Defendant
Kit Pyman
1st
Exhibit KP-1
26 August 2021

Claim No. BIOT SC 2021-1

IN THE SUPREME COURT OF THE BRITISH INDIAN OCEAN TERRITORY

BETWEEN:

(1) BERNARD NOURRICE

(2) SOLOMON PROSPER

Claimants

– and –

THE GENERAL COUNSEL OF THE BRITISH INDIAN OCEAN TERRITORY

Defendant

WITNESS STATEMENT OF KIT PYMAN

I, CHRISTOPHER "KIT" PYMAN of the British Indian Ocean Territory Administration, situated in the Foreign Commonwealth and Development Office, King Charles Street, London, SW1A, 2AH, WILL SAY as follows:

A. INTRODUCTION

1. I am the Administrator and Head of the British Indian Ocean Territory Administration (BIOTA). I have held that appointment since January 2020.

2. I am duly authorised by the Commissioner of the British Indian Ocean Territory to make this statement in response to the claim brought by Mr. Nourrice and Mr. Prosper and, more particularly, in support of applications by the Defendant to strike out the claim and to obtain summary judgment upon it.

3. The facts and matters contained herein are either within my knowledge, in which case they are true, or they are based on information from my colleagues and former colleagues, in which case they are true to the best of my knowledge, information and belief.

4. In June 2020, the Foreign and Commonwealth Office (FCO) was merged with the Department for International Development and became the Foreign, Commonwealth and Development Office (FCDO). For simplicity, I refer to the department as the FCDO throughout this witness statement and references to "*the Secretary of State*" are to the Secretary of State for that department.

5. There is now produced to me marked as Exhibit [KP-1] a paginated bundle of documents to which I shall make reference in the course of this statement. For ease, reference to pages within that paginated bundle shall be given as *[KP-1/**]*.

6. The matters covered in this witness statement are as follows:

   (a) The history of the BIOT;

   (b) The BIOT legal regime;

   (c) The previous BIOT litigation; and

   (d) The Claimants.

B. THE HISTORY OF THE BIOT

7. The Claimants' Particulars of Claim refer to various matters in the history of the BIOT, from which the present claims are said to arise. The historical background of the BIOT has been set out in a number of lengthy judgments of the English courts. The most comprehensive account is the judgment of Ouseley J in Chagos Islanders Group Litigation v. Attorney General [2003] EWHC 2222, QB ('CIL') *[KP-1/1]*.[1] That judgment was delivered in the course of group litigation brought on behalf of the Chagos

[1] References to paragraphs in the judgment of Ouseley J will be given as *[CIL/J**]*. References to paragraphs in the accompanying Appendix will be given as *[CIL/A**]*.

Islanders in both Mauritius and Seychelles: *[CIL/J99-100]*. An application for permission to appeal against that judgment was refused by the Court of Appeal: Chagos Islanders v. Attorney General [2004] EWCA Civ 997, CA *[KP-1/311]*.

8. For the purposes of this application, I may summarise the background as follows.

Occupation of the BIOT

9. The Chagos Archipelago comprises a number of coral atolls, located in the middle of the Indian Ocean, some of which are above sea-level and form islands. The largest island of the Chagos Archipelago, Diego Garcia, is situated in the south-east of the Archipelago. This has an area of about 30 square kilometres, which accounts for more than half of the Archipelago's total land area of approximately 60 square kilometres. Diego Garcia consists of a long ribbon-like structure around the edge of an atoll, about 13 nautical miles by 6 nautical miles, enclosing a lagoon.

10. The Chagos Archipelago is one of the most isolated island groups in the world. The islands were entirely uninhabited until first discovered by the Portuguese in the 16th century. The French assumed sovereignty in the late 18th century and began to exploit the islands for copra, originally employing slave labour. By then, the Indian Ocean and its African, Arabian and Indian coasts had become a centre of rivalry between the Dutch, French and British East India companies for dominance over the spice trade and over the routes to India and the Far East. France, which had already colonised Réunion in the middle of the seventeenth century, claimed Mauritius in 1775, having sent its first settlers there in 1772; it subsequently took possession of the Seychelles group and the islands of the Chagos Archipelago.

11. During the Napoleonic wars, Britain captured Mauritius and Réunion from the French. Under the Treaty of Paris in 1814, Britain restored Réunion to France, and France ceded to Britain Mauritius and its dependencies, which comprised Seychelles and various other islands, including the Chagos Archipelago. All these dependencies continued to be administered from Mauritius until 1903, when the Seychelles group was detached to form a separate Crown Colony. The Chagos islands continued to be administered as a

dependency of Mauritius until they were detached to become the BIOT in November 1965. In return Britain paid a grant of £3 million to the Government of Mauritius.

12. From the beginning of colonisation, the inhabitants of the islands were only present because they were employed by owners or lessees of the land or were family members of such employees. There was, and is, no 'general public' in the BIOT. None of the inhabitants, from the time of the islands' discovery, were "*indigenous*". The inhabitants did not own any land or houses and the owners/lessees had legal rights to remove and to refuse the return of those people. Those Chagossians who lived in BIOT did so as licensees at will, during their period of employment by the copra companies then operating in the territory. They had no arguable claim to any property rights *[CIL/J219-225]*, whether to fishing or anything else.

13. The BIOT was constituted as a separate overseas territory on 8 November 1965 by the BIOT Order 1965 *[KP-1/320]*. The BIOT comprised not just the Chagos Islands (which were removed from the dependencies of Mauritius by the 1965 Order) but also certain other islands (Aldabra, Farquhar and Desroches) which were likewise removed from the then colony of Seychelles. These islands (together with Mauritius and Seychelles) had been ceded to the Crown by France pursuant to the Treaty of Paris, 1814. *[CIL/J1-2, 16-17]*

14. The Order in Council provided the constitution for the BIOT. A Commissioner for the Territory was appointed to hold office during Her Majesty's pleasure, having such powers and duties as were conferred or imposed upon him by that Order or any other law or which Her Majesty might be pleased to assign him *[CIL/J17]*.[2] The Constitution for BIOT has since been re-enacted in the following measures:

    (a) The (UK) 1976 Constitution Order,[3] pursuant to which three islands were returned to Seychelles;

    (b) The British Indian Ocean Territory Order 1981;

[2] Royal Instructions were issued to the Commissioner the same day, 8 November 1965 *[KP-1/335]*.
[3] The British Indian Ocean Territory Order, 1976 (SI 1976 No. 893).

