Neutral Citation Number: [2020] EWHC 772 (Comm)

Claim No: CL-2018-000064

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

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

Date: 31/03/2020

Before:

THE HONOURABLE MR JUSTICE BRYAN

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Between:

(1) TERRE NEUVE SARL
(a company incorporated in France)
(2) LARGELY INVESTMENTS SA
(a company incorporated in Panama)
(3) LAURENT ZAHUT

Claimants

and

(1) YEWDALE LIMITED
(2) REDS LLC
(a company incorporated in the State of New York, USA)
(3) GPF SA (in liquidation)
(a company incorporated in Switzerland)
(4) MEYER EL MALEH
(5) JUDAH LEON MORALI
(as executor of the estate of the late Ernest Sasson)
(6) SARA SASSON
(7) CAROLE SASON-EL MALEH
(8) LAURE VASARINO
(9) AMANDINE JOSEK
(10) ROBERT NAGGAR

(11) JUDAH EL MALEH
(12) NESSIM EL MALEH
(13) HSBC PRIVATE BANK (SUISSE) SA
(a company incorporated in Switzerland)
(14) DRISS MRIOUAH

Alain Choo-Choy QC and **Samuel Rabinowitz** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for the **Claimants**

Fred Hobson (instructed by **Forsters LLP**) for the **Third Defendant**

Raj Megha (instructed by **Campbell & Co Solicitors**) for the **Fourth, Sixth, Seventh and Tenth Defendants**

Adam Cloherty (instructed by **Lipman Karas LLP**) for the **Eleventh Defendant**

Hearing dates: 19 and 20 February 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.

MR. JUSTICE BRYAN:

A. Introduction.

A.1 The Applications

1. These proceedings are concerned with the alleged misappropriation of a sum of €10.6 million paid by the First Claimant ("Terre Neuve") to the First Defendant ("Yewdale") between July 2009 and September 2012, and thereafter allegedly misapplied with the alleged participation of other Defendants. The sums were paid pursuant to a tax optimisation scheme ultimately for the benefit of the Third Claimant ("Mr. Zahut"), who beneficially owned Terre Neuve and the Second Claimant ("Largely"). The scheme was allegedly created by a Mr. Sasson (now deceased), who gave tax advice through his company, the Third Defendant ("GPF") and controlled Yewdale (an English company) and the Second Defendant ("REDS") (a New York company).

2. The Claimants allege that these monies were laundered through accounts at the Thirteenth Defendant (HSBC Private Bank SA ("HSBCPB")), which the Claimants allege the Eleventh Defendant ("Judah El Maleh") knew or should have known about, as a manager of the relevant department. The Claimants also allege that (amongst others) the Fourth, Sixth, Seventh and Tenth Defendants are implicated in and/or benefitted from the misappropriation.

3. This is a consolidated hearing of three applications challenging the Court's jurisdiction ("the Applications") made by GPF (the Third Defendant), the Fourth, Sixth, Seventh and Tenth Defendants and Judah El Maleh (the Eleventh Defendant).

A.2 The Background Facts

4. The facts of the matter are complex, and have previously been addressed by Christopher Hancock QC (sitting as a Deputy Judge of the High Court) at [2]-[16] of his judgment in relation to a previous hearing of ex parte applications for service out (reported at [2019] EWHC 1119 (Comm)). I further summarise the background facts below.

(i) The Scheme

5. In 1996, following discussions with Mr. Sasson, Mr. Zahut and Terre Neuve entered into tax optimisation agreements, which were varied by agreements over the following years. Those of primary importance were alleged **oral** agreements entered into in 2003 and 2008 ("the 2003 Oral Agreement" and "the 2008 Oral Agreement" collectively "the GPF Agreements"). The arrangement (as from 2008) was said to be as follows:

    (1) REDS would render invoices in respect of work done by Mr. Zahut for Terre Neuve;

    (2) Terre Neuve would pay the invoiced sums to Yewdale;

    (3) Yewdale would remit that money to REDS;

    (4) REDS would in turn transfer those monies (less a 3% commission) to Largely, which would be for the ultimate benefit of Mr. Zahut;

    (5) Largely and its bank accounts were controlled by GPF pursuant to various arrangements.

6. As to the identity of certain of the Claimants and Defendants:

    (1) The Sixth Defendant (Mrs. Sasson) and the Seventh Defendant (Mrs. Sasson-El Maleh) are the wife and daughter of Mr. Sasson, and heirs to his estate. Mr. Sasson worked with the Fourth Defendant (Meyer El Maleh), the husband of Mrs. Sasson-El Maleh. The Tenth Defendant (Mr. Naggar) was a director of Yewdale and, I am informed, a close friend of Mrs. Sasson, her daughter, and her son-in-law. These are collectively known as "the Campbell Co-Defendants", after their common legal representation by Campbell & Co Solicitors. All the Campbell Co-Defendants are domiciled in Switzerland.

    (2) It was previously assumed that the Fifth Defendant ("Mr. Morali") was the executor of Mr. Sasson's estate. I understand from the Claimants' skeleton argument that Mr. Morali has now indicated in correspondence that he has not been appointed executor of Mr. Sasson's estate. I note that the Claimants do not allege that Mr. Morali was implicated in the misappropriation.

(3) The Eighth and Ninth Defendants ("Ms. Vasarino" and "Ms Josek") are former employees of GPF. Both have been convicted by French Courts of money laundering.

(4) Meyer El Maleh's brothers (Judah and Nessim), the Eleventh and Twelfth Defendants respectively, were employees of HSBCPB (the Thirteenth Defendant). They both worked in the MEDIS ("Mediterranean and Israel") Department of that Bank, which was headed by Judah El Maleh. Judah El Maleh is domiciled in Israel. Nessim El Maleh is domiciled in Switzerland.

(5) HSBCPB has been found by the Swiss Financial Market Supervisory Authority ("FINMA") to have breached Swiss anti-money laundering laws in connection with payments going through its accounts. Nessim and Meyer El Maleh have been convicted of money laundering in Switzerland (2013) and France (2018). Judah El Maleh was dismissed by HSBCPB in November 2012 because of, amongst other matters, a loss of trust in him based on failings in the MEDIS department in the context of the wrongdoing. It is in issue in this action as to whether he had, as alleged by the Claimants, knowledge of the wrongdoing.

(6) The Fourteenth Defendant (Mr Mriouah) is a businessman who had bank accounts including with HSBCPB, into which he received payments of at least €4.5million from Yewdale. He is believed to be resident in France and/or Morocco.

(ii) The Written Agreements

7. Four written agreements ("the Written Agreements") were entered into between GPF and Mr. Zahut or Largely.

(1) A 1996 Asset Management Agreement was entered into by GPF and Mr Zahut. Pursuant to that agreement, Mr Zahut assigned to GPF responsibility for the management of his bank account at the Discount Bank & Trust Company and granted to GPF all powers to represent him with that bank in accordance with the terms therein.

(2) A 2003 Management Contract between GPF and Largely.

(3) A 2012 Asset Management Agreement between GPF and Largely.

(4) A 2003 Fiduciary Agreement entered into by GPF and Mr. Zahut relating to GPF's trusteeship of the shares in Largely.

8. All these agreements contained clauses which, according to GPF, provide for the jurisdiction of the Geneva courts.

(iii) The Claims

9. The claims relate to the sum of €10,627,699 paid by Terre Neuve to Yewdale between 2009 and 2012. The Claimants allege that pursuant to the 2008 Oral Agreement, this sum should have been transferred from Yewdale on to REDS and Largely. However, it appears that of this sum only US$137,288.80 was in fact transferred from Yewdale to Largely. The Claimants' case is that this money was misappropriated with the involvement of, and/or to the benefit of, the various Defendants.

10. In this action the Claimants seek damages of over €7.2 million (after taking into account applicable credits and a sum of US$3.75 million paid by REDS to Mr. Zahut in 2013) and/or restitution and/or rescission and/or an account and/or other relief under Swiss law and/or French law. There are a wide range of claims including for breach of contract, non-contractual liability for money laundering, breach of fiduciary duty, claims under the Swiss law doctrine of agency without authority, and claims in unjust enrichment.

(iv) Procedural History

11. On 25 April 2019, Christopher Hancock QC handed down an order ("the April Order") in respect of several *ex-parte* applications made by the Claimants, which included giving permission to serve out on REDS, Mr. Morali, Judah El Maleh and Mr. Mriouah ("the Non-European Defendants"), pursuant to CPR r.6.37 and PD6B, paragraph 3.1(3) (the "Necessary or Proper Party" gateway). Judgment was handed down on 3 May 2019 [2019] EWHC 1119 (Comm) (the "May 2019 Judgment").

12. No permission for service out was required for the remaining Defendants, who were all resident/incorporated in Switzerland or France, and accordingly subject to the Lugano Convention or the Brussels I Regulation Recast (respectively), with the exception of

Yewdale, which is an English company. Yewdale did not, at that time, challenge jurisdiction.

13. Christopher Hancock QC found, amongst other matters, that:

    (1) Although there were Swiss law jurisdiction clauses in the Written Agreements, those agreements were not themselves the basis or subject-matter of the Claimants' claims. This can be found at [42] of the May 2019 Judgment, in the context of determining whether there was a real issue which it was reasonable for the Court to try as against Yewdale, which was advanced as an anchor defendant for the purposes of the necessary and proper party jurisdictional gateway for service on, amongst others, Judah El Maleh.

    (2) The Claimants' claims against Judah El Maleh and the other Non-European Defendants depended upon the same investigation as the claims against Yewdale, because the common thread was an investigation into what happened to the monies paid by Terre Neuve to Yewdale, how and to whom those monies were transferred, and whom they ultimately benefitted. Therefore, the evidence in all the claims would be similar and interlinked, and there was an obvious risk of irreconcilable judgments (at [46]).

    (3) There was a serious issue to be tried as against Judah El Maleh for the purposes of CPR r.6.37(1)(b), though the Claimants' case against him was "more difficult" than against the other defendants before him (at [57]). In particular, Christopher Hancock QC accepted that the "factual arguments" put forward by Judah El Maleh "clearly give rise to triable issues" (at [56(a)]): those arguments included that Judah El Maleh had no personal involvement with the relevant transactions, that criminal proceedings were not taken against him, and that any supervisory failure by him would not be causative of the Claimants' loss.

    (4) The claim against Yewdale was not brought for the sole object of establishing jurisdiction over the other Defendants, because Yewdale is at the centre of whatever happened to the misappropriated funds: it received from Terre Neuve all the money to which this claim relates (at [62]. Christopher Hancock QC therefore

distinguished *PJSC Commercial Bank Privatbank v Kolomoisky* [2018] EWHC 3308 (Ch), which was subsequently overturned by the Court of Appeal).

14. I note that an attachment order was made *ex parte* against Judah El Maleh by the Swiss First Instance Court: this was before Christopher Hancock QC in the hearing pursuant to which the April 2019 Order was made. This attachment order has since been vacated by the Swiss First Instance Court in a judgment dated 27 May 2019 following an *inter partes* hearing ("the Swiss First Instance Decision"). This judgment was upheld by the Geneva Cour de Justice (Chambre Civil) ("the Appeal Court Decision") by its judgment dated 22 November 2019.

15. On 7 June 2019, Christopher Hancock QC heard an application by Yewdale to challenge the English Court's jurisdiction. He found, in a judgment handed down on 15 July 2019, and reported at [2019] EWHC 1847 (Comm) (the "July 2019 Judgment"), that:-

    (1) Yewdale had submitted to the English Court's jurisdiction by filing a substantive defence. In addition, he found that it was not appropriate to grant Yewdale relief from sanctions (as would be required to make its jurisdiction challenge application out of time). He nevertheless went on to consider Yewdale's grounds for challenging jurisdiction.

    (2) The English Court had jurisdiction over Yewdale pursuant to Article 4 of the Brussels I Regulation Recast, as Yewdale had its registered office in the United Kingdom.

    (3) The suit brought against Yewdale was not an abuse of the Article 4 jurisdictional provisions. The law on abuse of Article 4 was set out in the headnote to *Lungowe and ors v Vedanta Resources Plc* [2019] UKSC 20 ("*Vedanta*"). The claim against Yewdale was a bona fides one, and not brought solely for the purpose of bringing other Defendants within the jurisdiction. Further, there was no collusive behaviour between the Claimants and Yewdale. The case was far removed from the circumstances of the High Court decision in *PJSC Commercial Bank Privatbank v Kolomoisky and ors* [2018] EWHC 3308 (Ch).

(4) Yewdale was properly regarded as an "anchor defendant". The proceedings against Yewdale did not constitute an abuse of the European jurisdictional provisions, and the fact that Yewdale was not party to any agreement with an English jurisdiction clause did not mean that the claim was without merit.

(5) The alleged issue of whether Switzerland was the most convenient forum for the trial of the dispute did not arise, and was irrelevant, as this was a case involving the Brussels I Regulation, and as such issues of *forum non conveniens* did not arise: *Owusu v Jackson* (Case C-281/02) [2005] QB 801 ("*Owusu*").

(6) Article 7 of the Brussels I Regulation gave the Claimants a *right* to sue in a jurisdiction other than that which would otherwise be mandated by Article 4. Article 25 of the Brussels I Regulation did not assist Yewdale, because there was no evidence of an exclusive jurisdiction agreement in favour of Switzerland to be implied from course of dealing.

16. Christopher Hancock QC refused Yewdale's application for permission to appeal, and on 6 November 2019, Males LJ refused Yewdale's further application for permission to appeal. In his Order, Males LJ found that the appeal had no prospect of success, stating that Christopher Hancock QC was *"clearly right to find that Yewdale is domiciled here for the purpose of Article 4… he was entitled to find that there was no abuse of the jurisdictional provisions"*.

17. I am informed that the Non-European Defendants other than Judah El Maleh (that is, REDS, Mr. Morali, and Mr. Mriouah) have not applied to challenge the English Court's jurisdiction and/or to set aside the relevant part of the April 2019 Order. I understand from the Claimants' skeleton argument (and it is not challenged by the Defendants) that:

(1) REDS has not yet been served.

(2) Mr. Morali has indicated in correspondence that he does not consider himself a proper party because he has not been appointed executor of Ernest Sasson's estate.

(3) Mr. Mriouah has submitted to the English Court's jurisdiction.

18. Further, I am informed that Swiss-domiciled Defendants (apart from GPF and the Campbell Co-Defendants) have submitted (or are deemed to have submitted) to the jurisdiction of the English Court. I am told in the seventh witness statement of Mr. Gerbi and the Campbell Co-Defendants' Skeleton Arguments that Nessim El Maleh and HSBCPB have submitted to the Court's jurisdiction, and that both have filed Acknowledgments of Service. I understand that Ms. Vasarino (as well as Ms. Josek, who is domiciled in France) have been served, but have not responded to the claim and not made any application to challenge jurisdiction within time, and so are deemed to have submitted.

19. It will be seen, therefore, that the action is already proceeding in this jurisdiction against Yewdale (which has been found to be a valid anchor defendant) as well as a number of the overseas defendants: both those domiciled in Switzerland, and elsewhere. It is clear that this action will proceed in this jurisdiction, and will address the issues advanced by the Claimants in relation to the alleged misappropriation of the money, regardless of the outcome of each or any of the three jurisdictional challenges before me for consideration.

B. The Third Defendant's Application

20. GPF challenges the jurisdiction of the English Court, relying on Article 23 of the Lugano Convention and the four Written Agreements that GPF entered into with Largely or Mr. Zahut. The Written Agreements contain jurisdiction agreements purportedly in favour of the Swiss court and which GPF alleges, and Largely and Mr Zahut deny, extend to the claims in these proceedings advanced by them against GPF.

21. GPF applies for :

    (1) A declaration that the court has no jurisdiction in respect of claims brought by Largely and Mr. Zahut and an order setting aside service of the claim form in respect of those claims; or

    (2) To the extent that Largely and Mr Zahut bring claims against GPF in reliance on the four Written Agreements containing Swiss jurisdiction agreements, an order (i) seeking a declaration that the court has no jurisdiction in respect of such claims

and (ii) requiring the Claimants to serve Amended Particulars of Claim that remove such claims.

B.1 Applicable Law

22. Since GPF is domiciled in Switzerland, jurisdiction is governed by the Lugano Convention. Article 23 of the Lugano Convention provides that:

> "[i]f the parties, one or more of whom is domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise".

23. The wording of Article 23 Lugano Convention is materially identical to Article 23 of the Brussels Regulation (EU Regulation 44/2001), which has since been replaced by the Brussels Regulation Recast. Decisions of the Court of Justice of the European Union ("the CJEU") applicable to that provision of the Brussels Regulation apply equally to Article 23 of the Lugano Convention.

24. Two issues arise in this case, and I will take each in turn.

    (1) The first issue is whether the present dispute (or any part of it) falls within the scope of one or more of the jurisdiction clauses as a matter of construction. This is to be determined as a matter of English law. Article 23 of the Lugano Convention prorogates jurisdiction in circumstances where the parties have "agreed" that the courts have jurisdiction: in *Powell Duffryn C-214/89,* the CJEU held that whether an agreement confers jurisdiction is to be regarded as an independent concept. The court will determine whether parties have so "agreed" as an exercise of construction governed by the contract's substantive law: *British Sugar Plc v Fratelli Babbini di Lionello Babbini* [2004] EWHC 2560 (TCC), [2005] 1 Lloyd's Rep. 332. In this case, the relevant agreements are governed by Swiss law, but neither GPF nor the Claimants have suggested that (or adduced Swiss law evidence to the effect that) the principles of contractual construction are different as between Swiss and English law; as such, the clauses are to be construed by reference to English legal principles.

(2) If the dispute is within the scope of the jurisdiction clauses, there is a further issue as to whether the jurisdiction agreements satisfy the requirements of Article 23 of the Lugano Convention. This requires the dispute to be in connection with the legal relationship with which the agreement containing the jurisdiction clause is concerned: see for example *Etihad Airways PJSC v Prof. Dr Lucas Flother* [2019] EWHC 3107 (Comm) *("Etihad")* per Jacobs J at [123] ff.

25. As to the standard of proof: these issues arise within the context of proceedings brought before the English court on the basis that there is no jurisdiction agreement for the courts of another Member State, and GPF, as defendant, contends that there is such an agreement. The CJEU has confirmed that the court should use its own procedural law to deal with such a jurisdictional challenge. It is well established, and was not in dispute, that the party *alleging* that there *is* an applicable jurisdiction agreement must have a "good arguable case" / "the better of the argument on the materials before the court at the time of the challenge" – Dicey, 15th Edition, 12-120, and *Etihad* at [55].

B.1.1 The First Issue

26. The fundamental question asked as a matter of English law is: how would the jurisdiction clause be understood objectively by a person having all the relevant background knowledge of the transaction (*Arnold v Britton* [2015] AC 1619)?

27. The English court's approach to construing jurisdiction clauses was authoritatively restated in *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40 *("Fiona Trust")*. This case was concerned with an arbitration clause, but the principles equally apply to jurisdiction clauses: *Briggs (Civil Jurisdiction and Judgments, 5th edition: 4.42)*.

(1) *Fiona Trust* concerned the scope and effect of arbitration clauses in eight charter parties on the Shelltime 4 Form: "(b) Any dispute arising under this charter shall be decided by the English courts to whose jurisdiction the parties hereby agree." Owners alleged that the charters were procured by bribery, and purported to rescind the charters on this ground. The issue was whether the rescission issue should be determined by arbitration (as argued by Charterers) or by a court (as argued by the Owners, on the ground that rescission concerned the validity of the contracts, rather than the interpretation of their terms): *Fiona Trust* at [1].

(2) Lord Hoffman held that the wording of jurisdiction clauses should be given a broad or generous interpretation, based on the presumption that rational businessmen are likely to have intended that all the questions which arise out of the relationship which they have entered into or purported to enter into, are to be submitted to the same forum (*Fiona Trust* at [7] and [13]). Lord Hope similarly stated that *"if the parties have confidence in their chosen jurisdiction for one purpose, why should they not have confidence in it for the other?"* (*Fiona Trust* at [28]).

