Neutral Citation Number: [2026] EWHC 441 (Comm)

Case No: CL-2023-000160

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27/02/2026

Before :

LORD JUSTICE FOXTON

- -

Between :

(1) ABRAAJ INVESTMENT MANAGEMENT LIMITED (IN LIQUIDATION)	
(2) SAGE VENTURE GROUP LIMITED	
(3) K POWER HOLDINGS LIMITED	**Claimants**
- and -	
(1) KES POWER LIMITED	
(2) SHAN-E-ABBAS ASHARY	
(3) MASHREQBANK PSC	
(4) KEIRAN HUTCHINSON (in his capacity as receiver)	
(5) HANI BISHARA (in his capacity as receiver)	**Defendants**

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Adrian Beltrami KC and **Mark Cullen** (instructed by **Simmons and Simmons LLP**) for the **Claimants**
Ian Quirk KC (instructed by **Steptoe International (UK) LLP**) for the **Second Defendant**
Robert Weekes KC and **Madelaine Clifford** (instructed by **Jones Day**) for the **Third to Fifth Defendants**

Hearing date: 9 February 2026
Further submissions: 11 February 2026
Draft judgment to parties: 17 February 2026
Further submissions: 24 February 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 27 February 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Lord Justice Foxton :

A INTRODUCTION

1. This judgment addresses a number of consequential issues arising from the judgment I handed down following the trial in this matter ([2026] EWHC 65 (Comm): "**the Judgment**"). The issues arise under five headings:

   i) Permission to appeal.

   ii) The terms of the order.

   iii) Interest.

   iv) Costs.

   v) Stay.

B PERMISSION TO APPEAL

2. Mr Beltrami KC, who did not appear at the trial, seeks permission to appeal on three grounds:

   i) I was wrong to find that AIML is estopped from denying that there was a valid assignment of the KESP Receivable by AH to Mashreq because that involved a common assumption giving effect to a legal agreement which is a nullity, which is impermissible (Ground 1).

   ii) The effect of my ruling was that the estoppel by convention created a new right for Mashreq, which is contrary to authority (Ground 2).

   iii) I should not have made an order in Mashreq's favour for payment of the KESP Receivable, both as a matter of procedure and of law (Ground 3).

3. I will take Ground 2 first.

Ground 2

Was the point taken?

4. There was some debate at the consequentials hearing as to whether this argument had been sufficiently raised at the trial. I gave directions for the parties to serve a list of references which I have reviewed. The relevant history is as follows:

   i) In the Amended Reply and Defence to Mashreq's Defence and Counterclaim, the Claimants denied "that any alleged estoppel could operate to provide Mashreq with title to the KESP Receivable". That reference is the high point of the Claimants' case that the point was taken.

   ii) The "no new rights" point is not referred to in the Claimants' written opening, which dealt with the estoppel claim in three paragraphs, and had earlier

summarised the law relating to estoppel by convention without reference to the sword/shield issue.

iii) The issue was raised in Mashreq's opening, who stated "Cs have (rightly) not sought to suggest that Mashreq is seeking impermissibly to use estoppel by convention as a sword rather than a shield."

iv) The Claimants did not address this issue in their short oral opening. Nor did they challenge Mashreq's statement that they were not advancing a "sword/shield" point.

v) The Claimants' written closing did refer to the principle that estoppel by convention cannot be used to create new rights, and noted that it was common ground (paragraph 84). The immediately following paragraphs analysed the decision in *Rivertrade Limited v EMG Finance Limited* [2013] EWHC 3245 (Ch); [2015] EWCA Civ 1295 (on which Mashreq had relied in opening) and highlighted Kitchen LJ's statement at [51] on which reliance is now placed, continuing:

> "That was in circumstances where Forburg had beneficial title to the Ranhill proceeds and was a party to the relevant agreement, who had been directly informed by Rivertrade that its understanding was that the loan was secured by the Ranhill proceeds.
>
> In contrast, there was no common assumption in the present case to which AIML was a party that AH was owed the KESP Receivable or that AH had title or authority to give security over the KESP Receivable. Nor was there any communication from AIML to Mashreq to that effect".

vi) That appeared to be placing emphasis on the issue of whether AIML was party to the relevant common assumption (I found that it was and there is now no attempt to appeal against that finding). However, particularly with the benefit of hindsight, I accept it is possible to read it as a suggestion that the principle in paragraph 84 which was "common ground" was engaged in the case.

vii) In their main oral submissions, the Claimants did not mention these points, or the principle that a conventional estoppel cannot create new rights. They did, however, state that the facts in this case were "somewhat different to those in *Rivertrade* and various other authorities" (Day 4 page 76:20-25) and, when dealing with the issue of whether the AIML directors were sufficiently close to the transaction to have a *Moorgate v Twitchings* duty to speak, submitted that AIML was not as close to the Assignment agreement "as some of the other cases like *Rivertrade* where they are found to be party …" (Day 4/96:20-97/6).

viii) The summary of the Claimants' case on the alleged estoppel by convention at Day 4/9/94 was as follows:

> "The claim fails on the facts. First that there was no common assumption shared by each of the parties, including AIML, that the KESP receivable was owed to AH. Secondly no common assumption that AH held title to and had authority to assign the KESP receivable. Nor was there a common

> assumption that the assignment agreement and notice of assignment would or did validly effect a legal and equitable assignment to Mashreq and AIML did not share in or acquiesce in any of those alleged shared assumptions. Fourthly, we make the point that nothing crossed the line from AIML to Mashreq in respect of any of those alleged common assumptions. Fifthly, nor can it be said that AIML assumed some element of responsibility for the assumption, even if it can be shown that it was, in fact, made by Mashreq itself. Sixthly, in terms of reliance, we do make the point that it cannot be shown on the evidence that Mashreq did rely on the common assumption … Finally, we say it cannot be said, in all the circumstances, to be unjust or unconscionable for AIML to deny that there was any assignment of the debt to Mashreq."

No "new rights" point was raised in that seven-point summary.

ix) Day 5 also passed without a reference to swords, shields or new rights. Mashreq made extensive submissions about *Rivertrade* and responded to the attempt to distinguish *Rivertrade* at Day 5/5:17-24.

x) Mr Chapman KC returned to *Rivertrade* in his reply, referring again to the point of suggested distinction (Day 5 page 103 line 20 to page 104 line 16). This was not linked to the new rights point, but the issue of whether AIML shared the common assumption ("this position is distinguishable and distinct from that in *Rivertrade* and where again we say one has to pay due regard and regard to the contractual position and what the contractual documents in fact say, which are clear as to who, so to speak, is doing what").

5. In short, I do not think that the point was clearly (or, with respect, sufficiently) taken, although I accept it is now possible to see something resembling the argument in the Claimants' written closing. I do not feel able, against that background, to draw the inference Mr Weekes KC invites me to draw that a conscious decision was taken to abandon the point.

Should I allow the point to be taken now?