(c) The BIOT (Amendment) Order 1984;

(d) The BIOT (Amendment) Order 1994; and

(e) The BIOT (Constitution) Order 2004 ('the 2004 Constitution Order') (addressed further below), which revoked the 1976 to 1994 Orders *[KP-1/339]*.

15. On 30 December 1966, in an Exchange of Notes, the UK and US Governments agreed that the BIOT should be available to meet their various defence needs for "*an indefinitely long period*", expressed to be an initial period of 50 years, and thereafter subject to renewal for a period of 20 years, unless either Government gave notice to terminate the agreement *[CIL/J18, A2]*. If neither side objected during a two-year window from December 2014 to December 2016, the agreement would continue as it stood until the end of December 2036. Neither side did object during this time period and the agreement therefore now continues until 2036. There were further Notes exchanged in 1972 and 1976 *[CIL/J47, A414]*.

Crown acquisition of BIOT land

16. Title in the islands has at all material times vested in the Crown in the right of the BIOT: see *[CIL/J20-22]*. On 22 March 1967, the BIOT Commissioner made the Acquisition of Land for Public Purposes (Private Treaty) Ordinance, enabling him to acquire land by agreement for the same public purposes. It was under this power that, on 3 April 1967, lands vested in the Chagos Agalega Company Limited in Diego Garcia, Peros Banhos, the Salomon Islands and other islands became lands vested in the Crown, in return for payment of the sum of £660,000. The Crown also acquired Farquhar and Desroches; it already owned Aldabra. On 15 April 1967, the BIOT Commissioner on behalf of the Crown leased back to Chagos Agalega Company Limited most of the islands of BIOT, including Diego Garcia, Peros Banhos and the Salomon Islands *[CIL/A96]*. That lease was terminable on six months' notice. Such notice was given by the company on 29 June 1967: *[CIL/A106]*. The land in the BIOT has thereafter always been land vested in the Crown in right of the BIOT. The 1967 Ordinance was repealed by the Acquisition of Land for Public Purposes (Repeal) Ordinance 1983, section 2 of which "*confirmed and declared that all the land in the Territory is Crown Land*." *[CIL/J399]*

Fisheries (1969-2009)

17. On 10 July 1969, by Proclamation No.1 of 1969 *[KP-1/345]*, the BIOT Commissioner established an exclusive fisheries zone contiguous to the territorial sea of the BIOT, extending from the outer margin of the territorial sea to 12 miles from shore (the contiguous zone). Effect was given to this by the Fishery Limits Ordinance 1971 *[KP-1/347]*, s.3(1) of which made it an offence to fish in the BIOT territorial sea or the contiguous zone, subject to the other provisions of the Ordinance. Section 3(3) made provision for the taking of fish for commercial research, scientific research or sporting purposes under a licence granted by the Commissioner to the owner or operator of the boat. Section 4 provided:

> "For the purpose of enabling fishing traditionally carried on in any area within the contiguous zone by foreign fishing boats to be continued, the Commissioner may by order designate any country outside the Territory and the area in which and descriptions of fish or marine product for which fishing boats registered in that country may fish."[4]

18. Background material shows that it was intended to designate Mauritius under section 4. A minute dated 2 July 1971 from the Foreign and Commonwealth Office to the British High Commission in Mauritius states:

> "... the Commissioner of BIOT will use his powers under Section 4 of the BIOT Ordinance No 2/1971, to enable Mauritian fishing boats to continue fishing in the 9-mile contiguous zone in the waters of the Chagos Archipelago. This exemption stems from the understanding on fishing rights reached between HMG and the Mauritius Government, at the time of the Lancaster House Conference in 1965 ..." [5]

19. In the event, no designation under section 4 was in fact made.[6] However, some fishing by Mauritian vessels in BIOT waters did take place in practice[7] and the BIOT

[4] R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.3) [2013] EWHC 1502 (Admin); [2014] Env LR 11 at [113].
[5] Ibid. at [114].
[6] Ibid.
[7] R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.3) [2013] EWHC 1502 (Admin); [2014] Env LR 11 at [114].

Administrator reported incorrectly in 1972 that "*Mauritians have been declared as traditional fisherman in BIOT as the islands formerly formed part of Mauritius*".[8]

20. The presence of Mauritian vessels without formal authorisation prompted a reassessment of the situation and the adoption of the Fishery Limits Ordinance 1984, which repealed the 1971 Ordinance *[KP-1/351]*. On 21 February 1985, Mauritius was formally designated under that 1984 Ordinance "*for the purpose of enabling fishing traditionally carried on in any area within the fishery limits to be continued by fishing boats registered in Mauritius*." [9]

21. Subsequently, the Commissioner established a Fisheries Conservation and Management Zone ('FCMZ') in the BIOT, by Proclamation No.1 of 1991 *[KP-1/356]* and promulgated the Fisheries (Conservation and Management) Ordinance 1991 *[KP-1/358]*, to replace the Fishery Limits Ordinance 1984.

22. Thereafter, amendments to the Fisheries (Conservation and Management) Ordinance 1991 were consolidated in the Fisheries (Conservation and Management) Ordinance 1998 *[KP-1/376]* and the Fisheries (Conservation and Management) Ordinance 2007 *[KP-1/398]*. The principal effect of these Ordinances, from 1991 onwards, was that it was made an offence to fish in the FCMZ without a licence. During the same period, by Proclamation No. 1 of 2003 *[KP-1/424]*, the Commissioner established an Environmental Protection and Preservation Zone ('EPPZ'), covering the same area as the FCMZ.

23. Under this regime, in the period 1991–2009, the vast majority of licences granted were for deep sea fishing by third country vessels (for example, those of France, Japan, Spain and Taiwan). So far as Mauritian-flagged vessels were concerned: for deep sea fishing, between two and six licences were granted annually in the period 1991–1999, and none thereafter; and for inshore fishing, between three and seven licences were granted annually in the period 1992–1999, between two and four licences annually in the period

[8] Award, In the Matter of the Chagos Marine Protected Area before An Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, between the Republic of Mauritius and the United Kingdom, 18 March 2015, at [116]

[9] R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.3) [2013] EWHC 1502 (Admin); [2014] Env LR 11 at [120].