(3) The "relationship" between the parties is the relationship which arises from the contract entered into by them containing the jurisdiction clause. This is clear from the context of *Fiona Trust*: the parties are not linked by any other "relationship". This is further supported by the Court's reference to the 1970 *Federal Republic of Germany case*, which explicitly refers to "the relationships created by their [the parties'] contract, and claims arising therefrom": *Fiona Trust* at [14], and [30]. Further, *Fiona Trust* was concerned with whether the arbitration clause covered disputes over the agreement's *validity,* or only its *interpretation*: the nature of the disputes is different, but they both clearly arise out of the same contract.

(4) Therefore, the Court's generous approach to the interpretation of arbitration clauses must be read in light of the fact that the relationship between the parties arose out of the same contract. If the parties have confidence in their chosen jurisdiction "for one purpose", they should have confidence in it for other purposes, where those purposes arise from the same contractual relationship.

28. Subsequent cases have supported this interpretation of *Fiona Trust.* My attention was specifically drawn to *Microsoft Mobile OY v Sony Europe* (*"Microsoft v Sony")* [2018] 1 All ER (Comm) 419 in which Marcus Smith J stated at [45] (after referring to [6]-[13] of *Fiona Trust*):

> "45. The importance of having a "one-stop-shop" for all disputes – and the likelihood that the parties to an agreement would intend this – is clear. But that is true only to the extent that disputes arise out of the parties' relationship. Thus, absent extremely clear wording, a court would presume that the parties would have intended the same tribunal to deal with contractual disputes arising out of the relationship, as well as any "parallel" claims in tort. But, what would not be covered, absent extremely clear wording, would (to take a somewhat extreme hypothetical case) be Party A's case against Party B

(Party A and Party B being in a contract with each other containing an arbitration clause) for Party B negligently, but coincidentally and unrelated to the contract, running Party A over in the street. That would not be a dispute arising out of the parties' contractual relationship"

29. The example given is, of course, an extreme one being not only a tortious claim (and so different in legal nature) but also one that was wholly unrelated to the underlying contract. *Microsoft v Sony* itself was concerned with service out in a claim for losses caused by allegedly anti-competitive conduct, and whether that claim was covered by an arbitration agreement. In the event, Marcus Smith J found that the tortious claims were sufficiently closely related to any contractual claims arising out of their agreement, in large part because of the high degree of overlap between tortious claims arising out of cartelist behaviour, and breach of a contractual provision relating to price changes.

30. In cases subsequent to *Fiona Trust*, the generous interpretation to be given to jurisdiction clauses has been extended to cover multi-contract disputes. A jurisdiction agreement contained in one contract may, on its proper construction, extend to a claim that is made under another contract. In particular reference was made to *Sapinda Invest v Altera* [2017] EWHC 871 (Comm), *Emmott v Michael Wilson* [2009] 1 Lloyd's Rep 233 and *Etihad Airways v Flother* [2019] EWHC 3107 (Comm). Reference was also made to *UBS v HSH Nordbank* [2009] 1 CLC 934 [82] and *Deutsche Bank v Sebastian* [2011] 2 All ER (Comm) 245 [39]. For shorthand I will refer to the applicable principle as the "Extended Fiona Trust Principle". This has been referred to as a principle that applies where both contracts are part of an "overall package" of agreements: *UBS v Nordbank* [2009] 1 CLC 934 at 956; *Etihad* at [69], [72]-[74] and [102]; *Am Trust Europe Ltd v Trust Risk Group* at [45], and *Sapinda* at [20].

31. The following six points can be made about the Extended Fiona Trust Principle:-

    (1) The principle is based on the construction of the relevant jurisdiction clause (which I will refer to as being contained in "Contract A"): it is not based on an implication or implied incorporation of the jurisdiction clause from Contract A into a related contract (henceforth known as "Contract B").

    (2) As a matter of contractual construction, the wording of the clause in Contract A must be fairly capable of applying to disputes in Contract B. For example, a clause

which stated that "any dispute under this contract shall be referred to arbitration" may not apply to disputes arising out of a (related) Contract B.

(3) It is not legally or commercially odd or improbable that an agreement should have no jurisdiction clause. Equally an agreement may have no jurisdiction clause *and* not be covered by a jurisdiction clause in a different agreement. This was confirmed in *Am Trust Europe Ltd v Trust Risk Group* at [46] (albeit in reference to *competing* jurisdiction agreements):

> "There is no presumption that a jurisdiction (or arbitration) agreement in contract A, even if expressed in wide language, was intended to capture disputes under contract B; the question is entirely one of construction".

However, the absence of any *competing* jurisdiction clauses in any agreements within a particular set of agreements concluded by the parties for the same purpose, at the same time, and with the same subject matter, can be a relevant consideration (*Etihad* at [102(v)]).

(4) This principle normally applies where the parties to Contract A and Contract B are the same. This arises from the fact that the Extended Fiona Trust Principle ultimately involves an exercise in contractual construction. One would normally expect the parties to Contract A to intend that their dispute resolution mechanism be binding upon the parties to Contract A rather than also applying to persons who were not party to that contract at all. Where the principle is applied to a situation in which the parties to Contract A and Contract B are different, then it is possible that the court may conclude that it was the Contract A parties' intention that third parties should be able to rely on Contract A (for example in a Himalaya clause situation), or the court might conclude that only the common parties between Contract A and Contract B are bound by the jurisdiction clause in Contract A. However, the latter is an inherently unattractive prospect, as it involves the fragmentation of disputes pursuant to the same agreement (Contract B) – possibly even disputes concerning the very same obligations. This is the very menace which it was assumed in Fiona Trust rational businessmen want to avoid (of course agreements which appear to have been deliberately and professionally drafted are to be given effect, even where this may result in a degree of fragmentation in the resolution of disputes: see Dicey, 15th Edition at 12-110).

The effect of Fiona Trust is that fragmentation of disputes under one agreement is unlikely to be what the parties intended. However, it is perfectly possible that there may be fragmentation of the resolution of disputes across several agreements (although whether this was the parties' intentions is to be considered when construing the contracts).

(5) The Extended Fiona Trust Principle normally applies where Contract A and Contract B are interdependent (Point (5a)), or have been concluded at the same time as part of a single package or transaction (Point (5b)), or (if concluded at different times) dealt with the same subject-matter (Point (5c)).

(6) A jurisdiction agreement in Contract A will generally apply to Contract B where that contract was entered into at the same or a similar time as Contract A. In this regard:

(a) In *Etihad* at [104], the judge noted that jurisdiction agreements in Contract A generally did not apply to a different agreement (Contract B) which had been concluded *prior to* the jurisdiction agreement coming into existence:

> "Whilst it is not impossible for a jurisdiction agreement to have, on its true construction, such retrospective effect, a party seeking to rely upon a subsequently agreed jurisdiction agreement, in a separate contract, is likely to face an uphill struggle: see e.g. *Satyam*. One reason is that the earlier contract had an existence of its own, and hence an applicable law, prior to the conclusion of the subsequent agreements. If there was no jurisdiction agreement at the time it was concluded, then it may be difficult to conclude that it is to be found in a subsequent agreement, particularly if (as in *Choil*) the disputes arising under the later agreement are likely to have a very different character to disputes arising under the earlier agreement."

(b) Further, if Contract B was concluded prior to Contract A and the Contract A parties intended for the jurisdiction clause to deal with disputes under Contract B, one would normally expect Contract A to deal expressly with jurisdiction under Contract B. Quite apart from anything else the parties already know about Contract B's existence.

(c) If Contract A was concluded prior to Contract B, and a jurisdiction clause in Contract A was intended to cover Contract B, one might expect Contract B to cross-refer back to Contract A (albeit that ultimately what one is construing

for present purposes is Contract A and on normal principles of contractual construction it stands to be construed at the date on which it was entered into). It is also to be borne in mind that it may be more difficult to conclude that parties to a particular jurisdiction agreement intended for that agreement to apply to disputes arising out of contracts that have not been concluded yet, particularly if such future contracts are not being discussed as part of the same package of agreements, or if the future contracts are in fact separated by a significant period of time from the conclusion of the jurisdiction agreement.

32. Points (1) to (4) are an uncontroversial application of the principles applicable to contractual construction. Points (5) to (6) can be derived from the cases identified below.

33. In this regard, *Sapinda* engages Points (5a), (5b), (5c), and (6):

    (1) In *Sapinda*, Altera exercised an option requiring Sapinda to buy back shares in RNTS ("the First Option Agreement" which contained an English jurisdiction clause). However, in breach of the First Option Agreement, Sapinda failed to buy the shares. The parties then entered into negotiations: On 26 August Sapinda agreed to buy some shares from Altera in an oral agreement ("the Sale Agreement"). As to the remaining shares, a written agreement on 31 August was entered into: Altera had the option to sell to Sapinda those remaining shares at a specific price ("the Second Option Agreement"). The latter contained a jurisdiction clause in favour of England. A jurisdiction challenge was brought in respect of the Sale Agreement.

    (2) The jurisdiction clause stated that: *"The parties irrevocably agree that the courts of England have non- exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this agreement or its subject matter or formation (including non-contractual disputes or claims)."* (*Sapinda* at [4]). Sir Michael Burton, sitting as a Deputy Judge of the High Court, concluded that the dispute concerning the Sale Agreement did fall within the scope of the written jurisdiction clause in the Second Option Agreement, at [20] and [22]:

    > "It seems to me clear that the contractual claims for breach of the 26th August Agreement can be said to fall within the jurisdiction clause in 31st August Agreement. Do they arguably do so or at least sufficiently to show clear water

between the two arguments? I have already read into this judgment the material evidence:

(1) The 26th August Agreement and the 31st August Agreement were discussed simultaneously, to that extent "in respect of the same package."

(2) Both arose from the breach of the First Share Option Agreement, and the First Share Option Agreement remained in place until both agreements had been entered into.

(3) The two agreements together deal with the balance of the shares remaining unsold under the breached First Share Option Agreement.

(4) There is unchallenged evidence at para.28 of Mr. Rice's evidence to which I have referred that:

We made it clear that Altera's agreement to a second put option was conditional upon the purchase of the 1,360,631 Shares….

21. … It seems to me that in non-legal language what Mr. Rice was there saying is what was submitted by Mr. Hobson: namely, that the two agreements were interdependent."

(3) Point (4) applies: the parties to the Sale Agreement and the Second Option Agreement are the same.

(4) Point (5a) applies, by virtue of the finding in paragraph 21: the two agreements were interdependent and conditional upon one another. The interdependency in the two agreements is as follows: the Claimants agreed to delay payment for 5 million of the shares (by the Second Option Agreement), if the Defendant agreed to purchase just over 1 million shares in a total time-frame for a specific price. The Claimants' agreement to the Second Option was *conditional* on the Defendants' purchase of the 1 million shares.

(5) Points (5b) and (5c) apply: the subject-matter of both the Sale Agreement and the Second Option Agreement was dealing with the fallout from the breach of the First Option Agreement. Further, the Sale Agreement and the Second Option Agreement were both discussed at the same negotiations, and were concluded within a very short period of time, as part of the same "package" to prevent further breach of the First Share Option Agreement.

(6) As to Point (6): counsel for GPF referred to the fact that, here, the Second Option Agreement (the "Contract A") contained a jurisdiction clause which covered the *prior* Sale Agreement (the "Contract B"): the jurisdiction clause was to have a retrospective effect. However, in this case both agreements were discussed/negotiated at the same time, and were conditional on each other. This explains why the jurisdiction clause in the Contract A did not deal with the prior

Contract B: they were viewed by the parties as forming one "package" of arrangements. Further, disputes arising under the later agreement were likely to have a similar character to disputes arising under the earlier agreement (see *Etihad* at [104], above).

34. In *Emmott*, Points (4) and (5c) militated in favour of construing the Contract A jurisdiction clause as covering a dispute arising out of Contract B. Point (5b) did not arise, as the agreements were not discussed at the same time as part of the same package. In this regard:

    (1) In *Emmott*, the Defendant ("MWP") provided legal services in Kazakhstan, and Michael Wilson was its director and shareholder. By an agreement in 2001, the Claimant ("Emmott"), MWP and Mr. Wilson agreed that Emmott would join MWP as a director and shareholder: MWP and Emmott would operate as a quasi-partnership, and Emmott was entitled to 33% of the profit-sharing interest in MWP's earned fees. The 2001 Agreement was to be *"governed by and interpreted in accordance with the laws of England and Wales and all and any disputes shall be referred to and subject to arbitration in London":* this is the "Contract A". The claim concerned shares in Steppe Cement, which Emmott alleged were acquired by the MWP in lieu of fees owed to it. Emmott alleged that he and MWP entered into an oral agreement with Mr. Wilson made in February 2005 (the "Contract B"). The agreement reflected the fact that when Emmott joined MWP in 2002, part of the legal work which generated the fees in lieu of which the Steppe Shares were provided had already been done. He therefore claimed 27% of the Steppe Shares. Teare J concluded that the arbitral tribunal had jurisdiction in respect of the 2005 Agreement by virtue of the 2001 Agreement (at [45]).

    (2) As to Point (4): again, although this was not referred to by Teare J, it appears that the parties to the 2001 and 2005 Agreements were both the same (*Emmott* at [42]).

    (3) As to Point (5): the two agreements were *not* discussed at the same time (Point (5b)). However, the 2005 Agreement was, in reality, a variation of the 2001 Agreement, regarding Emmott's consideration for his participation in the partnership – the claim based on the 2005 Agreement arose out of the relationship between the claimant and defendant, which they entered into by reason of the

2001 Agreement (at [38]). The *explanation* for the transfer of the 27% of the Steppe Shares was Emmott's entitlement under the 2001 Agreement to a 33% profit-sharing interest in MWP (at [44]). Therefore, the contracts dealt with the same subject-matter (Point (5c)).

35. In *Etihad*, Points (4), (5) and (6) were engaged:

(1) In *Etihad*, Air Berlin claimed against Etihad in Germany for breach of a Comfort Letter (the "Contract B"). Etihad brought equivalent claims in declaratory relief in England, pursuant to which Air Berlin disputed jurisdiction. Etihad argued that a jurisdiction clause contained in a Facility Agreement (the "Contract A") concluded between the two parties which provided for the jurisdiction of the English Court should also encompass claims made under the Comfort Letter. The jurisdiction clause concerned *"any disputes arising out of or in connection with this agreement"*.

(2) Jacobs J reached the conclusion that the jurisdiction clause in the Facility Agreement should apply to claims brought pursuant to the Comfort Letter, setting out his conclusions at [69] and [102]:

> "[69] Drawing these threads together, I consider that the position is as follows:
> a) There is no reason in principle why the jurisdiction clause in the Facility Agreement should not extend to disputes arising in relation to the Comfort Letter.
> b) The Fiona Trust starting assumption is potentially applicable if it can properly be said (applying the good arguable case standard) that the Comfort Letter was part of a package of agreements which contained no competing jurisdiction clause.
> c) Ultimately, the question is whether (again applying the good arguable case standard), looking at the overall scheme of the agreements, the parties' intention, as revealed by the agreements reached between them, was that a dispute under the Comfort Letter falls within the jurisdiction clause in the Facility Agreement […]
> d) In ascertaining the parties' intention, it is relevant to consider the closeness of the connection between the Comfort Letter and the Facility Agreement.
> […]
> [102] I consider that these matters – (i) the width of the jurisdiction clause in the Facility Agreement, (ii) the fact that the Comfort Letter was part of the overall support package where all relevant agreements between Etihad and Air Berlin were governed by English law with English jurisdiction

clauses, (iii) the close connection between the Comfort Letter and the Facility Agreement in terms of the genesis of the Comfort Letter, (iv) Etihad's good arguable case that the Comfort Letter did not create contractually binding obligations and was ancillary to the Facility Agreement, (v) the absence of any competing jurisdiction clause in any of the agreements within the support package, and the existence of English law and jurisdiction clauses in the relevant agreements as part of that package, and (vi) the reasonable foreseeability of disputes which required consideration of the Comfort Letter in conjunction with the Facility Agreement – all lead to the conclusion that the parties intended disputes arising in relation to the Comfort Letter to fall within the jurisdiction clause of the Facility Agreement. I reach that conclusion whether or not the Fiona Trust starting point is applied. Since I consider that it should, in the present circumstances, be applied, that reinforces the conclusion which I have reached."

(3) Point (2) applied: Jacobs J considered the wording of the jurisdiction clause in the Facility Agreement to be particularly wide: [71].

(4) Point (3) applied, in that a relevant consideration was the fact that the "package" of contracts did not contain any "competing jurisdiction" clauses. However, this (a) presumes the existence of a package of agreements which were agreed at the same time and for the same purpose, and (b) was likely a means of distinguishing the case from the decision in *BNP Paribas v Trattamento Rifiuti* Metropolitani [2019] EWCA Civ 768, which did involve *"apparently competing jurisdiction clauses"* (*Etihad* at [68]).

(5) Point (4) applied: the parties to the Facility Agreement and the Comfort Letter were the same (although this was not mentioned by Jacobs J at [69] or [102]).

(6) Point (5) applied:

(a) The agreements were concluded fairly closely together in time, were negotiated as part of the same "package" of providing Air Berlin with financial support (specifically, a loan), and concerned closely-related subject matters. This was express in the wording of the Comfort Letter (at [73]-[74]: with reference to "*Support package – commercial arrangement").*

(b) Although the obligations in the Comfort Letter and the Facility Agreement were not conditional on each other, there was still a degree of

interdependence between the two agreements for two reasons. Firstly, Etihad initially refused to supply a facility agreement to Air Berlin with a sufficiently large loan amount: the Comfort Letter was conceived as a direct response to this, and was part of the reason that Etihad agreed to the Facility Agreement (as part of a package of cash and non-cash support: [76]-[83]). Secondly, Etihad had a good arguable case that the Comfort Letter did not create legally binding obligations. This provided significant support for Etihad's proposition that the Comfort Letter should be viewed as "ancillary or linked to something else" [84]-[86].

(7) As to Point (6), reference has already been made to *Etihad* at [104]. The Comfort Letter was discussed and entered into at a similar time to the Facility Agreement.

B.1.2 The Second Issue

36. Even if the jurisdiction agreement in the Written Agreements applies to disputes arising out of the Oral Agreements as a matter of contractual interpretation, GPF would have to demonstrate that, under Article 23, the dispute had arisen in connection with the particular relationship giving rise to the agreement containing the jurisdiction clause.

B.2 Application of the Law to the Facts

37. I am satisfied that the jurisdiction clauses in the Written Agreements do not extend to cover the claims by the Claimants made pursuant to the Oral Agreements. In this regard GPF have not established that they have the better of the argument on the evidence before me. I will set out the relevant provisions of the four Written Agreements which GPF submits contain exclusive jurisdiction clauses in favour of Switzerland, followed by the Claimants' pleaded case on the Oral Agreements which formed the Tax Optimisation scheme, followed by my reasons for the conclusion I have reached.

B.2.1 The Written Agreements

38. It is helpful at this point to set out the relevant provisions of the four Written Agreements which GPF submits amount to exclusive jurisdiction clauses in favour of Switzerland. In this regard: -

(1) The 1996 Asset Management Agreement between GPF and Mr. Zahut provided, amongst other matters, as follows:-

> "Clause 1: An asset management and administration agreement is hereby established between [Mr. Zahut and GPF].
>
> Clause 2: On the basis of this agreement, the Principal assigns to GPF responsibility for the management of the above-indicated account(s) and grants GPF all powers to represent him with the designated bank(s) within the limits of the provisions of the ad hoc form(s)…
>
> Clause 8: This asset management agreement is subject to Swiss law. Jurisdiction is assigned to the courts of Geneva, and the parties elect domicile for that purpose and effect".

