IN THE MATTER OF AN ARBITRATION

UNDER THE CHARTERED INSITUTE OF ARBITRATION RULESBETWEEN:

Broadsheet LLC

Claimant

- and -

(1) The Islamic Republic of Pakistan

(2) The National Accountability Bureau

Respondent

PART FINAL AWARD (Quantum)

Sir Anthony Evans

24 Lincoln's Inn Fields

London

WC2A 3EG

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(A) This **PART FINAL AWARD** (Quantum) (hereinafter "this Quantum Award") incorporates and is to be read together with the PART FINAL AWARD (Liability Issues) herein dated 1 August 2016 (hereinafter "the Liability Award").

(B) The Seat of the Arbitration is London (ref. the Liability Award paragraph 21).

(C) The hearing of Quantum Issues took place in London at the offices of Allen & Overy LLP on July 16-19 2018 ("the Quantum Hearing").

(D) For convenience of reference, this Quantum Award is paragraph-numbered from Q1.

SECTION 1

(a) Parties

Q1.1 Paragraphs 1 and 2 of the Liability Award are specifically incorporated herein.

Q1.2 As stated in paragraph 3 of the Liability Award, the two Respondents will be referred to together as "NAB" in this Quantum Award, save where it is necessary to distinguish between them.

(b) Representation

Q1.3 Broadsheet has continued to be represented by Mr. Stuart Newberger of Crowell & Mooring LLP of Washington D.C. He was assisted at the Quantum Hearing by Ms. Ashley Riviera, Mr. Gordon McAllister, Mr. Edward Norman and Mr. John Laird, all from his firm.

Q1.4 The Respondents have continued to be represented by Allen & Overy LLP of London and Singapore. Mr. Mark Levy assisted by Stephanie Hawes and Lucinda Critchley appeared at the Hearing, as did Mr. Adam Board, of Counsel.

(c) The Arbitration Agreement

Q1.5 Paragraphs 7-8 of the Liability Award are specifically incorporated herein.

(d) Arbitration – Further Proceedings

Q1.6 Interlocutory Hearings concerned with Discovery and other issues when both parties were represented by Counsel took place on 19 July 2017 and on 20 (pm only)/21(am only) December 2017. Procedural Rulings and Directions in writing were issued on 10 February 2017, 10 April 2017, 12 September 2017, 19 October 2017 and 15 February 2018.[1]

Q1.7 Further Pleadings concerned with Quantum Issues were served, as follows:

- Points of Claim (Quantum) ("POCQ") on 10 March 2017
- Points of Defence (Quantum) ("PODQ") on 17 May 2017
- Amended POCQ on 19 March 2018
- Amended PODQ on 1 June 2018

Q1.8 Both parties served Skeleton Arguments dated 6 July 2018 (and Claimant, a Supplement dated 13 July 2018). Each of these was a substantial Statement of Case in its own right. None of the formal Pleadings listed above was referred to at the Quantum Hearing and in effect they became documents of record only.

(e) Issues

Q1.9 The Liability Award distinguished between contractual claims under Clause 4 of the ARA, on the one hand, and the damages claim arising out of the Respondents' repudiatory breach of the ARA (as found in the Liability Award) on the other hand.

Q1.10 In the event, no contractual claim was pursued, because of the limitation (time bar) holdings in the Liability Award, but issues that arose In connection with the assessment of damages for the repudiatory breach of the ARA

[1] If this list is incomplete or incorrect through oversight, the parties are requested to supplement it as necessary.

(hereinafter "repudiation damages") made it relevant to consider what sums Broadsheet was entitled to claim from NAB under Clause 4 of the ARA before its termination in Oct./Dec.2003 (see Section 2 paragraph Q2.15 below).

Q1.11 There is also a damages claim for the tort of conspiracy pursuant to paragraph 307(C) of the Liability Award (Section 9 below, Issues 15 and 16).

Q1.12 Issues were raised as to Interest (Section 7 below, Issue 14) and as to Costs (Section 10 below).

(f) Witnesses and Experts

Q1.13 At the Quantum Hearing, the Claimant re-called one witness, Mr. Douglas Tisdale, whose Third Witness Statement dated 19 March 2018 was concerned with Quantum Issues. The Respondents recalled Mr. Talat Ghumman who also made a Third Witness Statement dated 22 May 2018. They also relied upon the Witness Statement of Tariq Fawad Malik dated 2 May 2018. The Claimant did not require Mr. Malik for cross-examination and he was not called at the Hearing.

Q1.14 The Claimant produced the Expert Report of Stroz Friedberg dated 18 March 2018. The co-authors, Joshua Larocca and Steven Markowicz, both gave evidence at the Hearing. Mr. Larocca is managing director of the firm's New York Office, and Mr. Markovicz a director of its intelligence and investigations group.

Q1.15 The Respondents relied on Expert Reports by Mr. Mark Bezant and by Mr. Yaser Dajani both dated 1 June 2018. They are senior managing directors of FTI Consulting at its London and Dubai offices respectively. Both gave evidence at the Hearing.

Q1.16 Following a telephone conference on 28 June 2018 between the Claimant's expert witnesses, Mr. Larocca and Mr. Markewitz, and Mr. Bezant (but not Mr.

Dajani), they revised their Report (First Revised Expert Report dated 3 July 2018). This was not agreed by Mr. Bezant but helpfully he added his comments to it, producing an "SF Revised Report annotated by FTI" dated 6 July 2018.

Q1.17 The parties agreed a procedure whereby the expert witnesses in turn made initial 'presentations' of their Reports, after which in turn they were cross-examined by the opposing party. Mr. Larocca and Mr. Markowitz gave their evidence and were cross-examined together. Mr. Bezant produced a summary of his Report entitled 'Opening Presentation'.

Q1.18 I am grateful to all the expert witnesses for the skill and care with which they prepared their Reports and gave their evidence at the Hearing.

(g) After the Hearing

Q1.19 It was agreed at the conclusion of the Quantum Hearing on 19 July 2018 that the parties would not submit Closing Submissions in writing but they agreed to respond to any specific questions that I might raise, and that they would keep me informed of any relevant developments, particularly in Pakistan.

Q1.20 I wrote to the parties on 22 August 2018 (letter wrongly dated 25 May 2017) and received their replies by letter (Claimant) and email (Respondent) dated 12 September 2018. Both parties submitted Reply Submissions dated 19 September (Claimant) and 21 September 2018 (Respondents) respectively. I acknowledged these by letter dated 20 September 2018.

Q1.21 I wrote again on 12 October 2018 and received replies both dated 29 October 2018 (having agreed to extend the date originally requested, 22 October 2018).

(h) Further narrative

Q1.22 When the ARA terminated in Oct./Dec.2003, Broadsheet was a trading company registered in the Isle of Man. Mr. James was its executive chairman and controlling shareholder (see the Liability Award paragraph 68). Mr. Tisdale was involved in its affairs by virtue of being Mr. James's legal adviser, and Mr. Malik effectively was its local representative in Pakistan.

Q1.23 On 19 May 2003, the company's former legal adviser in Jersey obtained a default judgment for outstanding fees in the sum of about £29,000 ("the Sinel judgement"). On 1 April 2004 the Sinel judgment was registered against Broadsheet in the Isle of Man.

Q1.24 Winding-up proceedings against the Company based on non-payment of the judgment debt were commenced in the Isle of Man in February 2005 and a Winding-up Order was made on 2-7 March 2005. On 2 April 2007 the company was formally dissolved.

Q1.25 Meanwhile, Mr. James remained active in business and/or financial affairs in the USA. On 4 January 2005 he purported to assign to a Colorado company, Steeplechase Financial Services LLC, "*all his right, title and interest in … connection with [the ARA]*" signing the Assignment as chairman of Broadsheet and 'Manager' of Broadsheet (Liability Award paragraph 66). He did not notify NAB of the Assignment nor did he he communicate with the Liquidator who was appointed in the Isle of Man shortly afterwards, in February/March 2005.

Q1.26 In April 2007, when Broadsheet (IoM) was formally dissolved, negotiations were in progress between NAB, represented by their lawyer, Mr. Soofi, and Mr. James's former associates representing another company, IAR, which had made an agreement similar to the ARA (but relating to other parts of the World) in 2000 at about the same time as he entered into the ARA on behalf of Broadsheet. In addition, Mr. James began to negotiate a Settlement

Agreement with NAB represented by Mr. Soofi representing that he, Mr. James, was authorised to represent Broadsheet, notwithstanding (and without disclosing) that the company was in liquidation and was recently formally dissolved.

Q1.27 His purpose in doing this can readily be inferred from the facts that at about this time he formed a new Colorado company, also called Broadsheet, which he represented was a successor to Broadsheet IoM. When the Settlement Agreement was signed on 20 May 2008 it provided that NAB would make payments totalling US$1,500,000, in settlement of claims made under the ARA, not to Broadsheet IoM or its Liquidator but to Broadsheet Colorado which Mr. James controlled and in effect to him personally..

Q1.28 When these facts became known to Mr. Moussavi, he took steps to have the dissolution of Broadsheet set aside. A new Liquidator was appointed who has authorised these arbitration proceedings against NAB (Notice of Arbitration was given on 23 October 2009).

Q1.29 The Settlement Agreement was authorised for NAB by an executive decision in which Mr. Soofi was not involved (Liability Award paragraph 237 (i) and (j)). There is no evidence as to who the decision makers were. The Governor of NAB at that time was Mr. Ahsan (Liability Award para. 237).

Q1.30 In addition to US$1,500,000 paid to or to order of Mr. James under the Settlement Agreement, NAB paid US$2,250,000 in settlement of the claims by IAR, also in about 2008.

Q1.31 Mr. James died in 2011/2.

Q1.32 So it has come about that a damages claim which arose in October/December 2003 is the subject matter of these proceedings which were commenced in October 2009. The Liability Award is dated 1 August 2016 and damages have

to be assessed now, in December 2018. Neither party has complained of delay at any stage of the arbitration proceedings.

SECTION 2

(1) Repudiatory Damages

Q2.1 The heading is short-hand for the claim for damages for Respondents' repudiatory breach of the ARA which was accepted by Claimant thus terminating the ARA in October/December 2003 (Liability Award para. 191). The parties broadly are agreed that the damages shall be assessed as sufficient to compensate the Claimant for loss of payments that it would have been entitled to receive from the Respondents under Clause 4 of the ARA had it not been terminated in October/ December 2003.

Q2.2 Such damages have to be assessed, it is also common ground, in accordance with principles stated in *The Golden Victory* [2007] 2 A.C. 353. These include the important proviso that account must be taken of relevant events that occurred after the breach of contract: because then, "estimate and conjecture are superseded by fact" (per Lord Robertson in *Bwllfa etc Ltd v. Pontypridd etc*. [1903] A.C.426 at 432, approved by Lord Walker [2007] 2 A.C. para. 66 at 392).