2000–2004, none in the period 2005–2008, and two in 2009. No new fishing licences were issued after the creation of the Marine Protected Area, on 1 April 2010, although licences then in force were permitted to run their course, with the last such licence expiring in October 2010.[10]

Removal of Chagossians from the BIOT

24. In December 1970, US Congressional approval was obtained for the construction of a naval defence facility on Diego Garcia. The inhabitants of Diego Garcia were initially removed to the other islands in the BIOT (Salomon Islands and Peros Banhos). Between July 1971 and May 1973 and following the conclusion of an agreement between the UK and Mauritian Governments concerning the cost of resettlement, the remaining population either left or were evacuated from Diego Garcia, Peros Banhos and the Salomon Islands to the Seychelles and Mauritius. *[CIL/J32-49]*

25. On 16 April 1971, the BIOT Commissioner enacted the Immigration Ordinance 1971, No 1 of 1971 ('the 1971 Immigration Ordinance') *[KP-1426]*. Section 4 of that Immigration Ordinance made it unlawful for someone to enter or remain in the BIOT without a permit. It also provided for the Commissioner to make an order directing that person's removal from the territory. *[CIL/J34]*. The 1971 Immigration Ordinance did not formalise any denial of any right of abode, or otherwise alter the legal position, since no right of abode had ever been recognised in the BIOT.

26. As described further, below, by reference to the ensuing litigation, the UK Government has, from time to time, considered the possibility of supporting or permitting resettlement in the BIOT. Plainly there have been many, and vocal, supporters of resettlement within Chagossian communities. However, for various reasons, the UK Government has not proceeded with resettlement.

[10] R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No.3) [2013] EWHC 1502 (Admin); [2014] Env LR 11 at [128]-[129].

Administration of the BIOT

27. The office of Commissioner is held by a senior official in the FCDO and is now constituted under section 4 of the 2004 Constitution Order. Under the 2004 Constitution Order, the Commissioner exercises executive powers, may constitute offices for the Territory and make appointments to such offices. The Commissioner is assisted by an Administrator, resident in London, and by the Commissioner's Representative, who is the officer in charge of the Royal Navy contingent on Diego Garcia. The Commissioner may make laws for the peace, order and good government of the Territory.

28. In practice, the BIOT Administrator conducts the day to day running of the Territory, under the direction of the Commissioner. Prior to March 2016, the role of Administrator was twinned with the incumbent also in the role of Head of the BIOT Team in the FCDO, effectively leading on wider policy issues as well as the day to day running of the Territory. Given the clear distinction between the two roles and the recognition of the workload of both, from March 2016 the roles were split with a BIOT Administrator appointed who had no involvement with the wider BIOT policy issues. The BIOT FCDO Policy team remained within the Overseas Territories Directorate ('OTD') of the FCDO and took the lead on issues such as US engagement, Mauritius engagement, the future of BIOT with regard to the question of resettlement and responding to litigation.

29. The BIOT Administration ('BIOTA') team is physically located in the FCDO but is separate from the FCDO BIOT Policy team. It consists of the Administrator, Deputy Administrator, Assistant Administrator and two Environment Officers.

C. THE BIOT LEGAL REGIME

30. The BIOT has a Supreme Court and a Magistrates Court established by the BIOT Courts Ordinance 1983 *[KP-1/432]*. The Supreme Court consists of a Chief Justice, and the 2004 Constitution Order, makes provision for the Court to sit in the UK "*as the Chief Justice may direct*" *[KP-1/342]*. There is a legally qualified, but non-resident, Senior Magistrate, and the officer in charge of the Royal Navy component in Diego Garcia is in practice appointed as a local magistrate. The BIOT has a Court of Appeal, established by Order in Council. Final appeal lies to the Judicial Committee of the Privy Council.

31. So far as applicable law is concerned, pursuant to section 3 of the BIOT Courts Ordinance, the law applied in the BIOT is the law of England, including the rules of equity, but:

    (a) Subject to specific laws made for the BIOT; and

    (b) Subject to such modifications, adaptations, qualifications and exceptions as local circumstances require.

32. Accordingly, in order to succeed in any civil claim in a BIOT Court a claimant must identify, plead and establish the elements of a substantive cause of action that is known to English law.

33. The same provisions mean that the English Civil Procedure Rules 1998 (SI 1998/3132) ('the CPR'), apply to civil litigation before the BIOT courts.

34. Pursuant to section 12 of the BIOT Crown Proceedings Ordinance 1984, as amended by BIOT Ordinance No. 5 of 2014 *[KP-1/454]*, civil proceedings against the Crown in right of BIOT shall be instituted against the General Counsel. Accordingly, although the present proceedings were purportedly commenced against Her Majesty the Queen, the General Counsel has informed the Court that he should be substituted as the Defendant.

D. THE PREVIOUS BIOT LITIGATION

35. Chagossian claimants have, since the 1970s, brought a series of legal proceedings against the UK Government and the BIOT Commissioner in the courts of England and Wales. Much of that litigation has concerned the existence or otherwise of an alleged 'right of abode' in the BIOT for Chagossians – and ancillary rights, such as a right of return or property rights, said to flow from that alleged right of abode. On each occasion, the English courts and the European Court of Human Rights have ultimately dismissed the Chagossians' claims.

36. Latterly, claims relating to the BIOT have been brought before international courts and tribunals, including by the Government of Mauritius. In some of those cases, the UK was a party or made representations. In others, the UK was not or did not.