6. Not without some hesitation, I have decided, in the rather unusual circumstances of the case, that it would not be unfair to allow the Claimants to take this point now. That is because the arguments which are central to the debate are either issues of law, or factual issues which were, in any event, fully explored in the context of the debate about the similarity between this case and *Rivertrade* and are not in dispute. Mr Weekes KC suggested that by allowing the point to be taken now, Mashreq would be deprived of the benefit of a first instance judgment on the issue. Assuming that can be described as a benefit in this case, I propose to rectify that omission now.

7. I am conscious that reasons given by a judge to justify a decision they have already reached may be thought to lack the forensic power of those given in the course of reaching that decision. However, I do not think that the Claimants can have any legitimate complaint in this respect, and in any event, I should state immediately that permission is given to appeal on this ground (the point being sufficiently arguable), and that these additional reasons will not be the last word.

The legal principles

8. I accept that there is considerable authority for the view that estoppel by convention cannot, of itself, create a new cause of action (see *Chitty on Contracts* (36th) [7-025]), or, as it was put in this case, create new rights. However, that cannot operate simply as a slogan. It is necessary to consider what the phrase means, and whether that meaning is engaged.

9. My account of the relevant authorities can begin with *Amalgamated Investment v Texas Commerce Bank* [1982] QB 84, in which the claimant had provided a guarantee of a loan made by the bank to the claimant's subsidiary (ANPP), but the relevant lending had taken the form of a loan from the bank to a wholly-owned Bahamian subsidiary of the bank (Portsoken) which itself made a loan to ANPP. The bank had applied amounts recovered from realising securities provided by the claimant in discharge of its liability under the guarantee, and the claimant brought proceedings seeking a declaration that it was not liable in respect of ANPP's liabilities:

    i) At first instance, Robert Goff J addressed the sword and shield issue at p.105. He said that it was "not of itself a bar to an estoppel that its effect may be to enable a party to enforce a cause of action which, without the estoppel, would not exist". While an estoppel cannot be "a source of legal obligation", it "may have the effect that a party can enforce a cause of action which, without the estoppel, he would not be able to do." He gave an example of such an estoppel *Spiro v Lintern* [1973] 1 WLR 1002, in which a husband, who had not authorised his wife to agree to sell his house, was held to be estopped from denying that his wife had such authority, with the effect that a purchaser from his wife was enabled to enforce against him a contract by his wife for the sale of the house.

    ii) On appeal, Eveleigh LJ held that estoppel by convention allowed the bank to resist the claim for the declaration (and thus continue to exercise its self-help remedy) but it would not have been able to bring a claim under the guarantee (p.126).

    iii) Brandon LJ (at p.132) was of the view that the bank could enforce the guarantee:

    > "In my view much of the language used in connection with these concepts is no more than a matter of semantics. Let me consider the present case and suppose that the bank had brought an action against the plaintiffs before they went into liquidation to recover moneys owed by A.N.P.P. to Portsoken. In the statement of claim in such an action the bank would have pleaded the contract of loan incorporating the guarantee, and averred that, on the true construction of the guarantee, the plaintiffs were bound to discharge the debt owed by A.N.P.P. to Portsoken. By their defence the plaintiffs would have pleaded that, on the true construction of the guarantee, the plaintiffs were only bound to discharge debts owed by A.N.P.P. to the bank, and not debts owed by A.N.P.P. to Portsoken. Then in their reply the bank would have pleaded that, by reason of an estoppel arising from the matters discussed above, the plaintiffs were precluded from questioning the interpretation of the guarantee which both parties had, for the purpose of the transactions between them, assumed to be true."

> In this way the bank, while still in form using the estoppel as a shield, would in substance be founding a cause of action on it. This illustrates what I would regard as the true proposition of law, that, while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed. That, in my view, is, in substance, the situation of the bank in the present case."

iv) Only Lord Denning was willing to contemplate the operation of estoppel by convention on a wider scale.

v) It is the judgment of Brandon LJ which has come to be recognised as the correct statement of the law: see Rix LJ in *Dumford Trading A-G v OAO Atlantrybflot* [2005] EWCA Civ 24, [39] and Mance LJ in *Baird Textile Holdings Ltd v Marks & Spencer Plc* [2001] EWCA Civ 274, [88].

10. However, it is accepted that estoppel by convention can defeat a defence, and enlarge the effect of an agreement, and in both instances enable one party to succeed where it would otherwise have failed (*Chitty*, [7-026]). This can include cases in which the claim is advanced on the basis of an asserted legal relationship between the parties which does not otherwise exist. As Colman J (who had a particular expertise in estoppel by convention, having appeared a lead counsel for the bank in *Texas Commerce Bank*) observed in *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep 159, 175:

> "It is reasonably clear that, at least in cases of proprietary estoppel and estoppel by convention, the claimant may formulate his cause of action on the basis of a mutually-assumed factual or legal relationship which differs from that which truly exists. The estoppel is not in itself the cause of action but it prevents the party estopped from relying by way of a defence on the factual and legal basis which truly exists".

11. In *Baird*, [89], when commenting on *The Henrik Sif* [1982] 1 Lloyd's Rep 456 (where an estoppel by convention was found which had the effect of preventing a charterer from denying that it was the contractual carrier under bills of lading), Mance LJ saw "no reason to doubt the outcome" because:

> "There was an undoubted legal relationship, contained or evidenced in the bill of lading contracts — whoever were the parties thereto. The conduct relied upon bound the charterers to accept that they were one of such parties";

contrasting *The Henrik Sif* with the case before the court where the law was asked "to attach legal consequences to a bare assurance or conventional understanding (falling short of contract) between two parties, without any actual contract or third party being involved or affected".

12. It is also clear that an estoppel by convention can operate between parties who are not in contractual privity. In *Tinkler v Revenue and Customs Commissioners* [2021] UKSC 39, for example, this species of estoppel operated in relation to a common assumption that a valid tax enquiry had been opened (such that the closure notice resulting from

this enquiry would itself be valid and generate a tax debt). At [70]-[72], Lord Burrows stated:

> "As was said at the start of this judgment, estoppel by convention most commonly arises where there is a contract between the parties. It is also true that many statements of the doctrine refer to there being a transaction between the parties … It is also correct that many of the statements of the doctrine by commentators, … refer to there being a transaction between the parties.
>
> However, it would appear that such statements merely reflect the primary contractual or transactional context in which estoppel by convention arises. And there have been wider statements of estoppel by convention that refer to mutual relations or dealings between the parties.
>
> On the facts of this case, while there was no transaction between HMRC and BDO/Mr Tinkler, there were mutual dealings between them subsequent to the common assumption."

13. At [75], Lord Burrows suggested that Brandon LJ's statement that estoppel cannot create a cause of action was "too sweeping" because proprietary estoppel could have such an effect. He continued:

> "The particular concern about allowing promissory estoppel and estoppel by convention to create a cause of action is that this might undermine the requirement of consideration for the validity of a contract. However, that concern is not relevant to the facts of this case which do not concern contractual dealings. In any event, in the context with which we are concerned, even if one were to insist that the estoppel by convention can support, but must not create, a cause of action in relation to the mutual dealings between HMRC and a taxpayer, it would appear that that restriction is satisfied. The underlying duty to pay tax is imposed by statute and the estoppel relates merely to the dealings between HMRC and the taxpayer in connection with the procedure by which HMRC determine the correct amount of tax to be paid under the statute."

