Neutral Citation Number: [2020] EWHC 1405 (Ch)

Case No: BL-2020-00292

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**BUSINESS LIST (ChD)**

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

Date: 3 June 2020

**Before** :

**MR JUSTICE NUGEE**

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**Between :**

**(1) LA MICRO GROUP (UK) LTD**
**(2) DAVID BELL** **Claimants**

**- and -**

**(1) LA MICRO GROUP, INC**
**(2) ROMAN FRENKEL**
**(3) ARKADIY LYAMPERT** **Defendants**

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**William Buck and William Hooper** (instructed by **Fladgate LLP**) for **the 1st Defendant**
**Thomas Sebastian and Alfred Artley** (instructed by **Reynolds Porter Chamberlain LLP**) for the **2nd Defendant**
**Paul Strelitz** (instructed by **Owen White Ltd**) for **the Claimants**

Hearing dates: 3 and 6 April 2020

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# Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: this judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be at 10 am on Wednesday 3 June 2020.

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MR JUSTICE NUGEE

**Mr Justice Nugee:**

*Introduction*

1. This judgment is given on the hearing of applications by the 1st Defendant, LA Micro Group, Inc, (**"LA Inc"**) and the 2nd Defendant, Mr Roman Frenkel, disputing the jurisdiction of the English court to hear the action. I will refer to them together as **"the Applicants"**.

2. The 1st Claimant, LA Micro Group (UK) Ltd (**"LA (UK)"**), is an English company. It was incorporated in 2004 and acquired by the 2nd Claimant, Mr David Bell, a British citizen resident in England. It now has two issued shares, one in the name of Mr Bell, and one in the name of the 3rd Defendant, Mr Arkadiy Lyampert. Mr Bell and Mr Lyampert are also the two directors of the company.

3. The substantive question raised in the action is as to the beneficial ownership of LA (UK). The position of the Claimants is that Mr Bell and Mr Lyampert are not only the legal owners of the two issued shares but also the beneficial owners, and that they are each entitled to 50% of the distributable profits of the company by way of dividends. Mr Lyampert's position is the same, although he has indicated that he does not intend to take any active part in the proceedings, and was not represented before me.

4. The position of the Applicants by contrast is that Mr Bell is only entitled to a 49% beneficial interest in the shares of LA (UK), and that LA Inc is entitled to the other 51%. LA Inc is a Californian corporation, and is, or was, owned 50/50 by Mr Frenkel and Mr Lyampert, both of whom are resident in California.

5. The Claim Form, in the form of a Part 8 claim seeking declaratory relief, was issued on 14 February 2020. By application notice dated 17 February 2020 the Claimants sought permission to serve the Claim Form on the Defendants in California, relying on the gateway in paragraph 3.1(11) of Practice Direction 6B, namely that the subject matter of the claim related wholly or principally to property within the jurisdiction. By Order dated 19 February 2020 Deputy Master Hansen granted permission to serve the Claim Form on the Defendants in California.

6. By application notices dated 17 March and 26 March 2020 respectively Mr Frenkel and LA Inc have applied under CPR r 11 to set aside the Order of 19 February 2020 granting permission to serve the proceedings out of the jurisdiction on the grounds that the court lacks jurisdiction. That is the question which has been argued before me. There is in each case an alternative application for the court to decline to exercise its jurisdiction if it has any, but it was not suggested that this in practice raises any separate issue. There is also a question raised as to whether the claim should proceed, if it is to proceed at all, as a Part 8 claim or a Part 7 claim, but this is very much a subsidiary question.

7. By CPR r 6.36 the claimant may serve a claim form out of the jurisdiction with the permission of the court if one of the gateways set out in Practice Direction 6B paragraph 3.1 applies. The principles applicable to the grant of permission are well established. They were summarised by Lord Collins JSC in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 at [71]. The claimant has to satisfy the court of three requirements:

(1) That there is a serious issue to be tried on the merits. The current practice in England is that this is the same as the test for summary judgment, namely whether there is a real (as opposed to fanciful) prospect of success.

(2) That there is a good arguable case that the claim falls within one of the gateways.

(3) That in all the circumstances of the case England is clearly or distinctly the appropriate forum for the trial of the dispute. This requirement is reflected in CPR r 6.37(3) which provides that the court will not give permission unless satisfied that England and Wales is the proper place to bring the claim.

8. In the present case, the Applicants do not dispute that the claim falls within one of the gateways, but they do take issue both with there being a sufficient case on the merits, and with England and Wales being the proper forum.

9. Mr William Buck, who appeared with Mr William Hooper for LA Inc, took the lead on the merits ground. Mr Thomas Sebastian, who appeared with Mr Alfred Artley for Mr Frenkel, developed the forum ground. Mr Paul Strelitz appeared for the Claimants. The hearing was conducted, as is usual in the current circumstances, as a remote hearing using Skype for Business; I am grateful to counsel and their instructing solicitors for their co-operation in enabling this to happen with the minimum of difficulty, and as with other matters I have conducted in this way, it proved an effective and satisfactory way of holding the hearing.

*Establishment of LA (UK)*

10. There is a long history to this matter and it is necessary to give quite a detailed account of the background to the current proceedings. I can take much of it from the judgment of Ms Amanda Tipples QC (as she then was), sitting as a Deputy Judge of the High Court, in previous English proceedings brought in the Chancery Division in 2015 by Mr Frenkel against Mr Lyampert, Mr Bell and LA (UK). These proceedings (**"the 2015 proceedings"**) came to trial before Ms Tipples in June 2017, and after a 6-day trial she handed down a reserved judgment on 13 September 2017, the neutral citation of which is *Frenkel v Lyampert* [2017] EWHC 2223 (Ch) (**"the 2017 Judgment"**).

11. The 2015 proceedings also concerned the question of who was the beneficial owner of the shares in LA (UK). I will have to look later at precisely what was in issue, and what was decided, but in essence Mr Frenkel's claim was that he was a 25.5% beneficial owner of the shares, and that claim was rejected by Ms Tipples in the 2017 Judgment.

12. Although Mr Bell, Mr Frenkel, Mr Lyampert and LA (UK) were parties to the 2015 proceedings, LA Inc was not, a point that was put at the forefront of Mr Buck's submissions on its behalf. I should therefore make it clear that findings of fact made by her are not (or may not be) binding on LA Inc, and the account I give below is not necessarily accepted by LA Inc. But with that caveat, it is convenient to refer to her findings as a way of giving an account of the background, most of which I did not understand to be disputed in any event.

13. References in this section of the judgment to numbers in square brackets are to paragraphs of the 2017 Judgment. Mr Lyampert and Mr Frenkel met in California in 1998 and ran a small business together buying and selling computer equipment [60]. That did not last, but in 2001 Mr Lyampert established a new company, namely LA Inc (originally called LA Micro Exchange Inc but renamed in 2003), got back in touch with Mr Frenkel, and agreed to go into business with him again through LA Inc. They each owned 50% of the shares. Its business was the purchase and resale of high-end computer parts [61].

14. Shortly after LA Inc was set up in 2001, it started trading with an English company called Bstock, owned by Mr Bell [63]. In due course that led to discussions in 2003-4 between Mr Bell on the one hand, and Mr Frenkel and Mr Lyampert (and also Mr Alex Gorban, a senior employee of LA Inc) on the other hand about a joint venture [63], [64]. By July 2004 that had resulted in an agreement in principle for LA Inc and Mr Bell to be shareholders in a new UK company, and on 1 July 2004 Mr Bell's accountants acquired an off-the-shelf company for him, namely LA (UK) (it had been incorporated under the name Windbell Investments Ltd on 27 April 2004, but changed its name to LA Micro (UK) Ltd on 11 August 2004) and he was appointed director and secretary [4], [64], [67]. He also became the sole shareholder, holding the one issued share (Ms Tipples says this was issued to him "on 27 April 2004" [6], but this does not seem to fit with the chronology and it seems more likely that it was issued on 27 April 2004 as a subscriber share and later transferred to him).

15. In August 2004 Mr Lyampert, accompanied by Mr Gorban but not by Mr Frenkel, came to the UK to finalise matters [76]. Discussions were held at Mr Bell's house in Windsor on or about 3 August 2004 [77]. It was common ground between all three parties (Mr Frenkel, Mr Lyampert and Mr Bell) that in the course of those discussions it was orally agreed that the company should be owned 49% by Mr Bell, but they differed as to what was agreed as to the ownership of the other 51% [16]. Mr Frenkel's case was that 25.5% was each to be owned by him and Mr Lyampert personally [10]; Mr Lyampert's that the 51% was to be owned by him alone [18]. Mr Bell however gave evidence that the agreement was that the 51% should be owned by LA Inc [78]. Ms Tipples, who heard from Mr Frenkel, Mr Gorban, Mr Lyampert and Mr Bell, regarded Mr Bell's evidence as "by far and away the most reliable evidence before the court" and she had no hesitation in accepting it in preference to that of the other witnesses [31], [33], [59]. She therefore found, as summarised in her conclusion, that there was no agreement that Mr Frenkel would own 25.5% of LA (UK); what was agreed was that LA Inc would own 51% of LA (UK)'s share capital [121(d)].

