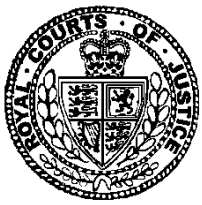

Neutral Citation Number: [2024] EWHC 1148 (Comm)

Case No: CL-2022-000474

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

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

Date: Monday 20 May 2024

Before :

MR RICHARD SALTER KC
Sitting as a Deputy Judge of the High Court

- -

Between :

(1) COSIMO BORRELLI (AS JOINT LIQUIDATOR OF CERTAIN FUNDS) AND THE CLAIMANTS LISTED IN ANNEX 1	**Claimants**
- and –	
(1) MUTAZ OTAIBI (2) HUSSAM OTAIBI (3) JAMES WILCOX AND THE DEFENDANTS LISTED IN ANNEX 2	**Defendants**

Mr Jeff Chapman KC and Ms Leonora Sagan (instructed by **Willkie Farr & Gallagher (UK) LLP**) for the **Claimant**

Mr Adam Rushworth and Mr Tom Foxton (instructed by **Allen Overy Shearman Sterling LLP**) for the **Twenty Third Defendant**

Hearing dates: 30 April, 1 May 2024

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……..

This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on Monday 20 May 2024

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MR SALTER KC:

(A) Introduction

1. There are two applications before the Court:

   1.1 An application issued on 10 May 2023 by the twenty-third defendant ("**FFISA**"), seeking (i) to set aside the Order made by Knowles J on 10 February 2023 granting permission to serve the Amended Claim Form and Particulars of Claim on FFISA out of the jurisdiction, and (ii) to stay or dismiss the proceedings against FFISA ("**the Set Aside Application**"); and

   1.2 An application issued on 3 April 2024 by the claimants, seeking permission for certain re-amendments to the Claim Form and amendments to the Particulars of Claim ("**the Amendment Application**").

2. The Set Aside Application, as issued, was based on three grounds: (1) that there is no serious issue to be tried on the merits of the claim against FFISA; (2) that the claims against FFISA fall within the scope of jurisdiction clauses in the agreements between FFISA and the fourth claimant, Global Fixed Income Fund 1 Limited ("**GFIF**") which confer exclusive jurisdiction for the purposes of the Hague Convention 2005 Article 6 in relation to the claims of GFIF, the only claimant alleged to have suffered loss caused by FFISA, on the courts of Luxembourg; and (3) that the claimants failed to disclose the existence of those jurisdiction clauses (and certain other matters) to Knowles J on the without notice application which led to his Order.

3. The first of these grounds was not, however, pressed by Mr Rushworth, who appeared with Mr Foxton, for FFISA at the hearing before me. Mr Chapman KC and Ms Sagan appeared at that hearing for the claimants. The Set Aside Application was supported by the first, second and third witness statements of FFISA's solicitor, Mr Mahmood Lone. These were responded to by the fourth and fifth witness statements of the claimants' solicitor, Mr Peter Burrell, whose first witness statement dated 8 February 2023 had supported the without notice application to Knowles J. Expert evidence of Luxembourg law for the purposes of the hearing before me was provided in the form of the Expert Reports of Professor Gilles Cuniberti dated 9 February and 10 April 2024 on behalf of FFISA and the Expert Report of Ms Clara Mara-Marhuenda dated 15 March 2024 on behalf of the Claimants.

(B) The claims in outline

4. The principal claimants in this action are four investment funds ("**the Funds**") and their Joint Liquidators. The draft Amended Particulars of Claim are 67 pages long. For the purposes of these applications, however, it is only necessary for me to give a simplified outline of the claimants' case. In very broad and bare outline, what the claimants say (or wish, by amendment, to say) is that:

4.1 Mutaz and Hussam Otaibi, the first and second defendants, and James Wilcox, the third defendant (together "**the Floreat Principals**") control and beneficially own the Floreat Group, of which most of the other defendants are corporate members.

4.2 The Floreat Group operate as private financial investment management and advisory service providers. The Floreat Principals acted at various points as directors of the Funds and at various points various members of the Floreat Group acted as investment managers and/or investment advisers to the Funds.

4.3 The Floreat Principals and/or the members of the Floreat Group (acting at the direction of the Floreat Principals) used their positions to "milk" the Funds of their assets. They did this by causing or influencing the Funds to enter into various transactions which are said to have been disadvantageous to the Funds but advantageous to the Floreat Principals and/or to the Floreat Group and/or by causing or influencing the Funds to pay certain excessive or otherwise improper fees and other amounts.

5. The claimants make (or propose to make) claims in the tort of conspiracy and for the equitable wrongs of dishonest assistance in breaches of trust and/or of fiduciary duty and (against some defendants) for knowing receipt of property belonging to certain of the Funds. The Amended Claim Form presently includes claims in the tort of deceit and for restitution on the grounds of unjust enrichment, but the claimants intend to delete those claims as part of their proposed re-amendments.