(2) The 2003 Fiduciary Agreement between GPF and Mr. Zahut provided, amongst other matters, as follows:

> "ARTICLE 1: The Mandatory holds the certificate of shares of said corporation in a fiduciary capacity on behalf of and for the account of the Mandator. The Mandatory will upon written request deliver said certificate of shares to the Mandator or to a person or persons designated by him.
> ARTICLE 2: The Mandatory shall exercise his best efforts to safeguard the interests of the Mandator and to exercise the various formalities necessary for the duration and good functioning of the corporation. The Mandator will contribute to this good functioning by communicating all information requested by the Mandatory
> ARTICLE 7: The present Fiduciary Agreement shall be governed by the Swiss law…parties agree all disputes which may arise between them concerning its [the 2003 Fiduciary Agreement's] interpretation, its execution or its inexecution will be submitted to the ordinary courts of the Canton of Geneva, subject to appeal to the Swiss Federal Court in Lausanne as provided by law".

(3) The 2003 Management Contract between GPF and Largely provided, amongst other matters, as follows:

> "Clause 1: By means of this document, a management and administration contract has been entered into between [Largely as Principal and GPF as Agent].
> Clause 2: By virtue of this contract, the Principal assigns to GPF management of the account (s) indicated above, and for these purposes gives it all authority to represent it vis a vis the designated banks, within the limits of the provisions of the ad hoc forms…
> Clause 9: This management contract is subject to Swiss law. The court forum with jurisdiction is assigned to Geneva, and to that end the parties elect domicile thereat under reserve of appeal to the Federal Court; the agent [GPF] however, has the latitude to enforce its rights before the natural court of the principal or before any other competent court".

(4) The 2012 Asset Management Contract between GPF and Largely provided, amongst other matters, as follows:

> "Clause 1: The undersigned [Largely as Principal and GPF as the other party, acting as authorised management agent] have agreed to the following.
> Clause 2 Purpose of the Agreement: On the basis of this agreement, the Principal grants GPF discretionary management agency to manage in its best interest, but at its risk and peril, the assets deposited in the account (s) at the bank(s) designated hereinabove, without the right of substitution, within the limits of the Directives on Asset Management Agreements of the Swiss Banking Association, and pursuant to the investment objectives defined and described …
> Clause 10: This agreement is subject to Swiss law. Any dispute between the parties shall be subject to the sole and exclusive jurisdiction of the Courts of the Geneva Canton without prejudice to any possible appeal to the Federal Court; the Agent [i.e. GPF] nevertheless has the latitude to enforce its rights in the Principal's [i.e. Largely's] normal jurisdiction or before any other court with jurisdiction".

B.2.2 The Oral Agreements

39. In relation to the alleged Oral Agreements which the Claimants rely upon in their contractual claims against the Defendants, the Claimants plead as summarised below in their Draft Amended Particulars of Claim ("DAPOC").

40. In the first quarter of 2003, the Claimants allege that the earlier 1996 tax optimisation agreement was modified after Mr. Sasson gave some further advice to Mr. Zahut and Terre Neuve. The changes were twofold: firstly, REDS would transfer the monies paid to it by Terre Neuve, less 3% commission to a new Panamanian company set up by GPF, and/or Mr. Sasson, and/or Meyer El Maleh ("the Transfer Operation"). Secondly, the new Panamanian company would be set up, and would be beneficially owned by Mr. Zahut as sole shareholder, though managed and controlled by GPF and/or Mr. Sasson and/or Meyer El Maleh in his interests. These constitute "the 2003 Arrangements" (set out at [31] DAPOC).

    (1) The Claimants allege that Mr Zahut, Terre Neuve, GPF, and REDS all entered into a series of agreements in order to implement certain aspects of these arrangements ("The 2003 Agreements"):

(a) The 2003 GPF Agreement (as defined at [32]-[33] DAPOC). This Agreement was allegedly between Mr. Zahut, Terre Neuve and GPF. GPF allegedly undertook that:

   (i) it would manage REDS in its operation of the 2003 Arrangements and procure that REDS issued the correct invoices in respect of Mr. Zahut's work on the basis of information provided by Mr. Zahut; REDS would ensure the safe receipt of monies accordingly paid to it by Terre Neuve, and would then transfer the monies, less the 3% commission, to the new company to be set up by Mr. Sasson and/or GPF and for the ultimate benefit of Mr. Sasson.

   (ii) GPF would set up, manage and control in the interest of Mr. Zahut a new company in Panama beneficially owned by Mr. Zahut as sole shareholder.

(b) Further or alternatively, the Claimants alleged the existence of The 2003 REDS Agreement (as defined at [33.2] DAPOC). This was allegedly entered into between Mr. Zahut, Terre Neuve and REDS. Under this agreement, REDS undertook to perform the same obligations as set out above at (a)(i) in relation to the 2003 GPF Agreement.

(2) Further or alternatively, if Mr. Zahut and/or Terre Neuve did *not* enter into the 2003 REDS Agreement, the Claimants plead the 2003 REDS Agency Agreement (set out at [34.1] DAPOC). This was allegedly entered into between REDS and GPF. This agreement provided that REDS must issue the invoices to Terre Neuve, ensure safe receipt of the monies paid by Terre Neuve and transmit those monies, save for the commission fee, to the new company to be set up by Mr. Sasson and/or GPF for the ultimate benefit of Mr. Zahut. This is essentially the same substantive obligation as the 2003 REDS Agreement, but with different contracting parties. Mr. Zahut and Terre Neuve claim to be third party beneficiaries of this agreement, with the right to compel performance of this agreement under Swiss Law.

(3) Largely was the company that was set up pursuant to the 2003 Arrangements. As a matter of Swiss and/or French Law, Claimants contend that Largely became a

third-party beneficiary or a third party, to whom performance of the 2003 Agreements and/or the 2003 REDS Agency Agreement was due.

41. In 2008, the tax optimisation arrangements were allegedly modified. REDS would invoice Terre Neuve as before, but the invoices would direct payment to be made to Yewdale, a UK Company. Terre Neuve would pay Yewdale; Yewdale would then remit the monies to REDS, which would then transfer those monies (save 3% commission) to Largely ("the 2008 Arrangements"). The 2008 Arrangements were allegedly implemented via the following Agreements ("the 2008 Agreements"): -

    (1) The 2008 GPF Agreement (set out at [49.1] DAPOC). This was allegedly entered into between Mr Zahut, Terre Neuve and <u>GPF</u>. The gravamen of this agreement was that GPF undertook to manage REDS and Yewdale and procure in its operation of the 2008 Arrangements, and ensure that they correctly implemented those new arrangements.

    (2) The 2008 REDS Agreement (set out at [49.2] DAPOC). Further or alternatively, the Claimants allege that this agreement was entered into between Mr. Zahut, Terre Neuve and <u>REDS</u>. The gravamen of this agreement was that REDS undertook to perform its part of the new arrangements.

    (3) The Yewdale Agreement (set out at [49.3] DAPOC). Further or alternatively, the Claimants allege that this agreement was entered into between Mr. Zahut, Terre Neuve and <u>Yewdale</u>. The gravamen of the agreement was that Terre Neuve and Yewdale undertook to perform their part of the new arrangements.

    (4) Further, if Mr. Zahut and/or Terre Neuve did not enter into the 2008 REDS Agreement, the Claimants plead the 2008 REDS Agency Agreement (set out at [50.1] DAPOC). This agreement was allegedly entered into between REDS and GPF, in which REDS undertook to perform its part of new arrangements.

    (5) Further or alternatively, the Claimants plead the Yewdale Agency Agreement, purportedly entered into between GPF, REDS and Yewdale, which provided that Yewdale should perform its part of the new arrangements.

(6) The Claimants claim that as a matter of Swiss and/or French law, Largely was a third-party beneficiary or a third party to which performance of the 2008 Agreements and/or the 2008 Agency Agreements was due.

42. I note that that none of these Oral Agreements refer to the Written Agreements. The 2003 GPF Agreement provides for the setting up of what would become Largely, and that GPF should manage and control this company in the ultimate beneficial interest of Mr. Zahut.

43. The Claimants plead that, as a result of the dissipation and/or misappropriation of the monies paid by Terre Neuve to Yewdale, GPF, REDS and/or Yewdale failed to discharge their obligations under the 2003 Agreements, the 2003 REDS Agency Agreement, the 2008 Agreements and/or the 2008 Agency Agreements ([121] DAPOC for Swiss Law, and [148] DAPOC for French Law). I will refer to all these agreements as "the Oral Agreements". The Claimants' further claims in tort, breach of fiduciary duty and unjust enrichment in relation to the misappropriation of monies ([130], [135], and [140] DAPOC respectively). It is said that this misappropriation was done *in breach of* these Oral Agreements.

B.2.3 Conclusions

44. I am satisfied that the Claimants' claims do not fall within the scope of any of the aforementioned jurisdiction clauses in the Written Agreements. GPF clearly does not have a good arguable case/the better of the argument in this regard. This is for the following reasons (each of which I will identify and then address in more detail below):-

(1) The parties to the Written Agreements are different from the parties to the Oral Agreements (in relation to Point (4) of the Extended Fiona Trust Principle).

(2) The Written Agreements did not form part of the same package as the tax optimisation scheme, the subject-matter is not similar, and there is little interdependency between them (in relation to Point (5) of the Extended Fiona Trust Principle).

(3) There are difficulties in construing the 2012 Written Agreement as containing a jurisdiction clause that applies to the earlier oral agreements, and the 2003 Fiduciary Agreement does not contain obligations with a sufficiently broad scope to be relevant to issues arising under the Written Agreements.

(4) The fact that the Claimants rely on the Swiss law clauses in the Written Agreements in order to establish that Swiss law governs the Oral Agreements does not mean that the jurisdiction clauses in the Written Agreements also apply to the Oral Agreements.

45. I set out my detailed reasons in relation to each of those four factors below. I consider that two factors are of particular (and ultimately decisive) importance. Firstly, the Written Agreements and Oral Agreements have a <u>different</u> subject-matter, in that the Written Agreements mostly concern the management of monies or assets *already held* by Largely, whereas the Claimants' claims are all concerned with the misappropriation of monies which *should have been transferred to Largely*, but which were not. Secondly, the parties to the Written Agreements were also not the same parties as those to the Oral Agreements.

(i) Different Parties to the Written Agreements, and the Oral Agreements

46. None of the Oral Agreements relied upon in support of the Claimants' pleaded claims have precisely the same parties as the parties to the Written Agreements which contain the jurisdiction clauses. GPF clearly does not have a good arguable case / the better of the argument in relation to this. In this regard:

(1) The purported Oral Agreements are between a variety of parties:

(a) The 2003 Agreements were entered into between Mr. Zahut and Terre Neuve on the one hand, and GPF and/or REDS on the other hand ([32] of the DAPOC). The 2003 GPF Agreement is alleged to have been entered into between Mr. Zahut, Terre Neuve and GPF. Further or alternatively, the Claimants plead that Mr. Zahut, Terre Neuve and REDS entered into the 2003 REDS Agreement, or that REDS and GPF entered into the 2003 REDS

Agency Agreement (pursuant to which Mr. Zahut and Terre Neuve claim to be third party beneficiaries and/or parties to whom performance of that agreement was due).

(b) The 2008 Agreements were again entered into by Mr. Zahut and Terre Neuve on the one hand, and GPF and/or REDS on the other hand ([48] DAPOC). The 2008 GPF Agreement is alleged to be between Mr. Zahut, Terre Neuve and GPF. Further or alternatively, the Claimants plead that there was a 2008 REDS Agreement, entered into between Mr. Zahut, Terre Neuve and REDS, or that the 2008 REDS Agency Agreement was entered into between REDS and GPF, or that the Yewdale Agency Agreement was entered into between Yewdale, REDS and GPF.

(2) Each of the 2003 and 2008 Oral Agreements involve one or more parties *additional* to Mr. Zahut and GPF, or Mr. Zahut and Largely. Further, in some cases, neither Mr. Zahut, nor Terre Neuve, nor Largely are parties to the alleged agreements (though they claim to be entitled to enforce those agreements by virtue of being third party beneficiaries under Swiss Law) – e.g.: the 2003 REDS Agency Agreement, the 2008 REDS Agency Agreement, and the Yewdale Agency Agreement.

(3) I do not consider that the jurisdiction clauses located in the Written Agreements (to which only Mr. Zahut/Largely and GPF are parties) extend to cover disputes which arise from the Oral Agreements and which contain additional parties:

(a) A person who is *not party* to a jurisdiction agreement is not bound by that agreement: therefore, the jurisdiction clauses in the Written Agreements cannot apply to disputes between Terre Neuve (which is party to none of the Written Agreements) and GPF. GPF accepts this, and has not sought to challenge the jurisdiction of Terre Neuve.

(b) It is conceptually possible that the jurisdiction clauses could apply to some parties but not others to the Oral Agreements. GPF submits that this analysis does not disturb the position of non-parties to the Written Agreements. They

accept that there would be some fragmentation of disputes arising from the same contract, but argue that this is the natural outcome of what the parties have agreed, and that I should not take into account whether all the parties to the Oral Agreements are also parties to the Written Agreements: rather I should only consider whether the dispute is sufficiently closely connected with the jurisdiction agreement.

(c) I find GPF's submissions unconvincing. They involve the fragmentation of disputes brought pursuant to the same agreement, and in this case disputes which concern the very same obligations. For example, Terre Neuve alleges that GPF breached the 2008 GPF Agreement by the misappropriation of monies paid by Terre Neuve to Yewdale; Mr. Zahut alleges that GPF breached the very same obligations. Such fragmentation is unattractive and unlikely to represent the common intention of the parties (for the reasons that I have already identified). This is not, as GPF argued, a type of *forum non conveniens* point - this potential fragmentation is part of the factual matrix against which I must construe the Written Agreements, and I am satisfied directly engages the very menace that the presumption in *Fiona Trust* seeks to avoid.

(4) Further, the Claimants bring some of their claims not as direct parties to the Oral Agreements, but as third-party beneficiaries under Swiss law:

(a) Certain of the Oral Agreements (the 2008 REDS Agency Agreement, the Yewdale Agency Agreement, and the 2003 REDS Agency Agreement) do not have Mr. Zahut as a party at all: instead, he seeks to enforce them as a third party beneficiary and/or a party to whom performance of that agreement was due, and who was intended to have the right to compel such performance. Further, Largely is not a party to any of the Oral Agreements, and seeks to recover pursuant to them on the same grounds.

(b) It is difficult to see how the parties to the Written Agreements could have intended the jurisdiction clauses therein to apply to disputes arising out of agreements that they themselves did not enter into, but which they could

enforce as third party beneficiaries, as long as at least one of the named parties happened to be parties to the Written Agreements.

(5) None of the Extended Fiona Trust Principle cases concerned disputes in which the parties to Contract A (which contained the jurisdiction agreement) were different from the parties to Contract B (a point which was accepted by GPF in oral submissions). As already identified, whilst it is conceptually possible for parties to agree that a jurisdiction clause extends to disputes between them under a separate agreement to which others are also party, clear words would need to be used (not least due to the potential fragmentation of disputes that such a construction could result in).

(ii) Different Subject-Matter and not part of the same package

47. I am satisfied that the Written Agreements were not a necessary or integral part of, and did not form a single package with, the Oral Agreements. GPF clearly does not have a good arguable case / the better of the argument on the point. In this regard:

48. Firstly, the Claimants' pleaded case does not allege that the Written Agreements formed part of the tax optimisation scheme. The tax optimisation scheme itself is referred to as "the 1996 Arrangements", "the 2003 Arrangements", and "the 2008 Arrangements" in the DAPOC. The 2003 Oral Agreements and the 2008 Oral Agreements are all pleaded as implementing their respective Arrangements ([31]-[36] and [47]-[51] DAPOC). By contrast, each of the Written Agreements are pleaded separately from the main tax optimisation Arrangements. They are pleaded in this way to set out the background of contractual dealing between the parties, and in order later to be relied upon in the context of the Claimants' plea as to Swiss law (see below at [57]). In *Etihad*, an important reason as to why the Facility Agreement and the Comfort Letter were found to be part of the "same support package" was that Air Berlin had described them in similar terms in their pleadings in the German proceedings (*Etihad* at [74]).

49. Secondly, and crucially in my view, I am satisfied that the Written Agreements have a different subject-matter to the Oral Agreements, and exist independently of the Oral Agreements.

(1) The Written Agreements are all concerned with the management of Largely's assets and/or shares: the 1996 Asset Management Agreement concerned the management by GPF of a bank account held by Mr. Zahut. The 2003 Fiduciary Agreement concerned GPF's trusteeship of its shares in Largely on behalf of Mr. Zahut. The 2003 Asset Management Agreement assigned to GPF the management of Largely's bank accounts; and the 2012 Asset Management Agreement concerned GPF's management of assets deposited in Largely's bank accounts.

(2) The cornerstone of the tax optimisation scheme was the establishment of the flow of money from Terre Neuve to Yewdale to REDS and to Largely, in such a way that minimised Mr. Zahut's tax liability. The management of Largely's assets and/or shares was not necessary or integral to securing a tax advantage. By contrast, *Sapinda* was concerned with two agreements which covered the same subject-matter (the sale of certain shares in order to remedy Sapinda's earlier breach of an option agreement). *Etihad* was concerned with a Comfort Letter and a Facility Agreement, both of which related to Etihad's purported commitment to provide financial support to allow Air Berlin to meet certain financial obligations).

(3) The 2003 GPF Agreement allegedly provides for GPF to undertake to set up, manage and control in the interest of Mr. Zahut, a company that would receive the monies transferred by REDS, which would be beneficially owned by Mr. Zahut as a shareholder: this company became Largely. This may have some cross-over in terms of subject matter with the Written Agreements: specifically, the 2003 Fiduciary Agreement (the obligation on GPF to hold Largely's certificate of shares "in a fiduciary capacity on behalf of and for the account of Mr. Zahut"). However, this is only one part of the 2003 GPF Agreement. A relevant comparison is *Michael Wilson v Emmott*: in that case, the jurisdiction clause was contained in the 2001 Contract (which was wide-ranging), and was applied to the 2005 Contract (which was narrower, and its narrow subject-matter was encompassed by the subject-matter of the 2001 Contract). Here, the 2003 Fiduciary Agreement is narrower, and any cross-over in subject-matter is encompassed by the 2003 Oral Agreements collectively, and the 2003 GPF Agreement in particular. Construing the 2003 Oral Agreements as governed by a

jurisdiction clause in the 2003 Fiduciary Agreement would be to "allow the tail to wag the dog".

(4) The Written and Oral Agreements have different sets of reward mechanisms. In the Oral Agreements, REDS took 3% commission. By contrast, the 2003 Fiduciary Agreement had an annual fee of US$500 and reimbursement of expenses (under Article 3 thereof), and the Asset Management Agreements had remuneration fixed by reference to a percentage of the value of the assets under management and/or a fee based on the value or volume of transactions.

(5) Further, the Written Agreements were not interdependent with the Oral Agreements in the same way as in *Sapinda* and *Etihad*.

(a) In *Sapinda*, there was Contract A (the 31 August Agreement) and Contract B (the 26 August Agreement). Entry into Contract A was conditional upon the parties earlier having entered into Contract B. By contrast, in the present case, it was not a *condition* of entry into the Oral Agreements that the Written Agreements should be entered into, or vice versa.

(b) In *Etihad*, there was a good arguable case that the Comfort Letter (the "Contract B") was not a legally binding agreement: therefore, it was necessarily ancillary to the Facility Agreement. By contrast, in the present case, the Oral Agreements and the Written Agreements each have a separate legal existence of their own.

(c) Whilst the Written Agreements probably would not have been entered into, but for the existence of the tax optimisation scheme set out in the Oral Agreements (as it appears that Largely was set up entirely to hold the proceeds of the tax-optimised transfers from Yewdale), this does not mean that the Written Agreements and the Oral Agreements are "interdependent" for the purposes of the principles applied in *Etihad* or *Sapinda* - the Written Agreements did not *have* to be entered into in order to secure the Oral Agreements.