14. As to that last statement, while the underlying legal duty to pay tax does arise by statute, the existence of a tax debt in any particular case may depend on the operation of a series of procedural provisions and steps, and, so far as the demand for tax in question was concerned, the valid service of a closure notice. On one view, Lord Burrows' statement attaches significance to the context in which the common assumption arose, which was between two parties in a legal relationship created and regulated by the statutory tax regime as, respectively, taxing authority and tax payer.

15. Finally, it should be noted that the KESP Receivable existed in advance and independently of the alleged estoppel, which is concerned with whether there has been an effective transfer of the debt. A *Moorgate v Twitchings* estoppel might in some sense be said to create a new right in this sense, because the effect of the estoppel is to allow the party asserting the estoppel to prevail against the anterior right of the party estopped, but that does not prevent the doctrine operating.

16. These authorities suggest that some care is required when dealing with the general assertion that an estoppel by convention cannot create new rights, and they suggest that

the particular legal context in which the issue arises is likely to be relevant to the correct analysis. In particular, it will generally be necessary for the estoppel to operate in relation to and affect a legal relationship between the parties which exists independently of the estoppel asserted. Even that proposition cannot be stated in unqualified terms – Mance LJ in *Baird* contemplates the legal relationship may exist independently of the estoppel, but the estoppel can arise as to who is party to it; and both Mance LJ in *Baird* (see the discussion of ostensible authority at [90]) and Colman J in *Azov Shipping* contemplated the doctrine extending to a case when a legal relationship had ostensibly been created between two parties, and the issue arises as to whether those purporting to act for one of them had authority to do so. Finally *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd (The Amazonia)* [1990] 1 Lloyd's Rep 237 would suggest that estoppel by convention can also operate in some circumstances where two parties purport to enter into a legal relationship which is legally ineffective (subject to the rule that estoppel cannot oust the effect of a statute). Alternatively, *The Amazonia* can be treated as a case where the independent legal relationship affected is the matrix contract.

The position in this case

17. In this case, the primary performance interest which Mashreq asserts is not against AIML, but against KESP, and KESP's liability does not arise by virtue of any conventional estoppel but pre-exists the estoppel alleged. In asserting that claim against KESP, Mashreq can point to the Assignment Agreement which purports to assign the KESP Receivable and the signed Notice of Assignment.

18. AIML's response to Mashreq's claim is that the Assignment Agreement did not assign the KESP Receivable because AH had no right to assign it, with the result that it is AIML, and not Mashreq, who is entitled to enforce the KESP Receivable. AIML also brings a rival claim to the KESP Receivable. In response to both AIML's challenge to Mashreq's claim and AIML's own claim, Mashreq deploys its estoppel by convention. To this extent, the manner in which the issue has emerged and the estoppel by convention deployed closely resembles that envisaged by Brandon LJ in *Texas Commerce Bank*.

19. However, the analysis need not stop at that point.

20. In this case, AIML is not itself party to the Assignment Agreement, such that the case presents a potential point of distinction to cases where an agreement between A and B is given a wider effect than it would otherwise have because of a conventional estoppel operating between A and B. Rather it is a case where an agreement between A and B achieves an efficacy it would not otherwise have had because of a conventional estoppel operating between A, B and C, where C would otherwise be able to take a point negating A's ability to do what it had promised to do. There is an obvious resemblance with *Spiro v Lintern*.

21. In considering the estoppel argument in this case, it is important to have the factual context in mind:

    i) The Abraaj Group presented itself and operated as a single unit.

ii) A loan taken out by AH and guaranteed by AIML was due for repayment to Mashreq before the alleged estoppel arose (and there were no funds to repay it at that time).

iii) Mashreq made it clear that rescheduling the loan due from AH and guaranteed by AIML was subject to a condition that the KESP Receivable was assigned to Mashreq by way of security.

iv) AIML and AH were both parties to the Second Amendment which rescheduled the debt, but only AH was party to the Assignment Agreement. However, these were interlocking agreements. Thus the Second Amendment made the conclusion of the Assignment Agreement a condition precedent to the amendments (clause 3 and Schedule 1 paragraphs 1(b) and 2(b)). The documents were largely signed by the same individuals on the Abraaj side, on the same date.

v) The two agreements had no independent life – neither would have been entered into in the absence of the other. In short, they formed part of a single transaction. In the words of Fletcher Moulton LJ in *Monks v Whitely* [1912] 1 Ch 735, 754 as cited in Sir Kim Lewison, *The Interpretation of Contracts* (7th), [3-07], each of the agreements was entered on the faith of the other and intended to speak as part of one transaction, and they cannot be treated as separate and independent transactions for the purpose of claiming rights which would only accrue if the selected deed was operative separately. The court's willingness to have regard to the fact that different agreements form part of one transaction is not only relevant to interpretation of contracts (e.g. for its relevance to the issue of past consideration, see *Chitty*, [6-030]).

22. In these circumstances, in my determination the fact that AIML is not a signatory to the Assignment Agreement does not preclude the operation of the doctrine of estoppel by convention. It was party to a single transaction which included as an essential element the assignment of the KESP Receivable, albeit the document intended to effect that assignment was one entered into between AH and Mashreq rather than AIML and KESP.

23. In this respect, the facts of this case bear a close similarity with those of *Rivertrade*, although I accept that the cases are not on all fours:

i) Mann J referred to a series of documents signed or exchanged in June 2009 which were "clearly part of a package" ([2013] EWHC 3245 (Ch), [175]-[176]) and which were "interlinking agreements" ([182]).

ii) The issues in that case, for present purposes, are whether a company called Finance, to whom the Ranhill claim was originally due, and a company called Forburg who was said to derive title from Finance, were estopped from challenging the validity of a purported assignment of the Ranhill claim by Holdings to Rivertrade as part of the June 2009 transaction.

iii) Mann J found that the effect of earlier April 2009 arrangements was that Finance had agreed to assign 35% of the Ranhill proceeds to Rivertrade ([166] and [169]). However, the estoppel by convention relied upon in relation to the June 2009 transaction was said to relate to 100% of the Ranhill proceeds. Mann J held that

Finance was not a party to the June 2009 transaction ([190]-[191]) but that the reference to Finance in the Facility Letter (one of the documents making up the June 2009 transaction) showed that the individuals signing the Facility Letter for Holdings, who were also directors of Finance, "had that company well in mind" ([209(vii)]).

iv) Mann J did not find that Forburg had promised to assign the Ranhill claim to Rivertrade under the June 2009 agreement: had that happened, no need for an estoppel by convention would have arisen. The Judge found Forburg was party to the April 2009 agreement ([209(ii)] and that Forburg was "party to the overall arrangement" of the June 2009 transaction ([209(vi)]).

v) The result was that both Finance and Forburg were estopped from asserting that Holdings was not an appropriate assignor of 100% of the Ranhill claim ([211]).

vi) That decision was approved in the Court of Appeal ([2015] EWCA Civ 1295). It is clear that Mann J's estoppel finding in relation to both Finance and Forburg was challenged in the appeal ([46]). Kitchen LJ set out Mann J's findings (quoting [209] of Mann J's judgment) which extended to both Finance and Forburg and said that the findings were "fatal" to the appeal ([50]).

vii) At [50], he went on to say more about the position of Forburg, noting that "it was the common intention of the parties to the June 2009 agreement that the benefit of the whole of the Ranhill receivable should be transferred to Rivertrade" and then stated:

> "It follows that this is not a case in which an estoppel is relied upon to create an enforceable right where none previously existed. It is instead one of those cases in which the estoppel is relied upon to bind the parties to an agreement to an interpretation which would not otherwise have been correct".

viii) Given Mann J's findings of fact as just cited by Kitchen LJ, that must mean that it was sufficient that Forburg was "party to the overall arrangement", which included within it an assignment of the Ranhill claim (albeit effected by Holdings to Rivertrade).