6. The claimants' complaints concerning the defendants' conduct fall broadly into six groups, of which the first five are the following:

6.1 The fourth claimant, GFIF makes claims in relation to investments described in the draft Amended Particulars of Claim as "the E-Notes".

6.2 GFIF also makes claims in relation to loan transactions involving Reading Football Club Limited and associated legal proceedings.

6.3 The fifth claimant, Real Assets (RA) Global Opportunity Fund 1 Limited ("**RAGOF**") makes claims in relation to transactions in connection with a property known as "Springs Farm".

6.4 The sixth claimant, Principal Investing Fund 1 Limited ("**PIF**"), makes claims in relation to dealings in relation to what is referred to in the draft Amended Particulars of Claim as the "Shanti Artwork".

6.5 GFIF, RAGOF, PIF, and the seventh claimant, Long View II Limited ("**Long View**") each make claims in respect of what are described in the draft

Amended Particulars of Claim as "unauthorised, excessive, duplicative or improper fees".

7. In order to give context to the Set-aside Application, it is necessary for me to give a little more detail about the sixth group of complaints. These involve claims made by GFIF relating to what are described in the draft Amended Particulars of Claim as "The Aviation Notes". The claimants' account of these transactions, as set out in the draft Amended Particulars of Claim and as described in greater detail in Mr Burrell's first and fourth witness statements, is broadly as follows:

7.1 GFIF is a close-ended investment company incorporated in the Cayman Islands on 13 July 2015. The first defendant, Mutaz Otaibi, was a director of GFIF from its incorporation until 18 April 2018, and thereafter continued from time to time to act as a *de facto* director of GFIF. Another of GFIF's three directors was David Whitworth, who is described as "a director who frequently acts alongside and for the Floreat Principals" and who "has been a director of RAGOF [and] PIF and has also been a director of [the fourth defendant, Floreat Real Asset Investment Management Limited] (RAGOF's IM) and of [the eighth defendant, LV II Investment Management Limited], (Long View's IM)"[1].

7.2 The fifth defendant, Floreat Investment Management Limited, acted as GFIF's investment manager from 20 August 2015 until 21 December 2018, when it was replaced by the sixth defendant, Floreat Global Fixed Income Management Limited. Mutaz Otaibi is the sole beneficial shareholder of both of these companies. Floreat Capital Markets Limited ("**FCML**"), the tenth defendant, and Floreat Merchant Banking Limited ("**FMBL**"), the eleventh defendant - both also companies in the Floreat Group - successively acted as investment advisers to GFIF's investment managers.

7.3 In about May 2016, FCML issued a single page prospectus for what it described as an "Investment Opportunity" in asset-backed securities ("**the Aviation Notes**"). The concept at that stage was of a sharia-compliant USD 150m issue with a target coupon of 7% and a target IRR of 9-10%, the cash-flow for which was to come from a portfolio of five aircraft leases, secured on "aircraft and underlying leases". "Seed Investment" was to come from the twelfth defendant, Floreat Wealth Management Limited. The intended structure of the transaction was designed to be highly profitable for the Floreat Group.

7.4 By July 2016, FCML had not managed to persuade any investors to agree to subscribe for the Aviation Notes, but a deadline was approaching for the payment of purchase deposits to secure the aircraft. The board of GFIF, under

[1] Burrell 4, para 23. See also the Amended Particulars of Claim paras 15B and 93.7A

the control of Mutaz Otaibi, initially agreed to lend up to USD 2m, later increased to USD 5m, to the fifth defendant for that purpose.

7.5 On 3 August 2016, FFISA was incorporated as a public limited company in Luxembourg as a Securitisation Vehicle ("**an SV**"), pursuant to the Luxembourg law of 22 March 2004 on securitisation. The Luxembourg securitisation law allows the creation of segregated compartments within an SV, each representing a distinct part of the assets and liabilities of the SV. Each compartment is treated in practice as a separate entity, and its assets are ring-fenced by law so as to be available only to the investors and creditors of the particular compartment. The plan was for FFISA to be the issuer of the Aviation Notes, in two series, Series A and Series B, each ascribed to a separate compartment.

7.6 On incorporation, FFISA had five directors, three of whom were employees of FFISA's corporate service provider, Deutsche Bank Luxembourg SA. The other two were Mutaz Otaibi and David Whitworth. As I have already mentioned, both at the time were also directors of GFIF.

7.7 Even by mid-November 2016, no investors had yet committed to subscribe for the Aviation Notes. There was therefore no money available to buy the aircraft. The tenth defendant (as investment adviser to GFIF's investment manager) therefore advised, and Mutaz Otaibi and David Whitworth as directors of GFIF agreed, that GFIF should provide an equity bridge loan of USD 44m ("**the Bridge Loan**") to the eighteenth defendant, FFI Aviation Portfolio Limited ("**FFIAP**") to assist with the proposed purchase of the aircraft.