(6) An additional argument of GPF is that the scope of the 2003 Fiduciary Agreement is broader than the other Written Agreements by virtue of Article 3: "*The*

Mandatory [GPF] shall exercise his best efforts to safeguard the interests of the Mandator [Mr. Zahut] and to exercise the various formalities necessary for the duration and good functioning of the corporation". GPF submits that this expands the matters covered by the jurisdiction clause. I address the submission in due course below – but in short, I am satisfied that this wording does not expand the subject matter of the agreement itself or the breadth of matters subject to the jurisdiction clause.

50. Thirdly, and more specifically, I am satisfied that the Written Agreements have a different subject-matter to the obligations which the Claimants allege that the Defendants have breached under the Oral Agreements:

    (1) I agree with the fundamental characterisation of the Claimants' claims as set out by Christopher Hancock QC in the May 2019 Judgment at [12]:

    > "The claim therefore relates to the €10,627,669 paid by Terre Neuve to Yewdale between 2009 and 2012. That money, less the 3% commission, should have been transferred from Yewdale to REDS and on to Largely. Of that money, US$137,288.80 was transferred from Yewdale to Largely; no money was transferred by REDS to Largely after April 2008. The Claimants' case is that this money was misappropriated with the involvement of and/or to the benefit of the various Defendants."

    (2) By contrast, the Written Agreements (as set out above) all concern what happened to the monies *after they had been transferred* by Yewdale for the benefit of Mr. Zahut. This distinguishes the present case from *Emmott*. In that case, the counterclaim in question arose out of the relationship between Mr. Emmott and MWP, into which they entered by reason of the 2001 Agreement (at [38]). The counterclaim was for Mr. Emmott to recover 27% of the Steppe Shares. The reason that Mr. Wilson was willing to agree that Mr. Emmott should have 27% of the Steppe Shares is because Mr. Emmott was entitled to a 33% profit sharing interest in MWP under the 2001 Agreement. Therefore, Mr. Emmott's claim arose substantially out of the 2001 Agreement: the 2005 Agreement was analogous to a variation of the relevant term of the 2001 Agreement. By contrast, the Written Agreements do not deal with the transfer of monies to Yewdale at all, but only with the management of monies in Largely.

51. Fourthly, the Written Agreements were <u>not intended to form part of the same "package" of measures</u> as the Oral Agreements for the purposes of the principles identified in *Etihad* and *Sapinda*.

    (1) For the reasons set out above, the subject-matter of the Written Agreements and the Oral Agreements is very different, and as such it would be inappropriate to characterise them as part of the same "package" of measures.

    (2) The Written Agreements and Oral Agreements were not (on the evidence before me) all "discussed simultaneously". The 2003 Oral Agreements were alleged to have been concluded in the first quarter of 2003. The 2003 Fiduciary Agreement and 2003 Management Contract were not concluded until 16 and 21 July 2003 respectively. There is no evidence before me that the Fiduciary Agreement, Asset Management Contracts, and the Oral Agreements were at any point discussed together in the same negotiation. Moreover, the 2012 Asset Management Agreement was concluded long after the 2008 Oral Agreements were entered into. This distinguishes the present case from *Sapinda* and *Etihad*, in which the two contracts were discussed in negotiations at the same time: in both of those cases, this fact was treated as an important indication in favour of the two contracts being part of the "same package" (*Sapinda* at [20] and *Etihad* at [75]-[83] and [102]).

    (3) There is no reference in the Written Agreements themselves to tax or tax optimisation, or to any of the processes by which the money would be transferred.

(iii) Scope of the wording of the Jurisdiction Agreements

52. I also do not consider that the jurisdiction clauses in the Written Agreements are sufficiently widely worded to extend to the oral and conduct-based agreements relied upon in the Particulars of Claim. GPF clearly does not have a good arguable case / the better of the argument on this. This is for four reasons:

53. Firstly, there is a temporal disparity between the conclusion of the Written Agreements and the Oral Agreements, which renders it inherently unlikely that jurisdiction clauses in

the Written Agreements are intended to extend to the subject matter of the Oral Agreements. In this regard:

(1) As to the 2003 Written Agreements and the 2008 Oral Agreements it is inherently unlikely that a 2003 jurisdiction clause was intended, as at the time of entering into the 2003 Written Agreements, to extend to oral agreements (with different subject matter) that might be entered into many years in the future (in fact 5 years later). Whilst in *Emmott*, a prior jurisdiction clause in the 2001 Agreement was found to extend to the later 2005 Agreement, in that case there was a complete overlap of subject-matter of the 2005 Agreement with the terms of the 2001 Agreement, which was a comprehensive agreement intended to govern the partnership relationship between the parties. However, in the present case, the 2003 Fiduciary Agreement and the 2003 Asset Management Agreements do not overlap in subject-matter with the 2008 or the 2003 Oral Agreements, and the 2003 Written Agreements are not a comprehensive agreement intended to govern the relationship between the parties, for the reasons that have already been identified. The 2008 Oral Agreements cannot properly be characterised as variations of the 2003 Written Agreements. They could be characterised as variations of the 2003 Oral Agreements, but for the reasons that have already been identified, disputes arising out of the 2003 Oral Agreements were also not governed by jurisdiction clauses in the Written Agreements.

(2) As to the 1996 Written Agreement, the claims in this case relate to the misappropriation of monies transferred from the Claimants between 2009 and 2012 – it is inherently unlikely that such were intended to be covered by an agreement about the management of an account which had ceased to be involved in the parties' arrangements six years earlier.

(3) The converse point applies in relation to the jurisdiction clause in the 2012 Asset Management Agreement. That agreement is said to apply retrospectively to the 2008 and 2003 Oral Agreements. In *Etihad*, Jacobs J found that a party seeking to rely upon a *subsequently agreed* jurisdiction agreement in a separate contract is likely to face an "uphill struggle" (at [104]). Further, if the parties had intended the jurisdiction clause to apply to an existing contract, one would normally expect the jurisdiction clause to expressly deal with its application to that earlier contract.

54. Secondly, as to the 2003 and 2012 Asset Management Agreements: they granted to GPF a mandate to manage Largely's bank accounts and for those purposes gave GPF authority to represent Largely vis-à-vis the designated banks. The claims made in these proceedings are about monies which never reached Largely's bank accounts, not the management of monies within those accounts. Clause 10 of the 2012 Asset Management Agreement provides that *"Any dispute between the parties shall be subject to the sole and exclusive jurisdiction of the Courts of the Geneva Canton"*. This does not mean that any dispute arising from the parties' asset management relationship falls under Clause 10. This clause must be read in the context of the rest of the Agreement, which only relates to the management of assets deposited in Largely's bank accounts, and as such Clause 10 is to be construed as limited to that subject matter.

55. Thirdly, as to the 2003 Fiduciary Agreement:-

    (1) This agreement relates to the trusteeship of the shares in Largely, which GPF was to hold in a fiduciary capacity on behalf of and for the account of Mr Zahut. The Claimants' claims have nothing to do with the shares in Largely, so do not fall within the scope of the jurisdiction clause, which only concerns the *"interpretation… execution… or inexecution"* of the 2003 Fiduciary Agreement.

    (2) GPF argued that the 2003 Fiduciary Agreement ought to be given a broad scope by virtue of Article 3, which provides that *"The Mandatory [GPF] shall exercise his best efforts to safeguard the interests of the Mandator [Mr. Zahut] and to exercise the various formalities necessary for the duration and good functioning of the corporation"*. However, this obligation is clearly directed at, and restricted to, the scope of the Agreement. In this regard: -

        (a) The Clause must be read as part of the subject-matter of the whole agreement. The Fiduciary Agreement's purpose is for GPF to hold shares in Largely on behalf of Mr. Zahut: it is not related to the transfer of monies pursuant to the tax optimisation scheme.

        (b) In any event, Article 3 expressly relates to the "good functioning" of Largely.

(c) Under Article 398 Swiss Code of Obligations ("SCO"), a contractual agent always has a duty *"at all times to look after and safeguard the interests of"* its principal. In those circumstances it cannot realistically be argued that in every Swiss law contract that expressly included such a term, the intention is to create a general obligation extending beyond the subject-matter of the agreement.

56. Fourthly, as to the 1996 Asset Management Agreement: this relates to GPF's management of the Discount Bank & Trust account (no. 140631), into which the monies that had been paid by Terre Neuve in the period 1996 to 2003 were supposed to be transferred (before Largely was formed). Clause 8 provides that *"This <u>asset management agreement</u> is subject to Swiss law",* followed by *"jurisdiction is assigned to the courts of Geneva"* (emphasis added). It is implicit in the placement of the jurisdiction agreement after the choice of law agreement that the assignment of jurisdiction also relates only to the management agreement itself.

(iv) Use of Written Agreements in pleadings to establish Swiss Law

57. GPF contends that the Claimants' reliance upon the Written Agreements in the context of its plea that the Oral Agreements are governed by Swiss law amounts to a recognition that the jurisdiction provisions of the Written Agreements are engaged. Such contention does not bear examination, and it is clear that GPF does not have a good arguable case / the better of the argument in this regard. This is for the following reasons:

(1) The Claimants contend in their Particulars of Claim that Swiss Law governs the Claimants' claims for breach of contract, pursuant to Articles 3 and 4 of the Rome Convention. At the hearing, they confirmed that they would no longer be pursuing the Article 3 ground. The Rome Convention (and not the Rome I Regulation) is referred to because the Oral Agreements were entered into before 17 December 2009. These references are included in support of a conclusion that Swiss law is the law applicable to oral agreements (which do not have choice of law clauses). The Defendants submit that in such circumstances regard must also be had to the jurisdiction clauses.

(2) However, the fact that the Claimants rely on the Written Agreements in the context of identifying the law applicable to other agreements, does not mean that disputes arising out of those other agreements are governed by jurisdiction clauses in the Written Agreements. The Claimants argue that those oral contracts are closely connected to Switzerland, by virtue of the existence of the Written Agreements (Article 4 Rome Convention). In this regard every contract must have a governing/applicable law. In contrast (and as already noted) there is no necessity for a jurisdiction clause; jurisdiction clauses are often not provided for, and it does not follow from the fact that a particular law is applicable (or is set out in the Written Agreements) that the jurisdiction clause in such agreements applies to disputes under the Oral Agreements. Further, the "closeness of connection" test in Article 4 is not a matter of contractual construction, it is an application of the conflict of laws rules in the Rome Convention. This does not mean that the Written Agreements are part of the same transaction or package as the Oral Agreements, still less that disputes arising under the Oral Agreements fall within the jurisdiction clauses in the Written Agreements simply by virtue of the fact that both are governed by Swiss law, and the Swiss law provisions of the Written Agreements are prayed in aid when addressing the law applicable to the Oral Agreements. I have already noted that it is not alleged by GPF that the jurisdiction provisions in the Written Agreements are to be implied into the Oral Agreements (not least, no doubt, because the requirements for the implication of such terms are not met, there being no necessity for any such term).

(3) Ultimately, and in any event, GPF's point is in reality no more than a forensic one. It is for the Court to determine whether or not the Oral Agreements are governed by Swiss law, and whether these claims fall within the jurisdiction clauses in the Written Agreements. How the Claimants have advanced matters, and what they chose to rely upon, is not determinative in that regard. I am satisfied that the claims do not fall within the jurisdiction clauses.

(iv) Tortious/Restitutionary/Breach of Fiduciary Duty Claims

58. In the above circumstances, and for the above reasons, I have concluded that the contractual claims under the Oral Agreements are not subject to the jurisdiction clauses in

the written agreements. I am equally satisfied that the tortious claims advanced are also not subject to the jurisdiction clauses. In this regard: -

(1) In tort, the claims are (a) on the basis that GPF has committed various unlawful acts that caused damage to the Claimants in misappropriating the monies that should have been (but were not) paid to Largely ([92.1] and [130] of the DAPOC) and (b) on account of GPF's responsibility for its governing officers' and employees' involvement in such wrongdoing ([131] of the DAPOC).

(2) In unjust enrichment and under the Swiss law principle of agency without authority, the claims are on the basis that GPF was paid certain sums of money from Yewdale (paras. [142]-[145] of the DAPOC, in particular [142.3]) – again, that relates to money that was not paid to Largely.

For the same reasons as in relation to the contractual claims, I am satisfied that the tortious claims are not subject to the jurisdiction clauses in favour of Switzerland.

(v) Article 23 and Exclusivity of Jurisdiction Agreements

59. As I have concluded that the disputes do not fall within the scope of the jurisdiction agreements it is not necessary to consider whether the claims fulfil the Article 23 Lugano Convention requirement that the dispute in this case must arise in connection with the particular legal relationship with which the agreement containing the clause is concerned. However, for completeness, I am satisfied that the subject-matter of the dispute does not arise in connection with the particular legal relationship arising out of the Written Agreements, and for the same reasons as set out above when considering the scope of the jurisdiction agreements.

60. In the above circumstances it is also not necessary to consider whether the jurisdiction agreements were exclusive in nature.

61. Accordingly, GPF's jurisdictional challenge based on Article 23 of the Lugano Convention, fails, and is dismissed.

C. The Fourth, Sixth, Seventh and Tenth Defendants' Application

62. The Fourth, Sixth, Seventh and Tenth Defendants (collectively the Campbell Co-Defendants), who the Claimants allege were involved in and/or benefitted from the misappropriation, challenge the jurisdiction of the English Court on various grounds, inter alia; that the claims against them are not sufficiently closely connected to be heard with the claims against the other Defendants in this jurisdiction, pursuant to Article 6(1) of the Lugano Convention, and should instead be tried in Switzerland pursuant to Article 2 of the Lugano Convention; that the claims against them would be more conveniently heard in Switzerland; that bringing proceedings against them in England is an abuse of process; that they should be tried in Switzerland pursuant to Article 5 of the Lugano Convention; that proceedings against them in England are a breach of their rights under Article 6 of the European Convention of Human Rights ("ECHR"); and that various agreements contain jurisdiction clauses which prevent the English Court from hearing the case against them. I will first identify the applicable principles before addressing each contention in turn.

C.1 Applicable Principles

63. The relevant international convention applicable to the Campbell Co-Defendants is the Lugano Convention 2007, which provides in relevant respects as follows:

> "Article 1
> (2) The Convention shall not apply to:… (d) arbitration
> Article 2
> 1. Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State…
> Article 3
> 1. Persons domiciled in a State bound by this Convention may be sued in the courts of another State bound by this Convention only by virtue of the rules set out in Sections 2 to 7 of this Title.
>
> …
>
> Article 5
> A person domiciled in a Contracting State may, in another Contracting State, be sued:
> 1. in matters relating to a contract, in the courts for the place of performance of the obligation in question; in matters relating to individual contracts of employment, this place is that where the employee habitually carries out his work, or if the employee does not habitually carry out his work in any one country, this place shall be the place of business through which he was engaged;

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;
3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred;

4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;

Article 6
A person domiciled in a State bound by this Convention may also be sued:
1. Where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.
…
Article 23
[set out above in relation to GPF's Application]"

64. I bear in mind a number of points in relation to the application of the Lugano Convention:-

(1) Exceptions to Article 2 are to be construed restrictively (see *Melzer v MF Global UK Ltd* (C-228/11), in the context of the Brussels I Regulation).

(2) In order for a foreign defendant to be brought in under Article 6(1), there must be: (a) a claim against an anchor defendant over which the English Court has jurisdiction due to its domicile; (b) which is so closely connected to the claim(s) against the foreign defendant and (c) it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

(3) Previously there was arguably inconsistent CJEU jurisprudence as to whether Article 6(1) can be utilised to bring in further defendants where an action against the anchor defendant was brought solely with the object of ousting the jurisdiction of the courts of the State in which the defendant was domiciled: *Kalfelis v Schröder* and *Freeport Plc v Arnoldsson* Case C–98/06 [2007] E.C.R. I–839. However, more recently, a majority in the Court of Appeal in *PJSC Commercial Bank Privatbank v Kolomoisky* [2019] EWCA Civ 1708 ("PJSC"), held at [6] and

[102]-[111] that a claimant with a sustainable claim against an Anchor Defendant, which it intended to pursue to judgment in proceedings to which a foreign defendant was joined as a co-defendant, was entitled to rely on Article 6(1) of the Lugano Convention, even where the claimant's sole object in issuing the proceedings against the anchor defendant was to sue the foreign defendant in the same proceedings.

(4) Nothing short of fraud or collusion between the claimant and the anchor defendant improperly to subvert Article 2 (or another principle of the Brussels I Regulation) would be sufficient to engage the abuse of law principle in relation to Article 6(1) (*PJSC* at [94], quoting Lord Briggs in *Vedanta*): -

> “[94] Having referred to *Freeport* and *Cartel Damage* and to the Opinion of the Advocate General in the latter case where he stated the sole object test, Lord Briggs said at [34]:
>
> "In its judgment, the Court of Justice [in *Cartel Damage*] expressly affirmed that opinion in para 27, adding at para 33 that in the context of cartel cases nothing short of collusion between the claimant and the anchor defendant would be sufficient to engage the abuse of law principle…
>
> [108] Fifth, we regard the CJEU's decision in *Cartel Damage* as rejecting a general sole object test but subjecting reliance on article 6(1) to the principle of abuse of law in cases of artificial fulfilment of the close connection condition. In general, all rights under EU law are subject to this principle and there is no reason to exclude article 6(1). It is noteworthy that the example given by the Court is a collusive arrangement between the claimant and the anchor defendant to conceal a settlement of the claim until the proceedings have been issued and served on the foreign defendants. As earlier mentioned, other examples might be naming a fictitious person as the anchor defendant (Freeport) and commencing proceedings against an anchor defendant knowing that it was an inadmissible claim (*Reisch Montage). “*

(5) “Irreconcilable” means a ‘divergence in the <u>outcome</u> of the dispute [which arises] in the context of <u>the same situation of law and fact</u>’: *Freeport plc v. Arnoldsson* [39]-[40] (emphasis added). The two claims do not need to have identical legal bases: this is only one relevant factor amongst others.

65. Where a defendant is within a jurisdictional provision of the Brussels I Regulation (and by extension, the Lugano Convention) because they are domiciled in a Member State,

there is no room for English courts to apply the principle of *forum non conveniens* (*Vedanta* at [16] and [81], applying *Owusu*). Therefore, *forum non conveniens* considerations are irrelevant if the requirements of Article 6(1) are otherwise fulfilled in relation to claims against the Campbell Co-Defendants.

66. Where the anchor defendant is sued in England under a provision of the Brussels I Regulation, but the "necessary or proper parties" are not domiciled in a Member State (so claims must be brought against them under the "necessary or proper party" gateway under PD6B), the *forum conveniens* consideration that hearing all the cases in England avoids the risk of irreconcilable judgments should not always be considered a decisive factor: *Vedanta* at [75].

C.2 Application of the Law to the Facts

67. I have considered with care the various arguments made by the Campbell Co-Defendants, but for the reasons set out below I am satisfied that the claims against them fall within Article 6(1) of the Lugano Convention and that none of the specific arguments raised by the Campbell Co-Defendants as to abuse of EU law, Article 5 Lugano Convention, Article 6 European Convention on Human Rights and purported jurisdiction agreements avails them in relation to their challenge to jurisdiction.

C.2.1 Article 6(1) Lugano Convention

68. The Campbell Co-Defendants are all domiciled in Switzerland, so are subject to the Lugano Convention (a point which is not disputed by any parties to this litigation). I am satisfied that the requirements of Article 6(1) are met in the present case for the following reasons.

69. Firstly, the English Court has jurisdiction over Yewdale (as a company with an English registered address), and Yewdale has been found (rightly in my view) to be an anchor defendant for the purposes of Article 6(1) of the Lugano Convention. In this regard:

    (1) The claim against Yewdale (relating to the Claimants' money which was transferred to Yewdale's bank account in England) is going to proceed, following the July 2019 Judgment.