Does this case engage the justifications for the principle that estoppel by convention cannot create a cause of action?

24. It is helpful at this point to revisit the justifications offered for the rule that an estoppel by convention cannot create new rights.

25. The justification most frequently given (in a contractual context) is that this is necessary to avoid circumventing the doctrine of consideration and the concomitant principle of English law that gratuitous promises are not enforceable save where made by deed: Lord Burrows in *Tinkler*, [75] and Mance LJ in *Baird*, [86]-[87] (cf. *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep 159, 175 where Colman J doubts the applicability of that policy to estoppel by convention). The desire to avoid circumvention of doctrines of the law of contract may not end with consideration. In *Baird,* [91], Mance LJ said that the estoppel plea in that case involved "the

requirements of contract (consideration, certainty and an intention to create legal relations)" being rendered "irrelevant" and pointed to the absence of any "objective intention to affect some actual or apparent pre-existing legal relationship."

26. In this case:

    i) The estoppel arises in relation to a single transaction comprising binding agreements for which consideration was obviously given.

    ii) There is no issue of certainty and there can be no question that the parties intended to create legal relations (and indeed to give Mashreq a legal right to enforce the KESP Receivable).

    iii) There was clearly an objective intention to affect the existing rights and obligations of Mashreq and AIML under the Facility Agreement and Guarantee (which were to be extended), and to affect the existing rights in relation to the KESP Receivable by giving Mashreq an effective security interest over that right, in each case in a manner which was intended to be legally binding.

    iv) There was an existing legal relationship between AIML, AH and Mashreq by reason of the Amendment Agreement (to which all three were parties) and the guarantee of the indebtedness under that agreement.

Conclusion

27. For these reasons, I am satisfied that the "new rights" argument takes AIML nowhere.

28. Indeed, the argument taken by AIML is essentially a technical complaint. It was party to a transaction to reschedule the loan and guarantee, which involved, as the price of that rescheduling, the granting of security over the KESP Receivable. The effect of AIML's argument is that it has been able to obtain the benefit of the extension, without bearing the consequences of what Mashreq made clear was the price for obtaining it. Picking up the language of Lord Burrows in *Tinkler* at [85], in my view, it is entirely satisfactory that, by reference to estoppel by convention, the law has the means to avoid such a technical point succeeding. But the Court of Appeal will be able to form its own view.

Ground 1

29. This is a refinement of Ground 2, contending that an estoppel by convention alleged was as to "the legal effect" of the Assignment Agreement, and that such a common assumption cannot found an estoppel by convention (relying on *Keen v Holland* [1984] 1 WLR 251, 261-2 and *The Nile Rhapsody* [1992] 2 Lloyd's Rep 399, 408).

Was this argument run at trial?

30. This argument was not advanced at trial, there being no reference to *Keen v Holland* or *The Nile Rhapsody* in the written or oral submissions. That is not of itself fatal, if the point can fairly be taken now.

Should I allow AIML to raise the argument now?

31. To answer that question, it is necessary to say a little more about *Keen v Holland*:

i) In that case, the parties had negotiated a lease on the assumption that, in its agreed form, it would not be a protected tenancy under the Agricultural Holdings Act 1948. This was not the case, leading the lessor to contend that there was an estoppel by convention preventing the tenant from contending that the lease had the status which it had as a matter of law. That contention was rejected, principally because it was not possible to use an estoppel to avoid the protection created by the 1948 Act. However Oliver LJ continued at 261-2:

> " This is not strictly a case of the parties having established, by their construction of their agreement or their apprehension of its legal effect, a conventional basis upon which they have regulated their subsequent dealings ... The dealing alleged to give rise to the estoppel is the entry into the agreement itself in the belief that it would produce a particular legal result. In fact, for reasons which had nothing to do with the defendant, the plaintiffs got it wrong: and what [counsel] appears to us to be contending for is a much wider conventional estoppel than has yet been established by any authority, namely, that where parties are shown to have had a common view about the legal effect of a contract into which they have entered and it is established that one of them would not to the other's knowledge have entered into it if he had appreciated its true legal effect, they are, without more, estopped from asserting that the effect is otherwise than they originally supposed. So broad a proposition cannot be deduced from the actual decision in the *Amalgamated Investment* case and although it may be supported on the basis of the very wide proposition of Lord Denning MR ... it cannot, in our judgment, be right."

ii) The words "without more" mean (and have been held to mean) that "some course of dealing after the contract in question had been entered into was necessary" (*PW & Co v Milton Gate Investments Ltd* [2004] 2 Ch 142, [165]; *Colchester BC v Smith* [1991 Ch 448, 496).

iii) The first instance authorities addressing *Keen v Holland* were reviewed by Briggs J in *Commissioners for HMRC v Benchdollar Limited* [2009] EWHC 1310 (Ch), who summarised the law at [52] as follows:

> "i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.
>
> ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely upon it.
>
> iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely upon his own independent view of the matter.

iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

32. The challenge which AIML's attempt to raise this point now faces is that Mashreq has been deprived of the opportunity to identify mutual or subsequent dealings sufficient to satisfy the rule in *Keen v Holland*, were it to be engaged. That is no idle possibility, and indeed it is highly probable:

i) If the Second Amendment had not been concluded, the debt under the Facility Agreement as guaranteed by AIML was already overdue and could have been called in. An issue would have arisen as to whether Mashreq's failure to take that step itself involved a mutual dealing acting on the common assumption.

ii) It was a condition precedent to the rescheduling of the loan made to AH and guaranteed by AIML that the Assignment Agreement was provided to Mashreq within 10 days of signing the Second Amendment. But for the common assumption, an issue might well have arisen as to whether this term was satisfied.

iii) The maturity date for the loan and the Guarantee was extended again on 6 September 2017 and 31 December 2017. Mashreq did not demand payment until 23 May 2018 and no acceleration notice was served until 12 July 2018.

iv) Issues would inevitably have arisen as to whether the parties were continuing to act on the common assumption in agreeing the extensions, and in Mashreq not acting on the basis that AH's failure to provide security over the KESP Receivable had prevented any extension of the loan occurring and/or given rise to an Event of Default allowing it to call for repayment under the Facility Agreement and to enforce the Guarantee.

33. Mashreq having been deprived of the opportunity to advance and develop these points at trial, it would not be fair to allow AIML to raise this point for the first time now, and accordingly permission to appeal is refused.