16. Agreement was also reached at the same time about trading arrangements between the two companies. In essence each would supply the other with equipment and hardware without any mark-up (ie at or near cost). If LA Inc sold hardware to LA (UK) at cost, and LA (UK) made a profit, the profits would remain with LA (UK) [81]; but it was agreed that LA (UK)'s profits (on all its business) would be split between the parties, with 50% going to Mr Bell.

17. There was a dispute before Ms Tipples as to who was to be entitled to the other 50%. Mr Frenkel's case was that it was agreed that dividends would be paid as to 50% to Mr Bell, and 25% each to him and Mr Lyampert or their nominees [10]; Mr Bell's case however was that it was agreed that dividends or profits should be split between

himself and LA Inc, and again Ms Tipples preferred his evidence [82], [83]. She therefore found, as summarised in her conclusion, that there was no agreement that LA (UK) would pay dividends 50% to Mr Bell, 25% to Mr Frenkel and 25% to Mr Lyampert; what was agreed was that the profits would be split equally between Mr Bell and LA Inc [121(e)]. In practice although the first payments were made to LA Inc, thereafter 25% of profits were paid into an investment vehicle of Mr Frenkel's and 25% into an investment vehicle of Mr Lyampert's [92]. Mr Bell's evidence was that these were not formally declared as dividends; they were just payments in respect of ongoing profits of LA (UK) and were subject to its cashflow [108].

18. In 2008 or 2009 a second share in LA (UK) was issued to Mr Lyampert [94]. Mr Bell's evidence was that he was told by his accountant that another share had to be issued; that he did not take any steps to issue shares in the proportion 49/51 as he simply did what was requested of him and thought 50/50 would be close enough; and that he could not recall why it was issued to Mr Lyampert rather than LA Inc, although it appears that he thought it may have been something to do with the fact that Mr Lyampert was the other director [95].

*Events of early 2010*

19. That was how matters stood in early 2010. What then happened is central to the questions raised in this action, but was a matter of dispute before Ms Tipples. I will set out what the evidence before her was, and what she found, but without prejudice to LA Inc's position that it is not bound by any of these findings.

20. Mr Frenkel and Mr Lyampert fell out. On 8 February 2010 Mr Frenkel dissolved LA Inc by giving notice to Mr Lyampert [22]. The next day Mr Lyampert spoke to Mr Bell on the telephone and told him that Mr Frenkel had closed down LA Inc and taken the staff with him to a new company; he (Mr Lyampert) would try and carry on with LA Inc as best he could [98]. Mr Frenkel also telephoned Mr Bell. Mr Bell's evidence was that Mr Frenkel said to him (of LA (UK)): "It's your business and I want nothing to do with it" [99]. Mr Bell flew to California in March 2010 and met both Mr Lyampert and Mr Frenkel. Mr Lyampert told him that LA Inc would get over this damaging time and Mr Bell agreed that he would continue to trade with LA Inc [100]. Mr Frenkel, according to Mr Bell, repeated to him "The company [ie LA (UK)] is yours. I want nothing to do with it." [101]. Mr Frenkel's written evidence was to the effect that what he said was that he would not be involved in (the management of) LA Inc while Mr Lyampert was in charge, but in cross-examination accepted that what he meant was that he wanted to be involved in LA Inc and not in LA (UK) [102]. Ms Tipples again accepted Mr Bell's evidence and found that Mr Frenkel told Mr Bell that LA (UK) was "yours"; and that from then on Mr Bell understood, and proceeded on the basis, that Mr Frenkel was not interested in any way in LA (UK) [103].

21. Mr Bell and Mr Lyampert also agreed on new trading arrangements between the two companies. Instead of supplying each other at cost, they would apply the usual margins; they would also be free to compete with each other. In Mr Bell's words "the gloves were off" [106].

22. So far as the profits of LA (UK) were concerned, there had never been any dispute

that Mr Bell was entitled to 50% of the profits, but Mr Lyampert now pressed him to pay the other 50% to him. Mr Bell took advice from LA (UK)'s then solicitors and was advised that he had to pay dividends to the legal shareholder, which was Mr Lyampert, and so felt comfortable paying 50% to him (although he in fact clawed back from this 50% a significant debt owed by LA Inc to LA (UK)) [107], [108]. Ms Tipples accepted Mr Bell's evidence that from 2010 he understood that Mr Lyampert was entitled to 50% of the profits of LA (UK) as he was a 50% shareholder, and that he (Mr Bell) was entitled to the other 50% as he owned the other 50% of the shares [109].

23. Mr Bell also gave evidence that he thought that as Mr Frenkel had said that he did not want anything to do with LA (UK) it was fine just to continue with the existing shareholders; and that if Mr Frenkel had asserted a claim in spring 2010, he would probably have folded the business because he would not want to have two warring parties as shareholders, LA (UK) (which had suffered from the economic crisis in 2008-9 [97]) not being at the time as big as it later became. Ms Tipples accepted that if Mr Bell had known that Mr Frenkel claimed an interest in LA (UK), he would have wound the company up and set up a new one [123]. By the time Mr Frenkel issued his claim in 2015 however LA (UK) had become very profitable [123]. For the period ended 30 April 2009 its turnover was some £1.2m and its net profit before tax a little over £100,000, whereas draft accounts for the period ended 30 April 2015 showed its turnover as having increased to some £13m and its net profit to over £850,000 [8].

*US proceedings*

24. I will come back to what Ms Tipples said about the effect of what happened in 2010. But first I should give an account of the various US proceedings that have taken place. The disputes between Mr Frenkel and Mr Lyampert in 2010 led to Mr Frenkel and some of LA Inc's other employees, including Mr Gorban, leaving LA Inc and starting a competing business called IT Creations, Inc (**"ITC"**). In the words of the Court of Appeal of California, "a profusion of lawsuits followed". I will try and disentangle the various pieces of litigation. It has all taken place in the courts of California, either in the Superior Court of California for the County of Los Angeles, or the Court of Appeal of California.

25. First, in March 2010 Mr Frenkel brought an action against LA Inc and Mr Lyampert (case no. BC434040) requesting dissolution of LA Inc and making claims against Mr Lyampert for breach of fiduciary duty, conversion of corporate assets, fraud and unjust enrichment (**"the Fiduciary Duty action"**). The essential allegation was that he had been using the company's money for personal expenditure on a grand scale. This action was consolidated with another action (case no. BC434901) brought in April 2010 by Mr Gorban's company, Design Creator, Inc (**"DCI"**) against LA Inc, Mr Lyampert and Mr Frenkel for breach of contract in not paying for services (**"DCI's action"**). LA Inc and Mr Lyampert brought cross-claims against Mr Frenkel, ITC, Mr Gorban, and the other individuals who had left to work at ITC, asserting breach of fiduciary duty and other claims.

26. In August 2011 Mr Frenkel applied for permission to amend the complaint in the Fiduciary Duty action to assert that he and Mr Lyampert had beneficial interests in LA (UK). Leave to amend was denied in September 2011, on the grounds that it was brought too late (trial being then scheduled for December 2011). (It was presumably

because of this failure that Mr Frenkel brought the 2015 proceedings in England instead). In the event trial of the consolidated actions and cross-claims took place in late 2014 and early 2015 before Judge Kleifield. He issued a statement of decision in January 2017 and entered judgment on 22 February 2017. In the Fiduciary Duty action Mr Frenkel succeeded in establishing that Mr Lyampert was liable to LA Inc in restitution for some $4.305m. In DCI's action, DCI succeeded in establishing a claim for breach of contract against LA Inc of $221,000. The cross-claims all failed. Judge Kleifield ordered Mr Lyampert to pay $221,000 to DCI, and some $2.042m to Mr Frenkel, the $2.042m being expressed to be "on account of Frenkel's 50% interest in any remaining assets due [LA Inc]" (and being calculated by subtracting the $221,000 payable to DCI from Mr Lyampert's liability of $4.305m, and dividing by 2). DCI was also awarded some $38,000 in costs against Mr Lyampert and LA Inc jointly. Both sides appealed on numerous grounds but in July 2019 the Court of Appeal of California affirmed the judgment. There is no evidence before me that any of the judgment sums have been paid.

27. Second, in May 2016 Mr Frenkel brought an action (case no. BC620673) against Mr Lyampert for concealing assets that could be used to satisfy the judgment debt (**"the Fraudulent Conveyance action"**). This action has not yet come to trial. In November 2017 Judge Alarcon granted Mr Frenkel's motion for a preliminary injunction prohibiting Mr Lyampert from disposing of any of his property, including his interest in LA (UK) and its dividends. More recently Judge Alarcon has handed down rulings on two further motions in this action, issued as tentative rulings on 23 January 2020 and confirmed on 25 February 2020. In the first, he granted Mr Frenkel's motion to amend his pleadings by filing a Third Amended Complaint. The amendment introduces a claim in conversion in relation to the interest in LA (UK), and a claim for declaratory relief, the pleaded case now being that LA Inc is a 51% owner of LA (UK), and that Mr Frenkel, as 50% owner of LA Inc, is entitled to half of any distributions LA (UK) has made or continues to make. In the second ruling Judge Alarcon denied LA (UK)'s motion seeking a modification of the preliminary injunction to permit it to buy back Mr Lyampert's share at a price of £1.9m. The grounds for refusal were that it had not been established that £1.9m was a fair price, DCI (which is not a party to that action but was found to have standing to oppose the motion) having adduced evidence that a reasonable fair value was between £7.4m and £13.3m. The trial of the Fraudulent Conveyance action was formerly listed for 15 April 2020 but has been postponed due to the impact of the Covid-19 virus on the courts of Los Angeles.