7.8 This agreement was recorded in a loan agreement dated 14 November 2016 ("**the Bridge Loan Agreement**") governed by English law and containing a clause conferring exclusive jurisdiction on the courts of England and Wales, as follows:

> **14. APPLICABLE LAW AND PLACE OF JURISDICTION/PAYMENTS**
>
> **14.1 This agreement and any non-contractual obligations arising out of or in connection with it is governed by the laws of England and Wales.**
>
> **14.2 The Parties agree that the English courts will have exclusive jurisdiction to settle any dispute including a dispute relating to non-contractual obligations arising out of or in connection with this agreement and for these purposes each Party submits to the jurisdiction of those courts.**

7.9 In fact, GFIF, did not itself have sufficient cash funds to make the loan, and so had to borrow USD 39m from Mahi Lending Services Limited ("**Mahi**"), a subsidiary of PIF. In connection with that loan, Mahi paid a transaction fee of USD 195,002 to the seventh defendant, Floreat Principal Investing Limited, Mahi's Investment Adviser.

7.10 Eventually, it was decided by the Floreat Principals that GFIF (with the assistance of further funding from RAGOF) should itself acquire the Series B Aviation Notes. On 19 December 2016 RAGOF invested USD 30m into GFIF Series 6 Shares, those funds being expressly stated to be for the purchase of Aviation Notes.

7.11 On 19 December 2016, GFIF entered into 4 written Subscription Agreements with FFISA relating to the Series B Aviation Notes ("**the Subscription Agreements**"). Under each of the Subscription Agreements, FFISA agreed to issue the Aviation Notes on 21 December 2016 and GFIF agreed to "subscribe to the Notes and to pay the subscription price".

7.11.1 Under the first of these, GFIF agreed to pay the subscription price of USD 1.2m by transferring to FFISA its rights in respect of the Bridge Loan.

7.11.2 Under the second, GFIF agreed to "submit its subscription to the Notes into the market" and to pay the subscription price of USD 30m to the account of the Settlement Agent for the Subscribing Bank/Custodian, Banque Pictet & Cie SA, Geneva.

7.11.3 Under the third, GFIF similarly agreed to "submit its subscription to the Notes into the market" and to pay the subscription price of USD 5.8m.

7.11.4 Under the fourth, GFIF again agreed to "submit its subscription to the Notes into the market" and to pay the subscription price of USD 44m.

It was common ground between the parties that the consideration amounts stated in the first and fourth of the Subscription Agreements have been transposed, and that the USD 44m subscription price (not the price of USD 1.2m) was paid by transfer of GFIF's rights in relation to the Bridge Loan.

7.12 Each of the Subscription Agreements was signed on behalf of FFISA and on behalf of GFIF by the same director, David Whitworth. Each Subscription Agreement contained an "Entire Agreement Clause" which provided that:

> **The [Terms and Conditions of the Series B Aviation Notes, as set out in the Offering Circular] form part of this Agreement and shall have the same force and effect as if expressly set out in the body of this Agreement, and any reference to this Agreement shall include the Conditions.**

7.13 Each Subscription Agreement also contained an "Applicable Law and Jurisdiction Clause" as follows:

> **This Agreement and all matters arising from or connected with it are governed by, and shall be construed in accordance with, Luxembourg law and shall be subject to the exclusive jurisdiction of the courts of the city of Luxembourg, Grand-Duchy of Luxembourg.**

7.14 On 21 December 2016, FFISA issued USD 132m of Aviation Notes in two series: (1) USD 51m of Series A Aviation Notes; and (2) USD 81m of Series B Aviation Notes. Each series was, on issue, represented by a Temporary Global Note held on behalf of Euroclear. The Notes were listed on the Euro MTN market of the Luxembourg Stock Exchange on 22 December 2016, under an Offering Memorandum of that same date.

7.15 Pursuant to the Subscription Agreements, GFIF subscribed for the whole USD 81m of the Series B Aviation Notes, using at least USD 69m of funding indirectly provided by RAGOF and PIF. GFIF's rights and obligations under the Bridge Loan Agreement were transferred to FFISA with effect from 21 December 2016 under a Transfer Certificate dated 19 December 2016, which started that it "and any non-contractual obligations arising out of it are governed by English Law".