(2) There is a real issue to be tried between the Claimants and Yewdale (May 2019 Judgment at [39]-[43]).

(3) The claim against Yewdale is not being brought for the sole purpose of bringing others to the jurisdiction, and there was no abuse in bringing the claim against Yewdale in England (May 2019 Judgment at [62]-[64]; July 2019 Judgment at [41]-[42]). Yewdale is properly to be regarded as an anchor defendant (July 2019 Judgment at [43].

(4) I am in agreement with, and adopt, the reasons given by Christopher Hancock QC in the May 2019 Judgment and July 2019 Judgment.

70. Secondly, the claims against the Campbell Co-Defendants are closely connected to the claims against Yewdale:-

(1) The Claimants' case, at its most basic, consists of an investigation into what happened to the monies paid by Terre Neuve to Yewdale, how and to whom those monies were transferred, and who they ultimately benefited (as rightly accepted by Christopher Hancock QC in the May 2019 Judgment at [46], in the context of determining necessary or proper parties pursuant to PD 6B 3.1).

(2) The claims against Meyer El Maleh, Carole Sasson-El Maleh, Sara Sasson, and Mr Naggar have the same common thread, and are intertwined with the substance of the claims brought against Yewdale. In this regard:-

(a) Meyer El Maleh and Mr Sasson are alleged to have set up and implemented the tax optimisation scheme set out above. They were therefore two of the primary actors in relation to the transfer of money from Terre Neuve to Yewdale, and what subsequently happened to that money. These two persons were also involved in the management of Yewdale, GPF, and REDS: it is through these companies that the Claimants say that the wrongdoing was executed. In particular, Meyer El Maleh was a director of Yewdale for much of the relevant time, having been appointed on 26 January 2011.

(b) Carole Sasson El Maleh and Sara Sasson are both heirs of Mr. Sasson, who was centrally involved in the wrongdoing: claims are brought against them which depend on Mr. Sasson's liability (see the Seventh Statement of Mr Gerbi ("Gerbi-7"), at [22.2]).

(c) Further, Carole Sasson El Maleh and Sara Sasson are alleged to have been involved in the companies at the heart of the wrongdoing at the material time. Carole Sasson El Maleh was allegedly a director of GPF (whose employees were involved in the daily operations of Yewdale) from 19 October 2010 and the director-secretary from 9 December 2011. A claim is made in relation to Carole Sasson El Maleh's receipt of monies directly from Yewdale (Gerbi-7 at [22.2.3], Particulars of Claim at [142]). Sara Sasson was allegedly a shareholder of Yewdale at the material time, though she has since divested herself of those shares (Gerbi-7 at [22.2.3]).

(3) Meyer El Maleh and Carole Sasson El Maleh are alleged to have received misappropriated funds. Further, at least €5 million was purportedly transferred to a Panamanian company said to be created by Mr. Sasson and Meyer El Maleh, in an account allegedly held in HSBCPB. It is not clear if the accounts of Meyer El Maleh and Carole Sasson El Maleh were at HSBCPB.

(4) Further, there is significant overlap between the legal causes of action brought against Yewdale and the Campbell Co-Defendants. The Claimants allege that each is liable for unlawful damage caused by money laundering (POC, [130.4]), albeit that these claims as made against Carole Sasson El Maleh and Sara Sasson are based on their purported liability in respect of Mr. Sasson's acts as his heirs. The 2008 Oral Agreements are ones to which none of the Campbell Co-Defendants are parties. There is no overlap with regards to breach of contract, but there is substantial overlap with regards to the torts and restitutionary liability in respect of the Campbell Co-Defendants and other defendants.

(5) Some reference was made by the Campbell Co-Defendants as to the family background of the Campbell Co-Defendants. However, the criterion of connection is the existence of such close legal or factual connections between the two sets of claims that are the subject of Article 6, which I am satisfied there are.

71. Thirdly, in light of this close connection, it is expedient to determine these claims together to avoid the risk of irreconcilable judgments resulting from separate proceedings against Yewdale in England, and the Campbell Co-Defendants in Switzerland. In this regard:-

(1) The claims all depend on a single investigation into a network of connected parties. The Claimants ultimately seek the recovery of monies paid by Terre Neuve into Yewdale's account, but which was not transferred on to Largely pursuant to the tax optimisation arrangements. Therefore, to determine liability, the court will need to investigate the destination of these funds, and who caused them to be dissipated/retained rather than being paid through. This will inevitably require the court to investigate: (a) the directions given by Mr. Maleh, Mr. Sasson and Mr. Naggar (as persons involved in Yewdale's management) and (b) directions given by other persons at GPF. The destination of the monies is also relevant in determining quantum.

(2) This was rightly recognised by Christopher Hancock QC in the May 2019 Judgment at [46]: *"[t]he evidence in all the claims will be similar and interlinked"* and *"[t]here would be an obvious risk of irreconcilable judgments if these claims were pursued separately"*. He was considering the case against the Non-European Defendants, but I agree with his comments, and I am satisfied that they have equal application to all of the Claimants' claims.

(3) The contention that the Campbell Co-Defendants are *"isolated by the veil of incorporation"* from the claims against Yewdale makes little sense: the determination of each of these claims on the facts requires consideration of the same material and the actions of the same persons. Claims which are closely connected do not need to have an identical legal basis (see *Freeport v Arnoldsson*, above).

(4) If proceedings against the Campbell Co-Defendants were conducted in parallel to proceedings against Yewdale, there is an obvious risk of irreconcilable judgments. Even if a Swiss judge considered identical disclosure, witness statements and expert evidence in a case against only the Campbell Co-Defendants the judge

might well come to a different conclusion on the facts from an English judge in the Yewdale claim. This is not "mere speculation" as claimed by the Campbell Co-Defendants – it is a common pitfall of parallel proceedings, and the very mischief which the Lugano Convention was designed to prevent. The reality is that the danger of irreconcilable judgments is present whatever disclosure regimes/witness evidence is before the court, as long as the causes of action are sufficiently closely related. In any event the Campbell Co-Defendants cannot possibly guarantee that the *"disclosure and factual background and… witnesses remain the same irrespective of jurisdiction"*. Even if the same witnesses are summoned, they may give different evidence in different proceedings, and the Swiss First Instance Court and Appeal Court Decisions in this very case demonstrate that disclosure regimes can affect the information that is before a tribunal (e.g. where claimants present evidence at a time which is regarded as too late to be admitted).

(5) Irreconcilable judgments would be particularly problematic in a case such as this where the allegation is that multiple defendants have participated together in a dishonest fraudulent exercise.

(6) The Campbell Co-Defendants made submissions as the meaning of the word "expedient" which was directed at, or came very close to relying upon, *forum non conveniens* considerations. Such submissions were misguided. In the context of Article 6 of the Lugano Convention, expedient means "appropriate" (i.e. there is such a risk of irreconcilable judgments that it is appropriate to hear the claims together). This is clear from the language used and the purpose of the Convention in facilitating the recognition of judgments.

72. Fourthly, the Campbell Co-Defendants contended that *Vedanta* is authority for the proposition that, in the application of Article 6(1) of the Lugano Convention, a balancing exercise is to be carried out of the connecting factors and the risk of irreconcilable judgments: the risk of irreconcilable judgments is not, they argue, a "trump card". I do not consider such submission to be of any merit. If jurisdiction is established under the Lugano Convention rather than at common law, the court has no discretion to decline such jurisdiction on the basis that the claim would be more conveniently heard elsewhere

(*Owusu*). *Vedanta* concerned a Zambian defendant to whom the English rules on establishment of jurisdiction (including the *forum non conveniens* doctrine) applied. It did not deal with jurisdiction established *against that specific Defendant* under the Brussels I Regulation or the Lugano Convention. Therefore, Lord Briggs' statements about irreconcilable judgments not being a trump card apply only to non-EU defendants brought in under PD 6B para 3.1(3) or another gateway: not a defendant brought in under Article 6(1) of the Lugano Convention. Subject to consideration of any abuse argument (which is very narrow in scope and not of any application on the facts of the present case), there is no discretion in the English court based on the appropriateness of the forum where jurisdiction is established under the Lugano Convention. Arguments as to whether (as suggested by the Campbell Co-Defendants) Switzerland is the more appropriate forum simply do not arise.

C.2.2 Abuse of EU Law

73. I am satisfied that there was no abuse of EU law in the application of Article 4 Brussels I Regulation with respect to Yewdale and the subsequent reliance on Article 6(1) of the Lugano Convention, as argued by the Campbell Co-Defendants, for the following reasons.

74. Firstly, many of the same issues were decided by Christopher Hancock QC previously in the June 2019 Hearing and I consider that he was correct to find as he did. Accordingly, whilst the Campbell Co-Defendants were not applicants or respondents at that particular hearing, the sentiments expressed by him have equal application in the context of the Campbell Co-Defendants, In this regard: -

    (1) Christopher Hancock QC found (rightly in my view) that Yewdale is a bona fides target for the Claimants' claims (at [37]-[44], July 2019 Judgment), which was not brought solely for the purpose of bringing other Defendants into the jurisdiction. Therefore, he concluded (again rightly in my view) that the "sole object" test (insofar as it was assumed at the time to exist) was satisfied. Yewdale was the recipient of the allegedly misappropriated funds, so at the centre of the claims advanced by the Claimants.

(2) He also found (again rightly in my view) that there had been "no collusive behaviour" between the Claimants and Yewdale in bringing the claim against Yewdale in England pursuant to Article 4 Brussels I Regulation improperly to subvert another EU law principle.

(3) The Campbell Co-Defendants attempt to distinguish the Deputy Judge's conclusions by arguing that though there may not have been abuse in bringing a claim against Yewdale in this court*, "it may well be an abuse to remove us from our home jurisdiction"* (at [18] of the Campbell Co-Defendants' skeleton) so that there is an *"abuse of Article 6(1) of the Lugano Convention".* However, the purported "abuse" is that the Claimants are relying on the fact that Yewdale is domiciled in England (so can be sued here under Article 4) to justify jurisdiction in this country against Lugano Convention defendants under Article 6(1). This alleged abuse is the same alleged abuse as was considered, and rightly rejected, by the Deputy Judge. There is no *separate* abuse in using Article 6(1), from a supposed abuse of Article 2; it is part of the same purported abusive scheme. The main thrust of the Campbell Co-Defendants' submission goes to whether the Claimants' sole purpose in suing Yewdale is to bring other defendants within the jurisdiction; this was substantially the same submission as made by Yewdale (see the July 2019 Judgment at [38]). Yewdale argued that in this case the sole purpose of suing it in England was to enable proceedings to be brought against other defendants in states other than those of their domicile. Such argument was rightly rejected by the Deputy Judge and the point is no better when made by the Campbell Co-Defendants.

75. Secondly, since Christopher Hancock QC's May 2019 judgment, it has been confirmed in *PJSC* that a claimant with a sustainable claim against an anchor defendant, which it intended to pursue to judgment, can rely on Article 6(1) of the Lugano Convention to bring in relevant defendants, even where the claimant's sole object in issuing the proceedings against the anchor defendant was to sue the foreign defendant in the same proceedings. The Campbell Co-Defendants cannot now *"maintain the sole object and sole purpose argument"* (skeleton argument at [44]). Further, the Campbell Co-Defendants make the point that the jurisprudence on abuse of EU law is "complex and

convoluted", by reference to the disagreement between the majority and minority constitution in *PJSC*. However, the decision in *PJSC* binds this court and there is no "sole object test" for the application of Article 6(1) Lugano Convention.

76. Thirdly (and importantly), there is no evidence that the Claimants colluded with Yewdale to use them as an anchor defendant to bring proceedings against the Campbell Co-Defendants in this jurisdiction. In this regard: -

    (1) The abuse of EU law principle can only apply to Article 6(1) where there is evidence of <u>collusion or fraud</u> (*PJSC* at [94] and [108]-[109] endorsing the *obiter* comments of Lord Briggs in *Vedanta*).

    (2) There can be no suggestion of any <u>collusion</u> between the Claimants and Yewdale in bringing English proceedings against Yewdale: in fact, Yewdale vigorously resisted the English Court's jurisdiction during the June 2019 hearing. Mr. Naggar in his first witness statement alleges that there has been collusion by the Claimants to remove him and other Defendants from his home jurisdiction but such allegation is neither particularised, nor supported by any documentation, and as such has not been demonstrated.

    (3) Further examples listed at [108] in *PJSC* were: naming a fictitious person as the anchor defendant; and commencing proceedings against an anchor defendant knowing that it was an inadmissible claim. Nothing that was alleged by the Campbell Co-Defendants before me, or in the skeleton arguments, comes close to any of these examples.

77. Further, I note that other Swiss-domiciled defendants (Ms. Vasarino, Nessim El Maleh and HSBCPB) have all submitted, or been deemed to have submitted, to the English Courts' jurisdiction. The main contentions of the Campbell Co-Defendants regarding the abuse of EU law would apply equally to these other Swiss-domiciled defendants.

<u>C.2.3 Article 5 Lugano Convention</u>

78. The Campbell Co-Defendants made submissions that Article 5 of the Lugano Convention was relevant in the current proceedings, because the Claimants' claims are centrally for

breach of contract. However, Article 5 clearly provides an *alternative* ground of jurisdiction: the Claimants can choose to sue defendants in the place of contractual performance, or as a related party under Article 6. The fact that the place of performance, the place where the harmful event occurred, or the country of the court seised in related criminal proceedings is in a different country than the present proceedings, has no bearing on the determination of whether it is expedient to try the claims against the Campbell Co-Defendants in this country to avoid a risk of irreconcilable judgments.

C.2.4 Breach of Article 6 ECHR

79. The removal of the Campbell Co-Defendants from their "home jurisdiction" of Switzerland does not contravene Article 6 of the European Convention on Human Rights. The Campbell Co-Defendants are sued in England pursuant to the Lugano Convention: it cannot sensibly be suggested that the English court process, in so far as England is the designated jurisdiction under those rules, is inherently unfair. Further, the existence of the practical difficulties that any of the Campbell Co-Defendants may have in terms of physical attendance at trial in England is not relevant to the issue of jurisdiction: they can fairly be addressed by the Court in due course, if indeed appropriate to do so in the specific circumstances, in accordance with well-established procedures (including e.g. use of video link facilities, hearsay evidence, or even the taking of evidence abroad).

C.2.5 Arbitration/Jurisdiction Clauses

80. The Campbell Co-Defendants contend that the English Court should refuse to take jurisdiction over the claims against them due to (1) an arbitration clause in an Agency Agreement dated 1998; (2) a letter of instructions from REDS to Terre Neuve dated 2009; and (3) the jurisdiction clauses in the Written Agreements. None of these contentions is of any merit and I reject each of them for the reasons set out below.

81. Firstly, as to the 1998 Agency Agreement:

    (1) The "Agency Agreement" was entered into in 1998. It was signed by Mr. Zahut representing Terre Neuve, and Mr. Rousso, representing REDS LLC. It provided that Terre Neuve (as the Principal) was to be represented by REDS (as the agent)

in selling goods and/or services as described in the Annex (Preamble). Clause VI (1) of this agreement provides:

> "Any dispute arising out of or in connection with this Agreement shall be referred to the arbitration in New York state of a single arbitrator appointed by Agreement between the parties or, in default of Agreement, nominated on the application of either party by the President for the time being of The Law Society."

(2) The Campbell Co-Defendants contest the jurisdiction of the English Court "pursuant to CPR Part 11.1 Brussels Regulation Recast 2012 and Lugano Convention 2007" (application notice of the Fourth and Seventh Defendants dated 22 May 2019, and application notice of the Sixth and Tenth Defendants, dated 25 July 2019). Article 23 of the Lugano Convention only applies where parties have agreed "that a court or the courts of a state bound by this convention are to have jurisdiction to settle any disputes which have arisen": arbitration in New York is not a court of a state bound by this Convention. Matters relating to arbitration fall out-with the scope of the Convention (Article 1(2)(d)).

(3) None of the Campbell Co-Defendants are parties to the Agency Agreement; none of them could therefore rely on s.9(1) Arbitration Act 1996. I should only add that the Campbell Co-Defendants did not in fact seek a stay in favour of arbitration (though had they done so any such claim would have failed).

(4) Further, the Agency Agreement is not one upon which the Claimants base their case, and the arbitration agreement cannot conceivably cover this dispute. None of the claims allege any breach of the Agency Agreement. Further, the Agency Agreement exhibited is between Terre Neuve and REDS, and is dated 1998. It appears to concern the issuing of invoices by REDS (as agent) on behalf of Terre Neuve (as principal). The REDS Agency Agreement referred to in the POC and DAPOC is between REDS and GPF, and was entered into in or around 2003: under that agreement, REDS promised to issue the invoices to Terre Neuve, ensure safe receipt of the monies paid by Terre Neuve, and transmit those monies to a new company set up for the benefit of Mr. Zahut. The bulk of the Claimants' case concerns what happened to the money for which Terre Neuve were invoiced *after it reached Yewdale.*

82. Secondly, as to the Letter of Instructions: the Campbell Co-Defendants have made reference to a letter of instructions dated 27 February 2009 from REDS to Terre Neuve, in which REDS request Terre Neuve to transfer certain amounts that REDS have invoiced to them. This letter does not appear to be relevant to any question of jurisdiction and does not contain any jurisdiction agreement. The Campbell Co-Defendants have submitted that in fact there were no 2008 or 2003 Oral Agreements, so the only "agreements" as to the transfer of funds between inter alia REDS, Mr. Zahut, and Terre Neuve were the 1998 Agency Agreement and the 2009 letter. As to whether there were any oral agreements, this is a matter for trial, whilst any Agency Agreement is of no relevance to the Claimants' claims or the jurisdictional challenge that is brought.

83. Finally, as to the Written Agreements: the Campbell Co-Defendants adopted the arguments of GPF regarding the Swiss jurisdiction clauses in the Written Agreements. However, for the reasons already given I have rejected the applicability of the jurisdiction clauses in respect of claims against GPF, and the position is no different in relation to the claims against the Campbell Co-Defendants. The Campbell Co-Defendants were not parties to the agreements containing those jurisdiction clauses.

84. Accordingly, and for the reasons given above, the Campbell Co-Defendants' challenge to the jurisdiction of the English Court fails, and their applications are dismissed.

<u>D. The Eleventh Defendant's Application</u>

85. Judah El Maleh is alleged to have owed and breached a Swiss-law duty to uncover and prevent the alleged laundering of misappropriated monies in the HSBC account. Judah El Maleh is domiciled in Israel. He applies to challenge the Court's jurisdiction to hear the claims made against him on the grounds:-

    (1) That claims against Judah El Maleh fail to meet the relevant evidential standard under CPR r.6.37(1)(b).

    (2) That he is neither a necessary nor a proper party within the meaning of para. 3.1(3) of PD 6B.

D.1 Applicable Law

86. On an application for permission to serve out of the jurisdiction under CPR rr. 6.36, 6.37 and 6.38, the applicant must demonstrate that he meets three criteria:

    (1) The claims must fall within one of the jurisdictional gateways set out in paragraph 3.1 of Practice Direction 6B. In this case, the relevant gateway is contained within Paragraph 3.1(3):

    > "The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –
    >
    > […]
    >
    > (3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (<u>otherwise than in reliance on this paragraph</u>) and –
    >
    > > (a) there is between the claimant and [that] defendant a real issue which it is reasonable for the court to try; and
    > >
    > > (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

    (2) The claims must have a reasonable prospect of success/there must be a serious issue to be tried between the Claimant and the defendant that they seek to join (i.e. the Claimants and the Necessary or Proper Party Defendant ("the NPP Defendant")) on the merits (CPR r.6.37(1)(b)); and

    (3) England and Wales must be the proper place to bring the claims (see e.g. *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80; [2018] 1 WLR 192 at [3]).