28. Third, in December 2019 DCI issued a petition (case no. 19STCP05416) requesting court supervision of the winding up and dissolution of LA Inc (**"the Judicial Supervision petition"**). The petition in particular alleged that Mr Lyampert held his interest in LA (UK) on behalf of LA Inc, and sought an order for it to be transferred to LA Inc and liquidated for the benefit of creditors and shareholders. Mr Frenkel has cross-petitioned seeking similar relief. DCI filed a motion for a preliminary injunction restraining Mr Lyampert from disposing of his share in LA (UK). In support of its motion DCI alleged that LA Inc's claimed beneficial interest in the shareholding of LA (UK) was the only currently known asset of LA Inc. That motion was granted by Judge Rizk in a ruling dated 24 February 2020. Then on 16 March 2020 Judge Beckloff granted a motion by Mr Frenkel for the appointment of a provisional director of LA Inc, and appointed Mr Vahan Yepremayn as independent

provisional director. Mr Yepremayn is a US lawyer, and his appointment is expressed to last until all litigation relating to the assets of LA Inc is resolved (or until such time as Mr Frenkel and Mr Lyampert agree that such an appointment is no longer necessary, or until further order of the court). Given that there appear to be no other known assets of LA Inc, it seems that the appointment was intended to last until litigation over the beneficial ownership of the shareholding in LA (UK) is resolved.

*The present action*

29. The present action was commenced by Part 8 claim dated 14 February 2020, supported by a witness statement of Mr Bell. The impetus for the claim, as explained by Mr Bell, is the recent developments in the US litigation. Specifically:

(1) LA (UK) has a key employee, Mr Dave Higgs. He is responsible for a large part of LA (UK)'s revenue. He has told Mr Bell that he requires an equity stake in the company, and has indicated that without it he will leave and set up a competing company.

(2) To persuade Mr Higgs to stay Mr Bell has increased his compensation package to a level that he regards as disproportionate for an employee and unsustainable in the medium term. But Mr Higgs has made it clear that he sees that as a short-term solution; what he wants is a substantial equity stake. But he is not willing to take equity so long as Mr Lyampert remains a shareholder, because he regards his and Mr Frenkel's involvement with the company to be toxic and to threaten its viability, a view which Mr Bell regards as entirely understandable.

(3) Mr Bell therefore sought to buy back Mr Lyampert's share, and in September 2018 reached agreement with him for LA (UK) to acquire his share for £1.9m, the intention being that that would enable equity to be made available to Mr Higgs (and other key employees). But because of the injunction that Mr Frenkel had obtained in the Fraudulent Conveyance action the agreement was conditional on the approval of the US court to the sale. That was why LA (UK) filed a motion for modification of the injunction to permit the sale to go ahead. That motion was however denied by Judge Alarcon in his tentative ruling of 23 January 2020 (paragraph 27 above).

(4) The other development in the US proceedings, which Mr Bell describes as even more concerning, and as necessitating the declarations which are sought in the present action, is the motion by Mr Frenkel to amend his pleadings in the Fraudulent Conveyance action by way of Third Amended Complaint, which was granted by Judge Alarcon in a tentative ruling also dated 23 January 2020 (paragraph 27 above). That pleading asserts that Mr Lyampert holds his share in LA (UK) for LA Inc.

(5) Mr Bell points to various statements in the US proceedings by attorneys for Mr Frenkel and DCI to the effect that in the 2017 Judgment Ms Tipples decided that LA Inc was the true owner of Mr Lyampert's share in LA (UK), or that LA Inc owned 51% of LA (UK), and that this had been LA (UK)'s own position in the 2015 proceedings. That, he says, is not what Ms Tipples decided, and ignores the fact that his evidence was to the effect that whereas

the original agreement in 2004 had been to that effect, that changed in 2010 when Mr Frenkel twice expressly disavowed any interest in LA (UK), and he and Mr Lyampert thereafter operated LA (UK) on the basis that it was owned equally between themselves.

(6) The purpose of bringing the present claim is therefore to obtain declarations from the English court as to the true position, rather than run the risk of the US courts deciding the Fraudulent Conveyance action on a mistaken understanding of what the 2015 proceedings decided. The declarations sought are to the effect that Mr Bell and Mr Lyampert are the legal and beneficial owners of the shares in LA (UK) and entitled to receive the distributable profits by way of dividends in the proportion 50:50, and that LA Inc is not an owner of any of the share capital, or entitled to be registered or directly entitled to receive dividends.

30. The case as presented by Mr Bell in his witness statement is that there should be no substantial dispute of fact, the facts having already been found by Ms Tipples in the 2017 Judgment, and that the matters which require consideration in order to grant the declaratory relief principally turn on matters of law by application to decided facts which the relevant parties cannot now argue with. It was for that reason that the proceedings were commenced by Part 8 claim.

*Serious issue to be tried on the merits?*

31. As already referred to (paragraph 7 above), it is well established that in order to obtain permission to serve a defendant out of the jurisdiction, the claimant has to satisfy the court that there is a serious issue to be tried on the merits. The test is the same as for summary judgment, namely whether there is a real prospect of success, but the onus is on the claimant, and remains on the claimant where the defendant applies under CPR r 11 to set aside permission obtained without notice.

32. Mr Strelitz pointed to the unenviable position in which Mr Bell found himself. He, and LA (UK), had got caught up in a dispute between Mr Frenkel and Mr Lyampert which had now been going on for 10 years. Mr Frenkel has over that period made repeated attempts to claim an interest in LA (UK) either directly or through LA Inc. The facts were exhaustively considered in a 6-day trial before Ms Tipples at which all relevant documents were disclosed and all the witnesses who could be thought to give material evidence did so, and Mr Bell thought that after the 2017 Judgment (in which his evidence was comprehensively preferred to that of the other witnesses), matters would be settled once and for all and it would be possible to move on. Instead he finds himself once again facing the uncertainty of further litigation by, or at the instance of, Mr Frenkel which threatens to have a serious effect on the future of LA (UK).

33. It is in those circumstances that this Part 8 claim has been brought. It is apparent from Mr Bell's witness statement in support of the claim that the premise on which the action is founded is that the relevant facts were found by Ms Tipples in the 2017 Judgment, that these are binding on the parties, and that they lead to the declarations sought. In effect the case is that Ms Tipples, having heard from all possible relevant witnesses, found that although it was initially agreed that LA (UK) was owned 49% by Mr Bell and 51% by LA Inc, Mr Frenkel disavowed any interest in LA (UK) in

2010, that this was relied on by Mr Bell, and that it follows as a matter of law that LA Inc has lost any rights that it had with the result that LA (UK) is now held 50/50 by Mr Bell and Mr Lyampert.

*Is the 2017 Judgment binding on LA Inc?*

34. As Mr Buck pointed out, there are a number of difficulties with that simple way of putting the case. The first is that LA Inc was not a party to the 2015 proceedings. He submitted that it was therefore not bound by any of the findings of fact in the 2017 Judgment. Indeed he said that Ms Tipples' factual findings would not even be admissible against LA Inc, relying on the well-known rule in *Hollington v Hewthorn*: see *Hollington v F Hewthorn & Co Ltd* [1943] KB 587. This remains good law: see the thorough examination of the point by Leggatt J in *Rogers v Hoyle* [2013] EWHC 1409 (QB) at [79]-[90], endorsed by Christopher Clarke LJ in the Court of Appeal [2014] EWCA Civ 257 at [32]-[40].

35. Mr Strelitz submitted that LA Inc was arguably bound by the 2017 Judgment because there was privity of interest between LA Inc and Mr Frenkel, relying on *Phipson on Evidence* (19th edn, 2018) at §43-29. The point was not really developed, but had it been necessary to resolve it, I would have had considerable doubts about the submission. Even in the case of a one-man company, doubts have been expressed as to whether such a company is the privy of its owner: see *Virgin Atlantic Airways Ltd v Zodiac Seats (UK) Ltd* [2013] UKSC 46 (***"Virgin Atlantic"***) at [25] per Lord Sumption (not cited to me but the most authoritative recent statement of the law in this area). But LA Inc was not a one-man company and, as Mr Buck said, one cannot simply equate it with Mr Frenkel. For reasons given below, however, I do not need to reach any conclusions on the point and do not propose to go into this question any further.