7.16 The Terms and Conditions of the Series B Aviation Notes ("**the Conditions**") contained governing law and jurisdiction provisions, as follows:

> **GOVERNING LAW AND JURISDICTION**
>
> **16.1 Governing Law**
>
> **The Floreat Aviation Notes Series B are governed by, and shall be construed in accordance with, Luxembourg law.**
>
> **16.2 Jurisdiction**
>
> **The Luxembourg district courts are to have jurisdiction to settle any disputes which may arise out of or in connection with the Floreat Aviation Notes Series B and accordingly any legal action or proceedings arising out of or in connection with the Floreat Aviation Notes Series B (Proceedings) may be brought in such**

> **courts. Each of the Issuer and the Noteholders irrevocably submit to the jurisdiction of the Luxembourg district courts and waive any objection to Proceedings in such courts on the ground of venue or on the ground that the Proceedings have been brought in an inconvenient forum. These submissions are made for the benefit of the Issuer only and shall not affect the Issuer's right to take Proceedings in any other court of competent jurisdiction nor shall the taking of Proceedings by the Issuer in one or more jurisdictions preclude the taking of Proceedings by the Issuer in any other jurisdiction (whether concurrently or not).**

7.17 IR Relations Ltd, the twenty-fourth defendant, acted (until 4 February 2019) as Liaison Manager, and Floreat Aviation Services Limited, the twenty fifth defendant acted as originator, in connection with this issue. Each received significant upfront, placement and continuing fees, amounting to several million USD. Mutaz Otaibi ultimately stood to benefit and did in fact benefit personally from about half of those fees. The significant benefits to be derived by Mutaz Otaibi, and/or the other Floreat Principals and/or the Floreat Group by reason of the issue of the Aviation Notes and/or GFIF's subscription for the Series B Aviation Notes were not properly disclosed to the independent directors of GFIF.

7.18 Following GFIF's subscription, FFISA used the proceeds from the sale of the Aviation Notes to purchase notes and shares in the eighteenth defendant, FFIAP, the twenty first defendant, FFI Aviation MSN 1518 Ltd ("**FFIA 1518**"), and the twenty second defendant, FFI Aviation MSN 1310 LLC ("**FFIA 1310**"). FFIAP, in turn, used the proceeds from sale of its shares in FFISA to acquire shares and inject capital into the twentieth defendant, FFI Aviation MSN 1407 (Guernsey) Limited, FFIA 1518 and FFIA 1310 which, together, purchased three aircraft for a total of approximately USD 270m. Those aircraft were then eventually leased to Hawaiian Airlines, Virgin Australia, and Asiana Airlines. Each of these lessees had a "questionable" credit rating.

7.19 In addition to the money from the sale of the Aviation Notes, the purchase of the aircraft was partly funded by a loan facility from Norddeutsche Landesbank, which was secured on the aircraft and on the proceeds of the eventual leases of those aircraft.

7.20 That, and other features of the transaction (which, as finally carried out, did not in several respects correspond with the description in the May 2016 single page prospectus), meant that GFIF's rights as ultimate account holder of the Series B Aviation Notes were unsecured and deeply and structurally subordinated.

8. It is the claimants' case that the Series B Aviation Notes were a highly risky, unattractive and unsuitable investment for GFIF, that investing in the Series B Aviation Notes was therefore not in GFIF's best interests, and that, by causing or influencing GFIF to make the Bridge Loan and thereafter to invest in the Series B Aviation Notes, the relevant defendants acted in breach of duty and were dishonestly motivated by the interests of the Floreat Principals and the Floreat Group.

9. The draft Amended Particulars of Claim also assert that, although between 21 December 2016 and 13 January 2020 GFIF reduced its holding of the Series B Aviation Notes from USD 81m to on USD 12,775,860, GFIF was thereafter wrongfully caused or influenced by various of the defendants to re-acquire approximately USD 53m of the Series B Aviation Notes ("**the 2020 Acquisitions**"). On behalf of the claimants, however, Mr Chapman KC made clear that GFIF does not assert that FFISA itself played any part in the 2020 Acquisitions.

(C) The Set-Aside Application

10. Against that background, I now turn to the Set-Aside Application itself. This falls into two distinct parts, the first part based upon the jurisdiction agreements in the Subscription Agreements and the Conditions, the second part based on what is said to have been the claimants' failure to comply with their duty to make full and frank disclosure to Knowles J. It is convenient to deal with these two parts separately, although there is inevitably some degree of overlap between them.

(C.1) The jurisdiction agreements

(C.1.1) The arguments of the parties

11. I begin by considering FFISA's reliance on the jurisdiction agreements. Mr Rushworth's argument on behalf of FFISA in relation to this first part of the Set Aside Application was straightforward. In his submission:

    11.1 GFIF's claim against FFISA in dishonest assistance is made on the basis that FFISA's assistance was by way of issuing the Series B Aviation Notes to which GFIF subscribed, and GFIF's claim in knowing receipt is made on the basis that FFISA, as issuer of the Series B Aviation Notes, received the transfer of GFIF's rights under the Bridge Loan Agreement and the other cash funds from GFIF's subscription.

    11.2 Those claims are plainly "matters arising from or connected with" the Subscription Agreements, which expressly confer exclusive jurisdiction on the courts of the city of Luxembourg.