87. As to the <u>first</u> criterion, the Court must be satisfied that the <u>jurisdictional facts</u> or criteria relevant to the "necessary or proper party" gateway are satisfied, to the standard of a "good arguable case", or "the better of the argument". The court should be satisfied (to this degree) that:

    (1) A claim form has been served on a "defendant" otherwise than in reliance on this gateway ("the Anchor Defendant").

    (2) There is between the Claimants and the Anchor Defendant a real issue which it is reasonable for the Court to try.

(3) The other person on whom the Claimants wish to serve the claim form (the NPP Defendant) is a necessary or proper party to the claim between the Claimants and the Anchor Defendant. Where the liability of multiple persons depends upon "one investigation", they are all "proper parties" to the same action: see WB 6HJ.7. Other expressions to describe this relationship have included "closely connected" and "a common thread" running through the allegations: *Carvill America Inc v Camperdown UK Ltd* [2005] 2 Lloyd's Rep 457. Equally, a party who may be joined in proceedings in accordance with the joinder rules is generally a "proper party": see WB 6HJ.7.

88. As to the second criterion, the Court must determine whether there is a serious issue to be tried on the merits between the Claimants and the NPP Defendant to be joined (in this case, Judah El Maleh), pursuant to CPR r.6.37(1)(b).

(1) The evidential standard applicable to the merits of the relevant claim against the NPP Defendant under CPR r.6.37(1)(b) is whether the relevant claim has a reasonable prospect of success: there should be a "serious issue to be tried", which corresponds to a "real, as opposed to fanciful" prospect of success. This is the same test as is applied when resisting an application for summary judgment: *Altimo Holdings and Investments Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at [71].

(2) The test for summary judgment is whether there is a realistic (as opposed to fanciful) prospect of success (*Altimo Holdings* at [71]). The principles applicable to determining whether a party has a real prospect of success were summarised for the purpose of summary judgment in *JSC VTB Bank v Skurikhin* [2014] EWHC 271 (Comm) at [15]:

> "(1) The Court must consider whether the defendant has a 'realistic' as opposed to a 'fanciful' prospect of success, see *Swain v Hillman* [2001] 2 All ER 91, 92. A claim is 'fanciful' if it is entirely without substance, see Lord Hope in *Three Rivers District Council v Bank of England* [2001] UKHL 16 at [95].
>
> (2) A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products v. Patel* [2003] EWCA Civ 472.

(3) The court must avoid conducting a 'mini-trial' without disclosure and oral evidence*: Swain v Hillman* (above) at p.95. As Lord Hope observed in the *Three Rivers* case, the object of the rule is to deal with cases that are not fit for trial at all.

(4) This does not mean that the Court must take everything that a party says in his witness statement at face value and without analysis. In some cases, it may be clear that there is no real substance in factual assertions which are made, particularly if they are contradicted by contemporaneous documents, see *ED & F Man Liquid Products v. Patel* (above) at [10]. Contemporary activity or lack of activity may similarly cast doubt on the substance of factual assertions.

(5) However, the Court should avoid being drawn into an attempt to resolve those conflicts of fact which are normally resolved by a trial process, see *Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical Co 100* Ltd [2006] EWCA Civ 661, Mummery LJ at [17].

(6) In reaching its conclusion, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond* (No. 5) [2001] EWCA Civ 550, [19].

(7) Allegations of fraud may pose particular problems in summary disposal, since they often depend, not simply on facts, but inferences which can properly drawn from the relevant facts, the surrounding circumstances and a view of the state of mind of the participants, see for example *JD Wetherspoon v Harris* [2013] EWHC 1088, Sir Terence Etherton Ch at [14].

(8) Some disputes on the law or the construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is determined the better, see the Easyair case. On the other hand the Court should heed the warning of Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at [84] that it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration, see also at [116].

(9) The overall burden of proof remains on the claimant,... to establish, if it can, the negative proposition that the defendant has no real prospect of success (in the sense mentioned above) and that there is no other reason for a trial, see Henderson J in *Apovodedo v Collins* [2008] EWHC 775 (Ch), at [32].

(10) So far as Part 24.2(b) is concerned, there will be a compelling reason for trial where 'there are circumstances that ought to be investigated', see Miles v Bull [1969] 1 QB 258 at 266A. In that case Megarry J was satisfied that there were reasons for scrutinising what appeared on its face to be a

legitimate transaction; see also *Global Marine Drillships Limited v Landmark Solicitors LLP* [2011] EWHC 2685 (Ch), Henderson J at [55]-[56]."

(3) In some cases, the disputed issues are such that their conclusion by settlement or trial largely depends upon the expert evidence relied on by each side. In such cases, an application for summary judgment will usually be inappropriate unless it is made after the exchange of the experts' reports and, in most cases, after the experts have discussed the case and produced a joint statement (*Hewes v West Hertfordshire* Hospitals NHS Trust [2018] EWHC 2715 (QB), a clinical negligence claim, at [45]).

89. As noted above, the evidential standard applicable to jurisdictional facts required for the CPR PD6B para 3.1(3) gateway (as set out in the first criterion) is that of a good arguable case: there must be a plausible evidential basis for it, which is sometimes referred to (as it was by counsel before me) as one side having "the better of the argument". This is a higher standard than the test applicable to the merits of the relevant claim under CPR r.6.37(1)(b): *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192, at [4]-[7]. I reiterate this point because the Skeleton Argument served by Judah El Maleh appeared to apply the "good arguable case" / "the better of the argument" test to the merits of the relevant claim under CPR r.6.37(1)(b) (e.g.: at [10], [38], [39], [43], [62], and in heading C). During oral submissions, counsel for Judah El Maleh accepted that the relevant test under the second criterion is a serious issue to be tried, though he argued that the wording of the test ("serious issue" vs "better of the argument") made little difference. In so far as there is a difference between the two tests, it is clear that there must be a "serious issue to be tried", and no more, in relation to the merits of the relevant claim under CPR r.6.37(1)(b).

90. Finally, as to the third criterion, the court must determine whether England and Wales is the "proper place in which to bring the claim" (CPR r. 6.37(3)). Judah El Maleh has not sought to challenge jurisdiction on this ground.

D.2 Application of the Law to the Facts

91. Judah El Maleh argues that the claims against him (as the NPP Defendant) do not reach the necessary evidential threshold in CPR r.6.37(1)(b), and that he is not a necessary or proper party pursuant to PD6B paragraph 3.1(3).

D.2.1 Necessary Evidential Threshold on each claim

92. In order for the Claimants to meet the evidential threshold in CPR r.6.37(1)(b), they must establish that there is a "serious issue to be tried" as to the two claims that they bring against Judah El Maleh, on the following grounds:

    (1) The Tort Claim: the Claimants allege that Judah El Maleh unlawfully caused damage to the Claimants under Article 41 SCO. The unlawful element is alleged to be money laundering, contrary to Article 305bis Swiss Penal Code ("SPC").

    (2) The Derivative Claim: the Claimants allege that Judah El Maleh's actions or omissions/failures placed him in breach of fiduciary duties that he owed to HSBCPB under Articles 716a, 717 and 754 of the SCO, and that such breach is actionable at the suit of the Claimants under Article 754 of the SCO, because they are "creditors" of HSBCPB who suffered direct damage.

93. I am satisfied that there is a serious issue to be tried between the Claimants and Judah El Maleh with respect to each of the aforementioned claims. I will now deal with each claim in turn, and set out why each element of each claim raises a serious issue to be tried.

(i) The Tort Claim: Introduction

94. In relation to the Tort Claim, I will set out the uncontested points of law, followed by the three questions in relation to which there must be a serious issue to be tried, followed by some preliminary comments on the state of the expert evidence before me. I will then go on to set out why I consider that each of the three questions raises a serious issue to be tried as between the parties.

(ii) The Tort Claim: Summary of Uncontested Law

95. I understand that the following points of law are uncontested in relation to the tort claim, which I derive from the expert reports of Mr. Burrus and Mr. Hofmann:

(1) The relevant provisions of the SCO and the SPC) are as follows:

> "Article 41 SCO
>
> 1 Any person who unlawfully causes loss or damage to another, whether wilfully or negligently, is obliged to provide compensation."
>
> "Article 305bis SPC
>
> 1. Any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he knows or must assume originate from a felony or aggravated tax misdemeanour is liable to a custodial sentence not exceeding three years or to a monetary penalty"

(2) The tort of unlawfully causing damage under Article 41 SCO may involve either wilful conduct or mere "negligence or carelessness".

(3) A breach of Article 305bis SPC can constitute a basis for liability under Article 41 SCO. A criminal conviction pursuant to Article 305bis SPC is not a necessary precondition: a finding of breach of Article 305bis SPC can be made in the context of civil proceedings alleging tortious liability under Article 41 SCO. To establish a breach of Article 305bis, the Claimants must establish the following:

(a) The state of mind element: the defendant knew or should have known (i.e. must have assumed) the criminal origin of the funds. It is sufficient that the defendant is aware of circumstances which cause him to suspect that the money stems from a criminal predicate offence.

(b) The act element: money laundering can arise by omission where the defendant is under a positive legal obligation to act to prevent the occurrence of the offence (i.e. if it is the position of a "guarantor") and is at <u>fault</u> in failing to comply with this obligation

(4) The commission of money laundering by negligence is not punishable by law, subject to two qualifications: (i) as seen above, a suspicion (i.e. something short of

actual knowledge) of the criminal origin of the money can found liability for money laundering; and (ii) money laundering can be committed by omission.

(iii) The Tort Claim: Summary of the Issues

96. In relation to the Tort Claim, there are three matters pursuant to which there must be at least a serious issue to be tried in order for CPR r.6.37(1)(b) to be satisfied:

    (1) Firstly, the Claimants must show that there is at least a serious issue to be tried in establishing the following facts, as are necessary in order to establish the **unlawfulness element** of Article 41 SCO (i.e. a breach of Article 305bis):

        (a) Issue 1.1: As to the 'state of mind' element of Article 305bis: the Claimants must establish to the relevant standard that Judah El Maleh knew that the funds that were passing through accounts maintained at HSBC, or that were otherwise managed or handled by employees of HSBC, were the proceeds of crime or connected to criminal activity, or alternatively, that he at least knew of circumstances that gave rise to a suspicion (or reasonable grounds to suspect) that this was the case.

        (b) As to the 'act' element of Article 305bis: the Claimants do not allege that Judah El Maleh had an active role in the money laundering. Therefore, they must establish that this is a case in which money laundering can be committed by omission, as follows:

            Issue 1.2: Judah El Maleh's role, responsibilities and functions within HSBC were such that he was subject to the obligation under Articles 3-9 SLML to prevent (including by investigating and reporting on) the money laundering activities that occurred within HSBC.

            Issue 1.3: Judah El Maleh was at fault in failing to comply with the above obligation.

    (2) Secondly, Claimants must establish that there is at least a serious issue to be tried that their claims fall within the **scope** of Article 41 SCO and Article 305bis SPC. In this context, Judah El Maleh relies on the contents and correctness of the judgment of the Swiss Appeal Court dated 22 November 2019 ("Issue 2").

(3) Thirdly, Claimants must establish that there is at least a serious issue to be tried that Judah El Maleh **caused damage** to the Claimants. Judah El Maleh relies on the correctness of the Swiss Appeal Court's purported finding that the existence of a natural causal link between the alleged damage and the alleged unlawful act was not plausible. ("Issue 3").

(iv) The Tort Claim: Preliminary Points on the Expert Evidence Provided

97. Before addressing such matters, a preliminary point to note is that the state of the expert evidence before me, in particular in relation to the interpretation of the Swiss Appeal Court judgment, is somewhat unsatisfactory:-

(1) In an Order dated 20 September 2019, Cockerill J gave permission to Judah El Maleh to adduce expert evidence in support of his jurisdiction challenge, and for the Claimants to adduce expert evidence on Swiss law in reply. The Order provides for one expert report per party, and does not provide for supplementary reports. Mr Burrus' expert report on behalf of Judah El Maleh is dated 24 September 2019 ("Burrus 1"). Mr Hofmann's expert report on behalf of the Claimants in response is dated 7 November 2019 ("Hofmann 1").

(2) On 22 November 2019, the Swiss Court of Appeal's decision was handed down. Judah El Maleh then served a further supplementary expert report from Mr Burrus dated 11 December 2019 ("Burrus 2"), commenting on that decision and on certain matters in Hofmann 1. However, Judah El Maleh did not have permission to serve such supplemental expert evidence. No application was made for permission to adduce this evidence until during the course of oral reply submissions. The consequence is that whilst Mr. Burrus has made certain comments as to Swiss law in this regard, the Claimants have not had the opportunity to provide responsive evidence from Mr Hofmann in relation thereto. Clearly it would be inappropriate to accept the evidence in Burrus 2 at a time when the Claimants have not had the opportunity to serve responsive evidence from their expert (even assuming the Court would otherwise have been willing to give permission for the service of Burrus 2). In such circumstances I do not give permission for the service of Burrus 2.

(v) The Tort Claim: Issue 1.1 Factual Issues relating to Judah El Maleh's subjective knowledge

98. The majority of Judah El Maleh's arguments before me focussed on whether there was a serious issue to be tried between the parties on Issue 1.1. In this context, the following arguments were made before me:

   (1) the Claimants rely, amongst other matters, on Judah El Maleh's role in HSBCPB relative to the size of the fraud; recordings of telephone conversations of Judah El Maleh obtained by the French police and other supporting evidence, including a deposition given by Ms. Vasarino (a trusted employee of GPF) during the French criminal proceedings.

   (2) Judah El Maleh argues that this evidence is, by itself, insufficient to found a case which passes the relevant evidential threshold; he also relies upon a judgment of the Swiss First Instance Court dated 28 May 2019, in which that court overturned an attachment order for seizure of Judah El Maleh's property pursuant to the Claimants' English proceedings, and the fact that he was not charged by either the Swiss or the French authorities following their investigation.

99. For the reasons that I identify below, I am satisfied that there is at least a serious issue to be tried that Judah El Maleh knew, or suspected, that funds that were passing through accounts maintained at HSBCPB, or that were otherwise managed or handled by employees of HSBCPB, were the proceeds of crime or connected to criminal activity.

100. Firstly, the Claimants do not have to provide "smoking gun" evidence that Judah El Maleh actually knew about the money laundering. It is not in issue between the Claimants' and Judah El Maleh's experts that the requisite "knowledge" for the purposes of Article 305bis SCP can either be actual knowledge of the money laundering, or knowledge of facts which are sufficient to give rise to a suspicion of money laundering. The Claimants only have to prove (at a minimum) that there is a serious issue to be tried as to whether Judah El Maleh had sufficient knowledge to give rise to a suspicion that the money came from criminal activity, which is a relatively low standard. Furthermore, as a general matter, it is relatively rare in financial fraud or money laundering for there to be

clear proof of the perpetrators' state of mind, due to the sophisticated nature of the crime and the persons involved. Therefore, evidence as to knowledge is likely only to be inferential, or on the basis of some documentary evidence interpreted using inferences made about knowledge from an alleged perpetrator's position within the organisation or his relationship with other perpetrators.

101. Secondly, the fact that Judah El Maleh had an important supervisory role over the HSBCPB department at which such a wide-ranging fraud took place, combined with his personal relationship with the persons committing that laundering, provides, I consider, significant support to the Claimants' contention that it can be inferred that he would have known (or would have had grounds to suspect) that the money laundering was taking place. In this regard:-

(1) The MEDIS department is recorded indirectly by FINMA as having managed the majority of the accounts involved in the money laundering at HSBCPB. Further, I am satisfied, to the standard required on an interlocutory basis, that this department was shut down by the HSBCPB in 2013 as a result of the fraud being perpetrated.

(2) Judah El Maleh was head of the MEDIS department, and was on the bank's Executive Committee. In his capacity as the department's head, he had overall responsibility for managing the team below him, and overall responsibility for consistent implementation of risk control and management and compliance with money laundering legislation. Judah El Maleh claims that when he became a member of the bank's Executive committee in 2002, he ceased to be involved in the "day-to-day" business of the MEDIS department. However, he does accept that he had weekly meetings with the head of each department, including the head of the Israel team. During those meetings, he accepts that he discussed problems with clients in some detail (e.g. some discussion of specific clients and transfers of money). Judah El Maleh acknowledges that he was able to look at account information if he needed to do so, but he says that he did not do this on a regular basis. However the issue of whether he was aware of the money laundering or would have had grounds to suspect that there was money laundering taking place is a classic issue for trial rather than for summary determination/strike out, not

least in the context of the further evidence I refer to below which supports the conclusion that Mr El Maleh was actually aware of money laundering taking place at an earlier period of time (pre 2009) – the inference being that such awareness also existed as at the later period of time in question.

(3) It is not obviously credible that the overall head of MEDIS had no knowledge, or even a suspicion, that such widespread money laundering was occurring in his department. It is of course possible that Judah El Maleh was not carrying out his supervisory responsibilities for the department at all (i.e. that he was grossly negligent), or that he was carrying out his duties but hired someone incompetent to carry them out after having taken reasonable steps. However, it is not possible to, and would not be appropriate to, carry out a "mini-trial" of such matters at this stage – which are again classically a matter for trial with the benefit of full documentary, and witness, evidence (potentially extending to banking expert evidence). It suffices to conclude that there is at least a serious issue to be tried that Judah El Maleh did know or suspect that money laundering was occurring.

(4) Further, Judah El Maleh had indirect supervisory responsibility over Nessim El Maleh, who was alleged to be involved in the money laundering. Further, it is suggested by the Federal Court in Geneva in its summary of the facts before giving its judgment in the employment proceedings between Judah El Maleh and HSBCPB that Nessim El Maleh was in an *earlier* period under the direct supervision of his brother. This creates a closer link between Judah El Maleh and the alleged money laundering. I bear in mind Judah El Maleh's evidence that he could not approve transactions by Nessim El Maleh due to their familial relationship, but it does not follow from this that he was unaware of what was going on, and it raises issues that will need to be explored at trial as to what supervisory role he was required to carry out, and did in fact carry out, and what knowledge he did, or should, have acquired as a result.

(5) The circumstances in which Judah El Maleh was let go from his position at the bank will also need to be explored at trial. Judah El Maleh points out that he was not dismissed with immediate effect for misconduct in relation to the money laundering activities, rather he was given six months' notice. Equally it was not alleged in the Swiss employment tribunal proceedings which resulted from Judah

El Maleh's dismissal that he was guilty of any involvement in the money laundering. The reason given for his dismissal appears to have been a "complete loss of trust" in the context of the money laundering that was taking place under his watch. This may have been all that HSBCPB needed to assert to justify his dismissal – as a result of which there does not appear to have been any adjudication as to whether he was in fact involved in the money laundering or knew of it.

102. Thirdly, and in my view importantly for present purposes, the evidence of Ms. Vasarino in the French Criminal Proceedings in June 2013 supports the contention that Judah El Maleh had the relevant knowledge:

(1) It appears from the evidence that Ms Vasarino was a trusted employee of GPF, as the assistant to Mr. Sasson and then to Meyer El Maleh. She stated that Mr. Zahut used to have funds held by International Trading Corporation (ITC) at HSBCPB. I understand from the Claimants' submissions that ITC was a company into whose HSBCPB account monies from REDS and/or GPF was received from the tax optimisation scheme and the Defendants' purported money laundering before 2009 (with its account with HSBC being closed in 2008).

(2) Ms. Vasarino states that "of course, ITC accounts were initially with HSBC in the JUDAS and NESSIM ELMALEH team. **<u>JUDAS personally supervised them to avoid problems</u>**". She continues that, "JUDAS feared that the bank would notice suspicious movements in the name of a nominee. ITC's account left HSBC in 2009… **<u>We fled HSBC at the express request of JUDAS ELMALEH who was in a panic</u>**" (emphasis added).