Q2.3 It is also common ground that the Claimant has the burden of proving, first, for how long the ARA would have continued in force after December 2003, and second, that it (Broadsheet) was and would have remained willing and able to perform its obligations under it. Respondents emphasize that this burden has to be discharged on the normal basis of 'balance of probabilities' but they accept that this is subject to the qualification stated in the judgment of Stuart Smith L.J. in *Allied Maples Group Ltd. v. Simmons & Simmons* [1995] 1 WLR 1602:

> "In many cases the plaintiff's loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff or independently of it … I have no doubt that the plaintiff must prove as a matter of causation that he has a real or substantial chance as

opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the upper and lower ends of the bracket should be." (p.1611A)

Q2.3 Mr. Newberger for the Claimant tended throughout to refer to the claim as one for damages for 'loss of the chance' to receive payments under Article 4 of the ARA; understandably, because the claim essentially is hypothetical, based on the premise that the ARA continued in force longer than it did in fact. For the same reason, counsel for the Respondents referred to it throughout as 'counter factual', meaning I think the same thing. But they stressed that the 'loss of chance' description did not have the effect of lightening the Claimant's burden of proof (save as regards third party intervention, as stated above), and Claimant's counsel do not dispute this..

Q2.4 It was also agreed that it should be assumed that during the 'notional' or counterfactual period the Respondents would perform their obligations under the ARA in the manner least burdensome to themselves i.e. in minimum compliance with its terms.

Q2.5 Clause 4 of the ARA reads as follows:

"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 or entity registered in accordance with the provisions of Clause"1.2" hereinabove shall be jointly shared as set out below. For the removal of 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, provided that such persons or entity had been registered before the settlement.

4.2 Broadsheet shall receive twenty percent (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 percent (80%) of the said amount thus recovered, less the bonus if any (,) should the case so be."

Q2.6 The main parameters, therefore, of Broadsheet's entitlement to receive "compensation" under this clause are:

(1) an amount recovered and available for transfer by NAB;

(2) as the result of the efforts of Broadsheet "or" of a settlement between NAB and

(3) a registered target.

Q2.7 With one exception, there is no dispute as to the identity of the relevant persons and entities who were "registered targets" for this purpose. The exception is Mr. Ishaq Dar whose case will be considered below (Section 4 Issue 5).

Q2.8 Claimant contends, first, and the Respondents accept that in connection with four registered targets there were recoveries by NAB during 2001-2002 which entitled Broadsheet to receive payments totalling US$1,415,000 under clause 4 of the ARA, which were never made. Claimant accepts that any claim for this sum under clause 4 is now time-barred, and no such claim is made in the arbitration. Claimant submits, however, that these facts are relevant to the issue whether the Claimant was able and willing to continue performance of the ARA after its termination in October/December 2003, and they will be considered in that context.

Q2.9 Secondly, Claimant contends that since termination of the ARA there have been three recoveries by NAB from registered targets (calling them the "Known Post-Termination Settlements"). The registered targets and claims are:

(a) The Schon Group and Sultan Lakhani: claims US$980,085.45 (2004/2010) and US$574,929.48 (2004/5), respectively;

(b) Fauzi Kasmi: claim US$87,197.96 (June 2005): and

(c) Lt. Gen.(ret'd) Zahid Ali Akbar: claim US$381,629.73) (2015)

(Total US$2,023,842.62).

Q2.10 Claimant's third category consists of "Potential Post-Termination Settlements". These are:

(a) Aftad Sherpao: claim US$700,000 (2004);

(b) Jamil Ansari: claim US$1,000,000 (2004);

(c) Amir Lohdi: claim US$347,856.40 (2005);

(d) The Sharif Family: US$158,150,628 (various dates);

(e) Ishaq Dar: US$6,005,329 (various dates); and

(f) Saif ur Rehman and Mujibar Rehman: US$100,000,000 (2004).

Q2.11 The above figures are taken from Annex 8 to Claimant's Skeleton Argument. The total gross ("loss-of-chance") claim is for US$268,227,656.02 (subject to discount etc). Of this, US$164,155,957 relates to (d), the Sharif family, and (e) Ishaq Dar (the two are linked), and a further US$100,000,000 to (f) Saif ur Rehman and Mujibar Rehman. Without these, the total is 'only' US$4,072,038.02 (claims (a) (b) and (c)) which if added to the Known Settlements (para.Q2.9) totals US$6,095,880.64.

Q2.12 Respondents' defences to these claims include those which they list as Issues 1, 2 and 3, and 7.

Q2.13 **Issue 1:** Respondents say that their solicitors' letter dated 28 October 2003 gave notice of termination under Article 18.4 of the ARA which took effect

after thirty (30) days; alternatively, had performance of the ARA continued or resumed, they would immediately have given notice to terminate under Article 18.4. In either event, performance of the ARA would not have continued beyond December 2003.

Ruling

(a) Article 18 provides comprehensively for Termination of the ARA whether by mutual agreement (sub-clause 18.1) or by a written Notice of Termination given by Broadsheet (sub-clause 18.3) or by NAB (sub-clause 18.4) in both cases effective 30 days after receipt.

(b) Articles 18.5 provides:

> "18.5 No Notice of Termination shall be applied to persons or entities registered by Broadsheet in accordance with the terms herein, in respect of which Broadsheet shall be allowed to continue its efforts to recover assets and no termination shall be effected in respect thereof and in respect of such registered persons or entities the provisions of this Agreement shall continue to apply and be operative."

(c) The terms of the letter dated 28th October 2003 sent by Respondents' solicitors to Broadsheet are set out in the Liability Award (paragraph 152). Respondents do not suggest that it included an express contractual Notice of Termination; rather, as I understand the submission, they say that their intention no longer to be bound by the ARA was so clear that failing their attempt to terminate it with immediate effect on grounds of Broadsheet's alleged repudiation, it should be assumed to have included also an implied Notice of Termination that would have taken effect after 30 days. That submission I find impossible to accept.

(d) The letter was sent after a lull in inter-party communications during which the Respondents consulted a leading firm of London solicitors specialising in international and commercial law who wrote the letter on

their behalf. It will be recalled that the letter claimed, first, to terminate the ARA from its inception on the ground that the Respondents were induced to sign it by pre-contractual material misrepresentations made by or on behalf of Broadsheet; alternatively, to terminate the ARA with immediate effect on the ground that Broadsheet in October 2003 was in fundamental (repudiatory) breach of its terms. If either of those assertions had been justified, Respondents would no longer have been bound by the ARA, with immediate effect. There is no trace in the letter of what it is now said was its alternative, and contradictory, meaning, namely, that Respondents asserted a contractual right to give a 30-day Notice of Termination under Article 18.4. In my judgment, the letter cannot be construed in that way.

(e) Respondents' alternative submission is that if the ARA had continued in force, in the 'counterfactual' situation which is relevant for the purposes of assessing damages, the Respondents would have taken an early opportunity to give Notice of Termination under Article 18.4 with the result that the ARA would have concluded thirty (30) days later.

(f) But Article 18.5 quoted above provides that notwithstanding a Notice of Termination and the expiry of thirty days, the ARA remains in force in respect of 'person and entities registered in accordance with its terms' in respect of which "the Agreement shall be deemed to continue to apply and be operative" (Article 18.5) (see further Section 6 para.6.9(ix) below).

(g) I asked Respondents' counsel why the Respondents might have failed to include an alternative Notice of Termination in the letter dated 28th October 2003 if their intention (in the alternative) was to become free of further obligations under it, if necessary on the terms set out in Article 18. He could not suggest a reason, and only one has occurred to me. It

is, that Respondents were aware when the letter was sent that such a Notice would not bring the ARA to an end for all purposes, and that they would remain potentially liable to Broadsheet for future recoveries made by them from existing Registered Targets. From that it may be inferred, given that they obtained legal advice, that their omission of an alternative Article 18.4 Notice of Termination, which was the contractual machinery for terminating the ARA, was deliberate, and on the evidence before me I would so find.

Q2.13 **Issues 2 and 3:** Respondents contend that the ARA would have terminated on or before 2 April 2007 when Broadsheet was dissolved by order of the IoM Court; therefore, Broadsheet's claim must be limited to recoveries made before that date.

Ruling

(a) The fact is that Broadsheet continued in existence as an IoM company with Mr. James as its Chairman and manager of its affairs (subject to the liquidation proceedings) until it was dissolved in April 2007.

(b) The purpose of the 'counter factual' inquiry required for the assessment of damages is to establish (to the appropriate standard of proof) whether Broadsheet would have continued to perform the ARA and to receive benefits under it after January 2004, upon the assumption that Respondents would have performed their minimum obligations under it.

(c) If that is proved, I have not understood how the fact of its dissolution in 2007 can be relevant to the 'counterfactual' inquiry. If the question is rephrased as "If the Respondents had paid the sums that they now admit were due to it under Article 4 from 2001/2, would Broadsheet nevertheless have been dissolved in 2007?" it is clear its circumstances in 2007 would have borne no resemblance to what they were in fact.

Q2.15 **Issue 7:** Respondents contend "Broadsheet fails to prove that it would have been ready, willing and able to continue performance of the ARA beyond December 2003, had it not been terminated."

Ruling

(a) Respondents are correct in saying that in the immediate aftermath of the termination of the ARA (by Broadsheet) in December 2003, Broadsheet remained under the management of Mr. James who appeared already to have lost interest in it and in further performance of the ARA, so much so that when its Jersey lawyers (whose claim for the balance of their outstanding fees in the relatively small amount of £29,000 had resulted in a default Judgment of the Jersey Courts in April 2003) presented a Winding-up Petition in the Isle of Man in February 2005, he made no attempt to defend it (Liability Award para.61).

(b) That followed, however, the events of 2002/3 when Respondents' own performance of the ARA was limited and specifically they declined to acknowledge their liability, as I have found it, to pay 20% Compensation to Broadsheet under Article 4 of the ARA in respect of funds recovered inside Pakistan. They now acknowledge that payments totalling US$1,415,000 became due before 2004 which were not (and have not been) paid to Broadsheet.

(c) First, therefore, it is necessary to consider what course Broadsheet's affairs would have taken, after December 2003, if the Respondents had acknowledged their liabilities under Article 4 and had paid the sum of $1.4 million now admitted to have been due. This has to be done in the absence of direct evidence from Mr. James who died in 2011/2 but who remained active in relation to Broadsheet at least until May 2008.

(d) On 4 January 2005 he executed in Colorado a purported assignment of Broadsheet's claims under the ARA to a Colorado company, Steeplechase, which apparently he controlled and owned (Liability Award para.66). From 2004 he represented to Mr. Moussavi that he was pursuing claims against the Respondents on behalf of both IAR and Broadsheet, and from April 2007 he represented to Mr. Soofi, representing the Respondents, that he was entitled to negotiate claims under the ARA on behalf of Broadsheet IoM as well as the newly formed 'Broadsheet Colorado' which he said was a 're-incorporation' of Broadsheet IoM (ref. the Liability Award paras. 59-70). Under the Settlement Agreement dated 20 May 2008 the Respondents made payments totalling US$1,500,000 to companies controlled by Mr. James ostensibly in settlement of their liabilities to Broadsheet IoM under the ARA (Liability Award paras.71-72).

(e) There is no direct evidence of the identities of the person(s) who authorised signature of the Settlement Agreement on behalf of the Respondents, and as found in the Liability Award "an executive decision was taken within NAB….by senior executives in NAB after it was approved by a high level committee within the Government and was authorised by the President of Pakistan" (Liability Award paragraph 237 (i) and (j)).