    11.3 To the extent (if any) that the claims made against FFISA do not fall within the jurisdiction clauses in the Subscription Agreements themselves, they are in any

event "disputes which may arise out of or in connection with the Floreat Aviation Notes Series B" within the meaning of the jurisdiction clause in the Conditions (incorporated by reference into the Subscription Agreements), which confers jurisdiction (which, by virtue of Article 3(b) of the Hague Convention 2005, is implicitly exclusive[2]) on the Luxembourg district courts.

11.4 Each of these clauses is an "exclusive choice of court agreement" within the definition on Article 3 of the Hague Convention 2005, which is given the force of law in the United Kingdom by the Civil Jurisdiction and Judgements Act 1982 s 3D and Scheds 3F and 3FA[3].

11.5 In the circumstances, Article 6 of the Hague Convention 2005 requires the English court to suspend or dismiss the proceedings against FFISA. The English court simply has no discretion to allow the proceedings against FFISA in England to continue.

12. On behalf of the claimants, Mr Chapman KC submitted as his primary case that neither of the jurisdiction clauses relied upon by FFISA has any application to the claims made by the claimants in the present action, because those clauses are contained in only one of the many sets of agreements forming part of the overarching conspiracy relied upon by the claimants, which was directed by Mutaz Otaibi and the other Floreat Principals and which involves the Floreat Group as a whole. To view those wider claims as encompassed by these specific jurisdiction clauses would be to ignore the bigger picture.

13. Mr Chapman KC accepted that the jurisdiction clause in the Subscription Agreements engages the provisions of the Hague Convention 2005 and accordingly that, if it applies to the disputes in the present action, the court must suspend or dismiss the claim against FFISA. In Mr Chapman's submission, however, the clause does not apply to those claims.

14. In outline, Mr Chapman's argument was as follows:

14.1 Since Article 3(a) applies only to disputes "which have arisen or may arise in connection with a particular legal relationship", the court in considering the scope of the jurisdiction clause must adopt a two stage process: deciding first what the relevant "particular legal relationship" is and only then, second, which disputes the clause applies to.

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[2] Mr Rushworth also relied upon the decision of Butcher J *in Deutsche Trustee Company Ltd v Bangkok Land (Cayman Islands) Ltd* [2018] EWHC 2052 (Comm) at [15] to [20], determining that a materially similar clause was exclusive.

[3] Inserted by the Private International Law (Implementation of Agreements) Act 2020. Amended by The Civil Jurisdiction and Judgments (2005 Hague Convention and 2007 Hague Convention) (Amendment) Regulations 2022 (SI 2022 No 77).

14.2 Mr Chapman could cite no English authority directly in support of this approach to the Hague Convention 2005. He relied, however, upon the approach described by Jacobs J in *Etihad Airways PJSC v Flother*[4] to what Mr Chapman described as the "closely analogous provision" under Article 25 of the Brussels Recast Regulation[5].

> **.. the test [under Article 25] requires identification, by reference to the facts of the case as a whole, of the legal relationship between the parties in connection with which the jurisdiction agreement was concluded. It then requires consideration of whether the dispute originates from that legal relationship or a different one ..**

14.3 As to the correct approach to the first of these stages, Mr Chapman relied in particular upon the following further passage from the judgment of Jacobs J:

> **[123] The leading case on the concept of disputes arising "in connection with a particular legal relationship" is the decision of the European Court of Justice in *Powell Duffryn*[6]. The court explained at para 31 that:**
>
> > **"This requirement aims to limit the effect of an agreement conferring jurisdiction to disputes originating from the legal relationship in connection with which the agreement was concluded. It seeks to prevent a party from being surprised by the referral to a specified court of all disputes which arise in the relationships which it has with the other party and which may originate in relationships other than that in connection with which the agreement conferring jurisdiction was concluded."**
>
> **[124] I consider .. that, applying *Powell Duffryn*, it is important to identify the legal relationship in connection with which the agreement conferring jurisdiction was concluded, and then to ask whether the dispute has originated in a different relationship; i e a relationship other than that in connection with which the agreement conferring jurisdiction was concluded. These questions should be asked bearing in mind that the purpose of the relevant words in article 25 is to is to avoid a party being taken by surprise by the referral of the dispute to a contractually agreed court, because the dispute had originated in a different legal relationship.**

---

4 [2019] EWHC 3107 (Comm), [2020] QB 793 at [131]. Mr Chapman also cited, to similar effect, *The Public Institution for Social Security v Al Rajan* [2020] EWHC 2979 (Comm) at [187] to [208], per Henshaw J; afffmd [2022] EWCA Civ 29, [2022] 1 WLR 4193 at [82] to [83], per Carr LJ.

5 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

6 *Powell Duffryn Plc v Wolfgang Petereit* (Case C-214/89) [1992] ECR I-1745, [1992] ILPr 300.