Does the point have merit?

34. I should record that I am in any event satisfied that the argument raised by AIML is without merit. This is not a case in which the parties' common assumption relates to the legal effect of the Assignment Agreement, but as to AH's ability to provide Mashreq with effective security over the KESP Receivable (when it was not the owner of the KESP Receivable). That appears to me to be far removed from the principle summarised in *Chitty*, [7.028] that an estoppel by convention "does not prevent a party from relying on the true legal effect (as opposed to the meaning) of an admitted contract merely because the parties have entered into it under a mistaken view as to that effect". It is also far removed from the facts of *Keen v Holland*, where the assumption

(even assuming it be common) was as to the effect of a statute on the parties' admitted contract.

35. The width which AIML's argument would give to the decision in *Keen v Holland* would extend to any case in which the estoppel allows a party to bring a claim under a contract which does not arise on its terms properly construed, including *Rivertrade* itself and cases such as *The Amazonia* and *Azov v Baltic* among many others.

Ground 3

36. This ground is best addressed after I have considered the parties' submissions on the form of the order at Section C below.

C THE FORM OF ORDER

37. The parties filed very different draft orders. I deal with issues of interest at Section D below and costs at Section E. In this section of the judgment I address:

    i) A series of more limited disputes about the order which should be made.

    ii) A series of linked disputes raising a more substantial issue.

The limited disputes

38. Taking the AIML draft order first:

    i) AIML paragraph 1:

        a) The issue is whether I should make a declaration that KESP is indebted to AIML in the sum of US$41,446,114 plus interest. For reasons I explain below, I have concluded that it would not be appropriate to make a declaration that this amount is due to AIML, which would be misleading in the light of my other findings and inconsistent with relief which I am satisfied I should grant.

        b) However, I am satisfied that I should make a declaration as to the total amount owed by KESP, given that Mr Ashary challenged this figure. It will be necessary to have definitions along lines which define "the Disputed Debt" as the amount due from KESP, without regard to the issue of who that amount is payable to, and "the KESP Receivable", as the amount of the Disputed Debt which is the subject of the estoppel by convention so far as Mashreq is concerned. I will leave it to the parties to come up with a mutually acceptable formulation.

        c) Accordingly. I will make a declaration along these lines:

        > "Without prejudice to the effect of the court's findings as to who is entitled to recover the Disputed Debt, the amount of the Disputed Debt at the date of judgment was US$41,446.14 plus interest".

    ii) AIML paragraph 2: Approved.

iii) AIML paragraph 3: This is addressed below.

iv) AIML paragraph 4: A paragraph on these lines is appropriate which reflects my rulings on paragraphs 1 and 3 but it should also expressly record that AIML's claim to recover the balance of the KESP Receivable in excess of the amount in paragraph 2 and interest thereon is dismissed.

v) AIML paragraph 5: This should also refer to "all Related Rights".

vi) AIML paragraph 6: This is addressed below.

vii) AIML paragraph 7: The order will need to reflect the fact that the court dismissed Mashreq's claim against KESP except the claim to recover the amount which is subject to paragraph 5. I address this below.

39. Turning to Mashreq's draft order:

i) Mashreq paragraphs 1 and 2: These are addressed below.

ii) Mashreq paragraph 3: This declaration is unnecessary; the matter being sufficiently addressed by AIML paragraph 4 as amended.

iii) Mashreq paragraph 4: This is addressed below.

iv) Mashreq paragraph 6: This is addressed by AIML paragraph 4 as amended.

The linked disputes

40. AIML contends that the effect of my judgment is that the KESP Receivable remains due and payable to it, and that it is entitled to a declaration to this effect, and that Mashreq is not entitled to a monetary order against KESP, merely a declaration as to the existence of the estoppel as against AIML. AIML contends that there is, in this respect, a fundamental difference between the position if Mashreq had succeeded in its case that there was an express or implied assignment as against AIML, and Mashreq having only succeeded on the basis of the estoppel by convention. It contends that success on the former basis would have entitled AIML to recover the KESP Receivable from KESP pursuant to a statutory assignment under s.136 of the LPA 1925, but that the estoppel has no effect as against KESP, against whom Mashreq has no legal or equitable rights.

41. Mashreq, by contrast, contends that it is entitled to a declaration that the KESP Receivable was the subject of a legal and/or equitable assignment by AIML to it.

42. To address this issue, it is first necessary to see how the issues were formulated before and at the trial.

The procedural position

43. Mashreq pleaded that AIML was estopped from denying that the KESP Receivable had been assigned or transferred to Mashreq (Amended Defence, [4.5]). It also pleaded that KESP was party to the assumption that there was a valid and effective assignment of

the KESP Receivable ([38]-[39] and [41]), paragraphs which were incorporated into its counterclaim and its Additional Claim.

44. AIML pleaded at paragraph 7.4(b) of its Amended Reply and Defence to Counterclaim that an estoppel was not capable of providing Mashreq with title to the KESP Receivable.

45. KESP did not participate in the trial. There is a certain irony in the events which led to this state of affairs, and the history of this matter is of some relevance to the issue before the court:

    i) There was a meeting of KESP's board of directors scheduled for 12 June 2023 at which a resolution was to be tabled by directors representing a group of shareholders known as "the Original Shareholders" ("**the OS Nominees**") to appoint solicitors to defend the claim commenced by AIML and others against KESP.

    ii) The directors representing the rival group of shareholder interests aligned with the Claimants did not attend that meeting, which was inquorate as a result.

    iii) There is a dispute as to whether that meeting was automatically adjourned to 19 June 2023 and whether a valid resolution to appoint solicitors to represent KESP in this action was passed at that point. What is not in dispute is that the directors representing the shareholder interests aligned with the Claimants voted against KESP being represented at or participating in the trial.

    iv) When solicitors appointed on KESP's behalf by the OS Nominees purported to enter an appearance, the Claimants and the associated shareholder interests challenged their authority to do so. The solicitors withdrew, while proceedings in the Cayman Islands courts were commenced to determine the effect of the second board meeting.

    v) Mr Ashary, who is one of the OS Nominees, applied to stay these proceedings until those Cayman Islands proceeding were over. That was resisted by the Claimants on the basis of an alternative the Claimants put forward: that Mr Ashary himself could join the proceedings and serve a defence addressing issues such as "the debt is not due and owing or it is due and owing to someone else or whatever the case is …" ([2024] EWHC 41 (Comm)).

    vi) With his consent, Mr Ashary was joined for the purpose of "defending the Claimants' claim for and on behalf of himself and the OS Nominees by advancing any argument and defence that the First Defendant would, if it was actively participating in the proceeding, have been entitled to advance". A later consent order permitted Mr Ashary to advance "any argument and defence that the First Defendant would, if it was actively participating in these proceedings, have been entitled to advance in response to the Additional Claim brought by the [Mashreq] against [KESP]".