(f) It is clear, therefore, and I find that from December 2003 until 2008 Mr. James continued to manage the affairs of Broadsheet, though with the object of obtaining payment by NAB of sums due under the ARA, apparently for himself rather than Broadsheet and without reference to the Liquidator who was appointed in April 2005.

(g) The present issue is whether Broadsheet under the direction of Mr. James was ready, willing and able to continue performance of the ARA

after December 2003 on the assumption that the Respondents performed their minimum obligations under it. I am satisfied (certainly on the balance of probabilities) that it was and would have done so.

(h) Mr. Tinsdale has remained in private practice since 2003 and has some knowledge of the late Mr. James' business activities until he died in 2011/2. He accepted that those included some major and costly failures, but he said that, if NAB had performed its obligations under the ARA after that agreement was terminated, "I believe the contract would have continued for so long as Pakistan continued to seek misappropriated assets – a task that is still ongoing". He added "*For its part, Broadsheet had both the desire and capability necessary to successfully recover assets and for Pakistan*". In his view, "*NAB had starved Broadsheet of the information and funds needed to succeed*".

(i) He stressed in particular that Broadsheet had developed a Model for Enforcement which together with his own access to the Department of Justice of the United States Government had resulted in the successful recovery of US$7.5 million from Admiral Haq. He had also developed good relations with senior officers of the Bailiwick of Jersey and these would have been useful in future cases.

(j) When asked about Mr. James' unsuccessful financial ventures after 2003, he said "*I do know that Jerry [James] simply continued to pay … I don't know which pocket from which he drew*".

(k) Respondents relied on two witnesses, first, Tariq Fawad Malik whose Witness Statement was admitted in evidence without cross-examination, and second, Talat Ghumman who was cross-examined. Mr.Malik is an independent business-man who was engaged by Broadsheet as its consultant or representative in Pakistan. He said that he was doubtful

even in 2000 whether Broadsheet could carry out its obligations under the ARA when so many targets were registered under it, and that in 2003 Mr. James appeared to have lost interest in it and for a time he, Mr. Malik, had to pay the local staff; but he added "*(though Mr. James later repaid me)*".

(l) Mr. Ghumman gave evidence during the Liability Hearing (Liability Award para. 136(i) etc.) and was recalled at the Quantum Hearing. He left NAB in 2004 and since then has been employed in the private security industry, currently based in Dubai. He was critical of Mr. Tisdale's evidence regarding the Enforcement Model and as to his chances of forming collaborative relationships with government officials in any foreign jurisdictions except possibly the U.S.A.

(m) Despite the above, I accept Mr. Tisdale's evidence and I FIND that had the ARA continued after Dec.2003 Broadsheet would have had the desire and capability necessary to continue to perform its obligations under it and that it would have done so, at least until 2008, if NAB had paid the sums that were or became due to it under Clause 4 of the ARA. Even if the annual cost for Broadsheet had been more than US$1.4 million per annum as estimated by the Respondents' expert witnesses, that was not disproportionate to Broadsheet's share of recoveries that could be anticipated and were in fact achieved during that period.

(n) The above finding is limited to the period until 2008 because further issues arise regarding recoveries made or anticipated after that date, which will be considered further below (para. Q6.10).

SECTION 3 – Narrative (cont'd)

Q3.1. Before considering Respondents' Issue 8 ("If Broadsheet would have been ready, willing and able to perform, what, if any, recoveries would have been achieved?") it is necessary to complete the narrative of events, under two heads.

Q3.2. <u>The 2008 Settlement Agreement</u>

(a) During 2007/8 NAB was engaged in negotiations with Mr. James who claimed that he was representing Broadsheet IoM and/or Broadsheet Colorado which had been incorporated there as the alleged "successor" of Broadsheet IoM (cf. the Liability Award para. 216 and following). The Settlement Agreement was signed on behalf of NAB in London on 26 May 2008.

(b) Under the Settlement Agreement NAB undertook to pay $1,500,000 to "Broadsheet" in "full and final settlement of its claims" under the ARA (Liability Award para.220). The payment was made to Broadsheet Colorado and/or to Mr. James personally (Liability Award para.236).

(c) There was no evidence at the Liability Hearing as to the identity of the person(s) who authorised the signing of the Settlement Agreement on behalf of NAB; it was an 'executive decision' and was approved by the President of Pakistan (Liability Award para.237(J)).

(d) No further evidence was produced at the Quantum Hearing but after the Hearing I asked by letter (wrongly dated) whether the parties considered that the Settlement Agreement was relevant to the Quantum issues. They replied separately by letters and email dated 12 September 2018 that they did not.

(e) However, it is direct evidence of NAB's attitude in 2007/8 towards claims that were made, ostensibly, under the ARA. Whoever the responsible officers were, they agreed to pay $1,500,000 to the person who claimed to be making the claims on behalf of Broadsheet, and the payment was made to him or to his order.

(f) The evidence establishes, therefore, that the payment was authorised by the Respondents in May 2008 as if it were in settlement of all outstanding claims by Broadsheet under the ARA.

Q3.3 <u>The Sharif Family</u>

(a) Mian Muhammed Nawaz Sharif ("Nawaz Sharif") has been Prime Minister of Pakistan on three separate occasions, namely:

(1) November 1990 – April 1993

(2) February 1997 – October 1999

(3) June 2013 – July 2017.

On each occasion he was elected by popular vote as leader of his party (PLP). On the second occasion in October 1999 he was evicted from office by a military coup led by General Musharraf who became Chief Executive (later President) of Pakistan and who established NAB on coming to power (Liability Award para.2). In July 2017 Nawaz Sharif relinquished his office when the Supreme Court of Pakistan found that he was disqualified from membership of Parliament.

(b) Nawaz Sharif has two sons, Hussein and Hassan, and a daughter, Maryam. His late wife died in London in September 2018 following a long period of sickness. All were registered targets under the ARA.

(c) Nawaz Sharif belongs to the second generation of a wealthy Punjab family which owns among many other assets in Pakistan and abroad a family business which according to its website is large and profitable. That business alone is valued at US$288 million. The total value of assets attributed to him in the evidence before me is US$805.9 million including US$622.2 million in Pakistan, US$54.1 million in Saudi Arabia,US$24.5 million in the UAE and US$105.1 million in the United Kingdom. (These are, however, gross figures that do not necessarily relate to the current value of the properties shown.)

(d) After his deposition by General Musharraf he spent a period in custody until December 2000 when he and his family were permitted to leave Pakistan for exile in Saudi Arabia. They lived there until 2007 when they returned to Pakistan

(e) There were various Court proceedings involving certain of Nawaz Sharif's business activities and he was sentenced to terms of imprisonment by the Sindh High Court in June 2000 and by the Attock Fort Accountability Court in July 2000. In early December 2000, however, he and certain family members including his brother, Shahbaz Sharif, petitioned General Musharraf, then the President of Pakistan, for clemency, and confidential agreements were entered into which included grants of pardon in exchange for the family's agreement to accept exile in Saudi Arabia.

(f) There is evidence that in 2001/2 Shahbaz Sharif made substantial payments to NAB totalling up to Rs.440 million (about US$ 7.35 million) and there was some dispute at the Liability Hearing as to whether those were 'assets recovered by NAB' for the purposes of Article 4 of the ARA (Respondents' contention was that they were Court Fines and not such assets, which Claimant no longer disputes). However, following the return of the family to Pakistan, the payments together with various

assets that had been surrendered to NAB were returned to him and his family on the orders of the High Court of Lahore, upheld by the Supreme Court of Pakistan. It seems, therefore, that these payments and assets are no longer relevant for present purposes, and I so find.

(g) In 2015 the files of Mossack Fonseca, a firm of Panama lawyers, became public knowledge thus disclosing the affairs of clients and former clients, including Nawaz Sharif and family members. In Pakistan, proceedings were instituted by the leader of another political party, Imran Khan (now the elected Prime Minister) which resulted in an Order of the Supreme Court dated 20 April 2017 establishing a body, the Joint Investigation Team ("JIT"), to inquire into the business affairs of, among others, Nawaz Sharif and members of his family in relation to certain allegations of corruption. The reason why the inquiry was not delegated to NAB was given in the Order of the Court:

> "2. In normal circumstances, such exercise could be conducted by the NAB but when its Chairman appears to be indifferent and even unwilling to perform his part, we are constrained to look elsewhere and therefore, constitute [the JIT with six members including a representative of NAB]".

The Chairman of NAB at that time held office under Nawaz Sharif who had been Prime Minister since 2013.

(h) Following the Final Report of the JIT, the Supreme Court by further Order dated 28 July 2017 disqualified Hamaz Sharif from being a Member of Parliament and he resigned accordingly. The Supreme Court also directed NAB to file three references in the Accountability Court at Islamabad against him and family members. In the first of these, relating to four apartments in Park Lane, London W1 ("the Avenfield Flats") the Judge, Muhammad Bashir, gave judgment on 6 July 2018 against five accused. These were Nawaz Sharif and his two sons, also his daughter

Maryam Nawaz (Maryam Safdar) and Captain (Ret'd) Muhammad Safdar (her husband and his son-in-law). They were found guilty of corruption offences under the National Accountability Ordinance 1999 relating to the Avenfield Flats and were sentenced to terms of imprisonment as follows - Nawaz Sharif for ten years and fined £8 million; Maryam Safdar for seven years and fined £2 million; and Capt. Safdar for two years. His two sons, Hussain Sharif and Hassan Sharif, failed to appear at the trial; they were declared as proclaimed offenders, and non-bailable perpetual warrants of arrest were issued against them.

(i) Nawaz Sharif and his daughter Maryam Safdar and her husband, Capt.(ret'd) Safdar, have appealed against the Rulings against them and on 19 September 2018 the Islamabad High Court suspended their prison sentences pending the hearing of their appeals.

(j) The two further References against Nawaz Sharif and family members pending before the Accountability Court relate to, first, the AL Azizia & Hill Metal Establishment (Saudi Arabia), and second, Flagship Enterprises (involved in property dealings in London). These cases have recently been transferred to another Judge, Judge Malik, on the application of Nawaz Sharif.

SECTION 4

Q4.1. This section will consider three separate issues identified by the Respondents as Issues 4 (and10) (Bank Loan Default cases), Issue 5 (was Ishaq Dar a registered target under the ARA?) and Issue 6 (Causation and Burden of Proof).

Q4.2. **Issues 4 and 10**

(a) NAB investigated a number of cases where bank customers in Pakistan acquired assets outside Pakistan by the device of agreeing bank loans with banks in Pakistan which they proceeded to draw down in foreign currencies in other countries. One feature of some such cases was that the borrower wilfully defaulted on its obligation to repay the loan enabling it to retain the assets held or acquired abroad.

(b) When it was established by agreement or otherwise that these were corrupt assets which NAB was entitled to recover it was necessary to involve the Lending Banks in the settlement or repayment arrangements. One such case involved the Schon Group (Section 6 para. Q6.4(a) below).

(c) In that case as in others the principal obligation of the debtor was to repay the bank loan but under the recovery arrangements the debtor undertook to repay the full amount to NAB which was entitled to deduct a commission of 'finder's fee' before passing it on to the Lending Bank. Initially the fee was 3% increased to 8% in September 2006.

