimant would suffer economic harm?