46. In his defence to Mashreq's additional claim, Mr Ashary did not contend that if the KESP Receivable was due, and Mashreq succeeded in its estoppel by convention case, KESP would nonetheless not be liable to Mashreq. On the contrary, Mr Ashary adopted

and repeated the estoppel by convention plea and alleged that KESP was party to the common assumption and that KESP would suffer considerable prejudice if AIML was permitted to resile from the common assumption. However, it was said that the KESP Receivable had not yet fallen due for payment, or was time-barred (i.e. it was either too early or too late), and that the alternative claims brought by Mashreq against KESP were without merit.

47. Paragraph 6 of Mashreq's Reply to Mr Ashary's pleading confirmed that it "admitted and averred" paragraph 6 of Mr Ashary's defence to the additional claim.

48. At the start of the trial, Mashreq amended its claim against KESP. The making of the amendment was not disputed by the Claimants or Mr Ashary. Mr Weekes KC made it clear that the purpose of the amendment was to make it clear that the relief sought against KESP (which already included a plea that Mashreq was entitled to an order that KESP pay it the KESP Receivable) was also advanced by reason of "the assignment of the KESP Receivable", something which he said was "implicit anyway", stating that the amendment was being made "so that it cannot be said that we did not properly put the assigned receivable … as part of our pleaded cases from the beginning".

49. Turning to the trial, there was never any suggestion on the Claimants' part that if the estoppel by convention case succeeded, Mashreq would nonetheless not be entitled to an order for payment against KESP because KESP was not party to the convention. Indeed, the Claimants' written closing stated that "the Mashreq Defendants cannot succeed in their claim without proving an assignment of the Debt from AIML to AH or that AIML is estopped by convention from asserting that the Debt was not assigned to AH", there being no suggestion that the latter scenario would lead to a significantly different outcome from the former, and have the effect that Mashreq could not obtain part of the relief sought. Mashreq's written closing made it clear that it was asserting a right to judgment on the amount of the KESP Receivable against KESP. That closing identified the relief sought as including an order against KESP for the payment of the KESP Receivable and interest.

50. There was no suggestion in the Claimants' oral closing that, even if the estoppel by convention was made out, Mashreq would not be entitled to the relief it was seeking. Indeed, making that argument – which was in essence a point open to KESP – would have involved something of a strategic *volte face* on the Claimants' part, who had decided on a strategy in which KESP would not participate in the trial, and Mr Ashary would raise such points as were thought to be appropriate on KESP's behalf. No such point was raised by Mr Ashary.

51. When I distributed the draft judgment on 17 December 2025, [282(i)] stated that "Mashreq's claim against KESP succeeds in the sum of US37,030,000 plus interest". There was no suggestion in response that this was not procedurally open nor that it did not follow from the findings I had made. That suggestion was first raised with the court in the Claimants' submissions of 6 February 2026 (after Mr Beltrami KC had been instructed), at which point it was argued that [282(i)] was erroneous.

Was the point now raised taken at trial

52. It is apparent from this history that the point now taken in relation to the relief available to Mashreq if it succeeded on its estoppel by convention plea was not raised at the trial.

It is also apparent that there is nothing in Mr Beltrami KC's proposed ground of appeal that I erred "as a matter of process" in making that finding. That submission was (with respect) somewhat surprisingly made by reference to the pre-amendment version of the Additional Particulars of Claim, and is inconsistent with the course of the trial, in which Mr Weekes KC made it clear at the start and end of the trial that this was the relief Mashreq was seeking, without objection.

Should I allow the point to be taken now?

53. It would, in my assessment, be unfair to permit this point to be taken now. A response to it is likely to have been that KESP was also party to the common assumption. That had been pleaded by Mr Ashary, was not in dispute between Mashreq and Mr Ashary, and did not need to be developed at trial. It is also not possible to identify what other responses might have deployed had this argument been raised. In these circumstances, Mashreq would clearly have been prejudiced if the Claimants were permitted to raise this point now. I would also note that it is too late for the Claimants to start seeking to take points on KESP's behalf now, having committed itself to a very different strategy while their claims were still in play. For those reasons, I also refuse permission to appeal on the Claimants' Ground 3.

The argument on the merits

54. I have already addressed the suggestion that [282(i)] of the Judgment involved an error of process.

55. As to the remainder of the argument, in my view it ignores the fact that these proceedings involve each of AIML, Mashreq and KESP before the court in proceedings to determine if the KESP Receivable was payable and if so to whom. Mr Ashary, who at the Claimants' instigation was there to address points for KESP, did not challenge Mashreq's contention that the debt was due to it or, if the debt was due, that it was entitled to judgment.

56. Had AIML sued and recovered the KESP Receivable in a trial in Mashreq's absence, it seems to me that it would have had no answer to a subsequent claim by Mashreq to recover the debt from AIML on the basis that the debt was not due to AIML but to Mashreq. Mashreq would have relied on the Assignment Agreement and Notice of Assignment, and deployed the estoppel by convention in response to AIML's challenge as to the efficacy of those documents. I note that in *Rivertrade,* the proceeds of the Ranhill claim had been recovered after the estoppel by convention had arisen ([2013] EWHC 3245 (Ch), [146]), and were the subject of a freezing order in Malaysia pending the trial between Rivertrade, Finance and Forburg. There was no suggestion that the court's finding of estoppel by convention did not entitle Rivertrade to those proceeds. On the contrary, Mann J found at [211] that the effect of his findings was:

> "Finance is debarred from asserting its title (if any) against Holdings and therefore from asserting that Holdings is not an appropriate assignor; and that Forburg is estopped from asserting that it has a title which is better than Holdings' or that it has a right to the Ranhill proceeds higher than Rivertrade's."

Rivertrade's clam to the Ranhill proceeds succeeded in full ([268]). Similarly, where there is an equitable assignment, but no notice is given of the assignment to the debtor

who pays the assignor, the assignee can recover the debt from the assignor (*Phoenix Group Foundation v Harbour Fund II LP* [2023] EWCA Civ 36, [91]).

57. However, where all parties are before the court, as here, the court can make an order short-circuiting that process by requiring KESP to pay Mashreq directly, not least because the court is by its orders able to ensure that KESP does not face any risk of paying twice.

58. Indeed, the position is in all relevant respects similar to the position of an equitable assignee of a debt, where the equitable obligations which arise as between the equitable assignor and assignee give the latter the ability to bring proceedings for and obtain judgment for the debt, even in the former's absence (which is not the case here): see *Guest on the Law of Assignment* (5th), [3-07]. The fact that the assignor may retain a cause of action *in law* (*Guest,* [3-11]) does not prevent this. Mr Beltrami KC's submissions about the facts of this case had obvious echoes of one analysis of equitable assignment, when he said "Mashreq is not an assignee of the debt; it does not have rights directly against KESP. It has rights against AIML" (cf. *Chitty on Contracts* (36th), [23-006]).

59. If I had accepted AIML's submission, the result would be that AIML would remain the legal and beneficial owner of a debt which it could not enforce and for which, as I have stated, it could be forced to account to Mashreq if it made a recovery, but Mashreq would not be able to recover either. That is not a commercially sensible outcome. Indeed it would mean that conventional estoppel could never operate satisfactorily in relation to the scope or effect of an agreement to assign a debt or indeed any other species of chose in action, and possibly to agreements for the transfer of interests in chattels in the possession of third party custodians who were not themselves parties to the shared common assumption.