(d) There was some dispute at the Liability Hearing as to whether Broadsheet in such cases was entitled to receive 20% of the full amount or alternatively of the commission retained by NAB or, as NAB contended, to receive no part at all because there was no 'recovery' by NAB for the purposes of Clause 4 of the ARA. A relevant limitation issue arose at the Liability Hearing and I said this in the Liability Award:

> "…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." (para. 274)

(e) It is now common ground that Claimant is not entitled to make any recovery in respect of that part of the recovery which NAB paid on to the Lending Banks, but the issue remained whether Broadsheet was entitled to receive 20% of the amount paid to and retained by NAB.

(f) Under Clause4 of the ARA Broadsheet is entitled to receive 20% of "the amount available to be transferred" from "assets recovered [by NAB]". I HOLD that this includes the part of such assets retained by NAB in the bankers loan default cases.

(g) Regarding the separate matter raised by the Respondents as Issue 10, I agree with them that there is no basis for finding that, had Broadsheet continued to be involved in the negotiations in the Schon Group and Lakhani cases, the agreed rate of commission for NAB would have been greater than it was.

Q4.3. **Issue 5**

(a) Mr. Ishaq Dar has been a prominent politician in Pakistan since before NAB was established and closely associated with Nawaz Sharif throughout that period, and to date. He has been the subject of investigations by the JIT (Joint Investigation Tribunal) established by the Supreme Court of Pakistan in 2017/8.

(b) Mr. Dar was never in the list of registered persons in Schedule 1 to the ARA but his name was included in a list submitted by Broadsheet by letter dated 12 August 2000, and again in a further letter from Broadsheet to NAB dated 5 January 2001. Mr. Board submitted on behalf of the Respondents that there is no evidence that they ever agreed to its

inclusion in the list, as required by Clause 1.2 of the ARA ("registered by mutual agreement between NAB and Broadsheet").

(c) Mr. Ghumman said in evidence that there was a reason why NAB never agreed to its inclusion because Mr. Dar gave some assistance to NAB regarding Sharif family assets in 2000/1.

(d) A number of procedural issues regarding Mr. Dar's inclusion or otherwise was raised at the Quantum Hearing. In their respective Closing Submissions after the Liability Hearing, the Claimants produced a list of registered persons which included his name, but the Respondents disputed it. One of the agreed issues for decision in the Liability Award was no. 23 ("On the true construction of Schedule 1 of the ARA, which individuals and/or entities were registered as targets pursuant to clause 1.2 of the agreement?") and although the Liability Award did not adopt the parties' list (Liability Award para.37) it included references to the "agreed list in Schedule 1" (para.76) and specific findings relating to individual cases that were expressly raised at the Liability Hearing (Sherpao and Ansari paras. 201 – 206).

(e) Respondents submit that the Claimant is barred from raising the issue as to Mr. Dar's inclusion, and on the first day of the Quantum Hearing I indicated that both parties' counsel might like to consider their positions regarding this issue overnight. No further application was made.

(f) Mr. Ghumman's 3rd. Witness Statement included his evidence that "NAB never agreed that Mr. Dar could be a registered target, and my recollection is that there were no investigations into Mr. Dar during my time at NAB [until August 2004]".

(g) Broadsheet's letter dated 12 August 2000, referred to above), stated "They shall be deemed to be mutually agreed unless NAB provide notice

of an objection to ant registered name within five days after the date of registration" and it is common ground that no such objection was received. I accept Mr. Board's submission that this did not modify the effect of the ARA so that NAB's consent was no longer required and it is significant in my view that Broadsheet made a further application in January 2001 without suggesting that his name was already agreed.

(h) **I HOLD** that Mr. Ishaq Dar was never a registered target under the ARA. The various procedural issues referred to above therefore do not arise.

Q4.4 **Issue 6**

(a) This issue as drafted by the Respondents is "What is the appropriate burden of proof for assessing Broadsheet's damages claim for repudiatory breach?".

(b) The general issue 'burden of proof' has been discussed above (Section 2 para.Q2.1) and essentially it is no longer in dispute. The Respondents' submission, however, also includes a particular issue which arose from long-running discovery issues that mostly were resolved either by agreement or after interlocutory Rulings.

(c) Claimant's submission is that it is entitled to rely on what it describes as a rule of law to the effect that when relevant documents are suppressed in the course of discovery which the opposing party would seek to rely upon to support its claim, or defence, the Court or tribunal may make an evidential presumption in favour of that party as to relevant facts. The rule sometimes takes its name from the direction given to the jury in the colourful case of *Armory v. Delamirie* in 1722 (I Strange 505). More recently it has been affirmed in *Browning v. Brachers* [2005] EWCA Civ.753 where Jonathan Parker LJ said that "the practical effect of [the presumption] is to give the claimant a fair wind in establishing what he

has lost" (para.210); but it has also been said that it may (only) apply when the party "has wilfully suppressed evidence that would otherwise have been available" (*Zabihi v. Janzemini & ors*. [2009] EWCA Civ 851 para 51) and that the principle should not be extended further than is necessary (*Porton Capital etc. v. 3M UK Holdings Ltd*. [2011] EWHC 2895 para.244).

(d) Disclosure applications continued to be made at the Quantum Hearing but only with regard to what was called the "$500 million" or the "money laundering" issue (Section 6 para.Q6.11 below). This emerged from the proceedings in the Supreme Court of Pakistan which resulted in the JIT Investigation in 2017/8 and subsequent Report. Before and during the Quantum Hearing the Claimant made repeated requests for discovery of documents on this issue and a substantial number of documents was produced. On the last day of that Hearing it was ordered, without objection by the Respondents, that they would produce a further Affidavit to complete the process of discovery on this issue, and they did so.

(e) It is important, in my view, to remember that this is an evidential presumption which cannot be stated as a rule of law except by reference to particular facts. There is no evidence of 'wilful suppression', in my view, in the present case, but the explanations given by the Respondents for the late and piecemeal disclosure of documents relating to this issue make it impossible to be confident that all relevant documents have been disclosed, even now. It follows, therefore, that there may be scope for the 'fair wind' principle to operate. When, and in what context, depends on the issue in question.

SECTION 5 -EXPERT EVIDENCE

Q5.1. Claimant's expert witnesses were Messrs. Larocca and Markewitz who produced the Expert Report of their firm, Stroz Friedberg ("the SF Report") dated 18 March 2018 and their First Revised Expert Report dated 3 July 2018 following their telephone discussion with Respondents' expert witness, Mr. Mark Bezant. Stroz Friedberg is a Consulting Firm, Mr. Larocca is a managing director of its New York office and Mr. Markowitz a director of its intelligence and investigations group. The former is a lawyer with experience as a federal prosecutor in the USA Department of Justice, whilst Mr. Markowicz is an accountant with extensive experience of forensic ac, and secondly, counting.

Q5.2. Respondents called, first, Mr. Mark Bezant who is a senior managing director of FTI Consulting, a large international firm, and a chartered accountant with long professional experience, and secondly, Mr. Yaser Dajani who is a senior managing director at the Dubai office of the same firm. The latter has long experience of asset tracing and asset recovery and was previously with Kroll, another well-known international firm.

Q5.3. All four witnesses, understandably and properly, were given limited instructions to consider and give expert evidence on specific issues, and it is important to say what these were. Mr. Larocca and Mr. Markwitz who produced the SF Report were concerned only with issues relating to the Sharif family and specifically certain matters arising from the Report of the Joint Investigation Team ("the JIT Report") that was established by and reported to the Supreme Court of Pakistan. Mr. Bezant was instructed by the Respondents only to consider and comment on the SF Report, and so his evidence likewise was confined to matters relating to the Sharif family, specifically the identification and valuation of relevant assets. Mr. Dajani on the other hand was instructed to consider certain issues relating to asset recovery generally, although again with specific reference to the Sharif Family (his Report para.

1.38), and to comment on the costs and other practical aspects of Broadsheet's proposed operation post termination of the ARA in 2003.

Q5.4. Stroz Friedberg was instructed to carry out a 'forensic audit' (or 'inventory') of the JIT Report. This consisted of identifying potentially recoverable assets of the Sharif Family that were referred to in it and ascribing a valuation to each. This resulted in a list of 76 items of property in three overseas jurisdictions, namely, Saudi Arabia, the UAE and the United Kingdom, as well as in Pakistan, with total values that were corrected in the Revised SF Report to take account of Mr. Bezant's comments on it. The revised total was US$820.8 million. The third instruction was "to apply the 20% rate due Broadsheet as outlined in the ARA" – a mechanical application of the 20% rate provided four in the ARA clause 4 – which resulted in a total 'Loss of Revenue' for Broadsheet of US$164.2 million. The fourth was to establish a 'borrowing rate of interest' for each of the 76 items of loss and to apply it from what they considered was the appropriate date. The interest calculation increased the total of 'Broadsheet's Entitlement' to US$304.6 million.

Q5.5. The question of interest will be considered separately below (Section 7 Issue 14). The list of 76 items does not include what came to be called the "$500 million" or "money laundering" claim and this too will be considered separately below (Section 6 para.6.11).

Q5.6. As well as certain differences regarding the inclusion and valuation of some of the 76 items in the SF list, Mr. Bezant raised a number of general issues regarding the SF figures. First, he considered that assets located in Pakistan should be excluded from the list because "Broadsheet's activities under the ARA did not include assets located in Pakistan", but he acknowledged that it is for the Tribunal to determine whether it is appropriate to include such assets, and I HOLD that it is appropriate to do so far as is necessary to give effect to the words of Clause 4 of the ARA. Secondly, he contended that there were

four further items of double-counting, totalling US$41 million, which Stroz Friedberg had not taken into account in their revised figures. Thirdly, he claimed that SF failed to take full account of the liabilities of property owning companies, including mortgages on properties owned by them. Fourthly, the list of 76 items of property included funds no longer held by, or no longer recoverable from the Sharif Family, affecting up to 69 of the 76 items in the SF list and as much as 98% of the total value. Fifthly, the SF list took no account of the fact that the actual recovery in respect of each item inevitably would be far less than its total value, whether as the result of an agreed settlement or because of the costs of establishing and enforcing claims, particularly in jurisdictions outside Pakistan. Sixthly, account should be taken of ongoing costs that Broadsheet would have incurred, if it had continued to perform the ARA after 2003. Mr. Bezant estimated that Broadsheet's 'Lost Revenue' was between US$2.9 million (high) and US$2.3 million (low) and that if its notional costs were deducted it was US$0.6 million on a high estimate; on a low estimate, Broadsheet would have incurred an actual loss of US$2.1 million.

Q5.7. Mr. Dajani stressed that the SF figures were a full valuation of the Sharif Family assets (as SF were instructed to do) and that it was overly optimistic to put them forward as actual recoveries that could have been made; it was assuming, in effect, a recovery rate of 100% which was "too simplistic" an approach. (Mr. Larocca accepted that SF was not asked to consider recovery rates, and he had not done so.) Mr, Dajani's estimates were: for the United Kingdom, "significantly lower than the 23% to 35% achieved in the case of Admiral All-Haq in Jersey; and for Saudi Arabia and the UAE "practically zero". Mr. Bezant suggested rates of 15-20% for the UK, and 5% for each of Saudi Arabia and the UAE. Further, Mr. Dajani said, SF failed to take account of the difficulty of obtaining information in relevant jurisdictions, and the time taken to effect recoveries.