> **[125] I agree .. that the relevant question is not simply whether a party would be taken by surprise: this is not the legal test. However, that question serves as a very useful cross-check on what I consider to be the relevant legal questions. If it is clear that a party would not be taken by surprise by the referral of the dispute, then it is very likely indeed that the dispute has not originated in a relationship other than that in connection with which the agreement was concluded. It is therefore very likely that application of the legal test, and the answer to the question whether a party would be taken by surprise, will lead to the same result.**

14.4 The "particular legal relationship" that gives rise to the dispute between the claimants and FFISA in the present action is not the narrow relationship created by the Subscription Agreements.

14.4.1 By far the more consequential legal relationship for the purposes of this action is that between the claimants and the Floreat Group and between the claimants and FFISA as an entity in the Floreat Group, controlled and directed by Mutaz Otaibi and David Whitworth, whose knowledge is attributable to FFISA. FFISA is merely an accessory to those primary wrongs.

14.4.2 The Aviation Notes transactions involved many defendants other than FFISA, and involved PIF and RAGOF as well as GFIF in plugging the funding gap. As Mutaz Otaibi himself acknowledged in a recorded conversation with other Floreat associates on 26 July 2018:

> **.. we got *all three of the funds* involved in a note that no one knew how to raise money for it, and there was no guarantee it was going to work to launch it ..**[7]

14.4.3 None of these other participants in the overall Aviation Notes transaction, whether on the defendants' side or the claimants' side, was a party to these jurisdiction clauses. This illustrates that the relationship created by the Subscription Agreements was merely a part of, and ancillary to, the wider relationship between the Funds and the Floreat Group, the abuse of which is complained of in this action.

14.4.4 Applying the "litmus test" of surprise, FFISA cannot plausibly complain that it has been taken by surprise by the referral of the present claims against it to this jurisdiction. On the contrary, for the reasons pleaded in paragraph 34 of the draft Amended Particulars of Claim, the claims in these actions are predominantly governed by

[7] Emphasis added.

English law. The relationships in the abuse of which FFISA is said to have dishonestly assisted were governed by English law, and the persons whose knowledge is relied on as showing FFISA's dishonesty are domiciled in England. Indeed, all three of the Floreat Principals are domiciled in England, and a significant number of the defendant companies are incorporated in England. All of the defendants other than FFISA are either subject to the jurisdiction of the English court or have submitted to this jurisdiction. All of FFISA's co-conspirators will therefore be sued here.

14.4.5 As to the second stage of the enquiry, the relevant jurisdiction provisions fall to be construed in accordance with Luxembourg law. The expert witnesses are agreed that:

> **The fundamental rule of interpretation of contracts under Luxembourg law is that contracts should be interpreted by assessing the actual common intention of the parties ..**
>
> **[I]f the parties are able to demonstrate that the actual common intention of the parties differs from the wording of the contract, actual common intention of the parties prevails ..**
>
> **The assessment of the common intention of the parties is an issue of fact .. Lower courts are thus free to rely upon both on intrinsic and extrinsic evidence to assess the actual common intention of the parties and there is no hierarchy between the two. Intrinsic evidence comprises the various contractual documents that the parties have agreed upon. Extrinsic evidence includes correspondence exchanged by the parties prior to or after the conclusion of the contract, acts of performance of the contract suggesting a certain understanding of the obligations of the parties..**
>
> **In the absence of extrinsic evidence demonstrating that the actual common intention of the parties might have been different from the wording of the contract, the enquiry will focus on intrinsic evidence of the actual common intention parties ..** [8]

14.4.6 Contrary to the views of Professor Cuniberti, however, Luxembourg law also provides guidance in cases like the present through the theory of contractual ensemble "where several contracts between different

[8] Expert Report of Professor Gilles Cuniberti at [11] to [14]. Ms Clara Mara-Marhuenda at [13] says "I agree with the Luxembourg Law principles of contractual interpretation applicable to jurisdiction clauses which have been laid out by Professor Cuniberti".

parties constitute a complex and individual contractual ensemble"[9]. The theory of indivisibility rests on "an interpretation of the common will of the parties" meaning that, where the Luxembourg courts deem the dispute *prima facie* subject to a jurisdiction clause is an indivisible part of a larger dispute, they can construe the clause narrowly by reference to the parties' common will[10].

14.5 In the present case, it is notable that FFISA has agreed to an asymmetric jurisdiction clause in the Conditions (which, in any event, provides for different Luxembourg courts to the clause in the Subscription Agreements) and to an exclusive English jurisdiction clause under the Bridge Loan Agreement. The claims against the other defendants, which are both logically anterior to the claims against FFISA and indivisible from those claims, can only be tried in England.

14.6 Against that background, the actual common intention of the parties should be taken to favour a narrow interpretation, tying the applicable legal relationship to the Subscription Agreements alone. Neither FFISA nor GFIF would have intended that the specific claims against FFISA in these proceedings should be the subject of a separate trial in Luxembourg, leading to fragmentation and the possibility of inconsistent judgements.