*Abuse of process?*

36. Mr Strelitz also submitted that if the 2017 Judgment did not strictly give rise to a *res judicata* binding on LA Inc as a privy, nevertheless it would arguably be an abuse of process for LA Inc to relitigate the same issues as were decided by that judgment, relying on the statement in *Phipson* at §43-57 that "persons closely associated with a party in previous litigation have on occasion been identified as persons who it would be abusive to allow to raise a subsequent claim." That seems potentially more promising: the question of whether it is an abuse to relitigate issues that have already been decided is one that requires a "broad merits-based judgment" (see *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31C per Lord Bingham), and in the present case, although LA Inc was not itself a party to the 2015 proceedings, both Mr Frenkel and Mr Lyampert, its owners, were parties, and are bound by the 2017 Judgment. Although no doubt legally a separate entity, LA Inc was in economic terms a vehicle for Mr Frenkel and Mr Lyampert to carry on business, and they were the individuals who would have been interested in advancing any claim that it had. In circumstances where all the natural persons who could claim to be interested in LA (UK) (namely Mr Frenkel and Mr Lyampert, either directly or through LA Inc, and Mr Bell) were parties to the action, and all the natural persons who might be able to give evidence did so, it does not seem impossible that the court would find it an abuse of process for LA Inc now to relitigate matters. It is not as if it is suggested that LA Inc has any fresh evidence that it would like to deploy. But again for reasons given below I do

not need to reach any conclusion on this point, and do not propose to consider it further.

37. I should however make it clear that I do not think that an argument that it would be an abuse of process for LA Inc to relitigate matters depends on showing that LA Inc is a creature of Mr Frenkel's. Mr Russell Ford, the solicitor for the Claimants, did say, in his 6th witness statement in opposition to the applications, that Mr Yepremayn's and LA Inc's participation in these proceedings "is something akin to another mouthpiece for Mr Frenkel", a statement which understandably led Mr Buck to protest that Mr Yepremayn was an independent professional and that there was no basis for impugning his integrity. That I accept. On the other hand, as Mr Strelitz said, it appears that LA Inc has long ago ceased trading (I was told it had not done anything since 2012 or 2013) and that it continues to exist solely for the purpose of litigating the dispute between Mr Frenkel (and Mr Gorban, through DCI) and Mr Lyampert. It was Mr Frenkel who procured the appointment of Mr Yepremayn as a third director, and who, I was told, has loaned monies to LA Inc to fund it, and LA Inc's position in the proceedings appears to be entirely aligned with that of Mr Frenkel. That conclusion does not involve any finding of impropriety on the part of Mr Yepremayn: LA Inc has at least one creditor in the shape of DCI which is owed a significant sum for costs (amounting, with post-judgment interest, to about $50,000) and Mr Yepremayn's duty is no doubt to assert on behalf of LA Inc and for the benefit of its creditors any claim that he considers sufficiently meritorious. But it remains the case that what LA Inc is seeking to do is put forward the same contentions as to the underlying facts as Mr Frenkel, and if he is estopped by the 2017 Judgment from asserting them, one can see the argument that it would be an abuse of process for LA Inc to assert the same claims.

*What was in issue in the 2015 proceedings?*

38. But as I have already said, I do not propose to reach any views on that issue. That is because Mr Buck's second point seems to me to be indisputably right. This is that the effect of the events in 2010 and after on the ownership of LA (UK) was not one of the issues in the 2015 proceedings, and hence what Ms Tipples said in the 2017 Judgment about it is not binding on anybody. I agree, for the reasons which follow.

39. The starting point for ascertaining what was in issue in the 2015 proceedings is the pleadings. Mr Frenkel's Particulars of Claim pleaded an oral agreement in 2004 made between Mr Bell and Mr Lyampert (acting for himself and Mr Frenkel) that LA (UK)'s share capital would be owned 49% by Mr Bell, and 25.5% each by Mr Lyampert and Mr Frenkel, and sought specific performance of that agreement. Mr Bell's Defence pleaded that the agreement was that LA (UK) was to be held 49% by Mr Bell and 51% by LA Inc. There was no reference to LA Inc (or indeed Mr Frenkel) having lost its right to claim the beneficial ownership as a result of the events of 2010 and thereafter, and indeed very little reference to the events of 2010 at all. All that was said was that Mr Frenkel had telephoned him to apologise for the demise of LA Inc by reason of a falling out between him and Mr Lyampert, and (in response to an allegation that he had stopped paying dividends to Mr Frenkel) that Mr Lyampert had told him that LA Inc's share of profits should now all be paid to him.

40. On these pleadings there was simply no issue pleaded or joined as to whether

anything had happened in 2010 and thereafter to affect the beneficial ownership of LA (UK). It was not suggested that the pleadings were ever amended to introduce such an issue. No counterclaim asserting that LA (UK) was now owned beneficially by Mr Bell and Mr Lyampert was ever, as far as I was told, put forward.

41. I have seen four witness statements made by Mr Bell in the 2015 proceedings dated between January and May 2017. None of them directly addresses the question whether LA Inc had lost its right to claim the beneficial ownership. It is true that in his 2nd witness statement dated 9 March 2017 (which appears to have been his main witness statement for trial) Mr Bell does refer to Mr Frenkel having said to him on the telephone in February 2010 that "It's your business and I want nothing to do with it", and as having repeated the same comments to him when he was in the US in March 2010 and visited Mr Frenkel's home. But it is not there asserted that Mr Bell understood by this that the beneficial ownership of LA (UK) had changed. Mr Bell also gave quite a bit of evidence about the payment of dividends to Mr Lyampert after 2010, but the thrust of the evidence is that he understood that Mr Frenkel had relinquished his interest in LA Inc and that Mr Lyampert had assumed total control of it, and hence that it was a matter for Mr Lyampert how LA Inc's share of profits was dealt with. In any event, it was part of Mr Bell's case that the distribution of profits was not the same as the beneficial ownership of the company, as indeed his evidence in relation to the agreement reached in 2004 (under which the ownership was split 49/51 but the profits split 50/50) demonstrated. Nowhere in his written evidence in the 2015 proceedings, as far as I can see, does he assert that the effect of the events of 2010 and thereafter was that he and Mr Lyampert became entitled to 50% ownership of the company each.

42. Consistently with this, Ms Tipples in the 2017 Judgment at [16] recorded that the parties were agreed that the issues to be resolved were (a) whether the agreement in 2004 to establish LA (UK) was an agreement between (i) Mr Bell, Mr Lyampert and Mr Frenkel; (ii) Mr Bell and Mr Lyampert only; or (iii) Mr Bell and LA Inc; and (b) whether the 51% shareholding was to be owned by (i) Mr Frenkel and Mr Lyampert in equal shares; (ii) Mr Lyampert alone; or (iii) LA Inc. Those were the questions which she duly answered in her conclusions at [121(d)], namely that the agreement was made between Mr Lyampert on behalf of LA Inc and Mr Bell, and was to the effect that LA Inc would own 51% of LA (UK)'s share capital: she had indeed summarised her conclusions to the same effect at the outset of the Judgment at [2].

43. Mr Strelitz relies on what she said at [122]-[124]. Since this is at the heart of his argument, it is simplest to quote it in full, as follows:

> "122. At the end of his closing submissions Mr Barden, as Counsel for Mr Frenkel, maintained that if I determined that the agreement to establish the UK Company [ie LA (UK)] was made between Mr Bell and Inc [ie LA Inc], then Mr Frenkel was entitled to declaratory relief to reflect this determination. In this context Mr Barden directed my attention to CPR Part 16.2(5) which provides that: "The court may grant any remedy to which the claimant is entitled even if that remedy is not specified in the claim form". The problem with that submission is that it has been no part of Mr Frenkel's pleaded case or indeed any of his evidence, that the agreement was made between Inc and Mr Bell. Mr Frenkel has not even pleaded this as an alternative case.

123. Mr Frenkel owned Inc 50/50 with Mr Lyampert and Inc was dissolved in February 2010, an event which gave rise to the Californian Claims. Following the breakdown of the relationship between Mr Lyampert and Mr Frenkel, Mr Frenkel disavowed any interest in the UK Company in what he said to Mr Bell in March 2010. Mr Bell accepted what he was told by Mr Frenkel, in person and over the telephone at that time, and I accept that if Mr Bell had known that Mr Frenkel claimed an interest in the UK Company, then Mr Bell would have wound the UK Company up, and would have set up a new company. It was over five and a half years later, in November 2015, that Mr Frenkel issued this claim and, in the meantime, the UK Company had become, and continues to be, very profitable. I accept what Miss Ansell QC has said in her closing submissions at para 60:

> "As a result of Mr Frenkel walking away from the [UK] Company and participation in its trade, Messrs Bell and Lyampert (believing themselves to be the undisputed sole two shareholders in the Company) used the [UK] Company to engage in further extensive trade, putting time and resources into making in a success. This trade would have been carried out through a completely different vehicle if Mr Frenkel had made his position clear. To allow Mr Frenkel now to re-enter the scene and take 50% of Mr Lyampert's shareholding, past and future dividends would thus cause the latter substantial injustice and lost capital and income."

124. In these circumstances, I do not see that Mr Frenkel, as the claimant, is entitled to any relief in respect of Inc, particularly in circumstances where I have found, as a matter of fact, that he disavowed any interest in the UK Company in March 2010, and Mr Bell continued the UK Company's business in reliance on what he was told by Mr Frenkel in this regard. If, as Mr Frenkel now says, he can claim relief in respect of Inc, then his claim in this regard should have been set out in his statement of case and properly pleaded. That, of course, is so that Mr Lyampert and the other defendants would have the opportunity to consider, and meet the case advanced on behalf of Inc. It is not a claim that can be introduced by Mr Frenkel as an afterthought under CPR Part 16.2(5). Further, for what it is worth, I do not consider that it is a claim that is likely to succeed, given the very substantial delay in the bringing of this claim, what Mr Frenkel told Mr Bell in March 2010, and the continued operation of the UK Company in the light of that representation."