37. In light of the claims now made by the Claimants, in respect of further alleged property rights to "*indigenous fishing*", I summarise the previous litigation which has considered these issue (directly or indirectly) as follows:

Vencatessen v. Attorney-General: Claim for Damages

38. The first Chagossian claim was the case of Vencatessen v. Attorney General, commenced in February 1975. The writ claimed compensatory damages, aggravated damages and exemplary damages for intimidation, deprivation of liberty and assault in BIOT, the Seychelles and Mauritius in connection with the claimant's departure from Diego Garcia, the onward voyage and subsequent events.[11] The claim was not formally brought as a representative action, but it was treated by both parties as being a test case for the benefit of the Chagossians as a whole.[12]

39. The claim led to a settlement between the United Kingdom, the Government of Mauritius and the Chagos Islanders in 1982, with the UK giving £4 million to the Ilois Trust Fund for distribution to eligible Chagossians, and the Mauritian Government contributing £1 million by way of land. The Chagossians received advice from two eminent firms of English solicitors (Messrs. Bindmans and Messrs. Sheridans) and from two leading barristers (John MacDonald QC and Louis Blom-Cooper QC) confirming that the settlement reached was a reasonable one.[13] Both English and Mauritian legal advisers were present during the course of the settlement negotiations to advise the Chagossians.[14]

Bancoult (1): Challenge to the 1971 Immigration Ordinance

40. Secondly, there was the case now known as Bancoult (1).[15] That consisted of a judicial review challenge to the legality of section 4 of the 1971 Immigration Ordinance *[KP-1/427]* (see paragraph 25, above). That provision had been made by the BIOT Commissioner pursuant to powers conferred on him by the 1965 Constitution Order. The

[11] See the judgment of Ouseley J. in Chagos Islanders v. Attorney General [2003] EWHC 2222 (QB), [2003] All ER (D) 166 at [55] of the judgment.
[12] See R (Bancoult) v. Secretary of State for Foreign & Commonwealth Affairs (No. 2) [2009] 1 AC 453 HL, per Lord Hoffmann at [12]-[13].
[13] *[CIL/J67, J532, J570 and J583]*.
[14] *[CIL/J529-J533, J581-J582; J682]; [CIL/A575- A586]*.
[15] R (Bancoult) v. Secretary of State for Foreign & Commonwealth Affairs and the Commissioner for the British Indian Ocean Territory [2001] QB 1067, DC.

Divisional Court held that section 4 of the 1971 Ordinance was *ultra vires* and unlawful. The reasoning adopted to reach that conclusion was subsequently considered to be *per incuriam* by Lord Hoffmann in R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No. 2) [2008] UKHL 61, [2009] 1 AC 453 at [50] (with whom Lords Rodger and Carswell agreed at [109] and [128]-[130] respectively).

41. There was no express finding in the Divisional Court in Bancoult (1) that the Chagossians had an established right of abode, although Laws LJ at p. 1104 considered that they were "*belongers*" in the territory. This issue was considered in more detail in the Chagos Islanders Litigation (addressed next in this witness statement). Ouseley J at ***[****CIL/J380]* of his judgment recognised that there was no piece of BIOT legislation which conferred on the Chagossians any rights as "*belongers*" of the BIOT. See also [771] of the Appendix to his judgment. Nor has any right of abode ever been conferred by BIOT legislation. Nor did Lord Hoffmann recognise any right of abode conferred under BIOT law at [44] of his speech in Bancoult (2). At [45], he recognised that a right of abode was a creature of law. But there is no legal basis for any right of abode asserted by the Claimant in this case, not least since any putative right of abode that may arguably have existed at common law was removed by section 9 of the 2004 Constitution Order.

42. In any event, following the judgment of the Divisional Court in Bancoult (1), the 1971 Ordinance was repealed and replaced by the British Indian Ocean Territory Ordinance No. 4 of 2000 ('the 2000 Immigration Ordinance') *[KP-1/463]*. The 2000 Immigration Ordinance was promulgated so that, in short, British Dependant Territories' citizens connected with BIOT (as defined by section 4(3)) were able to return to the islands, save Diego Garcia, without a prior permit. Section 4(1) of that Ordinance imposed immigration control, while section 4(3) relaxed that control in relation to a defined class. The prohibition on unpermitted return to Diego Garcia nonetheless remained in place. To be clear, the 2000 Immigration Ordinance did not confer on any Chagossian – or on any other British citizen – any right of abode in any part of the BIOT.

43. In parallel with Bancoult (1), the UK Government had commissioned a feasibility study, conducted in a series of phases, on resettling the Chagos Islands. In particular:

44. A Preliminary Feasibility Study in June 2000 concluded that:

"5.1 The conclusion of this preliminary study is that resettlement of one or both of the two atolls is physically possible, but only if a number of conditions are met. These include confirmation that:

- A sustainable and affordable water resource can be developed;
- The nature and scale of settlement will not damage the environment;
- Public money is available to finance infrastructure and basic services; and
- One or more private investors are willing to develop viable enterprises which can generate sufficient incomes to pay for the investment and recurrent costs of re-settlement."[16]

45. Following a "*Phase 2A*" analysis of meteorological, hydrological and hydro-geographical parameters pertaining in the Chagos Islands by the British Geological Survey, a "*Phase 2B*" Report by the engineering consultancy Posford Haskoning Ltd was published in July 2002. That Report was summarised by Lord Hoffmann in R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61, [2009] 1 AC 453, HL ('Bancoult (2)') at [23]. The Executive Summary of the Phase 2B Report stated, in a paragraph headed "*General Conclusions*", that:

"To conclude, whilst it may be feasible to resettle the islands in the short-term, the costs of maintaining long-term inhabitation are likely to be prohibitive. Even in the short-term, natural events such as periodic flooding from storms and seismic activity are likely to make life difficult for a resettled population."[17]

46. The Phase 2B Study concluded (*inter alia*) that:

(a) While it was feasible for some of the Chagossians to resettle the outer islands on a subsistence basis in the short term, the costs of maintaining long-term habitation were likely to be prohibitive;

(b) Even in the short term, natural events such as periodic flooding from storms and seismic activity were likely to make life difficult for any resettled population;

(c) Fisheries resources were substantial, but considerable investment would be needed to make them commercially viable;

[16] R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No.4) [2016] UKSC 35; [2017] AC 300 at [136].
[17] Ibid. at [12].

(d) A resettled population would be vulnerable to current and predicted climatic changes. Sufficient, short-term coastal defences would be cost prohibitive and non-pragmatic in the long term; and

(e) The environment would be vulnerable to human-induced disturbance. This would accelerate the effect of global warming and make resettlement much less feasible over time.

47. In the light of the conclusions set out in the Phase 2B Report, and other material considerations relating to cost, defence interests and the environment, the view formed by Ministers was that anything other than a short-term resettlement on a purely subsistence basis would be highly precarious. It would also involve expensive underwriting by the UK for an open-ended period, and probably permanently. Ministers also took into account environmental considerations and defence considerations.