14.7 Applying the relevant principles of interpretation under Luxembourg law, the court should therefore find that the subjective common intention of the parties was not to require that the sort of claims made in the present action should be tried only in the courts of Luxembourg.

15. With regard to the jurisdiction clause in the Conditions, Mr Chapman made similar submissions as to its proper interpretation under Luxembourg Law. He also alternatively submitted that the Hague Convention 2005 could have no application because that clause is, by its clear terms, asymmetric, constraining GFIF's rights but permitting FFISA to take proceedings in any court. In support of that submission, Mr Chapman relied upon:

15.1 The wording of Article 3(a) of the Convention, which defines exclusive jurisdiction clauses as those which specify the courts of one Contracting State "to the exclusion of the jurisdiction of any other courts".

15.2 Paragraph 32 of the Explanatory Report on the Convention by Trevor Hartley and Masato Dogauchi, which states:

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9 Expert Report of Ms Clara Mara-Marhuenda at [29].

10 Expert Report of Ms Clara Mara-Marhuenda at [30] to [37].

> **An asymmetric choice of court agreement (a choice of court agreement under which one party may bring proceedings exclusively in the designated court, that the other party may sue in other courts as well) is not regarded as exclusive for the purposes of the Convention.**

15.3 The Minutes of the Twentieth Session of the Hague Conference on Private International Law 2005, which record the rejection and withdrawal of a Swiss proposal to include asymmetric jurisdiction agreements within the scope of the Convention, which records:

> **.. The view of the Commission .. that asymmetric agreements were not covered by the Convention and that the Convention was not designed for clauses of this sort ..**

15.4 The willingness of the English Court of Appeal, by reference to this material, to proceed on the basis (although without deciding) that:

> **.. the Hague 2005 Convention should probably be interpreted as not applying to asymmetric jurisdiction clauses ..**[11]

16. To the extent, therefore, that it is only the jurisdiction provisions contained in the Conditions which apply, Mr Chapman submitted that the court is not obliged to suspend or dismiss the proceedings against FFISA. Instead, the common law rules apply and the court retains a discretion to disapply the terms of the jurisdiction agreement.

17. In Mr Chapman's submission, there is a particularly strong case for doing so in relation to the present action, not only because FFISA is merely one small cog in the larger machinery of the overarching conspiracy alleged by the claimants, but also because all the other relevant defendants have either been sued as of right in England or have submitted to the jurisdiction and so will be tried here. The risks of duplication of costs and inconsistent judgements point very strongly to England being clearly the most appropriate forum. Coupled with the strong connections that the overall conspiracy has to this jurisdiction, the case for allowing these proceedings to continue against FFISA is, in Mr Chapman's submission, compelling.

(C.1.2) Analysis

18. The application to Knowles J in relation to FFISA was made on the basis that FFISA was a necessary or proper party within paragraph 3.1(3) of Practice Direction 6B to the claims against FCML, FMBL and the Floreat Principals. Although Mr Rushworth took issue with some important aspects of the adequacy of the pleading of the claims against FFISA, he accepted (at least for the purposes of the Set Aside Application)

[11] *Etihad Airways PJSC v Flother* [2020] EWCA Civ 1707, [2022] QB 303 at [85], per Henderson LJ.

that GFIF would have a "good arguable case" for jurisdiction under that gateway[12], but for the jurisdiction clauses on which FFISA now relies.

19. I must therefore decide whether either of the jurisdiction clauses relied upon by FFISA covers the claims made against FFISA in the present action. If those claims fall within the jurisdiction clause in the Subscription Agreements, Article 6 of the Hague Convention 2005 will oblige me to suspend or dismiss the proceedings against FFISA. If some or all of the claims do not, but nevertheless fall within the jurisdiction clause in the Conditions, I must decide whether that jurisdiction clause is a "choice of court agreement" within the meaning of Article 3 of the Hague Convention 2005. If it is then, again, I must suspend or dismiss the proceedings. If it is not, I must decide whether sufficiently strong reasons exist in the present case for refusing to give effect to that clause by granting a stay: see *Donohue v Armco Inc*[13] and *Zephyrus Capital Aviation Partners 1D Ltd v Fidelis Underwriting Ltd*[14].

20. As Henshaw J has observed[15], "the authorities, whilst not entirely explicit, tend to suggest that the party seeking to rely on [a jurisdiction] clause has the burden of showing a good arguable case on that point". Nevertheless even where, as in the present case, the interpretation of the clause involves the application of principles of foreign law[16], it is seldom if ever that the determination of such a question will turn on the burden of proof.