44. I think it clear what Ms Tipples was doing in this carefully expressed passage. She was rejecting a submission made by counsel for Mr Frenkel that he could obtain (under the guise of seeking, pursuant to CPR r 16.2(5), a remedy not claimed on the Claim Form) a declaration that LA Inc was a beneficial owner of the shareholding in LA (UK). She did so because no claim to that effect had been pleaded [122]. Indeed she had noted at [17], when identifying the issues for trial, that the Claim Form and Particulars of Claim did not seek any relief on the part of LA Inc, or any form of

declaration that Mr Lyampert held the share in his name on trust for LA Inc. An assertion in the alternative that LA Inc had a beneficial interest in the shareholding was simply not part of Mr Frenkel's case. It was not therefore an issue for trial [17]; it was not addressed in Mr Frenkel's pleading; and it was not addressed in his evidence [122]. If he was going to advance such a claim on behalf of Inc, the claim should have been pleaded [124]. That was so that the defendants could consider and meet the case advanced [124]. Hence no relief should be granted. Ms Tipples' decision therefore was that Mr Frenkel was not entitled to a declaration in respect of a case that had not been pleaded, and had only been introduced as an afterthought [124]. If I may say so, the decision seems to me entirely orthodox and obviously right, given the scope of the trial.

45. Mr Strelitz naturally relies on what Ms Tipples says in [123] where (i) she repeats her finding that Mr Frenkel disavowed any interest in LA (UK); (ii) she accepts Mr Bell's evidence that if he had known that Mr Frenkel claimed an interest in LA (UK) he would have wound the company up and set up a new company; and (iii) she accepts the submissions of Ms Ansell (leading counsel for Mr Lyampert). In [124] she repeats that she had found that Mr Frenkel had disavowed any interest in LA (UK) in March 2010 and that Mr Bell continued LA (UK)'s business in reliance on what he was told by Mr Frenkel in this regard. But these are not findings that go to any of the pleaded issues. They are part of the explanation why it would be wrong to grant Mr Frenkel the declaration in favour of LA Inc that he sought. Since such a claim had not been pleaded, the defendants had not sought to meet it, and, as her final sentence of [124] makes clear, she thought that it was a claim that they would have had a good prospect of defeating, given the delay and Mr Bell's reliance on what Mr Frenkel had said. That is self-evidently not a decision that such a claim would fail, only that it did not follow from the fact that she had found that it was agreed in 2004 that LA Inc would have a 51% interest, that the same was still the case in 2017.

46. I have spent some time on this as the foundation of the current Part 8 claim is that Ms Tipples has made all the findings of fact necessary to resolve the issue. But I accept Mr Buck's submission that an analysis of the pleadings and Ms Tipples' judgment establishes beyond argument that she did not make any decision as to whether LA Inc had or had not lost its claim to a 51% beneficial interest in LA (UK), for the simple reason that it was not an issue before her. In those circumstances I think that there is no question of *res judicata*. There is no cause of action estoppel as this only arises where a cause of action has been held either to exist or not to exist: *Virgin Atlantic* at [17] per Lord Sumption. There is no issue estoppel as this only arises when an issue has been determined as part of the determination of a cause of action; I was not referred to any authority on this point but in fact had occasion to consider it recently in *Kea Investments Ltd v Watson* [2020] EWHC 472 (Ch): see at [43]-[47] and cases there cited.

47. Mr Strelitz said that the events of 2010 and thereafter were relevant to the pleaded claim, as Mr Frenkel sought specific performance of the agreement made in 2004, and that meant it was necessary to consider the whole history including the position from 2010 onwards. That may explain why the evidence was adduced, but I do not think it changes the position: in the event Mr Frenkel's claim for specific performance was dismissed not because of what happened from 2010 onwards but because he failed to establish the agreement he relied on at all. Consistently with this the Order made by

Ms Tipples simply dismissed Mr Frenkel's claim, and made no declarations.

48. Nor do I think that the broader question of abuse of process can assist the Claimants. I was not referred to any example where it had been held to be an abuse for a person who had been a party to one action to reopen in a second action a question of fact which although found as a fact in the first action had not been necessary to the decision, and on general principles I do not think that would normally be regarded as abusive; *a fortiori* where the person seeking to reopen the question was not even a party to the first action.

49. In those circumstances I accept Mr Buck's submission that the Claimants have not shown that they have a reasonable prospect of establishing that the simple premise on which the Part 8 claim was brought, namely that the declarations all flow as a matter of law from the 2017 Judgment which is binding on the parties, is well founded. The 2017 Judgment did not decide anything about whether LA Inc had lost its rights to a beneficial interest in LA (UK), and the findings of fact on which the Claimants rely were not necessary to Ms Tipples' decision on any of the matters that were in issue, and are not in my judgment binding on LA Inc. It can therefore insist, if it wishes to do so, on these facts being found again, although, at any rate if the claim is tried here, the evidence given in the 2015 proceedings would be admissible (as hearsay statements), and LA Inc would no doubt be running a costs risk if it were held to have acted unreasonably in requiring matters to be proved again.

*Do the claims have any other reasonable prospect of success?*

50. However, I do not think it follows that there is no serious issue to be tried. Although, as Mr Strelitz put it, the effect of the 2017 Judgment is "front and centre" of the claim, it is not the only material that the Claimants rely on. Mr Buck said that the evidence in support of the application for permission to serve out, and in answer to these applications, simply relied on the 2017 Judgment and put forward no alternative basis for the claims. But I accept Mr Strelitz's submission that the Claimants can also rely on the evidence filed in support of the Part 8 claim itself, as that is clearly material to an assessment of the merits (and indeed Mr Ford's evidence in support of the application expressly cross-referred to it). It took the form of a witness statement from Mr Bell dated 14 February 2020. Much of it is taken up with the previous history of the 2015 proceedings and the various US proceedings, but among other things Mr Bell says that Mr Frenkel expressly disavowed any ownership or interest in LA (UK) twice, both on the phone to him (February 2010) and in person at his house (March 2010) (para 8(m)); that had he for one moment thought that he would have been caught between two warring and very wealthy individuals he would have started afresh with a new company (para 8(n)); and that Mr Lyampert and he from then onwards treated each other as equal shareholders (para 8(p)). Later in his witness statement he asserts that any claim by Mr Frenkel on behalf of LA Inc, or by LA Inc itself, would be dismissed in circumstances where: (a) back in 2010 he would have dissolved LA (UK) and started afresh if Mr Frenkel had made any form of claim to its profits in competition with Mr Lyampert; (b) from 2010 he understood that Mr Frenkel and LA Inc were no part of the ownership of LA (UK) and that it was simply himself and Mr Lyampert as 50/50 owners; (c) payments of profits were from the point of Mr Frenkel's disavowal of all interest in LA (UK) made to him and Mr Lyampert alone; and (d) it would be grossly inequitable for him to have made LA (UK) as profitable as he had done since 2010 and for Mr Frenkel or LA Inc to now

say that they were entitled to share in the profits (para 56). He later says that he has categorically believed since 2010 that LA Inc has no standing to assert rights in or ownership of LA (UK) and its stock or profits (para 60).

51. Mr Buck submitted that there is no explanation in the Claimants' evidence of how what had on Mr Bell's own account been LA Inc's original 51% interest in LA (UK) had disappeared. That he said would require some form of transfer of its interest, as to 1% to Mr Bell and as to 50% to Mr Lyampert, but no attempt had been made to suggest how this might have happened.

52. Mr Strelitz however submitted that when Mr Frenkel disavowed "any ownership or interest" in LA (UK), that must have included not only a direct interest but also an indirect interest through LA Inc, and that Mr Bell's evidence was sufficient to found an argument that LA Inc's rights had been lost by estoppel or laches.

53. That seems to me to be arguable, with a reasonable prospect of success. It was evidently the view that Ms Tipples took, and I accept both that Mr Frenkel's disavowal might have been understood to refer not only to a direct claim but an indirect claim through LA Inc, and that if Mr Bell relied on that as he says, then it is arguable that LA Inc has lost its claim through estoppel and/or laches.

54. Mr Buck referred me to various material casting doubt on whether Mr Bell really did understand from 2010 onwards, as he now says, that LA Inc had no interest in LA (UK). This includes the fact that in a deposition for the US proceedings in February 2012 he had said that the owners of LA (UK) were himself, Mr Frenkel and Mr Lyampert, which Ms Tipples took to be an inaccurate way of referring to the owners being himself and LA Inc (2017 Judgment at [110]-[113]); the fact that in his Defence in the 2015 proceedings he explained the payment of 50% of profits to Mr Lyampert not by reference to a belief that he was now the other 50% owner, but as something that was done because Mr Lyampert on behalf of LA Inc had directed that LA Inc's 50% share of profits ("Inc's Sum") should now all be paid to him (and a comparable statement in his 2nd witness statement referring, in the context of payment of dividends to Mr Lyampert after 2010, to him being "now in sole control of [LA] Inc"); and the fact that Mr Bell's solicitors wrote a letter dated 31 August 2016 to Mr Frenkel's then solicitors in which they said that "Mr Bell believes that LA Micro Inc is the correct legal and beneficial owner of 51% of the shares and entitled to 50% of the dividends", a statement that is now said to have been made in error.