48. The Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs at the time, Bill Rammell MP, noted in a statement to Parliament on 15 June 2004 (Hansard (HC Debates), col 32WS) that in the light of the feasibility report it would be "*impossible for the Government to promote or even permit resettlement to take place. After long and careful consideration, we have therefore decided to legislate to prevent it.*" He also added that: "*Equally, restoration of full immigration control over the entire territory is necessary to ensure and maintain the availability and effective use of the territory for defence purposes, for which it was in fact constituted and set aside in accordance with the UK's Treaty obligations entered into almost 40 years ago.*" Phase 3 of the Feasibility Study did not therefore take place.

<u>The Chagos Islanders Group Litigation</u>: 'Compensation' Claim:

49. The third set of legal proceedings was a group claim brought by the Chagos Islanders group litigants against the Attorney General and the Secretary of State, seeking compensation and declaratory relief. The claim advanced a number of complaints, including what was said to be a tort of "*unlawful exile*", unknown to English law. The proceedings were advertised in Mauritius and the Seychelles and approximately 5,000 Chagossians participated *[CIL/J99-100.* Both Mr Nourrice and Mr Prosper were parties

to that group claim and their respective names appeared on the group litigation order *[KP-1/487]*.

50. The claim culminated in a judgment of Ouseley J in CIL, delivered on the defendants' application to strike out the claim as disclosing no reasonable cause of action. After a 37-day hearing,[18] Ouseley J struck out the claim in the course of a very detailed judgment, making a number of factual findings.[19] He also made it clear that there was no legal obligation upon the United Kingdom, whether by way of additional compensation or otherwise, to fund resettlement of the BIOT: see the speech of Lord Hoffmann in Bancoult (2) at [25]. The claims were variously out of time, under the Limitation Act 1980, or did not constitute a cause of action known to English law (such as the alleged tort of "*unlawful exile*").

51. Following an oral hearing, the Court of Appeal dismissed an application by the claimants for permission to appeal against the order: Chagos Islanders v. Attorney General [2004] EWCA Civ 997.

Bancoult (2) and Chagos Islanders v. UK: Challenges to the 2004 Constitution and Immigration Orders

52. In 2004, legislative changes were made to the BIOT constitutional regime, summarised by Lord Hoffmann in Bancoult (2)[20] at [26]:

> "The Foreign Office was advised by its High Commission in Mauritius that the possibility of landings on the islands in the autumn of 2004 should be taken seriously.[21] The United States also informed the UK Government of its concern at any action which might compromise what it regarded as the unique security of Diego Garcia. The Government had decided that in view of the feasibility report, it would not support resettlement of the islands. It therefore decided to restore full immigration control. On

[18] It involved hearing oral evidence from 19 of the claimants and their legal advisers (past and present). There were approximately 30 lever arch files of material made available to the Judge during the course of the hearing. A chronology submitted by the defendants to the action alone ran to 154 pages.

[19] The learned Judge found, for example, that the plantations on the Chagos archipelago were run down and effectively the population had no choice but to leave for that reason: *[CIL/J126, J261, J299-305, J315-316, J329, J331; A303]*. The suggestion made in the Claimants' Particulars of Claim at [7] that Chagossians were subjected to "*forcible exclusion…by Her Majesty's Armed Forces*" is wrong.

[20] R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs [2008] UKHL 61, [2009] 1 AC 453, HL

[21] See also Lord Hoffman at [25] where he refers to the possibility of direct action by landings on BIOT by a political group in Mauritius calling itself a "*flotille de la paix*".

10 June 2004 Her Majesty made the Constitution Order which revoked the BIOT Order and granted a new constitution including section 9, which I quoted at the commencement of my speech. At the same time, another Order in Council, the British Indian Ocean Territory (Immigration) Order 2004 (the 'Immigration Order') was made dealing with the details of immigration control."

53. The 2004 Orders were challenged by way of judicial review before the Divisional Court. In R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No.2) [2006) EWHC 1038 (Admin), the Divisional Court quashed section 9 of the 2004 Constitution Order and granted declaratory relief in relation to certain provisions in the 2004 Immigration Order. That decision was upheld on appeal, albeit for different reasons. The judgment of the Court of Appeal in Bancoult (2) [2007] EWCA Civ 498, [2008] QB 365 was delivered on 27 May 2007. However, the House of Lords by a majority allowed the Secretary of State's appeal. Lords Hoffmann, Rodgers and Carswell found that the 2004 Orders were lawful and dismissed the claim for judicial review.

54. The 2004 Constitution Order was also the subject of legal challenge before the European Court of Human Rights ('ECtHR') in Chagos Islanders v. United Kingdom (2012) 56 EHRR SE 15, ECtHR. The ECtHR dismissed the application on admissibility grounds on 11 December 2012, partly on the basis of declining jurisdiction to consider aspects of the complaint and partly on the basis that the complaint was manifestly ill-founded. Following the rejection of the legal challenge to the 2004 Constitution Order the specific question of resettlement was raised as a topic for a policy review by the then Secretary of State.

Bancoult (3): Challenge to the creation of a Marine Protected Area

55. The next legal challenge brought by Mr Bancoult was to the creation of a Marine Protected Area in the Chagos archipelago.

56. On 1 April 2010, by Proclamation No. 1 of 2010, the Commissioner for BIOT established a marine reserve to be known as the Marine Protected Area ('MPA') *[KP-1/488]*. Mr Bancoult challenged the decision on the basis *inter alia* that the consultation process which took place prior to its creation was alleged to be flawed and the decision itself was alleged to have been taken for an improper purpose.

57. Mr Bancoult also complained about the preparation and contents of the Phase 2B Feasibility Study, in particular that one of the experts working on that Study had proposed development scenarios in which resettlement was feasible and that these scenarios had not been disclosed.

58. The Divisional Court (Richards LJ and Mitting J) dismissed the application for judicial review by a judgment dated 11 June 2013: [2013] EWHC 1502 (Admin); [2014] Env LR 11 ('Bancoult (3) DC'). The criticisms of the Feasibility Study in that case (Ground 2 there) were summarised in the judgment of the Court at [83] to [87]. The Divisional Court at [92] found that the Feasibility Study (and therefore any criticisms of it) was irrelevant to the consultation procedure adopted for the MPA. The Divisional Court did not therefore address the additional submissions from the Secretary of State that: (i) any challenge to the conclusions of the Phase 2B Report could – and should – have been properly brought in Bancoult (2); and (ii) the criticisms of the Feasibility Study process and the drafting of the Phase 2B Report were unfounded.