Q5.8. With regard to Broadsheet's notional on-going costs after 2003, Mr. Dajani estimated these as US$114,219 per month, or within the range US$100,000 to US$140,000. He also disputed that the Recovery Model involving the use of state-to-state Requests for Legal Assistance and Mutual Legal Assistance which Broadsheet had developed would have been as effective as Mr. Tisdale claimed.

Q5.9. As will appear below, I have not found it necessary to consider these issues in relation to each of the 76 items of property listed by Stroz Friedman; if I had attempted to do so, I would have found it an almost impossible task (paragraph Q6.10(v)). My conclusions, in general terms, are:

(a) Respondents are correct in saying that the list of assets with full valuations does not provide a sufficient basis for the assessment of damages; it is also necessary to estimate the likely levels of recovery, as well as the costs of and time taken for recovery, for the calculation of damages to be made. These of course would have to be assessed separately for each item in the list; Claimants provided no evidence of the basis on which this could be done;

(b) the SF list does not purport to identify assets currently held by members of the Sharif Family; rather, it lists items of property which have been held by or attributed to them over a period of twenty years, or more. One result of this is that, as Respondents' expert witnesses have pointed out, the list may include both the funds used to purchase a property asset, and the property asset itself; or the value of shares in a property owning company as well as the property it owns; or the value of a property that has been sold together with the value of other property bought with the proceeds; and more simply, it may include funds which have been dispersed or 'spent' whether on the acquisition of other

property or, as was suggested in evidence, in a casino where it may or may not have been recouped by later winnings;

(c) One example of the foregoing is the item described as 'the highway kickback'. This appears as Item 30 "Lahore-Islamabad highway kickback" which is valued at US$160 million and is dated 1 Jan 2004. There is evidence, it is said, in the Constitutional Petition presented to the Supreme Court of Pakistan in 2016 that during a previous period as Prime Minister Nawaz Sharif succeeded in obtaining authorisation for the construction of a motor highway from his home town of Lahore to Islamabad, and that he or his associates received US$160 million by way of allegedly corrupt payments from the contractor(s) concerned. This evidence, in my view, does not support a claim that there is, or was, an asset worth $160 million in his possession which NAB could have recovered from him, or could recover now, without further evidence linking that sum to cash or property assets which can or could have been seized;

(d) if relevant, I would not be prepared to accept that the relevant recovery rates would be as low as the range from 'practically zero' (for Saudi Arabia and the UAE) to 20% (for the UK) which the Respondents' witnesses suggest. This is immediately relevant in one case, namely, the four Avenfield Flats which the Accountability Court has declared (subject to appeal) are the property of the Government of Pakistan, the Second Respondent in this arbitration. The values ascribed to them total US$13 million (items 62-65). If the Government has to prove its title before the English Courts, and then realises their value, I would expect (and I find) that the net recovery will be not less than about US$8 million. But I would accept that the net recovery from local assets in Saudi Arabia or

the UAE could be significantly lower, depending on the circumstances of each case; and

(e) Mr. Dajani's estimate of ongoing costs for Broadsheet of (say) US$120,000 per month was not, as I understood it, challenged by the Claimant; a total of US$1,440,000 per year. But that costs liability would only arise during whatever period the ARA continued in operation and Broadsheet remained active in Pakistan.

SECTION 6 – ISSUE 8

Q6.1. Respondents' Issue No. 8 rephrases and embraces the central issue in the assessment of damages, namely, what damages are recoverable by Broadsheet as compensation for Respondents' repudiatory breach of the ARA? The Issue is stated as follows:

> "Issue 8: If Broadsheet would have been ready, willing and able to perform, what, if any, recoveries would have been achieved?"

Q6.2. As indicated above, the assessment may be made under three heads, corresponding to the Claimant's formulation of its claim (paragraphs Q2.9 and Q2.10 above), namely:

(1) known recoveries;

(2) potential recoveries excluding those listed below under (3); and

(3) the Sharif family/ Ishaq Dar, and Saif/Mujibar Rehman.

Q6.3. **(1) Known recoveries**

(It is not suggested that, if the ARA had continued, NAB would not have made any of the recoveries which it did make in fact.)

Q6.4. **(a) The Schon Group and Sultan Lakhani**

(i) These were 'bank loan default' cases (ref. Section 4 para. Q4.2 above) where settlements were agreed between the debtors and the bank creditors to which NAB was also a party and it was provided that the principal sums due to the banks would be paid to NAB for onward transmission to them, less a percentage commission to be retained by NAB.

(ii) As indicated above, the Claimant first contended that Broadsheet was entitled under clause 4 of the ARA to claim 20% of the total (gross)

amount received by NAB, rather than 20% of the amount of the commission which NAB retained, but in the result the claim was limited to the latter amount.

(iii) The Schon Group represents members of the Hussain family which is one of the wealthiest and most influential in Pakistan. They were registered targets under the ARA, and Broadsheet was actively involved in negotiations with them, in Dubai and elsewhere, in the course of which POAs and Interpol Red Notices were issued. There was evidence that in about February 2002 the family itself indicated that its bank debts totalled Rs.1,953,637,000, but no agreement was concluded with them before the ARA was terminated in October/December 2003.

(iv) Later, NAB resumed the negotiations and a formal Agreement dated 25 October 2005 was concluded under which the Schon Group undertook to repay Rs. 1.225 billion (partially in exchange for withdrawal of criminal charges against Hussain family members). The Agreement provided for NAB to retain an 8% commission, which would amount to about Rs.98 million.

(v) However, the payments in fact made to NAB between 2007 and 2013 fell short of that total and the sum retained by NAB was Rs.16,858,860 equal to US$243,830.90. If Clause 4 of the ARA applies, 20 per cent. of that figure is US$48,766.18.

(vi) Respondents accept that that amount is due, together with interest as may be appropriate, if the Claimant is entitled to make any recovery in this BLD case, and I have held (Section 4 above) that it is entitled to do so.

(vii) The claim however is for a significantly greater amount, made up as follows. as NAB had done in another case involving the Mercury

Corporation. The chance was lost, Claimant submits, of recovering payment of the amount previously volunteered by the Group itself as the amount of its debts (Rs.1,953,637,000) and of obtaining a commission of 15 per cent. On that basis the 20 per cent share of NAB's notional recovery (15 per cent of the total amount) was US$980,085.45.

(viii) Mr. Tisdale, the Claimant's witness, gave evidence of the negotiations in 2002, in which Tariq Fawad Murik, Claimant's representative in Pakistan, was also involved. Mr. Ghumman also gave evidence about them and in his Third Witness Statement he also said this:

> "14 … I understand that a settlement agreement was reached between the Schon Group and its creditors (including bankers) in October 2005, after I had left NAB."

(ix) That statement was disingenuous, to say the least. When he was cross-examined, he said that he was present at the signing of the October 2005 agreement in his new post-NAB capacity as a private consultant and adviser to the Hussain family. It was not suggested to him that this involved any conflict of interest on his part and I need say no more about it. But I should refer to a suggestion that he made regarding the 2002 negotiations. He said that the Hussein family had abandoned those when Mr. Malik representing Broadsheet demanded an advance payment of $1 million from them 'under the table' which he, Mr. Ghumman, considered was soliciting a bribe. Later in his evidence, Mr. Ghumman was referred to a letter dated 1 March 2002 in which Mr. Tisdale reported to NAB on the state of negotiations with the Schon Group, including a reference to the 'standard and customary pre-negotiation letter' which included a demand for an advance payment of sums claimed by NAB. Mr. Ghumman said that he could not recall whether he saw that letter, either then or later when he was employed

by the Schon Group. I found his evidence on this matter entirely unconvincing and I reject his suggestion that Mr. Malik was soliciting a bribe on behalf of Broadsheet. Mr. Malik had not been asked about it.

(x) The claim for 20 per cent. of a larger sum than NAB actually received in respect of this transaction raises the general issue whether NAB would have recovered more, had Broadsheet continued to be involved after December 2003, as well as the question whether there is evidence of any particular reason why Broadsheet could have achieved a better result in this case. The Claimant relies on the fact that NAB agreed a much lower figure in 2005 than the debtor had volunteered in 2002 but that does not enable me to find that a higher figure could have been agreed in 2005. Nor is there any basis for finding that a commission rate of 15 per cent, could or should have been agreed with the Schon Group in 2005. The claim is expressly put forward as compensation for 'loss of a chance'. I FIND AND HOLD that the evidence fails to establish that there was any significant chance of agreeing a higher figure in 2005 or of recovering more in 2007-2013 than NAB in fact did.

(xi) In respect of this transaction, therefore, the claim succeeds in the amount of US$48, 766.18 (say US$48,760) with interest to be assessed from 2007/2013 (say 1 January 2013).

(xii) In the case of Sultan Lakhani, the claim is for US$574,929.48 that being 20% of the sum which NAB was entitled to receive under a settlement agreement made with him and various creditor banks dated 9 August 2004. The total amount payable to NAB was Rs.1.12782 billion and NAB was entitled to a commission ("finders fee") of 3 per cent.

(xiii) In fact, NAB received only Rs. 7,380,342 (US$125,162.23) and contends that Broadsheet is not entitled to recover more than 20% of that amount, which is US$25,032.45.

(xiv) Again, there is no evidence of any reason why NAB would have been able to agree, or in fact would have recovered, any greater amount than it did, had Broadsheet continued to be involved under the ARA.

(xv) The claim succeeds, therefore, in the amount of US$25,032.45 (say US$25,000) with interest from 1 January 2005.

Q6.5. **(b) Fauzi Kasmi**

The parties are agreed that NAB received a relevant payment from Fauzi Kaumi in June 2005 and as to its amount. There is evidently a difference between them as to the relevant rate of exchange (Rs. To US$). Claimants say that the 20% figure is agreed as US$87,197.96 but Respondents say US$84,005.91. I have rounded these figures and taken the mean (US$85,600).

Q6.6. **(c) Lt.Gen. (ret'd) Zahid Ali Akbar**

The agreed (20%) figure is US$381,629.73 (say US$381,600) and the agreed date 1 December 2015.

(2) Potential recoveries

Q6.7. **(a) Aftad Sherpao**

(i) Mr. Sherpao became a registered target under the ARA in August/November 2002 in the circumstances set out in paragraph 202 of the Liability Award.

(ii) By way of background, Broadsheet before that date established links with the authorities in Jersey which led to the recovery of assets belonging to Admiral Haq (Liability Award para.139).

(iii) In November 2000 General Maqbool, the then Chairman of NAB, filed an Accountability Reference against Mr. Sherpao and instructed the Assistant Director of the FIA to conduct an investigation. Assets totalling about US $5 million (Rs.264,796,552.88) were frozen pending his Report.

(iv) The Report in May 2001 found that Mr. Sherpao "abused his authority, indulged in mal-practices and corruption on large scale and accumulated moveable and immoveable properties in his own names and in the names of his dependents" whilst Chief Minister of the NWFP (North West Frontier Province) and that the value of their properties was "grossly disproportionate to his/their known legal source of income".

(v) In July 2002 Broadsheet informed NAB that it had located assets belonging to Mr. Sherpao in a bank account in Jersey. The account was in the name of a Trust owned and/or controlled by him and a total of US$3,500,000 million was held in it. Broadsheet asked NAB to make a formal request to the Jersey authorities for a freezing order in respect of its claims and meanwhile imposed a temporary freezing order.