55. I accept that this material does cast real doubt on the assertion by Mr Bell that he has "categorically … believed since 2010" that LA Inc has no standing to assert rights in or ownership of LA (UK). But it is not the practice of the court on an application like this to reach conclusions on disputed matters of fact by conducting a mini-trial on the documents; in general oral evidence and cross-examination are required. In my judgment, despite the material marshalled by Mr Buck, there is sufficient in the Claimants' case for them to have got over the not very high hurdle of showing a serious issue to be tried on the merits.

56. What however this does show is that if the action is to proceed here, there is likely, contrary to the premise on which the Part 8 claim was issued, to be a dispute of fact, not so much necessarily over what was said by Mr Frenkel to Mr Bell in 2010, but as to what Mr Bell thought that meant. I think it inevitable (as indeed I thought when the

matter first came before me) that at least Mr Bell will have to give oral evidence and be cross-examined. I also think it shows that the proceedings are not in fact suitable for the Part 8 procedure and should continue, if they are to continue at all, by way of Part 7 claim in which the parties' factual cases can be pleaded out. That is a point to which I will return.

57. For the reasons I have given however I reject Mr Buck's challenge to the jurisdiction based on the merits.

*Is England the appropriate forum?*

58. There was no dispute as to the applicable principles. The leading case is *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (***"The Spiliada"***), and the leading judgment that given by Lord Goff. Where the claimant seeks permission to serve out of the jurisdiction, the onus is on the claimant to establish that England is clearly or distinctly the appropriate forum. The fundamental principle is that the court has to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice: *The Spiliada* at 480G per Lord Goff.

59. The factors which the court is entitled to take into account in considering whether one forum is more appropriate are legion, and the authorities "do not, perhaps cannot" give any clear guidance as to how these factors are to be weighed in any particular case: *The Spiliada* at 465C per Lord Templeman. Lord Goff at 480C accepted that the applicable principle was that stated by Lord Wilberforce in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50 at 72 where he had referred to "the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense". Lord Goff himself referred to the residence or place of business of the defendant and the ground invoked by the plaintiff as factors to be considered (at 482A) but cautioned that the importance to be attached to any particular ground may vary from case to case, giving as an example the fact that English law is the putative proper law of a contract as something that in one case might be of very great importance, or of little importance in the context of the whole case (at 481G).

60. In the present case the factors relied on by Mr Strelitz for the Claimants were that LA (UK) is an English company, and the dispute is most closely connected with England; that Mr Frenkel previously brought the 2015 proceedings in England; that there was unlikely to be a substantial dispute of fact; that declarations by the English court would be likely to be followed by the Californian court; and that the Claimants feared that if they submitted to the jurisdiction of the California courts, they would be embroiled in litigation in California, possibly for many years, noting that the Fiduciary Duty action took 9 years to resolve (from commencement in 2010 to dismissal of the appeal in 2019). In effect I think the case being advanced was that the English proceedings were little more than an attempt to obtain clarification of the effect in law of what had already been found by Ms Tipples in the 2017 Judgment, and should be regarded as a follow-on to those proceedings, and that it would make sense for the English court to give a definitive ruling on the point for the benefit of the Californian court rather than run the risk that the Californian court would proceed on a misapprehension of what the English court had decided.

61. Mr Sebastian, who took the lead on this aspect of the argument for the Applicants,

said that the starting point was that the Californian courts were already seised of the very same issue. But unlike the Californian proceedings, the claim in England could not resolve all the issues between the parties. The effect of allowing the English proceedings to continue would therefore be to fragment the dispute between two jurisdictions. That would lead to increased costs and inconvenience for the parties in having to litigate the dispute in two places rather than one.

*Is the claim most closely connected with England?*

62. Lord Goff said in *The Spiliada* at 482A that the ground invoked by the claimant in seeking permission to serve out is a relevant factor. Here the Claimants rely on the gateway in Practice Direction 6B para 3.1(11), namely that the subject matter of the claim relates wholly or principally to property within the jurisdiction, and Mr Strelitz submitted that the claim was a truly English claim. It relates to the ownership of an English company, which is not only incorporated in England but is, and always has been, based in Windsor where it has a warehouse and manufacturing facility, where all its employees are based, and where all its trading is conducted from. The company has no connection with the US, apart from the fact that some of its customers are there.

63. Mr Sebastian submitted that while all this was true it had no relevance to the appropriate forum for the resolution of the dispute as to the beneficial ownership, which will turn on conversations between the three relevant individuals in 2010, two of whom live in California, not on where its warehouse and employees are based.

64. In my judgment however this is to underplay the English nature of the dispute. It is necessary, as Lord Goff says, to set the issue in the context of the case as a whole. The relevant context seems to me as follows;

    (1) The background to the dispute is the agreement made in 2004 between Mr Bell and Mr Lyampert (on behalf of LA Inc) to set up a joint venture in the shape of LA (UK), to be owned by Mr Bell and LA Inc. That agreement was made in England and concerned the ownership, operation and distribution of the profits of an English company, to be run by Mr Bell, an English resident, in England. Although this was not the subject of any argument, I think the overwhelming likelihood is that it was in these circumstances an English contract governed by English law.

    (2) Mr Bell then acquired the single share in LA (UK). Consistently with the 2004 agreement, under which he had agreed that the company would be 51% owned by LA Inc, he would necessarily have held that as to 49% for himself and 51% for LA Inc, and that would have made him a trustee of the share. Again, although there was no argument on the point, I do not have any real doubt that that trust would have been an English trust governed by English law: not only was the trustee (Mr Bell) and the trust property (the share in LA (UK)) English, but it was a trust to give effect to the 2004 agreement, itself as I have said almost certainly an English contract.

    (3) In 2008 or 2009 a second share was issued to Mr Lyampert. It is not suggested that the beneficial ownership changed at that point. That means that Mr Bell and Mr Lyampert must thereafter have held their 2 shares between

them as to 49% for Mr Bell and 51% for LA Inc. (I do not propose to consider whether the technical position was that each held his share in those proportions, or whether Mr Bell held his share as to 98% for himself and 2% for LA Inc, and Mr Lyampert his 100% for LA Inc – I very much doubt anyone gave any thought to this at the time and it makes no difference to the present point.) The relevant point for present purposes is that on any view the issue of the second share to Mr Lyampert meant that thereafter Mr Bell and Mr Lyampert were both trustees, but that trust seems to me to have been a continuation of the trust that had subsisted since 2004. What had happened was that another share had been added to the trust property, in the name of a second trustee, but it was I think plainly the same trust.

(4) In the evidence filed for Mr Frenkel (a witness statement of Mr Daniel Wyatt, of his solicitors), it is said that Mr Frenkel does not admit that the applicable law of the claim to beneficial ownership of Mr Lyampert's share is English; that filed for LA Inc (a witness statement of Mr Thomas Bolam, of its solicitors) goes rather further and positively asserts that LA Inc considers that the applicable law would be US law. Again I heard no oral submissions on the point but I am inclined to think this must be wrong. The foundation of LA Inc's claim to beneficial ownership is the trust of the share(s) to give effect to the 2004 agreement, and for the reasons given above, that seems to me almost certainly to be English law.

65. Against that background, the issues raised by the Part 8 claim seem to me as follows: (i) what did Mr Frenkel say to Mr Bell in 2010? (ii) did Mr Bell understand him to represent that LA Inc thereafter had no interest in the company? (iii) did he act on that representation? (iv) if so, was the effect of that that LA Inc had lost its beneficial interest by estoppel; and (v) has LA Inc lost its beneficial interest by laches?

66. Viewed in that light, I accept Mr Strelitz's characterisation of the Claimants' claim as a thoroughly English claim. What is in issue is whether the beneficiary under an English trust of English property (incidentally with two trustees, one of whom is English) has lost its beneficial interest. The factual issues include the statements made by Mr Frenkel, but whether those will actually be in dispute depends on whether he and LA Inc are content to accept Ms Tipples' findings (that what he said was to the effect that "the company is yours"), or not: it is quite unclear from the evidence filed on this application whether they currently intend to dispute this. Apart from that, the factual issues turn on the understanding of Mr Bell, and what he did or did not do, in England. The legal issues will, it seems to me, be questions of English law pure and simple.

67. In *The Spiliada* at 481F-G Lord Goff said that the circumstances in which the court might grant leave to serve out were of great variety, ranging from cases where, one would have thought, leave would normally be granted to cases where the grant of leave was much more problematic, giving as an example of the former the case where an injunction is sought ordering the defendant to do or refrain from doing something within the jurisdiction. The claim in the present case, analysed as I have done above, seems to me to be almost as strong. The "natural forum" (in the sense of the forum with which the action has the most real and substantial connection: see *The Spiliada* per Lord Goff at 478A) for this dispute seems to me to be England. That I think is a powerful factor pointing to England as being the most appropriate forum.