59. Mr Bancoult appealed to the Court of Appeal. By a judgment dated 23 May 2014, the Court of Appeal (the Master of the Rolls and Gloster and Vos LJJ) dismissed the appeal: [2014] EWCA Civ 708, [2014] 1 WLR 2921 ('Bancoult (3) CA'). The issue which had been Ground 2 before the Divisional Court was not pursued on appeal to the Court of Appeal. An appeal against the Court of Appeal's decision on two grounds only (the allegation of improper purpose and fishing rights) was then brought before the Supreme Court. By a decision dated 8 February 2018, the Supreme Court dismissed the appeal: [2018] UKSC 3 [2018] Env LR 24 ('Bancoult (3) SC').

60. In the course of Bancoult (3) DC, Mr Bancoult advanced a ground of challenge that the MPA decision was [100],

> "…flawed by 'the failure to disclose [in the consultation] that the MPA proposal, in so far as it prohibited all fishing, would adversely affect the traditional and/or historical rights of Chagossians to fish in the waters of their homeland, as both Mauritian citizens and as the native population of the Chagos Islands'."

61. It was contended by the claimant that a promise had been made to allow Mauritius fishing access to the waters of the BIOT and that this reflected (as set out at [146]) "*the*

Chagossians' traditional rights to fish in Chagos waters" and that "[t]*he creation of BIOT and the removal of the Chagossians did not extinguish those rights*".

62. The Divisional Court rejected these arguments entirely and concluded at [151] that:

> "In so far as the claimant's fishing rights case rests on the position of Chagossians as such (as opposed to their reliance on any rights enjoyed by Mauritius), we see no tenable basis for it. Any traditional fishing rights enjoyed by the inhabitants of the Chagos Archipelago were lost with the loss of the right of abode and their removal from the islands. There is nothing in the history since the last of the resident population left in 1973 to justify the view that Chagossians as such have continued to enjoy fishing rights in respect of BIOT waters or, therefore, that a no-take MPA would have an adverse effect on such rights. Certainly there is insufficient substance in this aspect of the matter to have called for specific reference to it in the consultation document in order to meet the requirements of a lawful consultation process."

63. Subsequently, in Bancoult (3) CA, at [109] the Court of Appeal rejected the submission that any right of abode had survived the removal of the Chagossians from the island and that "*traditional fishing rights*" had continued to be exercised. The Court of Appeal held that:

> "The reality is that, since 1973, the Chagossians had neither enjoyed, nor exercised, any rights in their capacity as Chagos Islanders to fish the BIOT waters. The evidence demonstrated that there was no history of commercial fishing in the BIOT by Chagossians, even before 1973 and certainly not after that date. Being employed as crew members on Mauritian (or other) flagged vessels, which had licences to fish the BIOT waters, cannot be equated with the exercise of "traditional fishing rights" by the Chagossians. In this context it is, in our view, immaterial precisely when the right of abode was lost and there is no need to explore any application of the doctrine of 'relation back' in respect of the House of Lords' judgment in the *Bancoult (No 2)* case [2009] AC 453 in 2008. What is clear is that, as at the date of the consultation paper, the House of Lords had determined in the *Bancoult (No 2)* case that there was no right of abode in the BIOT."

UNCLOS Arbitration: Mauritius complaint regarding the Marine Protected Area

64. In parallel with the Bancoult (3) proceedings, on 20 December 2010 Mauritius instituted proceedings against the UK pursuant to Article 287 of the United Nations Convention on the Law of the Sea (UNCLOS) before an arbitral Tribunal ('the UNCLOS Arbitral Tribunal'), objecting to the establishment of the MPA.

65. In its award of 18 March 2015, the majority of the UNCLOS Arbitral Tribunal held that the declaration of the MPA was not in accordance with consultation obligations under UNCLOS and invited the parties to enter into those negotiations "*with a view to achieving a mutually satisfactory arrangement for protecting the marine environment*." It did not take any view on the substantive quality or nature of the MPA. The UK was not required to dismantle it. The tribunal held the UK's undertaking to return the Chagos Archipelago to Mauritius when no longer needed for defence purposes was legally binding.

Bancoult (4): Attempt to reopen Bancoult (2)

66. In the course of the Bancoult (3) proceedings, documents were disclosed which included an earlier draft of the 2002 feasibility study. The claimants in a further judicial review alleged that those documents ('the Rashid documents') ought to have been disclosed in Bancoult (2).

67. Mr Bancoult's complaint about the preparation of the Phase 2B Feasibility Study, and the non-disclosure of certain documents, led to an application by him to set aside the decision of the House of Lords in Bancoult (2) on the grounds that the documents might have had a decisive effect on the judgment. That application was rejected by a majority (Lord Mance, Lord Neuberger and Lord Clarke) in R (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No.4) [2016] UKSC 35; [2017] AC 300 ('Bancoult (4)').

68. The majority in the Supreme Court in fact held that the non-disclosure of the Rashid documents would not have made a material difference to the case that would have been advanced in any additional challenge: see the speeches of Lord Mance at [64] to [65] and [71]; and Lord Clarke at [77] and [80]. In particular, Lord Mance at [65] stated:

> "65. The General Conclusions and the section on Vulnerability immediately preceding them remained unaltered from the draft to the final stage 2B report. There is no probability, likelihood or prospect (and, for completeness, in my view also no real possibility) that a court would have seen or would see, in the process of preparation, re-drafting and finalisation of the stage 2B report and in the associated material which can now be seen to have existed, anything which could, would or should have caused the Secretary of State to doubt the General Conclusions, or which made it irrational or

otherwise unjustifiable to act on them in June 2004. On that basis, the application to set aside the House of Lords' judgment by reference to the Rashid and other documents disclosed late must fail."

69. The Supreme Court in Bancoult (4) did not overturn the ruling of the House of Lords in Bancoult (2).[22] The Rashid documents did not "*cast serious doubt on the reliability of the Phase IIB Study*." It was noted that it would be open to Mr Bancoult to challenge in subsequent proceedings any future refusal of the Government to permit or support resettlement as irrational, unreasonable or disproportionate (depending on the legal test to be applied).