(vi) NAB supplied the requested letter on 30 August 2002 but in general terms ("there are ongoing court proceedings") without specifying specific causes of action as the Jersey Court required. Broadsheet (Mr. James and Mr. Tisdale) in October/December 2002 provided a negotiating strategy for NAB including a draft RLA (Request for Legal Assistance) with no response from NAB. In March 2003 they informed NAB that they would be meeting the Attorney General of Jersey and asked for further instructions. Mr. Ghumman replied on behalf of NAB by letter dated 18 April 2003 stating that NAB was waiting to hear from Pakistan's Tax Authorities and that the draft RLA was being examined

and that they should await his further response. There was no further reply.

(vii) On 20 September 2003 the Crown Advocate in Jersey contacted Mr. Tisdale asking for "an update as to the Sherpao matter". Before he could provide one, Broadsheet received the Respondents' solicitors' letter dated 28 October 2003 purporting to terminate the ARA.

(viii) On 30 January 2004 the lawyer acting for the government of Jersey wrote direct to NAB asking for detailed information regarding any prosecutions, ongoing or otherwise, against Mr. Sherpao. He expressed his "extreme concern at the lack of progress" and said that failing a reply the funds would be unfrozen. There is no evidence of a reply and the funds were later released without any recovery by NAB or Pakistan.

(ix) Mr. Ghumman in his Witness Statement said that he attended a meeting between the chairman of NAB, General Hafiez, and Mr. Sherpao where the letter from Jersey was discussed. Mr. Ghumman said in evidence that Mr. Sherpao "did not have any answers to our enquiries" and that he felt that "we were very close to obtaining assets from Mr. Sherpao" but that by the time he left NAB in August 2004 "we had not managed to do so". When he was asked about this in July 2018 his evidence was confused and unsatisfactory. He insisted that the reason why the case against Mr. Sherpao could not be pursued during his time at NAB was because the Court in Pakistan acquitted Mr. Sherpao of wrongdoing and the rule against 'double jeopardy' applied. However, he could not explain why, in that case, the NAB investigation was continuing as apparently it was when the above meeting took place; nor why it continued, as it did, until as late as 2015 (see below).

(x) Mr. Ghumman suffers from ill-health and may have done so before he left NAB in August 2004. Making due allowance for this, I FIND that Mr. Sherpao remained under investigation by NAB and a registered target for the purposes of the ARA (Article 18 refers) at least until August 2004.

(xi) Subsequent events included the following:

On 25 August 2004, Mr. Sherpao was appointed the Interior Minister of Pakistan.

In November 2006 NAB filed a Supplementary Reference against Mr. Sherpao which accused him of committing "acts of corruption";

In August 2007 Mr. Sherpao submitted a return to NAB regarding foreign assets, including bank accounts in Jersey, stating that all "have been generated through agricultural income, on which I pay regular income tax" and claiming that funds were routed to Jersey "for portfolio investments via London and Switzerland.

In October 2007 the government of Pakistan issued a National Reconciliation Ordinance.

In October 2008 NAB wrote an open letter stating that no case was pending against Mr. Sherpao "in this Bureau". However, in January 2010 the Director General of NAB authorised an investigation into the original reference of Mr. Sherpao in October 2000.

On 29 September 2011 the Supreme Court off Pakistan "affirm[ed] Mr. Sherpao's acquittal" in a case concerned with certain plots of land.

On 15 August 2015 the Executive Board of NAB closed the investigation into Mr. Sherpao's assets against the recommendation of its

Prosecution Division which had reported "Investigation is incomplete and defective one. Case may not be closed until its logical conclusion".

(xii) Findings

(a) Claimant alleges that had the ARA continued NAB would have recovered the funds held in the Jersey account amounting to US$3.5 million and would have been obliged to pay 20% of that amount namely US$700,000 to Broadsheet under Clause 4 of the ARA.

(b) There is no clear explanation of why NAB failed to take action to make the recovery either in 2002/3 when Broadsheet informed it of the bank account or in January 2004 in response to the letter from the lawyer for the government of Jersey inviting it to do so. The letter went so far as to say "Jersey wants to assist Pakistan. It cannot do that without Pakistan's assistance".

(c) The Respondents submit that NAB did not have, and does not have sufficient evidence to succeed in any claim against Mr. Sherpao's assets. That is not easy to reconcile with the written evidence that following the Chairman's meeting with Mr. Sherpao in about February 2004, Mr. Ghumman thought that Mr. Sherpao had no answer to their queries and that they were close to recovering assets from him. And there is no evidence that that was in fact the reason why no action was taken.

(d) They also submit that NAB was under no contractual obligation to Broadsheet to pursue that or any other claim, even against registered targets. The submission surprised me because NAB was established with the statutory duty of recovering corrupt assets and the second Recital to the ARA reads "AND WHEREAS NAB wishes to recover such funds and other assets wheresoever situated". However, the legal issue

was not argued before me and I shall assume that NAB owed no contractual duty to Broadsheet to pursue recovery claims in any particular case.

(e) Nevertheless, the fact remains that NAB had the opportunity to pursue a claim against the asset in Jersey which Mr. Sharpao has acknowledged was his or his family's property. There is evidence that a claim was justified and there is no clear explanation why none was made. I am entitled to assume that NAB would have performed its statutory duties following termination of the ARA. If Broadsheet had continued to be involved, given its established links with the authorities in Jersey, there was a greater chance that NAB would be induced to press its claim for recovery of the asset there. I FIND AND HOLD that there is a significant chance that NAB would have recovered the amount that was held in the bank account in Jersey, and that it would have done so by 31 December 2004. I assess the chance as 33 1/3 %.

(f) The net recovery would have been (say) 90% of US$3,500,000, equals US$3,150,000. One-third of that figure is US$1,050,000 and Broadsheet's entitlement under Clause 4 of the ARA (20%) therefore would be US$210,000.

Q6.8. (b) Jamil Ansar

(i) Paragraphs 203-206 of the Liability Award set out my findings as to the reasons why Mr. Ansari may be regarded as a registered target under the ARA. He was involved in the transaction which led to NAB's recovery of US$7,500,000 from Admiral Haq (Liability Award para. 139) and to its payment of US$1,500,846 (20%) to Broadsheet. The asset recovered by NAB was a bank account in Jersey in the Channel Islands.

(ii) Mr. Ansari was a businessman also involved in that transaction. He too had received a substantial payment in connection with it, and in January 2002 the Jersey authorities informed Mr. Tisdale that they had important information regarding his financial affairs. These included a bank account in Jersey holding US$5 million. Broadsheet asked NAB to agree that Mr. Ansari should be registered as a target under the ARA. NAB never did so but there was no valid reason for withholding its consent (Liability Award paragraphs 203-206).

(iii) From then until September 2003, just as they failed to agree that Mr. Ansari should be a registered target under the ARA, NAB rejected Broadsheet's requests that they should take steps to recover the $5 million asset that he owned in Jersey. The reason now given in the arbitration, by Mr. Ghumman as their witness and by their counsel, is that they had insufficient evidence that the funds were corruptly obtained.

(iv) Claimant submits that that explanation is unconvincing because Mr. Ansari confessed in writing, when the Jersey police were inquiring into contract under which Admiral Haq received a 'kickback', that he too had received a payment under it, which Claimant says was corrupt and unlawful. Mr. Ghumman says that the payment was or could have been a lawful commission, and that that was the reason why NAB took no action against him.

(v) When the lawyer acting for the authorities in Jersey wrote to NAB in January 2004 regarding proceedings against Mr. Sharpao (see above) he also said that they were willing "to cooperate with Pakistan fully" in the repatriation of Mr. Ansari's assets, but that if they received no reply within one month he would be permitted to remove his funds. There is no further evidence but it can be assumed that that is what occurred.

(vi) The story does not end there because some time later, on 31 January 2007, Mr. Ansari made a 'voluntary payment' to NAB of Rs.48,040,714.30 (US$792,620.27). No documents or other explanation of this payment has been produced by the Respondents. The fact of payment supports Claimant's contention that the funds were corrupt assets. Respondents accept that Broadsheet is entitled to recover damages corresponding to 20% of this amount, which is US$158,524.05 (say US$158,500).

(vii) There is an issue, however, as to whether, if the ARA had not been terminated and if Broadsheet had continued to be involved, there was a significant chance that NAB would have authorised proceedings in Jersey resulting in a recovery of the funds held by the bank. As stated above in connection with Mr. Sherpao, I assume that NAB would have performed its statutory duty even if the ARA does not require it to do so, because there is no evidence of any valid reason why it should not.

(viii) I conclude that there is a significant though small chance that a recovery of a net figure of US$4,500,000 would have been made during 2004 and that the percentage chance of success was 20% (US$900,000). The damages figure therefore is US$180,000.

Q6.9. **(c)** **Amir Lodhi**

(i) Mr. Lodhi who is described as an arms dealer was implicated by Mr. Ansari as a party to the arms supply contract under which Admiral Haq received a corrupt payment. The amount paid to Mr. Lodhi was said to be US$1,739,282.

(ii) From January 2001 Broadsheet sought to add Mr. Lodhi to the list of registered targets under the ARA.

(iii) In May 2001 Broadsheet Investigators located Mr. Lodhi in Monaco and by November 2001 an Extradition Request was prepared. This was acceded to by the Monaco authorities by February 2002 but by then Mr. Lodhi was no longer there.

(iv) Broadsheet located him again in Italy in August 2002 and later prepared a draft RLA which was forwarded to NAB in March/April 2003.

(v) The government of Pakistan issued the National Reconciliation Ordinance in October 2007.

(vi) NAB brought proceedings against Mr. Lodhi in the Accountability Court in Pakistan. These were quashed by order of the High Court in November 2007 and NAB's appeal to the Supreme Court was dismissed.

(vii) Claimant's contention essentially is a complaint about the Respondents' lack of cooperation and assistance in pursuing these claims against Mr. Lodhi during the period of the ARA. The claim is a large one (US$347,856.40 being 20% of the amount allegedly paid to him in 1998) but no specific asset is identified and I can find no evidence to support the suggestion that there was a significant chance that a claim would have resulted in the recovery of any asset from Mr. Lodhi if brought earlier than October 2007.

Q6.10 **(3) The Sharif Family**

(i) At all times since NAB was established, in 1999, there has been a clear potential for claims and recoveries from Nawaz Sharif and his family. He and they were registered as targets soon after the ARA was concluded in June 2000. Large sums were paid by him or them in respect of Court proceedings and/or under the terms of the confidential agreement made in December 2000 which permitted him and them to travel into exile in Saudi Arabia, where he remained until 2006/7. Those sums, it

appears, have been repaid and can no longer count as recoveries for the purposes of Broadsheet's present claim. There is no evidence, in short, that NAB has made any actual recovery to date.

(ii) The 2017/8 proceedings, however, in the Supreme Court of Pakistan, including the JIT Investigation and Report, have produced a very different situation where (subject to pending appeals) there is an authoritative listing of personal and family assets totalling (as corrected) US$820 million, both in Pakistan and abroad, and where certain real property in the United Kingdom valued at US$13 million ("the Avenfield flats") has been forfeited to the Pakistan State as having been acquired with corrupt assets. These call for separate consideration in this Award.