*Existing proceedings in California*

68. The real question is whether this factor is outweighed by the point on which Mr Sebastian focused his submissions, which is that the Californian courts are already seised of the same issue. In the Fraudulent Conveyance action, the Third Amended Complaint pleads among other things that LA Inc owns 51% of LA (UK) (paragraph 27 above), and seeks relief in conversion and declarations against Mr Lyampert on that footing. In the Judicial Supervision petition, DCI pleads that Mr Lyampert holds the interest in LA (UK) on behalf of LA Inc and seeks an order requiring Mr Lyampert to transfer it to LA Inc. Both these proceedings therefore raise the issue whether LA Inc has a beneficial interest in LA (UK).

69. Mr Sebastian relied on two points in particular. First he referred to statements in the authorities that the interests of justice are best served by the submission of the whole dispute to a single tribunal, that the attitude of the English courts is, if possible, to avoid fragmentation of disputes, and that the fact that all possible related claims can be tried in one of the competing fora but not another carries great weight; see *Donohue v Armco Inc* [2001] UKHL 64 at [34] per Lord Bingham, *Konkola Copper Mines plc v Coromin* [2006] EWCA Civ 5 at [27] per Rix LJ, *BAT Industries plc v Windward Prospects Ltd* [2013] EWHC 4087 (Comm) at [70] per Field J.

70. Second, he said that fragmentation of the dispute would lead to increased costs. The parties would have to instruct English solicitors and counsel as well as Californian attorneys.

71. These points were attractively advanced by Mr Sebastian. But I think it is not quite as simple as he suggested. First, although it was suggested that the claim in the Fraudulent Conveyance action was simply the "mirror image" of the English proceedings, I do not think this is quite right, for two reasons.

72. The first is that the Fraudulent Conveyance action only concerns the share held by Mr Lyampert, not the share held by Mr Bell. Although it proceeds on the basis that LA Inc is the 51% owner of LA (UK), it only seeks relief against Mr Lyampert, and Mr Bell is not a party to the action. But on any view, Mr Bell was formerly a trustee of his share at least to some extent for LA Inc, and whether that be as to 51% or only 2%, it seems to me that he is entitled to know whether he personally remains a trustee of his share or is solely beneficially entitled to it. For reasons already given, I think that is a peculiarly English question. It is not even clear – I have no evidence on the point – how easy it would be for that question to be raised in California.

73. The second is that the Fraudulent Conveyance action proceeds on the basis that it has already been decided that LA Inc is the 51% owner of LA (UK), as does the Judicial Supervision petition. I have seen no evidence that any issue has been raised in those proceedings as to the effect of what happened in 2010 and thereafter: indeed I have seen nothing in the way of a defence from Mr Lyampert and do not even know if he has filed one, or if the Californian procedure requires him to. (There is evidence from Mr Dirk Julander, LA (UK)'s Californian attorney, that Mr Lyampert is expected to file a demurrer challenging the legal sufficiency of the claim, but that would not appear to be a defence on the merits). By contrast the very purpose of the English proceedings is to determine whether the events of 2010 and thereafter have caused LA Inc to lose its rights. So I do not think it can be said that the Fraudulent Conveyance

action as currently constituted raises precisely the same issues as the English proceedings. It may be that those issues could be raised in California, but I do not strictly have evidence to that effect either, or as to what would be involved in doing so.

74. That brings me to the question of fragmentation and increased costs. As I have said Mr Bell is entitled to know if he is still a trustee of his share or not. That seems to me, for reasons already given, a quintessentially English question, given that he is, or was, an English trustee under what in my view was an English trust of English property, namely a share in an English company. The case for permitting him to litigate that question here seems to me a very strong one. But if he is permitted to litigate that question here, there is no good reason not to allow the question of whether Mr Lyampert is still a trustee to be litigated at the same time, since it has not been suggested that it raises any separate issues.

75. Moreover it seems clear that if the English proceedings are permitted to continue, the Claimants do not intend to take any part in the Californian proceedings. So while it is true that permitting the English proceedings to continue will cause Mr Frenkel and LA Inc to incur costs in England that they would not otherwise incur, it is also true that refusing to allow the English proceedings to continue would require the Claimants conversely to incur costs in California they would not otherwise incur. Mr Sebastian pointed out that LA (UK) has already retained Mr Julander in connection with its motion to modify the preliminary injunction, and that he is continuing to give it advice; but it is one thing to have instructed an attorney for a discrete application and to keep one informed of what is happening, and another thing to take an active part in a trial.

76. In these circumstances I think the advantages and disadvantages of both sets of proceedings continuing are more finely balanced than they might at first seem. It is true that in general there are practical advantages in all aspects of a dispute being litigated in one place, and, as Mr Sebastian pointed out, that the English court cannot on any view resolve all aspects of the disputes in California, as the Fraudulent Conveyance action concerns other property of Mr Lyampert's as well as his share in LA (UK), and the Judicial Supervision petition invokes the powers of the Californian court over a Californian corporation in dissolution, and cannot be replicated in England. But the choice is between (i) allowing the English proceedings to continue so that a definitive answer can be given to one discrete question (has LA Inc lost its beneficial interest?) which will then enable the Californian court to proceed on a correct understanding of what has been decided in England rather than on what is said to be a misapprehension; or (ii) requiring the Claimants, unless they are willing to abandon their claims, to go to California to argue matters that on the view I take are matters of English law and largely concern acts taking place in England.

77. Mr Sebastian said that the Californian court did not need to have guidance from the English court: it is common for courts all over the world to grapple with issues of foreign law, with the benefit of expert evidence if necessary. I accept that that is so, but there are many advantages in questions of law being decided by a home court rather than a foreign court. Evidence and cross-examination is not required, which is likely to make resolution of the point both quicker and cheaper. And the court is familiar with its own law, in a way that it is not with foreign law, which means that the court's resolution of the issues is likely to be both easier and more soundly based.

Other things being equal, I have no doubt that it is preferable, both in terms of practical convenience and in terms of the ends of justice, for questions of English law to be argued in England as questions of law rather than for them to be argued in California as questions of fact on expert evidence (and possibly, although I have no evidence as to whether this would be the case, before a jury).

78. So although I accept that fragmentation is in principle undesirable, on the facts of the present case I do not consider that the existence of the Fraudulent Conveyance action is a particularly strong factor. It will cause inconvenience and expense for the Applicants to have to litigate here; but it will cause inconvenience and expense for the Claimants to have to litigate questions of English law in California.

*Other factors*

79. A number of other factors were referred to in argument but none of them seems to me to carry much weight.

80. Mr Sebastian said that Mr Lyampert has indicated that he does not intend to participate in the English proceedings, whereas he is the principal defendant, and likely to give evidence, in the Fraudulent Conveyance action, and submitted that it is preferable for the ends of justice that the dispute be resolved in California rather than in England where there will be an evidential lacuna. I do not think any significant weight should be attached to this point. As I understand it, the Claimants' case in the English proceedings is based on the actions of Mr Bell in reliance on representations of Mr Frenkel, and not on the actions of Mr Lyampert. If the Claimants can make out their case without him, then his absence will not affect the justice of the case. And he will no doubt still give evidence in California on the other issues that arise there.

81. Mr Sebastian also had a separate submission on the utility of the proposed declarations. I consider this below.

82. For his part Mr Strelitz relied on the fact that Mr Frenkel had previously brought the 2015 proceedings in England. I agree with Mr Sebastian that that does not really affect the question of where it is appropriate for the current issue to be resolved.

83. Mr Strelitz also relied on the so-called "*Cambridgeshire* factor": see *The Spiliada* at 485E-486B per Lord Goff. There the fact that the legal and expert teams had been involved in previous litigation in England was regarded as a relevant factor to which the judge at first instance had been entitled to give considerable weight. Mr Strelitz suggested that the fact that the parties had been previously engaged in the 2015 proceedings in England was likewise a significant factor. I agree that this is of some relevance, but the previous proceedings here were on nothing like the same scale as in *The Spiliada* (see at 467G), and I think little weight should be attached to this point, not least because LA Inc was not involved in the 2015 proceedings.

84. Mr Strelitz also referred me to what had been said by Clarke LJ in *Limit (No 3) Ltd v PDV Insurance Co* [2005] EWCA Civ 383 at [72] where he said that it was incumbent on a defendant in a situation like this so far as possible to identify the issues concerned and to state as clearly as possible how they arose or might arise in the proceedings. Mr Strelitz criticised the Applicants for not clearly identifying the issues that would arise in the Californian proceedings, and said that the Claimants

feared that they would seek to have a second bite at the cherry. I do not think this takes matters any further: as Mr Sebastian pointed out, LA Inc is for the reasons already given not bound by Ms Tipples' judgment and has not yet had a first bite. In any event the Applicants' position does not seem to me to be obscure: it is that the English court has already decided that the agreement in 2004 was that LA Inc should have a 51% beneficial interest and it was for those who suggested that the position was now otherwise to explain how that interest had been transferred or lost.

*Utility of declaration*

85. Before reaching a conclusion on the appropriate forum, there is one other question to consider. It is an established principle that in a case where a claimant seeks declaratory relief only, the court has to apply careful scrutiny to the claim and ask whether the grant of such a declaration would be useful: *Howden North America Inc v ACE European Group Ltd* [2012] EWCA Civ 1624 at [21] per Aikens LJ.