70. Notwithstanding the outcome of Bancoult (4), the Secretary of State accepted that the credibility of the 2002 Study had been damaged by the opaque process that produced it. It was partly for that reason that a new feasibility study was commissioned from KPMG in 2013. Work on that study proceeded over the following years. At the same time, the FCDO engaged in discussions with the US Government to establish its policy position on resettlement of the BIOT. This highlighted, *inter alia*, continuing US security concerns around its base on Diego Garcia. These discussions coincided with work by the UK and US Governments in advance of a 2016 rollover of the Exchange of Notes, under which US forces continued to use the BIOT for defence purposes.

Horeau: Challenge to the consultation process in a new resettlement study

71. In March 2015, a report by KPMG was considered at a meeting of the UK National Security Council (NSC).

72. The report noted defence and security concerns, environmental considerations and social and economic concerns about establishing a remote community. The Government of Mauritius' assertion of sovereignty over the Chagos Islands, which raised political issues to be navigated, was also noted. The report identified that the Outer Islands were remote, demanding environments and the infrastructure which would have to be built would be "*invasive and cause major environmental damage to the coral reefs, fish and other*

[22] The decision in Bancoult (2) has, for example, been affirmed by the Privy Council in Paponette v. Attorney General of Trinidad and Tobago [2010] UKPC 32; [2012] 1 A.C. 1 and applied by the Court of Appeal on a number of occasions.

marine life". However, the KPMG Report concluded that resettlement was feasible in the sense of capable of being done. It assessed three resettlement options, each of which was premised on the use of infrastructure on Diego Garcia.

73. The KPMG report recommended a series of next steps, including establishing how many Chagossians wanted to resettle and on what basis. Accordingly, after the NSC meeting, a consultation process was undertaken to ascertain Chagossian views on resettlement on the terms that might be possible.

74. Ms Solange Hoareau, a Seychellois Chagossian, sought to challenge the consultation process and what was said to be a refusal to pay direct support to those who were not resettled. Permission to bring an application for judicial review claim was refused by the High Court (Andrews J) in R (Horeau) v. Secretary of State for Foreign and Commonwealth Affairs [2016] EWHC 2102 (Admin).[23]

Hoareau and Bancoult (5): Challenge to the 2016 resettlement decision

75. Following the consultation exercise, officials at the FCDO led the completion of a review of resettlement of the BIOT. FCDO officials were working simultaneously on a rollover of the Exchange of (Diplomatic) Notes that would extend the US use of Diego Garcia for a further 20 years. The outcome of this work was a decision made at an NSC meeting on 15 March 2016, attended by the then Prime Minister (Rt Hon David Cameron MP), the Secretary of State, the Secretary of State for Defence, the Chancellor of the Duchy of Lancaster, the Home Secretary, the Secretary of State for Energy and Climate Change, the Attorney General and the Minister for DfID. It was decided that the two options of resettlement either including or excluding Diego Garcia should be ruled out. A financial package for Chagossians in the communities where they then lived would be reviewed to see whether it could be enhanced.

76. The March 2016 decision was referred to the new Prime Minister (Rt Hon Theresa May MP) in August 2016 for her consideration and approval. The Prime Minister subsequently approved an announcement of the rollover of the Exchange of Notes, together with the announcement of a financial package worth about £40 million. After

[23] The judgment in that case was handed down with a typographical error in the title.

an NSC write-round procedure, this was announced in a written ministerial statement on 16 November 2016: the UK Government would not support resettlement of the BIOT but would provide a financial support package of approximately £40 million for Chagossians over a period of 10 years.

77. Ms Hoareau and Mr Bancoult challenged various aspects of the resettlement decision in claims for judicial review that spanned some 15 separate, albeit sometimes overlapping, grounds of challenge. In R (Hoareau and Bancoult (No.5) [2019] EWHC 221 (Admin), [2019] 1 WLR 4105, ('Hoareau and Bancoult (5)'), the Divisional Court analysed the claims by reference to 6 overarching issues:

    (a) Whether the Secretary of State had erred in law by failing to give separate consideration to a decision on right of abode for Chagossians;

    (b) Whether the Secretary of State had acted incompatibly with the Claimants' ECHR rights;

    (c) Whether the Secretary of State had failed to comply with the Public Sector Equality Duty under section 149 of the Equality Act 2010.

    (d) Whether the Resettlement Decision was irrational and flawed by errors of fact and misrepresentations to Ministers;

    (e) Whether the Secretary of State had failed to take into account the responses to the 2015 consultation exercise; and

    (f) Whether the Secretary of State had failed to undertake an assessment of the needs of Chagossians in designing the support package and/or had been materially misled on the basis for the £40m figure.

78. The Divisional Court dismissed the claims on all grounds and noted, in particular, that the 'right of abode' question was inextricably linked to the practicalities of resettlement in the Chagos Islands. This was illustrated by the fact that, between 2000 and 2004, no one had chosen to take up or assert any legal rights allegedly conferred by the 2000 Immigration Ordinance to go and live there [114]. It was therefore wrong, as a matter of

law, to suggest that the UK Government was under any legal obligation to consider restoring the right of abode either separately or in advance of its consideration of the practical questions which arose in its consideration of whether resettlement should be permitted [115]. Contrary to what the claimants had suggested, there was no support for this in the reasoning of the Supreme Court in Bancoult (4) [123]-[125]. It was impossible to see how it could be said that the Secretary of State's "*failure*" to abrogate (or to consider abrogating) the 2004 Orders could be impugned as irrational. He was rationally entitled to take the view that, if resettlement should not take place, there was no need for, or any practical point in, revisiting the 2004 Orders [126].