(iii) The value given to the Avenfield flats by the JIT has to be discounted in order to produce the value of any recovery that will or may made by NAB in respect of these assets for the purposes of Clause 4 of the ARA. Account must be taken of the costs of realising the value of the property and remitting the proceeds to Pakistan as well as intangibles such as the prospects of changes in the market values. It is suggested that these together would amount to a significant proportion of the Courts' existing estimates, but I do not accept that view. It is not clear that the English Courts would have any specific reason not to enforce the findings of the JIT and the Pakistan Accountability Court. I assess the recovery figure as about US$8 million (para. 5.9 (d) above) and with a further discount for accelerated payment, about five per cent (5%), the relevant (20%) figure is US$1.5 million.

Other Assets

(iv) As stated above, the total value of assets both in Pakistan and overseas listed by the JIT is agreed by the expert witnesses as US$820 million. Whilst accepting that this figure must be discounted to take account of many factors, not least the costs of recovery etc., Claimant's representatives have put it forward as what might be called the gross amount of possible recoveries by NAB for the purpose of calculating Broadsheet's potential entitlement to 20 per cent, under the ARA Clause 4.

(v) I have not found this approach helpful, partly because it is practically impossible to establish or even to estimate in relation to each of the 76 items in the list what the net value of that asset might be after repatriation to Pakistan or in the hands of NAB. But some totals lend a useful perspective and provide a starting point:

Pakistan – total US$622 million

Saudi Arabia – total US$95.6 million

UAE – total US$33.6 million

UK (excluding Avenfield) – US$114 million.

(vi) Respondent's expert witnesses assess the prospects of net recovery, with resulting net figures, as follows –

Pakistan - ?

Saudi Arabia – 5% - US$4.78 million

UAE – 5% - US$1.68 million

UK – if 20% - US$22.9 million.

As stated above, these percentage estimates in my view are unduly low. And I bear in mind that it is far from clear whether individual assets are currently held and could be recovered under 'corrupt assets' legislation. Other difficulties such as 'double-counting' have been identified and in part acknowledged in the expert evidence.

(vii) I invited both parties in my post-Hearing letter dated 2 October 2018 to consider whether following recent events in Pakistan an "overall settlement figure" may be agreed between Nawaz Sharif and/or the Sharif family, on the one hand, and the Respondents, at some time in the future. The Claimant replied that it is unable to comment on the present situation in Pakistan. The Respondents replied the prospect of any such settlement is "simply not relevant" because, first, Broadsheet no longer can have any claim under Clause 4, and secondly "the parties have not advanced any evidence relating to whether an overall settlement figure will or might be agreed with Mr. Sharif and Pakistan (sic)". They further contend that NAB no longer has power "to conclude any voluntary returns" and that neither party has any current intention of reaching a settlement. They say "all the evidence suggests that such a settlement will not be reached.

(viii) The first, legal, objection arises because the Respondents contend that the Claimant cannot be entitled to make any recovery by reference to Clause 4 of the ARA without proving, on balance of probabilities, that it would have remained able and willing to perform the ARA to date and until the time when any recovery is made from the Sharif family. They acknowledge that following an earlier termination of the ARA the Claimant would retain its rights under Clause 18.5 (quoted above under para. Q2.13(b)) but they contend that Art. 18.5 does not apply as regards the Sharif family because when the ARA was terminated in

December 2003 there were no ongoing efforts by the Claimant to recover assets from them. They say that the words "Broadsheet shall be allowed to continue its efforts" imply that Art. 18.5 extends the ARA in respect of registered targets only when Broadsheet is making such efforts at the time when it is terminated.

(ix) In my judgment, that argument must be rejected. Art. 18.5 provides in terms "no termination shall be effected in respect of registered targets at the time of termination" and the suggested implication does not detract from those express words; nor is there any practical reason why it should do so.

(x) I agree, however, that it is impossible to find that the Claimant would have continued able and willing to perform the ARA in the counterfactual situation which must be envisaged for the assessment of damages, beyond 2008. That was the date when the Respondents in fact were willing to terminate the ARA and by entering into the Settlement Agreement with Mr. James in May 2008 they believed that they had done so. In all the circumstances **I FIND** on balance of probabilities that had the ARA continued beyond 2003 there would have been an agreed termination in about 2008 and I HOLD that Broadsheet would have remained entitled under Article 18.5 to its share of recoveries made from registered targets, including the Sharif family, thereafter (failing an agreed settlement of that liability, which was not made). It follows that the measure of damages includes compensation for loss of that right at its current valuation.

(xi) Having regard to Respondents' assertion that such a settlement will not be reached, I should make it clear that I do not make any finding as to whether or not there will be an agreed settlement between the Respondents and the Sharif family. It may be, however, that an

objective valuation of the compensation which the Claimant is entitled to recover is effectively the same as a reasonable settlement figure.

(xii) Having regard to all the evidence I FIND that the appropriate valuation of the potential recovery from the Sharif family is US$100 million to be realised at some future date. Deducting 5% to take account of likely delay in eventual recovery, the net figure therefore is US$95 million and the Claimant's share at 20% is US$19 million. (US$100 million could also be an attractive settlement figure for both parties, given the Respondents' low estimate of their prospects of successful recovery.)

(xiii) Before leaving the Sharif family I should add this comment. It is clear from the above figures that the possible recovery from them was far greater than from any other person or family, and this was known to the Respondents from 2000 when the settlement that permitted their exile to Saudi Arabia was negotiated and agreed. After that agreement was concluded, NAB's representatives were reluctant to discuss it, either with Mr. James in February 2001 (Liability Award paragraph 138) or with Mr. Byrne from Matrix, who found them "disinterested" after his presentation in May 2001 which included information relating to Sharif family assets in London and elsewhere (Liability Awards paragraphs 140-1). In October 2003 there was some reason why NAB chose not to terminate the ARA by exercising its contractual right to do so, which would have left it exposed to future claims in respect of registered targets. It was after Nawaz' Sharif's return from exile in 2006 that NAB was willing to reach a final settlement with Broadsheet, which they agreed (with Mr. James) in 2007/2008.

(xiv) I bear in mind that none of the Respondents' witnesses and representatives has been asked in terms whether its potential liabilities to Broadsheet in respect of the Sharif family was a reason why NAB

decided not to give notice to terminate the ARA in September 2003, and why it entered into the Settlement Agreement (with Mr. James) in May 2008. That would be a permissible inference from the evidence but I make no finding about it.

Q6.11.**(5) Saif ur and Mujibar Rehman ("the $500 million transaction")**

(i) There was no mention of this matter at the Liability Hearing but it came to the Claimant's attention when it was referred to in the JIT Report to the Supreme Court of Pakistan in connection with the affairs of Nawaz Sharif.

(ii) There followed a series of requests for further Discovery which persisted through the Liability Hearing. A substantial file of documents has now been disclosed and a reasonably clear picture has emerged from it.

(iii) As stated above (para. Q4.4) I find that there was no deliberate suppression of documents but the late disclosure and apparent reluctance to give full disclosure could justify drawing adverse inferences against the Respondents on particular issues, if it appeared that the documents were incomplete. In fact, no such issue does arise.

(iv) It appears from the file that on 28 May 1998 the President of Pakistan by Presidential decree 'froze' all foreign currency accounts held by Pakistani banks. A formal complaint was lodged with the Chief Ehtesab (NAB's predecessor) Commissioner in Islamabad against the Prime Minister, Nawaz Sharif, Senator Saif-ur-Rehman and two others, alleging first, that they acted together with others, including Mujeeb-ur-Rehman, Senator Rehman's brother, to withdraw US$500 million from various Pakistani bank accounts, and second, that a named person connected with Nawaz Sharif had been stopped when boarding a flight

at Lahore airport carrying bags of foreign currency, but then was permitted to continue on the flight following an intervention by the Prime Minister.

(v) The complaint was forwarded to the Director General of the Federal Investigation Agency ("F.I.A.") by the Deputy Director (I&E) of NAB on 8 November 1999 who stated "2. The cases have been examined in [NAB] and it appears that prima facie offences under section 3 of the Ehtesab Act are made out."

(vi) The file reveals that various enquires were made, for example with the State Bank of Pakistan, and that no support was found for either allegation. It is noteworthy that an early document (6 November 1999) refers to "transmitting Rs.500 million abroad" but all subsequent references are to US$500 million. On more than one occasion it was recommended that the file be closed. But it was only on 18 March 2005 that the case was formally closed and letters to that effect dated 5 April 2005 were sent by the Chairman of NAB (Brigadier Mahmood) to the four men named.

(vii) On 29/7/02 the file was noted "It is not possible to carry US$500 m. in a bag & dispose of the same in UAE……Case is recommended for closure."

(viii) Both Nawaz Sharif and Saif-ur-Rehman were registered targets under the ARA during 2000/2003 but Broadsheet was not informed that this investigation was under way. The claim is for "loss of a chance valued at $100 million (plus interest)".

(ix) But there is no satisfactory evidence that a quantity of cash amounting to US$500 million (or Rs.500 million) ever existed, let alone that it exists now as an identified asset and a potential source of recovery for NAB, whether as cash or as a bank deposit (and there is no suggestion

that any such deposit was made). Even if that sum or any part of it was taken outside Pakistan, as is alleged, the overwhelming likelihood is that it was used to finance the purchase of other assets that have been identified in the case of Nawaz Sharif though not of Saif-ur-Rehman. This claim must be dismissed.

SECTION 7

Q7. 1. This Section is concerned with three issues raised by the Respondents as Issues nos. 9 (assets inside Pakistan), 11 (exchange rates) and 14 (Interest).

Issue 9

Q7.2. "Can Broadsheet establish that performance under the ARA in respect of assets outside Pakistan would have led to increased settlements in respect of assets inside Pakistan, had the ARA continued?".

Q7.3. If this means only that the amount of any projected recovery of assets from the Sharif family should not be increased "had the ARA continued" i.e. to take account of hypothetical further performance of the ARA after December 2003, I accept it.

Q7.4. But Respondents' submission appears to be wider; that, because Broadsheet's obligations under the ARA were confined to the recovery of assets outside Pakistan, "its claim in respect of assets within Pakistan must be restricted to settlements NAB has or would have reached with a registered target" (Skel. Argument para.114) and that "Broadsheet must show that but for the termination of the ARA, NAB would have entered into such settlements (sc. "settlements concerning assets made within Pakistan") which it otherwise did not do" (ibid. para. 116). They point out that the vast majority its claim (sc. set out in the SF Report) relates to assets within Pakistan. On this basis, they submit "Broadsheet has not proved that these settlements (sc. assumed settlements in respect of Sharif family assets within Pakistan) would have been reached had the ARA not been terminated" pointing out, correctly, that any such recovery would require that "evidence of misappropriation" would be required in relation to such assets, namely, the domestic assets of the Sharif family (ibid. para. 118). They do not engage, however, with the

presumption in favour of misappropriation on which NAB and the Pakistan Courts can rely.

Q7.5. On my preferred analysis, the Claimant is entitled to compensation for loss of the right to claim under Clause 4 of the ARA, had that continued, not only 20% of recoveries made by NAB from targets registered under the ARA, but also where now, at the date of assessment of damages, it is proved that there is a significant chance that such recoveries will be made at some future date. Respondents are correct that on the evidence the chance of future recoveries is limited to the Sharif family and that Broadsheet would not have contributed (after the ARA was terminated) to any such recovery that may be made from assets situated inside (or outside) Pakistan. But in my judgment that does not prevent the Claimant from recovering compensation for what is correctly described in this instance as "loss of a chance" to make a projected claim under the ARA.