The orders which should be made

60. In these circumstances, the only further orders required are:

    i) An order that KESP shall pay Mashreq the sum of US$37,030,000 plus interest (I shall deal with the amount of interest below).

    ii) An order that save for (i) the amount KESP is required to pay AIML pursuant to AIML paragraph 2 and (ii) the amount KESP is required to pay Mashreq pursuant to Mashreq paragraph 4, KESP shall have no liability to AIML or Mashreq or parties claiming through or under them for the Disputed Debt.

    iii) An order dismissing Mashreq's alternative claims against KESP.

61. No orders are required in the terms of Mashreq paragraphs 1 to 3 which do not reflect the terms or effect of the court's findings, and in any event are sufficiently covered by the orders proposed. The effect of my order is that it is the obligations which now arise under the Judgment and the court's order which matter.

62. Nor is an order in terms of AIML paragraph 1 appropriate. Not only is that inconsistent with the estoppel I have found (involving a declaration as between all parties to the action of a state of affairs AIML is precluded from asserting against Mashreq) but it

would purport to preserve the existence of a liability which has been superseded by the payment orders made in the court's order. Whether this involves an application of the doctrine of merger strictly so-called was not the subject of argument, and it is not necessary to decide it. I incline to the view that there is a merger here: the rationale for the rule (*Spencer Bower and Handley: Res Judicata* (6th), [19.02] is engaged, and there is sufficient similarity for the doctrine to apply.

D THE CLAIM FOR INTEREST

63. I accept that both AIML and Mashreq are entitled to interest on the amounts I have ordered KESP to pay to them pursuant to s.35A of the Senior Courts Act 1981. There was no suggestion that the default Commercial Court interest rate for US dollar awards (US Prime) should not apply (cf. *Lonestar Communications Corp LLC v Kaye* [2023] Costs LR 1317, [14]). That rate should apply post-judgment as well (*JSC Commercial Bank Privatbank v Kolomoisky* [2025] EWHC 2909 (Ch), [68]).

64. In AIML's case, I am satisfied that interest should run from the date of the Assignment Agreement (I adopt the same approach for Mashreq's expenses claims). That reflects a simplifying assumption, which AIML put forward as its alternative case, and also the fact that AIML let a lengthy period pass without seeking to recover these amounts.

65. AIML also argues that it is entitled to statutory interest on the KESP Receivable to the date of judgment, even though it has received no award in that amount. I am satisfied that this claim is hopeless:

    i) Section 35A provides:

    > "Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose —
    >
    > (a) in the case of any sum paid before judgment, the date of the payment; and
    >
    > (b) in the case of the sum for which judgment is given, the date of the judgment."

    ii) In this case, AIML has neither obtained judgment for the balance, nor received payment before judgment and it is not entitled to s.35A interest. While I have not made the declaration sought by AIML concerning the balance of the Disputed Debt, a declaration would not provide the basis for an award of statutory interest in any event: *Odyssey Aviation Limited v GFG 737 Limited* [2019] EWHC 1980 (Comm), [17] and [22].

    iii) AIML's contention that it retains the "right" to statutory interest because it was not assigned, or the right to interest in respect of the period before assignment, is misconceived. The award of the statutory interest involves the exercise of a

procedural rule of the forum contingent on (i) proceedings being commenced in that forum and (ii) the debt not having been paid before this happens. Neither event had occurred at the date of the Assignment Agreement. There is no sense in which AIML had any form of "vested" right to s.35A interest at the date of the assignment.

66. What of Mashreq? It meets the requirements for a s.35A interest award for the period after the date of the Assignment Agreement, a finding which does not depend on the assignment of a right to interest from AIML (as I have stated, AIML had no such right to assign even in respect of the period delay up to the date of the assignment, still less for the period of any delay in paying Mashreq thereafter).

67. What of the period before the Assignment Agreement. I am satisfied that Mashreq is entitled to recover s.35A interest for this period as well:

    i) First, to the extent that this depends on some form of transfer from AIML of an ability to complain about the period of delay in payment up to the date of assignment, I am satisfied that this falls within the definition of "Related Rights" and was transferred to Mashreq (being "any moneys … payable deriving from that Security Asset" or "any other assets deriving from, or relating to, that Security Asset").

    ii) Second, I am not persuaded that the words "the date when the cause of action arose" in s.35A include, in the case of the assigned debt, the fact of the assignment. Otherwise, the effect of an assignment would be to preclude the recovery by anyone of statutory interest prior to the relevant assignment (possibly even when the debt is re-assigned back to the original assignor). I accept that there may be circumstances in which the fact of an assignment might be relevant to the period for which interest is awarded as a matter of discretion.

    iii) While I do not exclude the possibility that there might be cases in which issues arise as to whether the assignee is under some form of obligation to the assignor in respect of statutory interest relating to the period before the assignment (cf. *H Cousins v D&C Carriers* [1971] 2 QB 230) I am satisfied that the "Related Rights" wording avoids that issue in this case.

68. Interest will run for the deferred and non-deferred Service Fees of US$33,000,000 from 31 December 2016 (a decision which takes into account the time taken by anyone to assert these claims against KESP). So far as the expenses are concerned, I will award interest from the date of the Assignment Agreement, a simplifying assumption which reflects Mashreq's alternative way of putting its interest case.

E COSTS

69. The costs position in this case is complicated because, as I noted at the trial, the case has involved some strange bed-fellows. Mr Ashary and Mashreq have agreed not to seek costs against the other (which will need to be reflected in the order as per Mashreq paragraph 13), and so, subject to ensuring that costs referable to the issues between them are not visited on the Claimants, those costs can be left out of account.

70. The time for costs arguments at the oral hearing was constrained. The further submissions made by the parties when dealing with the issue of interim payments after receiving the draft judgment have shed further light on the issues which arise, and caused me to revise certain of the assessments made in the circulated draft.

Costs orders

71. I take first the position as between the Claimants and Mr Ashary:

    i) Mr Ashary chose to participate in the proceedings, which was no doubt believed to advance the strategic interests of the OS Nominees, and he must bear any cost consequences which arise from points taken by him in KESP's interests if there would have been a basis for a costs order against KESP if it had participated in the proceeding. The description of Mr Ashary as something akin to a litigation friend is, with respect, wholly inaccurate.

    ii) Mr Ashary can have no liability for costs of the action (the costs of the stay application have already been dealt with) prior to 9 February 2024 when he was joined to the proceedings (as Mr Beltrami KC accepted). The Claimants did not seek a costs order against KESP. The effect of this order is that Mr Ashary has not been required to pay costs for the period when he claims he achieved a "victory" by preventing a default judgment and allowing time for Mashreq to join the proceedings. However, I am not persuaded that he deserves a costs order in his favour for that period (not least because his principal activity was an unsuccessful stay application).

    iii) Mashreq was joined to the proceedings at the same time. From that point, therefore, there was no need for Mr Ashary to raise the issue of whether KESP was liable to the Claimants or Mashreq or to act to avoid a default judgment against KESP. His principal role in the case was to dispute the amount of the debt and the expenses. Those are issues on which AIML substantially succeeded. However, the Second and Third Claimants' claims failed in their entirety.

    iv) The Claimants allocated costs to the issues as between them and Mr Ashary both through contemporaneous time code allocation and a retrospective allocation of 50% of general costs, which is too high. I accept issues relating to what was agreed about when the debt became payable, and what expenses were approved and in what amounts, involved significant disclosure expenses and time at trial, and issues were also raised about limitation which took less time (together "**the Ashary Issues"**). In these circumstances, I am satisfied that the appropriate allocation of the Claimants' costs to the Ashary Issues is greater than the figure circulated in the draft judgment, and that the figure should be 33%.

    v) However, I also take into account the fact that the Claimants lost on the onwards assignment issue, and that the Second and Third Claimants' claims failed altogether. I am satisfied that these factors are fairly reflected by a 10% reduction in that figure (giving the Claimants, in effect, 90% of the costs referable to the Ashary Issues).

    vi) For these reasons, I am satisfied that a fair allocation of costs to the Ashary Issues is one requiring Mr Ashary to pay 30% of the Claimants' total costs from 9

February 2024.