(3) The inference that the Claimants invite the Court to draw is that what Judah feared was that HSBCPB would discover the money laundering being performed using ITC (and of which he was, in the context of such an inference, aware). I consider that this is a possible inference that the Court might well draw at trial – certainly there is a serious issue to be tried in this regard. The Claimants will also invite the Court at trial to draw an inference from this that Judah was aware of the tax optimisation scheme, and associated money laundering that went on <u>after</u> 2009 using the successors to ITC in the scheme.

(4) Judah El Maleh points out that this testimony was given in the context of French proceedings in which he himself was not charged, convicted or questioned: however, it is still testimony that has the potential to fix him with knowledge of the tax optimisation scheme and money laundering, and there is certainly a serious issue in this regard.

(5) I consider that the evidence of Ms. Vasarino adds materially to the Claimants' case that there is a serious issue to be tried as to Judah El Maleh's knowledge of the money laundering, not least when also taken in conjunction with the other evidence that I have already referred to including as to his position within HSBCPB. Whilst Ms Vasarino has not (at least to date) given evidence as to any involvement of Judah El Maleh in the period between 2009-2012, her evidence in relation to an earlier period is supportive of an inference that he had knowledge of a similar money laundering scheme, in the same bank department, occurring before 2008. Of course, and assuming that she is called as a witness at trial, she may or may not repeat such evidence, and may or may not come up to proof in relation to the earlier period (or indeed any evidence she may be able to give in respect of the later period) – but this is again a classic matter to be explored at a full trial, and in the meantime the evidence she has given to date bolsters the merits of the Claimants' claim for present purposes.

103. Fourthly, there are recordings of Judah El Maleh's telephone conversations obtained by the French police in the course of their investigation into the money laundering which are also supportive of the Claimants' case that Judah El Maleh had the requisite knowledge. The Claimants rely on several extracts of covert recordings of conversations allegedly between Judah El Maleh, Meyer El Maleh and Nessim El Maleh, as tending to show Judah El Maleh's knowledge of the alleged money laundering. Judah El Maleh asserts that there are innocent explanations for the contents of each of the recordings, and that they have been taken out of context. The very fact that there may (at least on Judah El Maleh's case) be more than one interpretation to what is being said in a particular conversation evidences that such matters will need to be explored in their full context (and with all available documentary and witness evidence) at trial. Whilst the possibility of innocent explanations is to be borne well in mind, this does not mean that what the

conversations appear to show on their face, should be ignored when considering the merits to the requisite level, on Judah El Maleh's application.

104. I will now go through each conversation relied upon by the Claimants as establishing a serious issue to be tried as to Judah el Maleh's knowledge.

(1) The first conversation was on or around 25 August 2012 and between Meyer El Maleh and Judah El Maleh, in the context of Judah warning Meyer not to engage in "compensation transactions":

> "*Judah: Be careful with that, the day when it comes crashing down, you won't be comfortable anywhere: not in Morocco, not anywhere.*
>
> *Meyer: No no no (...) I'm doing things discreetly (...)*
>
> *Judah: (...) Meyer, get out of there ok, get out, very quickly, but be careful.*
>
> *Meyer: But I'm not there, inside.*
>
> *Judah: Yes, but, but yeah, you told me no no no, but there you go, he delivered the money to Mardoché, you took them. So, you too are being stupid!*"

Mardoché is another El Maleh brother, to whom a Mr. Simon Perez had allegedly delivered cash. Simon Perez was (according to the French police), one of the primary actors in the money laundering scheme. I understand that a compensation transaction is a type of banking transaction which carries a higher risk of being used for money laundering. I understand that in a compensation transaction, there is movement of money from account A to account B, and a corresponding payment back from B to A, usually in cash, creating a circular transaction. I accept that there is nothing in this particular conversation which links the compensation transactions that Judah is warning Meyer about to money laundering through HSBCPB. However, I consider this evidence supports the submission that Judah ought at least to have been suspicious that Meyer was undertaking money laundering (and the Claimants at trial will no doubt submit that he was).

(2) The second conversation was between Judah and Nessim:

"*Judah: I don't understand that Meyer is also agreeing to take Mardoché the money and not Mardoché take the money. So, there are limits to all these screw-ups too.*

Nessim: What do you mean? For who?

Judah: Because he agreed to PEREZ giving the money to Mardoché in Paris?

Nessim: My friend, he will tell you who do you want me to give them to? (Laughs) but he doesn't want to introduce these guys there in…

Judah: But Meyer only had to say no, I don't need it. […]

Judah to Nessim: "Listen to me carefully: what you are doing with Meyer in the foreign exchange office, I don't agree with it, I'm totally against it. (...) I'm going to tell him, don't count on me introducing a client to you because that would be signing the death warrant for everything, that's it"

(a) The Claimants contend that this reveals that Judah was aware of the money laundering in which Nessim, Meyer and Simon Perez were involved. Judah El Maleh contends that this is not supposed to be advice to Nessim, but Judah telling Nessim about a conversation that he intends to have with Albert Maleh (their brother, who was not an employee of HSBCPB), to warn him against compensation transactions, as he had previously warned Meyer.

(b) In my view, there is at least a serious issue to be tried that the Claimants' interpretation of this recording is the correct one, in the context of Judah El Maleh discussing with Nessim specific details of the alleged money laundering occurring between Simon Perez and Mardoché. Further, I read this recording in the context of Ms. Vasarino's above allegations that Judah El Maleh <u>previously</u> supervised Nessim El Maleh personally to cover for him in the context of similarly "suspicious movements" in the ITC account.

(c) My attention was drawn to the Claimants' *Replique* in the Swiss attachment proceedings where the Claimants refer to the same conversation, and assume that Judah El Maleh is making comments to Nessim about Albert, not offering advice to Nessim. However, in those pleadings it is pleaded by way of conclusion that, *"the Respondent [Judah*

El Maleh] knew that his brothers, among whom was Mr. Nessim El Maleh, were engaged in offsetting transactions […] " The full context of what was being asserted in the *Replique* was not before me, as only one page of it had been translated.

(d) Even if Judah El Maleh is correct in that he was making comments to Nessim about *Albert's* conduct, not warning off Nessim, the tenor of these conversations still implies that Judah and Nessim were within the circle of confidence of Meyer and Simon Perez in relation to the compensation transactions. As it is alleged that Nessim was partaking in those transactions the Claimants may well be able to justify the drawing of an inference at trial that Judah knew about Nessim's involvement, in addition to knowing about Meyer and Simon's involvement.

(3) In a third conversation, Judah El Maleh is alleged to mention transferring money to or through a "Simon", in a conversation recorded on 23 August 2012. The Claimants claim that this is clearly a reference to Simon Perez. Judah El Maleh claims that this is a reference to a different Simon, and further that he did not know of Simon Perez's involvement in the alleged money laundering. In circumstances where Judah El Maleh refers to "Perez" giving money to Mardoche El Maleh in Paris in the second telephone conversation I consider that there is at least a serious issue to be tried that the Claimants' interpretation is the correct one. Again, this is a matter for exploration at trial when there is likely to be much more evidence before the Court. I am satisfied, however, that the evidence currently available supports the Claimants' case.

105. I also bear in mind that the French police adopted the interpretation of the recordings advocated by the Claimants, and formed the view that Judah El Maleh knew about the alleged money laundering, albeit that (for whatever reason), the French authorities did not charge Judah El Maleh. Ultimately, of course, it is a matter for me as to whether the Claimants have a sufficient evidential basis for their claims in the context of the application before me.

106. Meyer El Maleh gave the following evidence in a hearing on 6 November 2012 in Geneva (in relation to Simon Perez allegedly asking Judah El Maleh to tell his brother Mardoche to be more discreet):

> "I was afraid that MARDOCHE was beginning to do things fast and in the end would do something stupid. In other words, make calls directly to clients to satisfy them and that he would end up being too indiscreet.
>
> You ask me how that justifies my indicating that it was going to cost everyone dearly. […]. You ask me why Simon asked me to have my brother Judas intervene. Judas was supposed to tell MARDOCHE to stay discreet. You pointed out to me that Judas was therefore informed of these matters. My response is **not especially**, because I did not ask him to do so."

(emphasis added)

107. The Claimants place particular reliance on the words "not especially". It is submitted that the use of such language supports the inference (based on Meyer's evidence) that Judah was informed of the relevant matters, but not to a high degree. Judah El Maleh submits, by way of rebuttal, that this evidence is to be interpreted as Meyer El Maleh denying that Judah El Maleh knew about the relevant matters, because he did not ask Judah to speak to Simon Perez. On balance, I consider (solely for the purpose of considering the merits at an interlocutory stage) that the language used is more consistent with Judah having been informed ("not especially" is somewhat defensive/evasive to a question that ought to be capable of a "yes or no answer", and is capable of being construed as carrying the connotation that Judah was informed at least at some level).

108. Judah El Maleh submits that nothing in these conversations links the money laundering allegedly perpetrated by Meyer, Nessim and Simon Perez to accounts within HSBCPB. However, if Judah El Maleh did indeed have knowledge or suspicion that Nessim El Maleh, who worked under him in HSBCPB, was in fact undertaking money laundering or "compensation" transactions, then I consider it well arguable that this in itself should have raised at least a suspicion that Nessim El Maleh was using his position at this bank to make transfers to compensate the cash transactions. I consider that there is a serious issue to be tried that, from this evidence in conjunction with Nessim El Maleh's position at HSBCPB and Judah El Maleh's supervisory role, Judah El Maleh did know about, or suspected, the alleged money laundering going on through HSBCPB accounts.

109. Judah El Maleh notes that Meyer gave further evidence in the 6 November 2012 Geneva hearing that:-

> "my brother Judas never talked to me about what I was doing with Nessim… I never talked to him about clearing transactions. Personally, I never talked to him about Simon PEREZ. Nessim never informed me of any conversation that he might have had with Judas regarding clearing, Simon PEREZ, and the money MARDOCHE received in Paris. Between 2007 and May 2010, I have no contact with Judas, with whom I was on bad terms. […]".

110. I bear such evidence in mind, but none of this is conclusive as to whether Judah knew about Nessim's role in the HSBCPB alleged money laundering: it only speaks of Meyer El Maleh's knowledge of conversations between him and Judah. Meyer El Maleh told the investigating magistrate in Paris on 14 June 2016 that Judah El Maleh was "*fired because he was covering for Nessim, and because then there was another case with Asia, a sector which Judah handled*". This is not the reason that HSBCPB gave for terminating Judah El Maleh's employment, but this does not detract from the general point that Meyer considered Judah to have been *"covering for Nessim"*.

111. Fifthly, the fact that Judah El Maleh was not charged by the Swiss or the French authorities following investigations into the money laundering does not (thereby) mean that the Claimants do not have a case against Judah El Maleh as to money laundering in civil proceedings. That is a matter for consideration by the English court with the benefit of all available documentary and factual evidence, including expert evidence on Swiss law. I make three further points with regard to the matters specifically drawn to my attention by Judah El Maleh's counsel:

   (1) Judah El Maleh submitted (in reliance on Burrus 1) that the fact that a criminal investigation was conducted in the context of the Claimants' allegations but did not result in Judah El Maleh being charged or convicted of any criminal offence would carry significant weight in the decision-making process of a civil judge in Switzerland. This was repeated in oral submissions, in the context of the Swiss courts being allegedly deferential to what the criminal authorities had determined. However, Mr. Hofmann did not fully agree with this conclusion, stating that Swiss civil courts will examine "freely" whether the prerequisites of the offence are fulfilled, based on the evidence before them. The degree of deference shown by Swiss courts to the determinations of criminal authorities may well itself be a

serious issue to be tried between the parties, but it clearly cannot be assumed that a Swiss court applying Swiss law would always follow the determinations of criminal authorities.

(2) Judah El Maleh further relied on the fact that money laundering is an offence to be prosecuted *ex officio* in Switzerland. In Burrus 2, it is noted that the criminal justice authorities are obliged to commence and conduct proceedings where they are aware of or have grounds for suspecting that an offence has been committed (Article 7 Swiss Criminal Procedure Code). Again this is not decisive as to the merits of any civil claim. I also do not have before me evidence as to the finer details of Article 7 and how it is applied in practice or as to what the actual reasons were which led the Swiss authorities to conclude that there were no grounds to suspect that Judah El Maleh had committed an offence (assuming they did so conclude) or as to whether they had the same evidence before them, as I have before me (or a judge at trial is likely to have).

(3) Judah El Maleh also relied on the decision by the French authorities not to charge Judah El Maleh. I consider that this is limited relevance to the Claimants' case. The French police believed (as of 5 September 2015) that Judah El Maleh was *"perfectly aware of the activities of Meyer and Nessim",* having obtained the telephone conversations that I have referred to. In the event it appears that Judah El Maleh was not prosecuted, but I do not have evidence as to the reasons for that. Nor do I have evidence as to whether money laundering is an *ex officio* offence in France, or indeed what the purpose of the police operation may or may not have been, and whether or not particular offenders, or classes of offenders, were targeted.

112. Sixthly, the conclusions of the Swiss Courts as to the factual allegations of unlawfulness are not determinative of the issues before me, and that will arise at trial:

(1) It is not alleged that this court is bound by the decision of the Swiss First Instance Court or the Appeal Court as a matter of res judicata and/or issue estoppel.

(2) It is an obvious point, but it does not follow that the documentary, factual and expert evidence before this Court will be the same, or that the same decision will be reached in the light of such evidence.

(3) There appears to be a dispute between the parties as to the evidential standard to which the claimants must prove their claim as applied by the Swiss Court. According to Mr Burrus, in his supplemental report, the evidential standard that the Claimants' claim failed to meet in the Swiss attachment proceedings is a similar standard to that applied by the English court in these proceedings: whether the claimants had a prima facie case, in which the judge acquires *"the impression of a certain plausibility of the existence of the alleged facts, without having to exclude that it may be otherwise [...] the condition is that there must be some initial evidence"*. However, the Claimants submit that the test in fact applied by the Swiss courts was higher, as suggested by the language in the Swiss First Instance Decision: *"demonstration of the likelihood of [the claim's] existence",* whether the applicant has *"plausibly argued his claim",* and in the Swiss Appeal Court's judgment *"plausibility that the debt exists"* and "*probability that the claim exists"*. In circumstances where the experts were not directed to address the standard of proof in their first report, and Mr Hofmann has had no opportunity to reply to Mr Burrus' supplementary report (for which no permission has been granted by this Court in any event), it would be neither possible, nor appropriate, for me to attempt to resolve this question on this application. To the extent relevant, this is just the sort of point best determined at trial after hearing both the written and oral evidence from the experts (to the extent that they ultimately disagree).

(4) It does not appear that the Swiss First Instance Court's decision addressed directly the question of whether Judah El Maleh had the relevant knowledge/suspicion of the money laundering going on in HSBCPB, instead their decision was based on several other factors (inter alia, that Judah El Maleh had not been convicted or arrested, and that his dismissal by HSBCPB was pursuant to the contractual notice period).

113. In the above circumstances, and for all the reasons I have given, I am satisfied that there is, at the very least (if not more than) a serious issue to be tried that Judah El Maleh had actual knowledge or suspicion of the alleged money laundering taking place through HSBCPB bank accounts, having regard, in particular, to the documentary and witness evidence (in the form of Ms. Vasarino's statement and the covert recordings) which

themselves have to be considered in the context of the potential inferences that it may be appropriate to draw set against the backdrop of Judah El Maleh's senior position overseeing a department in which extensive money laundering allegedly took place. The decisions of the Swiss/French authorities not to prosecute, and of the Swiss First Instance and Appeal Court, are matters that will no doubt be addressed in expert evidence, and raise issues for consideration at trial, but do not lead to the conclusion that there are not serious issues to be tried on the merits.

(vi) The Tort Claim: Issue 1.2 and 1.3: Factual Issues relating to Judah El Maleh's Obligations and Breach thereof

114. I consider that there is clearly a serious issue to be tried as to the 'act' (Issue 1.2) and 'fault' (Issue 1.3) elements of Article 305bis, for the following reasons.

115. Firstly, I am satisfied that there is a serious issue to be tried as to whether Judah El Maleh's responsibilities and functions within HSBC were such that he should be subject to obligations under Articles 3-9 SLML to prevent the money laundering activities that occurred within HSBC. Judah El Maleh does not accept that he was under such a duty. In this regard:-

(1) As addressed by the Swiss law experts, financial intermediaries such as banks (e.g. HSBCPB, which was Judah El Maleh's employer at the time) are under a positive duty pursuant to Articles 3-9 SLML to prevent money laundering (i.e. they are "guarantors" in this context). The required mental element for the reporting obligation under Article 9 SLML is that the financial intermediary "knows or has reasonable grounds to suspect" that the assets involved in the particular business relationship are connected with specific criminal offences, or represent the proceeds of specific crimes, or are subject to the power of disposal of a criminal organisation, or serve to finance terrorism. An individual working within such a financial intermediary may be a "*guarantor*" in this context, and hence may be himself liable for money laundering by omission, if that individual acts (a) as a governing officer or as a member of a governing body of the relevant institution, (b) as a partner, (c) as an employee with independent decision-making authority in his field, or (d) without being a governing officer, member of a

governing body, partner or employee, as a de facto manager. I understand that this exposition of the law is not in dispute.

(2) The question of whether Judah El Maleh is a guarantor depends upon a detailed examination of his duties within the institution, including the bank's internal guidelines defining processes, responsibilities and distribution of tasks. The question of whether Judah El Maleh is a "guarantor" raises a serious issue to be tried between the parties.

116. Secondly, I am satisfied that there is a serious issue to be tried that Judah El Maleh failed to comply with that obligation, and was at fault in doing so. Some submissions were made to the effect that Judah El Maleh complied with his Article 3-9 duties by making sure that compliance officers assigned to the MEDIS department were professional and efficient. The Claimants' expert Mr Hofmann accepts that a delegation of obligations to subordinated persons is allowed, but only where the transferred obligation is precisely described and the start date stated. Further, this "delegation" is just a modification of the content of the duties: Judah El Maleh was still responsible for selecting, instructing and overseeing the subordinate persons. Given the widespread nature of the alleged money laundering discovered by the Swiss authorities in the MEDIS department, and the judgment of the Employment Tribunal upholding the bank's "total loss of trust" in Judah El Maleh following his failure to identify the unlawful acts in the MEDIS department, I am satisfied that there is at least a serious issue to be tried as to whether Judah El Maleh failed in his selection, instruction or oversight of the subordinate persons responsible for compliance, and was at fault in doing so.

117. Thirdly, Judah El Maleh made submissions as to the conclusions of the Swiss Courts, the failure of Swiss Authorities to charge him, and the failure of HSBCPB to dismiss him for misconduct apply to Issues 1.2 and 1.3. However, for the reasons that I have already identified I do not consider that these matters lead to the conclusion that there is no serious issue to be tried on this part of the Claimants' claim.

(vii) The Tort Claim: Issue 2 Scope of Articles 305bis SPC and 41 SCO.

118. I consider that there is a serious issue to be tried as to whether or not the Claimants' case falls outside the scope of Article 305bis SCP and Article 41 SCO. I will set out the

arguments each party made, followed by my reasoning in support of the conclusion reached.

119. Judah El Maleh contends that the Claimants' case fails (regardless of the factual issues identified above) because it is said that it falls outside the scope of Article 305bis SCP and Article 41 SCO due to, inter alia, the fact that the money laundering was an inherent part of the tax optimisation scheme, and Claimants therefore benefitted from the offence that they now seek to base a tort claim on. In this regard:

(1) Judah El Maleh relies, in support of these contentions, on the decision of the Swiss Appeal Court that the Claimants could not recover anything as a matter of Swiss law.

(2) Further, he relies on and adopts each of the grounds that the Swiss Appeal Court gave for concluding that the Claimants could not recover anything as a matter of Swiss law, even if Judah El Maleh did act unlawfully within Article 305bis (at [71] ff of his Skeleton Argument).