86. Mr Sebastian said that it was for the Claimants to explain how the declarations they sought would be useful. The rationale put forward was the desire of Mr Bell to offer equity in LA (UK) to Mr Higgs, but there were two answers to that. The first was that a purely financial or commercial interest in obtaining a particular declaration did not make the request for a declaration legitimate or the declaration an appropriate one for the court to grant. The second was that the declaration would not achieve its end. It was for the Claimants to show that the declaration would be recognised in the Californian courts. They had not attempted to do this in any proper way: they had exhibited a letter from Mr Julander, but had not sought permission for expert evidence. In any event, even if the Californian courts recognised the declaration, although this would presumably put an end to the claim in the Judicial Supervision petition for Mr Lyampert's share to be transferred to LA Inc and sold, it would not affect Mr Frenkel's claim in the Fraudulent Conveyance action where he had frozen Mr Lyampert's assets by obtaining a preliminary injunction as a judgment creditor of Mr Lyampert. That meant that in practice Mr Lyampert would not be free to sell the share at whatever price he chose – any sale would be subject to the Californian court which would be able to regulate the price at which it was sold.

87. I do not think that these arguments mean that there is no utility in the declarations sought. First, Mr Bell, as I have already referred to, is entitled to know whether he is still a trustee (to any extent) of the share in his own name, or whether he owns it outright. That is not affected by any question as to the effect of the judgment in California.

88. Second, I accept Mr Strelitz's submission that LA (UK) has a legitimate interest in knowing not only who holds the legal interest in its shares (which is not in fact in dispute) but also in knowing who has a beneficial interest in its shares. This is not just idle curiosity: the directors of LA (UK) have taken the view that it is essential for the continued health, or even survival, of the company to be in a position to offer equity to Mr Higgs and other employees and until they know whether Mr Lyampert is free to dispose of his share, they cannot take that matter forward.

89. Third, I accept that there is no formal evidence before the court as to whether the Californian court will give effect to declarations made by the English court, which is a matter of the private international law of California. But even without such evidence

I would expect the Californian court to give effect to an English judgment as to the ownership of English property and the operation of English trusts, and it is noticeable that Mr Frenkel has himself relied in California on the effect of Ms Tipples' judgment (albeit, according to the Claimants, misrepresenting what she actually decided). It seems to me that there is some force in Mr Strelitz's submission that if the Californian court is going to be asked to proceed on the basis that the relevant question has already been decided in England, it will be helpful to that court to know what has actually been decided, and what view the English court now takes.

90. Fourth, although I accept that success in its claim will not lead to LA (UK) being able to buy Mr Lyampert's share without reference to the Californian court, that does not mean that it would be of no benefit to it. First, if the effect of the English proceedings is to dispose of the claim in the Judicial Supervision petition to have the share transferred and sold, that is likely to be a benefit to LA (UK) as it will no longer have to concern itself with DCI, only with Mr Frenkel. Second, Mr Frenkel's interest in Mr Lyampert's assets will be limited to his position as judgment creditor. That means that as long as the share is sold at a price high enough to discharge the judgment debt owed to Mr Frenkel, the Californian court should have no reason not to lift the injunction.

91. For these reasons I am satisfied that there is real utility for the Claimants in obtaining the declarations that they seek.

*Conclusion on appropriate forum*

92. I can now state my conclusions on whether the Claimants have shown that England is clearly and distinctly the appropriate forum. In my judgment they have. For the reasons given above, England seems to me the natural forum for the resolution of the beneficial ownership of the shares (in the sense of the forum with which that issue has its closest and most real connection), and I do not think that is outweighed by the impact of the Californian proceedings. So far as the declarations in respect of Mr Bell's share are concerned, it seems to me that there is nothing of any significance to set against the conclusion that England is the most appropriate forum for those matters to be decided; but even in relation to the declarations in respect of Mr Lyampert's share, leaving the parties to litigate in California has a mix of advantages and disadvantages and there is not in my judgment sufficient to displace England as the forum in which the dispute can most suitably be tried for the interests of all the parties and for the ends of justice.

*Full and frank disclosure*

93. A number of points were taken in the evidence as to the lack of full and frank disclosure by the Claimants. They were not the subject of any oral argument, and I can deal with them briefly. Although the principle of full and frank disclosure undoubtedly applies to *ex parte* applications to serve out of the jurisdiction, the practice is not to penalise oversights as rigorously as in other contexts such as *ex parte* applications for freezing orders or other injunctions: see the summary by Andrew Smith J in *Dar Al Arkan Real Estate Development Co v Al Refai* [2012] EWHC 3539 (Comm) at [149].

94. The matters referred to in the evidence of Mr Wyatt for Mr Frenkel were as follows:

(i) the impression given that the Claimants have no right to participate in the Californian proceedings; (ii) the failure to refer to the Judicial Supervision petition; (iii) a failure to explain the likely complexity of any trial; (iv) the failure to set out the Claimants' positive case as to how the beneficial ownership has transferred to Mr Lyampert; and (v) the volte-face from the position as stated in the Claimants' solicitors' letter of 31 August 2016 (paragraph 54 above). The matters referred to in the evidence of Mr Bolam for LA Inc were as follows: (vi) the failure to explain properly the effect of the Tipples judgment; (vii) the failure to explain that the applicable law of their claim might be contentious; (viii) the failure to explain that the Californian proceedings were ongoing and anticipated to go to trial; and (ix) the fact that the Claimants made no attempt to deal with the merits ground.

95. Some of these do not seem to me matters which the Claimants can be criticised for at all. (iii), (iv), (vi) and (ix) all go to the question whether the Claimants were right in thinking that the claim was a straightforward one that followed from the findings in the 2017 Judgment. With the benefit of hindsight and full argument, I agree that the Claimants took an over-optimistic view of what their claim involved, but I do not think this is properly to be characterised as a failure to make full and frank disclosure; I think the Claimants simply did not anticipate the arguments that would be put forward by the Applicants. Much the same goes for (v), which is a specific point that does cast doubt on the merits of the Claimants' claim, but given the way in which they approached the claim (as one that really followed from the 2017 Judgment), I do not see that the Claimants were at fault in not referring to it. As to (vii) I do not think the Claimants had any reason to think that the proper law of their claim would be contentious, nor indeed, for the reasons I have given, do I think there is really much doubt about it.

96. That leaves (i), (ii) and (viii), all of which concern aspects of the Californian proceedings. The Claimants did of course disclose the existence of the Californian proceedings, as the very impetus of the Part 8 claim was the risk that the Californian court might proceed to decide the Fraudulent Conveyance action on the basis that Mr Lyampert holds his share for LA Inc. Mr Ford referred to that matter coming to trial in April 2020 (which it was then expected to do). In those circumstances I do not think (viii) is made out. There is more validity in (ii), namely the criticism that the Claimants did not really explain the Judicial Supervision petition, but given that it was explained that there were proceedings in California, I do not think it made a significant difference that there were two sets of proceedings in which the point arose rather than one.

97. Finally, while I agree that it was less than ideal for the Claimants to say, as Mr Ford on their behalf did, that as non-parties they had "no authority to make submissions to, or give evidence before, the US court" without making it clear that it was their choice not to intervene, Mr Ford did cross-refer to Mr Bell's witness statement in support of the Part 8 claim, which said that he had been advised that if LA (UK) sought to intervene in the Fraudulent Conveyance action as an interested party, it would almost certainly be bound by any decision and subject to the US court jurisdiction. That was I think sufficient to show that it was the Claimants' choice not to seek to intervene.

98. In all the circumstances I do not consider that there has been a failure of the duty to make full and frank disclosure, or at any rate such a failure as to require the order granting permission to serve out to be set aside now that the matter has been fully

argued.

*Part 7 claim or Part 8 claim?*

99. I can deal with this question very briefly as well. The premise on which the Claimants brought this as a Part 8 claim was that the relief they sought flowed from the findings of fact made by Ms Tipples in the 2017 Judgment and that there would be no substantial dispute of fact. For the reasons already given, I do not accept this characterisation of the case, and I think it inevitable that there will have to be oral evidence from, and cross-examination of, at least Mr Bell.

100. Moreover it is apparent that Mr Frenkel and LA Inc have not found it easy to understand quite how the Claimants put their case. The present applications may have clarified matters somewhat but I think there would still be advantages in the claim proceeding by way of Part 7 claim in which the Claimants' case can be pleaded in the usual way. I will therefore direct that the proceedings continue by way of Part 7 claim.

101. There will no doubt need to be suitable directions. It will be helpful to know what the current state of play is with the Fraudulent Conveyance action and when it is now expected to come to trial. It was initially postponed to May 18 due to the Covid-19 virus, but the letter from Mr Julander indicated that agreement had in principle been reached to move that for another 90 days or so. In addition, in the light of Mr Lyampert's expected demurrer and other matters, Mr Julander said (at the end of March) that he would not expect a trial for another 6 months or more.

102. I will give counsel an opportunity to address me on appropriate directions, and any other consequential matters, when this judgment is handed down.

*Conclusion*

103. I dismiss the applications disputing the court's jurisdiction or inviting the court to decline to exercise it. I will however direct that the proceedings continue as a Part 7 claim.