79. The claimants appealed to the Court of Appeal, praying in aid an Advisory Opinion of the International Court of Justice ('ICJ') on legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965 ('the Advisory Opinion', which I describe below), which had been handed down after the Divisional Court's judgment. The Court of Appeal dismissed the appeal: [2019] EWCA Civ 1010, [2021] 1 WLR 472. The Court of Appeal held that the Advisory Opinion was just that, advisory; it did not act to extend the ECHR to the BIOT; the 2004 Constitution Order was a statutory block on any putative "right of resettlement" said to derive from customary international law [143]; and there was no requirement for "*anxious scrutiny*" to be adopted because [152]:

> "As the House of Lords observed in *Bancoult (No.2)*, the "*important*" right of abode had been satisfied by the payment of compensation. Mr Bancoult had been prevented from returning to the Chagos Islands in 1968 after his family had travelled to Mauritius for hospital treatment and Ms Hoareau had been removed from Diego Garcia to the Seychelles in about 1971. Thereafter, as Lord Rodger had noted in *Bancoult (No.2)* at paragraph 112 *"... the economic conditions and infrastructure which had once supported the Chagossian way of life has ceased to exist ...*". The removal of the right to remain and return in the case of both Mr Bancoult and Ms Hoareau was wrongful. Compensation was offered to those who were victims of the wrongful removal. Any further right to return to the Chagos Islands had been removed by the 2004 Orders, the legality of which was upheld in *Bancoult (No.2).* The decision in *Bancoult (No.4),* which affirmed the decision in *Bancoult (No.2),* did not alter this conclusion.

80. Permission to appeal was refused by the Court of Appeal and Ms Hoareau and Mr Bancoult applied to the Supreme Court for permission. A decision on that application is awaited at present.

ICJ Advisory Opinion: Separation of the Chagos Archipelago from Mauritius in 1965

81. On 22 June 2017, by resolution 71/292, the General Assembly of the United Nations requested an advisory opinion from the ICJ on two questions relating, first, to the law on partial decolonisation in the context of Mauritius and, second, to the consequences of any conclusion that the UK was in breach of international law in failing to ensure full decolonisation.

82. The ICJ did not consider that there was any jurisdictional obstacle to answering these questions, although the UK submitted that they were, in substance, addressed to the sovereignty dispute between the UK and Mauritius [60]-[61]. Nor did the ICJ consider that it was prevented from addressing these questions by the findings of the UNCLOS Tribunal that the UK and Mauritius were bound by the agreement to return the Chagos Islands to Mauritius once they were no longer needed for defence purposes [81].

83. The Advisory Opinion focusses on the bilateral relations between the UK and Mauritius in the context of what is described as an "*ongoing process of decolonisation*". The ICJ opined:

    (a) That the decolonisation of Mauritius was not conducted in a manner consistent with the right of the Mauritian people to self-determination: [177]; and

    (b) That the UK was under an obligation to bring to an end its administration of the BIOT, so enabling Mauritius to complete the decolonisation of Mauritius (including the Chagos Islands) in a manner consistent with the right of the Mauritian people to self-determination [178].

84. The Advisory Opinion did not assert the resettlement of Chagossians in the Chagos Island to be a matter of the Chagos Islanders' right to self-determination. The Advisory Opinion made a general statement about the existence of a right to self-determination in international law in the context of decolonisation [144] and not more broadly. At the material time in the 1960s, this was a right to self-determination asserted by Mauritius which led subsequently to the establishment of Mauritius as an independent republic. The Advisory Opinion accordingly focussed on the rights of Mauritians to self-determination

and it was in this context that the ICJ considered the interaction with the principle of territorial integrity at [160] and [170]. The ICJ specifically did not opine, let alone make any binding finding, that this included a right of return and resettlement to the BIOT for Chagossians ([176] and [181]).

85. The Advisory Opinion remitted the issue of resettlement to the UN General Assembly [181]. In its Resolution 73/295 of 22 May 2019, the General Assembly also remitted this issue to be addressed later "*during*" the completion of the process of decolonisation [2(f)]. That Resolution "*urges*" the UK to cooperate with Mauritius to facilitate resettlement [4], but imposes no obligation of resettlement upon Mauritius, as the state that would, on the basis of the conclusions of law reached in the Advisory Opinion, allegedly have the power to secure such resettlement.

ITLOS Judgment: Mauritius-Maldives maritime boundary dispute

86. On 28 January 2021, a Special Chamber of the International Tribunal for the Law of the Sea issued a judgment on preliminary objections in a maritime boundary dispute between Mauritius and the Maldives ('the ITLOS Judgment'). The UK played no role in the arbitral proceedings.

87. The Maldives' preliminary objections included that in order to determine Mauritius's boundary claim, it would be necessary for the Special Chamber to adjudicate upon "*the disputed issue of sovereignty over the Chagos Archipelago*", which it did not have jurisdiction to do [100]-[115]. In order to determine these objections, the Special Chamber considered "*the legal status of the Chagos Archipelago*" at [116]-[246], with particular reference to the Advisory Opinion and UNGA Resolution 73/295. The Special Chamber rejected the Maldives objections.

88. On 3 February 2021, Ms Hoareau and Mr Bancoult filed at the Supreme Court brief joint "*Supplementary Submissions*" regarding the ITLOS Judgment, which was said to be "*highly material*" to their proposed appeal in Hoareau and Bancoult (5). The Supreme Court has not yet ruled on the application for permission to appeal.

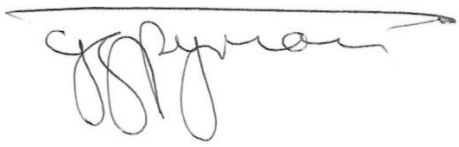
E. THE CLAIMANTS

89. I have been informed that under circumstances provided for in the CPR, the Court has power to order a claimant to provide security for the costs that may be incurred by a defendant in defending the claim. Those circumstances include where the claimant is resident outside the jurisdiction and is not resident in a state party to the Hague Convention on Choice of Court Agreements (CPR r.25.13(2)(a)(ii)).

90. Naturally, neither Mr Nourrice nor Mr Prosper is resident within the jurisdiction of this Court (i.e. the BIOT).[24] According to the claim form, both Mr Nourrice and Mr Prosper are resident in the Republic of the Seychelles, which is not a party to the Hague Convention.

91. I have no detailed knowledge of the Claimants, or the financial resources available to them, save insofar as I understand that they have enquired about the availability of legal aid to fund the litigation of their claims.

I believe that the facts stated in this witness statement are true.

Signed: 

Date: 26 August 2021

[24] Nor are they resident in the United Kingdom, where this Court may sit at the direction of the Chief Justice, pursuant to section 13(4) of the 2004 Constitution Order.