Q7.6. Respondents' submission that assets of the Sharif family which are situated inside Pakistan should be excluded from the calculation of the loss (Skeleton Argument para.118) therefore is rejected (for reasons given in the Liability Award para.94).

Issue 11

Q7.7. "What exchange rate should be used to convert post-termination settlement amounts?"

Q7.8. It is common ground that recoveries made by NAB in other currencies should be converted to US dollars for the purposes of assessing the compensation due to Broadsheet; this relates specifically to the recoveries made from the Schon Group, Mr. Lakhani and Lt. Gen. (retd.) Zahid Ali Akbar (Respondents' Skeleton Argument para. 124). It also arises in the case of projected recoveries of Sharif family assets.

Q7.9. Respondents submit "The date that should be adopted …. Is the date of receipt of payment of any settlement by the Respondents" (Skeleton Argument para. 125). In my judgment this is correct.

Issue 14 - **Interest**

Q7.10. "What approach should be taken to interest (should the Tribunal wish to award any)?"

Q7.11 The parties are agreed that the Award may include interest pursuant to section 49 of the Arbitration Act 1996 and that the Award should take account of the International Arbitration Guidelines (Part II – Interest) of the Chartered Institute of Arbitrators. These read:

> Section 49
>
> ….(3) The Tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case…….".
>
> Guidelines
>
> The rate should be reasonable and take into account all relevant circumstances, in particular applicable contractual provisions and interest rates prevailing in the markets for the relevant currency during the relevant period.
>
> ……..
>
> It is good practice to assess the rate of interest by reference to the rate at which a position of the receiving party would have had to pay to borrow the sum awarded for the period in question. The starting point for that assessment is the rate of interest applicable to short term unsecured loans prevailing for the currency of payment at the place of payment."

Q7.12. The parties differ as to each item in the calculation – the rate of interest, the date from which it should run, and whether simple or compound is appropriate in the present case.

Q7.13. The cumulative effect of these differences is substantial. Stroz Friedberg made an assessment based on borrowing at prime rate plus 3% which produced total sums of US$93 million ((simple) and US$140.4 million (compound). (Both figures are marginally less if adjusted in line with Mr. Bezant's comments.) By contrast, at deposit rates, after adjustment, the totals are US$13 million (simple) and US$14.1 million (compound). Mr. Bezant calculated that the net assessment, discounted for accelerated receipt of losses after 1 January 2018, would be marginally negative (minus US$0.1 million).

Q7.14. It is common ground that the assessment has to take account ("meet the justice") of the circumstances of the present case. The circumstances are highly unusual. The damages award represents compensation for loss of payments that Broadsheet would have been entitled to recover from NAB following termination of the ARA in Oct./Dec. 2003. For that purpose it may be necessary to infer that Broadsheet continued trading and to perform the ARA, but the fact is that Broadsheet ceased trading and was placed in liquidation in 2005. (Although the company was dissolved in 2007, that Order was formally rescinded in 2009.) Effectively, it has continued in existence for the sole purpose of maintaining its damages claim in this arbitration.

In these circumstances, it would be unrealistic in my view to treat Broadsheet for interest purposes as if in fact it had continued trading after 2003/4 when the ARA was terminated or had had any need to borrow funds for trading purposes since then. In my view, interest calculated at a deposit rate is appropriate in the present case and the claim for a borrowing rate is dismissed. By the same token, however, the Claimant is entitled to compound interest calculated with annual rests.

The deposit rate adopted by the expert witnesses is based on US Treasury yields which I hold is an appropriate formula.

The date from which the calculations runs depends on when liability to make the payment in question would have arisen. Therefore, it varies in each case. To the extent that compensation is awarded for loss of anticipated future payments, I hold that a corresponding discount must be made.

SECTION 8: CONTRACTUAL DAMAGES

Q8.1 The damages recoverable by the Claimant for breach of contract total US$ made up as follows together with compound interest at the appropriate Deposit rate from the dates shown below.

Reference (para.)	**Name of target**	**Amount**	**Interest from**
Q6.4(a)	Schon Group	US $48,760	1 Jan. 2013
	Lakhani	US $25,000	1 July 2005
Q6.4(b)	Kasmi	US $85,600	1 July 2005
Q6.4(c)	Lt.Gen Zalid Ali Akbar	US$381,600	1 Jan. 2016
Q6.7(a)	Sherpao	US$210,000	1 Jan. 2005
Q6.8(b)	Ansari	US$180,000	1 Jan. 2005
		US$158,500	1 Feb. 2007
Sub-total		US$1,089,460	
Q6.10 (iii)	Sharif (Avenfield)	US$1,500,000	None
Q6.10 (iv)	Sharif (Other assets)	US$19,000,000	None
Total		US$21,589,460	

Q8. The parties are requested to calculate the amount of interest from the above dates to the date of this Award (17 December 2018).

SECTION 9: ISSUES 15 AND 16 (DAMAGES IN TORT)

Q9.1. The reasons for the holding that the Respondents are liable in damages for the tort of conspiracy to cause economic harm to Broadsheet are set out in paragraph 256 of the Liability Award.

Q9.2. The following paragraph referred to issues that had been raised at the Liability Hearing as to the correct measure of damages but apart from the holding (necessary for the purpose of establishing liability) that some economic harm [to Broadsheet] was foreseeable, there was "no concluded view".

Q9.3. The Liability Award (paragraph 305) reserved for further consideration, if necessary, the question whether Broadsheet's Liquidator was entitled to ratify the Settlement Agreement dated 20 May 2008, but he stated that he did not seek to do so.

Q9.4. The measure of damages, if any, that Broadsheet is entitled to recover in these circumstances was considered by both parties in their written submissions for the Quantum Hearing (Claimant's Skeleton Argument Section IV p.36 and Respondents' Skeleton Argument Section III.E p.46 and the pleadings referred to). However, it was not referred to, except in passing, at the Quantum Hearing.

Q9.5. As stated in the Liability Award, where the issue was whether economic harm was foreseeable (para. 257), the Claimant contended that the costs incurred in bringing the proceedings might be so regarded, and that claim is maintained as part of its damages claim (Skeleton Argument para. 164). Claimant also claims 'Exemplary Damages' alleging that the Respondents are liable for "oppressive, arbitrary or unconstitutional conduct by a public servant" (ibid.)).

Q9.6. Respondents say that that raises issues of Pakistani constitutional law which the Tribunal has no jurisdiction to decide and that in any event ought to have been raised at the Liability Hearing, which it was not. Respondents also

dispute that the conduct complained reached the threshold of "outrageous conduct, disclosing malice, fraud, insolence, cruelty and the like" referred to in later authorities as necessary for the finding to be made (ref. McGregor on Damages para. 13-019).

Q9.7. Respondents also contend, first, that the Liquidator's decision not to ratify the Settlement Agreement dated 20 May 2008 'broke the chain of causation' resulting from the tort, and secondly, that to award substantial damages alongside the contractual claims would permit double recovery for Broadsheet.

Q9.8. My conclusions are as follows:

(a) there is no basis for a finding of 'outrageous conduct' in the present case. There is limited evidence as to the 'executive decision' at the highest level of government which authorised signing the Settlement Agreement on behalf on Respondents' behalf (Liability Award para. 237(J) and ref. para. Q.[INSERT]) (above) and their conduct was reckless rather than unconscionable (Liability Award paras. 255-7). The claim for Exemplary damages therefore is dismissed;

(b) the damage caused to Broadsheet was that in 2007/8 it had no opportunity to consider and act upon the Respondents' willingness at that time to pay US$1,500,000 in final settlement of its claims under the ARA;

(c) had the Liquidator ratified the Settlement Agreement in 2016, Broadsheet would have been entitled to recover that sum (plus interest) as damages in the arbitration, but (probably) no more;

(d) instead, the Liquidator elected to proceed with the arbitration and to continue both claims, for damages in contract and tort;

(e) the tort claim clearly is in the alternative to the contractual claim, and if the latter succeeds the appropriate measure of damages for the tort has to be adjusted to take that into account;

(f) when the contractual damages award is more than US$1,500,000 (plus notional interest from 2008) the tort claim should succeed for nominal damages only; and

(g) if the recovery for breach of contract damages were below that figure, the tort damages might be increased up to the maximum of US$1,500,000 (plus interest).

SECTION 10: AWARD and COSTS

Q10.1. **I HOLD, FIND, AWARD and DECLARE**

(A) that the Respondents jointly and severally are liable to pay to the Claimant as damages for breach and repudiation of the ARA (Asset Recovery Agreement dated [20] June 2000) the sum of US$21,589,460 plus interest thereon calculated pursuant to this Award (para.Q8.2);

(B) further, that the Respondents jointly and severally are liable to the Claimant to pay nominal damages (say US$1) for the tort of unlawful conspiracy; and

(C) alternatively to (A) and (B), that the Respondents jointly and severally are liable to the Claimant to pay damages not exceeding US$1,500,000 for the tort of unlawful conspiracy together with interest thereon (calculated as above) from 1 May 2008 to the date of this Award (17 December 2018).

Q10.2. Further, in the exercise of my discretion under Article 10 (Costs)mof the Arbitration Rules of the Chartered Institute of Arbitrators (2000 Edition) ("the Rules") and without prejudice to paragraph Q10.3 (below) I HOLD and AWARD that the Costs of this Award (adjusted as regards VAT as necessary) shall be borne as to one-half by the Claimant and as to one-half by the Respondents jointly and severally; and if either the Claimant or the Respondents have paid more than one-half of the total they shall be entitled to recover the balance over one half from the other party.

Q10.3. I reserve for further consideration all questions of liability for the parties' costs of the arbitration to be assessed in accordance with Article 10 of the Rules, and I DIRECT that any claim by either party to recover from the other party all or any part of their costs of the arbitration shall be made in writing and submitted to me by not later than 31 January 2019 stating inter alia whether that party seeks an oral hearing of the. Application.

Q10.4. Pursuant to Article 11.2 of the Rules, I record the names and email addresses etc. of the parties and their representatives, as follows:

Claimant	Respondents
Broadsheet LLC (in liquidation) c/o	(1) The Islamic Republic of Pakistan (2) The National Accountability Bureau
Claimant's representatives	Respondents' representatives
Stuart H Newberger Crowell Moring 1001 Pennsylvania Avenue N.W. Washington DC 20004-2595 snewberger@crowell.com ARiveira@crowell.com JLaird@crowell.com SGellman@crowell.com ENorman@crowell.com	Judith Gill Allen & Overy LLP Allen & Overy LLP 50 Collyer Quay #09-01 OUE Bayfront Singapore 049321 Judith.Gill@AllenOvery.com Mark.Levy@AllenOvery.com Lucia.Raimonova@AllenOvery Rick.Gal@AllenOvery.com Katrina.Limond@AllenOvery Jaehee.Suh@AllenOvery.com PakistanBroadsheet@AllenOvery.com

The seat of the arbitration is London, England.

DATED THIS 17th DAY OF December 2018.

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Sir Anthony Evans