(3) The relevant grounds of the Swiss Appeal Court are set out as follows:

> "In particular, the claimants do not have the status of injured parties, within the meaning of criminal law, of the prior offence whose purpose was to conceal the product, in this case drug trafficking [the First Ground].
>
> Nor were the plaintiffs harmed by the money laundering acts committed; on the contrary, they benefited for several years, directly or even indirectly, from the commission of such acts, which provided them with liquidity without raising suspicions [the Second Ground].
>
> They cannot also complain that their involvement – apparently unintentional – in such money laundering acts ultimately prevented them from exploiting for longer the tax optimisation scheme that they had put in place, which was considered fraudulent. The purpose of repression of money laundering cannot be to allow the commission of other offences, in particular tax offences, provided that the proceeds of such offences are not laundered [the Third Ground]."

(4) Judah El Maleh must logically rely upon the decision and each of the grounds as being a correct exposition and implementation of Swiss law.

120. The Claimants contend that their claim does fall within the scope of Article 305bis SCP and Article 41, because the money laundering was not an inherent part of the tax optimisation scheme, and because their claim is based on damages caused by misappropriation (a form of theft). The Claimants also contend that Judah El Maleh cannot rely on the Swiss Appeal Court's decision, because it is wrong in its application of Swiss law to the facts. Further, the Claimants' Skeleton Argument sets out substantive reasons as to why the Swiss Appeal Court was wrong on the First and Third Ground (at [56.4] and [56.5]), and why there is a serious issue to be tried as to the factual allegations upon which the Second Ground was based.

121. I am satisfied that there is a serious issue to be tried as to whether the Claimants' case falls within the scope of Articles 41 SCO and 305bis SCP for the reasons I identify below.

122. Firstly, there is a serious issue to be tried between the parties as to whether the *decision* of the Swiss Appeal Court is correct, in its application of Swiss law to the facts, in circumstances where its correctness is heavily relied upon by Judah El Maleh. I cannot determine this issue before trial not least in circumstances where this would require further expert evidence (and the testing of that evidence in the absence of agreement between the experts). In this regard:-

(1) In his second witness statement and in his submissions, Judah El Maleh relies on the Swiss Appeal Court as correctly applying Swiss law to the facts of the present case: he refers to this judgment in his skeleton argument at [84] as "inherently convincing" and states that there is "no sensible basis" on which the court should go behind the Swiss Court's conclusions on Swiss law. Judah El Maleh does not provide an expert report setting out why the Appeal Court's exposition of the law and its application to the facts is correct: Burrus 1 sets out the legal test at [24] for the scope of Article 305bis, and Burrus 2 sets out in bare terms the conclusions of the Appeal Court. However, as I have already noted, Judah El Maleh does not have the permission of the Court to serve such a further report.

(2) For their part, the Claimants have in their written and oral submissions contended that the Appeal Court's findings are not a correct application of Swiss law to the factual matters arising in this case, but have yet to produce an expert report in this regard in circumstances where there was no permission granted to the parties to serve a further report (and the Swiss Appeal Court judgment post-dates the experts' reports for which permission was given).

123. I do not have the expert evidence before me that would enable me to conclude with any certainty whether Swiss law is as stated in the Swiss Appeal Court judgment or, still more pertinently, what the proper application of Swiss law is to the facts of the present case. It is clear that there is a live issue between the parties on this and it is one that will need to be resolved at trial, with the benefit of expert evidence from each party's expert. Even had such expert evidence been available and before me at this time (which it is not) I consider there would have been a danger of, in effect, conducting a mini-trial on issues of foreign law on which the experts are not *ad idem* – on established principles that would not have been appropriate.

124. Secondly, I am satisfied that there are further specific serious issues to be tried between the parties as to the correctness of the First and Third Grounds in the Swiss Appeal Court's decision. In this regard:-

(1) I consider that there is a serious issue to be tried in relation to the First Ground as to who the "norm" of Article 305bis SCP is intended to protect.

(a) In Burrus 1, Mr Burrus considers that a breach of Article 305bis SCP can constitute an unlawful act creating liability under Article 41 SCO, provided that the norm breached is one that specifically intends to protect the rights of the injured party (at [24]). This is not disputed by Mr. Hofmann. The point of dispute is whether the "norm" in the Claimant's case is theft/misappropriation (as the Claimants and Mr. Hofman contend), or whether the predicate offence has to be the criminal offence pursuant to which money was laundered under Article 305bis SCP (Judah El Maleh contends that this is correct based on the Swiss Appeal Court's decision). The Claimants contend that the Swiss Appeal

Court is wrong, on the basis that it has fundamentally misunderstood their case as being about something other than misappropriation.

(b) Neither expert report comments on the correctness of the Swiss Appeal Court's conclusion on the First Ground. In these circumstances, the point of dispute involves issues of foreign law on which I have not yet heard full evidence. I am satisfied that there is a serious issue to be tried in this regard, and it is classically a matter that will need to be addressed at trial on the expert evidence exchanged in due course.

(2) I am satisfied that there are serious issues to be tried as to the correctness and interpretation of the Swiss Appeal Court's conclusions on the Third Ground. In this regard:-

(a) The meaning of the Third Ground is unclear from the face of the judgment. I did not have the benefit of expert evidence to explain the court's reasoning. Burrus 2 does not clarify matters; indeed, Mr Burrus largely recites the words of the judgment and Mr Hofmann has yet to provide expert evidence in relation to the judgment.

(b) If the Swiss Appeal Court has concluded that the money laundering was an inherent part of the tax optimisation scheme, this is a restatement of the Second Ground, and it raises the same serious factual issue to be tried (as addressed below).

(c) If the Swiss Appeal Court has concluded that the Claimants cannot use the Article 305bis SCP money laundering offence in circumstances where it was considered to be part of a tax fraud scheme, is it being said the commission of any tax offences by the Claimants operates effectively as a defence of illegality to any of their claims? Again, this is an area that will require expert evidence both to explain the Swiss court's reasoning, and any effect of such reasoning on the Claimants' claim. Judah El Maleh accepts that any argument as to illegality as a substantive defence in Swiss law is a matter for trial (see the Second Witness Statement of Mr Ford at [54]).

125. Thirdly, I am satisfied that there is a serious issue of *fact* to be tried between the parties as to whether the Claimants benefitted directly or indirectly from the commission of the alleged money laundering acts. This is related to the Second Ground. This ground was adopted by Judah El Maleh as being correct (at [70.2] of his Skeleton Argument). Its correctness, however, was challenged by the Claimants (at [56.5] of their Skeleton Argument). In this regard:

(1) Judah El Maleh alleges that the Claimants did benefit indirectly from the money laundering scheme, because it was an intrinsic part of the tax optimisation scheme. This is based upon the description of the money laundering operation in the French Police Report and the factual findings of the Swiss Appeal Court, and the finding of the *Tribunal de Grande Instance de Paris* (the Paris first instance criminal court) on 11 June 2019 that Mr. Zahut was guilty of, *inter alia*, laundering tax fraud proceeds as part of an organised group. The Claimants submit that the money laundering was <u>not</u> an intrinsic part of the tax optimisation scheme, but the reason for and therefore ultimate cause of the misappropriation – see paragraph 78.2 of the DAPOC, in which they plead that *"the monies were misappropriated including by being transferred, it is inferred, through HSBCPB accounts, by and/or with the assistance and/or knowledge of and/or for the benefit of the Defendants pursuant to a money laundering scheme".*

(2) I am satisfied that there is a serious issue to be tried between the parties as to which version of events is correct, and it is not a matter that can, or should, be determined on an interlocutory basis. Judah El Maleh has adduced no expert evidence to support a conclusion that Claimants benefitted from the money laundering scheme, and this would be likely to require expert account evidence. The police report does not mention the tax optimisation scheme explicitly; neither does the finding of the Paris First Instance Criminal Court against Mr. Zahut. I note that the Swiss Appeal Court appears to have considered that the money laundering and the tax optimisation were interlinked (as would be necessary for their Second Ground to work) – however the Claimants contend that the Swiss Appeal Court was wrong to reach such a conclusion.

126. Again, Judah El Maleh seeks to rely on the Swiss First Instance Appeal Court's conclusions that the Claimants' claim fails for want of causation, and seeks to rely on

each individual reason. He relies on two of the Appeal Court's conclusions as being correct:

(1) The Swiss Appeal Court firstly upheld the first instance court's decision on causation, and itself determined that *"the existence of a natural causal link between the alleged damage and the alleged unlawful act is not plausible",* because there was no indication that the suggested *"impossibility"* of the Claimants being able to recover their funds is due to the alleged money laundering, as opposed to other reasons – such as the "tax fraud acts" for which Mr Zahut was convicted.

(2) The Swiss Appeal Court secondly determined that: "*the claimants do not indicate that they made any steps that would have been in vain to recover this balance before bringing the company and others before the London courts [...]"*and *"serious doubts remain as to the impossibility of recovering the disputed funds and therefore as to the actual nature of the damage suffered by the claimants".*

127. However, I am satisfied that there is a serious issue to be tried as to whether the tort allegedly committed by Judah El Maleh caused the damages to the Claimants. In this regard:-

128. Firstly there is, on the facts, a serious issue to be tried as to whether Judah El Maleh's participation in the money laundering operation *caused* the Claimants loss:

(1) The Claimants claim that there is "a wealth of evidence" that monies paid by Terre Neuve to Yewdale were flowing through accounts held at HSBCPB and managed by the MEDIS department during the period from 2009 to 2012, which they allege were operated by Nessim El Maleh. Those transfers are set out (amongst other purported transfers) in their DAPOC at [77.1] – [77.5], and in particular at [77.2]-[77.3]. The existence of this evidence was not substantially challenged by Judah Maleh for the purposes of the jurisdictional challenge.

(2) The Claimants use this evidence to contend that the money laundering was essentially a cause of the misappropriation of funds: the monies were transferred "pursuant to a money laundering scheme". The Defendants challenge this in that they argue (in relation to legal liability) that the money laundering scheme was

part and parcel of the tax optimisation. For the reasons that I have identified above, there is a serious issue to be tried between the parties as to whether the money laundering caused the misappropriation, or was an intrinsic part of the tax optimisation scheme.

(3) The Claimants further contend that there is a link between Judah El Maleh's involvement in the money laundering and the Claimants' loss, in that the Claimants would not have lost all the funds paid to Yewdale if Judah El Maleh had blown the whistle on, and/or acted so as to prevent, the MEDIS department's money laundering activities, particularly Nessim and Meyer El Maleh's participation in compensation transactions that were likely matched with interbank transfers involving accounts at HSBCPB. Save for claiming that the money laundering activities and the tax optimisation scheme were interlinked, Judah El Maleh does not fully engage with this issue.

129. Secondly, the conclusions of the Swiss First Instance and Appeal Courts on causation, were made, as I understand it, without access to evidence which is now before this Court. In this regard:

(1) The First Instance Court and Appeal Court reached the conclusion that there was no causation because there was no evidence brought by the Claimants that Yewdale regularly transferred funds to the accounts of other entities within HSBCPB. The Appeal Court refused to consider this evidence because the Claimants had failed adequately to explain why they were unable to adduce that evidence before the First Instance Court.

(2) However, that evidence, and the Claimants' associated allegations, are before me and I consider that they raise a serious issue to be tried, for the reasons I have already identified. For the same reason, I do not find the Swiss Appeal Court's other conclusions on causation (cited at [72] of Judah El Maleh's skeleton argument) to be helpful in determining whether there is a serious issue to be tried: they did not have to consider the specific causal scenario which is now before this Court.

(3) Further, the Claimants contend that the Appeal Court's alternative conclusion on causation was (a) in the nature of an illegality defence and (b) was in any event

incorrect ([56.7.2] of their Skeleton Argument). In these circumstances, I cannot determine whether this application of Swiss law is correct on an interlocutory basis.

(4) Judah El Maleh contends that the Claimants cannot complain about the way that the Claimants presented the case to the Swiss Courts, but I consider that to be beside the point. The English Court will have to consider the question of causation on the basis of all the evidence, and the Swiss law expert evidence addressed to that evidence. Once again, this raises serious issues to be tried.

(ix) The Derivative Claim

130. In my view, there are also serious issues of law to be tried between the parties as to whether the Derivative Claim can succeed. I will first set out the various contentions of the parties, followed by the relevant provisions of Swiss law, followed by the reasons for my conclusion.

131. As to the contentions of the parties before me:

(1) Judah El Maleh contends that the Claimants' Derivative Claim must fail as a matter of Swiss law for two reasons: firstly, that the Claimants are not creditors in the sense required by the Derivate Claim pursuant to Article 754(1) SCO; and secondly, that the Claimants suffered no direct damage because the company against whom the primary offence was committed (HSBCPB) is solvent.

(2) The Claimants submit that there is a serious issue to be tried as to each of the above points based on the evidence of the parties' respective Swiss law experts.

132. The relevant provisions of the Swiss Code of Obligations are as follows:

"Art. 716a
1 The board of directors has the following non-transferable and inalienable duties:
[…]
3. the organisation of the accounting, financial control and financial planning systems as required for management of the company;
[…]
5. overall supervision of the persons entrusted with managing the company, in particular with regard to compliance with the law, articles of association, operational regulations and directives;
[…]
2 The board of directors may assign responsibility for preparing and

implementing its resolutions or monitoring transactions to committees or individual members. It must ensure appropriate reporting to its members.

Article 717

1 The members of the board of directors and third parties engaged in managing the company's business must perform their duties with all due diligence and safeguard the interests of the company in good faith.

Article 754

1 The members of the board of directors and all persons engaged in the business management or liquidation of the company are liable both to the company and to the individual shareholders and creditors for any losses or damage arising from any intentional or negligent breach of their duties.

2 A person who, as authorised, delegates the performance of a task to another governing officer is liable for any losses caused by such officer unless he can prove that he acted with all due diligence when selecting, instructing and supervising him."

133. As to the reasons for my conclusion: I consider that two issues of Swiss law are raised: the question of whether the Claimants are "creditors" within the meaning of the relevant provisions of Swiss law, and the question of whether the Claimants can have suffered direct damage where HSBCPB is solvent. These are issues that will need to be tried between the parties, and it would not be appropriate to determine them now, whether by way of "mini-trial" or otherwise. On any view there is a serious issue to be tried. In this regard:-

134. Firstly, as to the question of whether the Claimants are "creditors" within the meaning of the relevant Swiss legal provisions:

(1) It is common ground that in order to bring a derivative claim for breach of Article 717, the Claimants must be "creditors" for the purposes of Article 754.

(2) There is a disagreement between the experts as to whether the facts of the present case entitle the Claimants to contend that they have become creditors of HSBCPB. In this regard:

(a) Mr Burrus contends that the Claimants are not entitled to bring a derivative claim from a breach of Article 717, because they are not "creditors" within

the meaning of Article 754, and they did not have a contractual relationship with HSBCPB. Mr Hofmann contends that this is incorrect because one can acquire the status of a creditor by suffering damage by the debtor at one earlier point in time (before the breach of duty in Article 717), so that subsequent damage done by the breach of Article 717 can equally be recovered under Article 754.

(b) The dispute between the experts was put as follows in the Claimants' skeleton argument: "*whether the facts of the present case entitle the Cs to contend that they have become creditors of HSBC as a result of one or more of their claims against HSBC crystallising before, even if only a scintilla temporis before, Judah El Maleh committed the alleged breaches of duty.*"

(3) This also raises a serious factual issue for trial. It is not possible to conclude at an interlocutory stage that the Claimants could never be HSBCPB's creditors by reason of damages claims against it before Judah El Maleh committed his alleged breaches of fiduciary duty. It is not currently possible at this early stage of the proceedings to plead precise dates for HSBCPB's alleged wrongdoing in failing to prevent the money laundering, versus Judah El Maleh's breach of his fiduciary duties towards HSBCPB.

135. Secondly, as to whether the Claimants have suffered "direct" damage:

(1) It is common ground that the only damage that can be recoverable under Article 754(1) SCO is "direct" damage.

(2) There is a disagreement as to whether "direct" damage of the creditor can exist in situations outside the relevant company (HSBCPB) being placed in bankruptcy. Mr Burrus contends that "direct damage of the creditor is essentially theoretical, except if the company has been placed in bankruptcy" (Burrus 1, [49]). Mr Hofmann contends that direct damage actually has to do with a direct loss suffered by the creditor, which can include damage caused by money laundering (Hofmann 1, [49]). This is a disagreement as to the interpretation of the applicable law, which I cannot resolve on an interlocutory basis.

D.2.2 Necessary or Proper Party

136. Judah El Maleh contends that he is neither a necessary, nor a proper party, primarily because his liability is contingent on proving that the money laundering alleged to have been performed by the other defendants in fact took place, so it is possible for the claim against him to be run in standalone proceedings. The Claimants contend that he is a proper party, because the claims against him are bound up with the claims against HSBCPB.

137. I am satisfied that Judah El Maleh is a proper party to these proceedings, for the following reasons:-

138. Firstly, an examination of Judah El Maleh's state of mind for the purposes of the Claimants' claims under Article 41 SCO will inevitably involve a single investigation of the claims against him and the claims against the other Defendants: for example, further analysis of the covert recordings I have set out above will be required to determine the precise nature of the money laundering scheme, and to determine whether Judah El Maleh knew about this scheme.

139. Secondly, the claims against Judah El Maleh are closely bound up with the claims against HSBCPB and Nessim El Maleh. The Claimants allege that money laundering occurred contrary to Article 305bis SPC, and that amongst others Judah El Maleh, Nessim El Maleh, HSBCPB and Mr. Mriouah each committed this offence as principal, co-author and/or accomplice ([130.4] DAPOC). Similarly, HSBCPB and GPF are alleged to be liable under Article 55 SCO, Article 722 SCO and/or Article 55 SCO on the basis of the actions of those companies' governing officers and/or persons with authority to represent the companies or manage their business and/or employees, with Judah El Maleh alleged to be a governing officer ([131] DAPOC). Nessim El Maleh and HSBCPB have already submitted to this court's jurisdiction, so a trial of the claims against them will inevitably take place here.

140. Thirdly, I am not persuaded by Judah El Maleh's submissions that he is not a proper party because joining him to proceedings would force him to be part of wide-ranging litigation, despite the fact that he played a relatively small role and the case against him is

based on his alleged failure to spot and prevent money laundering or misappropriation. There are still clear factual and legal connections between the claims against him and the claims against the other Defendants, particularly the money laundering claims against HSBCPB, so that it would be impractical and wasteful to have separate proceedings, potentially in another jurisdiction. Further, it is not uncommon in the Commercial Court for defendants with a self-contained role to be caught up in much larger proceedings, as long as the claims against them do overlap with the claims against the main defendants. Normally such defendants will tailor their participation, so as to limit their involvement to what is necessary to protect their interests and answer the claims against them.

D.2.3 England and Wales as the Proper Place to Hear the Claim

141. Judah El Maleh does not challenge the conclusion in the May 2019 Judgment that this Court is the proper place to hear the claim. That is clearly correct: the claims against Nessim El Maleh and HSBCPB will go ahead here because they have already submitted to the jurisdiction, regardless of whether the claim against Judah El Maleh is heard in this country. Due to the legal and factual links between the two claims, hearing the claims together will be cost and time-efficient, and avoid a risk of irreconcilable findings (e.g.as to the meaning of the covertly-recorded conversations).

D.2.4 Conclusion

142. In the above circumstances, and for the above reasons, I am satisfied that: -

(1) Judah El Maleh is a proper party to the Claimants' claim;

(2) There is at least a serious issue to be tried on each of the Claimants' claims (tort and derivative) against Judah El Maleh; and

(3) England and Wales is the proper place to bring the claim against Judah El Maleh.

143. Accordingly, Judah El Maleh's application also fails and is dismissed.

144. I trust that the parties will be able to agree the terms of the Order to reflect the outcome of the applications before me, and any consequential matters including as to costs.