72. In addition, I am asked by the Claimants to make special cost orders in relation to the costs of the disclosure application of 18 July 2025 against Mr Ashary which were the Claimants' costs in the case. After the circulation of a draft of this judgment, I was referred to the costs order made by Jacobs J following that hearing where he explained that the costs order was to operate as follows:

> "That means that if the claimants are ultimately successful they will recover their costs of the proceedings as between the claimants and [Mr Ashary]. The claimants will therefore not get the entirety of their costs of this application if, for example, the judge considers having heard the trial, that the appropriate costs of order is that the claimants should recover 75% of their costs of the proceedings".

It is necessary to distinguish between two different questions: (i) the percentage of the Claimants' total costs referable to the claim against Mr Ashary (33% on my revised figure) and (ii) the percentage of those costs awarded in the Claimants' favour (90%). The costs of the disclosure hearing are exclusively concerned with the Ashary Issues and the Claimants are, in accordance with Mr Justice Jacobs' order, entitled to 90% of those costs.

73. I turn to the position as between the Claimants and Mashreq:

    i) Mashreq was the substantially successful party, obtaining judgment for US$37m and interest in what was in effect an AIML-Mashreq fight.

    ii) Three adjustments need to be made to that figure. First, Mashreq also incurred money on the Ashary Issues, although significantly less than the Claimants (who bore the burden of disclosure, reviewing the expenses etc and made all the running at trial). Second, Mashreq incurred costs of its Additional Claim against KESP, to which Mr Ashary responded, which involved legal arguments about the Notice of Assignment, albeit no disclosure. I am satisfied that these represented about 20% of Mashreq's costs.

    iii) As to the remaining 80% of Mashreq's costs, it is also necessary to reflect the fact that it lost on points which took a significant degree of time – the express and implied assignments – albeit these represented alternative routes to the same end, and that it did not recover all of the amount claimed.

    iv) I am satisfied that the appropriate order is for the Claimants to pay 72% of Mashreq's costs (90% of 80%).

74. Both costs orders are on a standard basis and provision should be made for detailed assessment.

75. I accept that the cost orders made in favour of the Claimants (against Mr Ashary) and Mashreq (against the Claimants) should carry interest at 1% over Bank of England base rate from the dates of payment until three months from the date of this judgment and thereafter at 8% per annum.

Interim payments

76. In relation to the costs order made in the Claimants' favour against Mr Ashary, I accept that issues arise as to the rates charged by the Claimants which substantially exceed 2025 London I Guideline Rates. I have taken this into account in taking 40% as the amount of the interim payment.

77. In relation to the costs order made against the Claimants and in favour of Mashreq, the Claimants have identified issues as to (i) the proportionality of the total level of Mashreq's costs when compared with their own costs, (ii) the high level of hourly rates which are in excess of guideline rates, (iii) the involvement of two partners and (iv) costs arising from a change of solicitors when a conflict of interest emerged. I have taken this into account in taking 40% as the amount of the interim payment.

78. For its part Mashreq has suggested that the total costs bill to which my percentage allocation should be applied is not £3.8m (which reflects a costs deduction which I have taken account of in my 72% figure) but £4.55m. I accept this – I should make it clear that this does not involve a claim for costs not placed before the court at the oral hearing, but an adjustment to reflect the fact that I have approached the allocation of excluded costs differently to the manner adopted in the Mashreq schedule of costs.

79. On that basis, I am satisfied that interim payments are appropriate on the usual basis as follows:

    i) Mr Ashary shall pay the Claimants an interim payment of £522,000 (comprising £468,000, being 40% of 30% of the Claimants' approximate total costs of £3.9m, plus £54,000, being 40% of 90% of the costs of the hearing of 18 July 2025) within 28 days.

    ii) The Claimants shall pay Mashreq an interim payment of £1,310,000 (comprising 40% of 72% of Mashreq's total costs of £4.55m) within 28 days.

F STAY

80. The principles applicable to an application for a stay of execution were not in dispute. The starting point is that a successful litigant will not lightly be prevented from enforcing its judgment pending an appeal, and solid grounds are required to justify a stay. Where such grounds exist, the court is concerned to compare the comparative prejudice to the unsuccessful party if a stay is refused, execution proceeds but the appeal then succeeds, and the prejudice to the successful party if delayed in executing its judgment debt by an unsuccessful appeal.

81. I am satisfied that, in this case, the issue of whether KESP owes the Disputed Debt to AIML or Mashreq is of obvious importance to the competing interest of the parties. Different creditors may hold different views on whether to enforce the debt at all, and the leverage the debt will offer (both in terms of influencing the ongoing operations of KESP or in any insolvency) will be considerable. I reject Mashreq's suggestion, therefore, that enforcement of the judgment against KESP can cause no prejudice because the sole issue is the identity of the creditor. In these circumstances, I am satisfied that allowing Mashreq to enforce the judgment now involves a significant risk of prejudice to the Claimants, by materially altering the status of KESP and those interested in it in a manner which could not be reversed if the appeal succeeded.

82. By contrast, I am not persuaded that a stay will occasion any significant prejudice to Mashreq. It has demonstrated a remarkably relaxed attitude to enforcement of its security to date, and there is reason to believe that its attitude to the debt is in part shaped by some form of ongoing collaboration with the OS Nominees. I am satisfied that the award of interest will sufficiently protect its position, particularly when the overall effect of the evidence before the court suggests real doubt that KESP can pay the amount found to be due now.

83. In these circumstances, I will stay the enforcement of Mashreq's monetary judgment against KESP pending the resolution of the appeal on condition that AIML agrees to a stay in respect of its monetary judgment against KESP (to avoid it securing a temporary advantage in terms of the leverage an enforceable debt might offer while Mashreq was precluded from doing so). AIML has confirmed it is willing to give an undertaking to this effect. I accept, however, that there should be liberty to Mashreq to apply to lift the stay. That is intended to allow for the possibility that AIML and/or those associated with it may seek to take some other step which upsets the status quo which I have sought to maintain through my stay order.

84. I will also extend the date for commencement of detailed assessments of costs until 3 months after the final determination of AIML's appeal by the Court of Appeal.