21. I am reluctant to accept Mr Chapman's broad submission that, in deciding whether claims fall within the scope of an exclusive jurisdiction clause for the purposes of the Hague Convention 2005, the court is always required to undertake the sort of two-stage process which is required when considering the applicability of Article 25(1) of the Brussels Regulation Recast.

22. The general desirability of interpreting the Hague Convention 2005 and the Brussels Regulation Recast in conformity with each other where it is reasonably possible to do so cannot be doubted[17]. However, as the Court of Appeal pointed out in the *Etihad Airways* case[18], the Hague Convention 2005 and the Brussels Regulation Recast each has a different scope. The Brussels Regulation Recast provides a comprehensive code of jurisdiction and enforcement, whereas the Hague Convention 2005 applies only "in international cases to exclusive choice of court agreements"[19]. Rulings of the CJEU

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12 See *Kaefer Aislamientos SA v AMS Drilling Mexico SA* [2019] EWCA 10, [2019] 1 WLR 3514.

13 [2001] UKHL 64, [2002] 1 All ER 749.

14 [2024] EWHC 734 (Comm) at [125], per Henshaw J.

15 *The Public Institution for Social Security v Al Rajan* [2020] EWHC 2979 (Comm) at [76].

16 In an English court, foreign law is a matter of fact: see Lawrence Collins and Jonathan Harris, *Dicey, Morris & Collins on the Conflict of Laws* (16th edn, Sweet & Maxwell 2023) at [3-002]

17 Article 26(1) of the Hague Convention 2005 specifically provides that it "shall be interpreted so far as possible to be compatible with other treaties in force for Contracting States, whether concluded before or after this Convention".

18 *Etihad Airways PJSC v Flother* [2020] EWCA Civ 1707, [2022] QB 303 at [87 to [88], per Henderson LJ.

19 Article 1(1).

regarding the interpretation of the Brussels Regulation Recast are authoritative. It is clear from *Powell Duffryn*[20] and the cases which have followed it that the relevant concepts under the Brussels Regulation Recast are to be construed autonomously as rules of (what is now) EU law and not by reference to the laws of any particular Member State. There is no similar transnational court with jurisdiction to rule on the interpretation of the Hague Convention 2005.

23. Mr Chapman relied upon paragraph 144 of the Explanatory Report by Trevor Hartley and Masato Dogauchi, which states:

> **.. To determine whether the proceedings are subject to such an agreement [within the Convention], the court must interpret it. Under Article 3(a) of the Convention, the agreement applies to disputes "which have arisen or may arise in connection with a particular legal relationship". In interpreting the agreement, the court must decide what that relationship is, and which dispute the agreement applies to ..**

However, there is nothing in the Convention which prescribes how such a jurisdiction provision in a contract should be interpreted, which therefore leaves the matter to the governing or applicable law of the contract[21]. Unlike the position under the Brussels Regulation Recast, there is no jurisdictional fall back in the Hague Convention 2005 to deal with a case where the clause on its true interpretation under its governing or applicable law covers the claims in question but nevertheless falls outside the Convention.

24. Fortunately, I do not need finally to decide this point because, on the facts of the present case, it does not in practice matter. The Grand Duchy of Luxembourg is a Member State of the EU. As Professor Cuniberti explains in paragraphs 32 to 37 of his Expert Report, no cases have come before the Luxembourg courts involving the Hague Convention 2005. Those courts are, however, familiar with the Brussels Regulation Recast and would be likely to interpret the provisions of the Hague Convention 2005 by analogy with that Regulation. Given that I must interpret the jurisdiction clause in the Subscription Agreements in accordance with the principles of Luxembourg law – in other words, to make "a finding as to what the [Luxembourg] court's ruling would be if the issue was to arise for decision there"[22] – it seems to me that I should also adopt that approach, even though English law might take a different view.

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20 *Powell Duffryn Plc v Wolfgang Petereit* (Case C-214/89) [1992] ECR I-1745, [1992] ILPr 300, especially at [14]

21 See eg Regulation (EC) No 593/2008 European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) Art 12(1)(a), which still applies (as amended) in the UK as retained EU law: see the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (UK Exit) Regulations 2019 (SI 2019 No 834) and the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020 (SI 2020 No 1574).

22 See *MCC Proceeds v Bishopsgate Investment Trust* [1999] CLC 417 (CA) at [23]-[24].

25. Even on that basis, however, I am unable to conclude that the claims made against FFISA in this action fall outside the scope of the jurisdiction provisions of the Subscription Agreements and are not "matters arising from or connected with" the Subscription Agreements.

26. As for the "particular legal relationship" constituted by the Subscription Agreements. Mr Chapman urges me to confine that to the Subscription Agreements alone. But the only substantial acts of participation in the wrongs done to the Funds which are alleged against FFISA in the draft Amended Particulars of Claim are the issuing of the Series B Aviation Notes and the receipt of the consideration for those notes. Under the Subscription Agreement, FFISA expressly agreed to issue the Notes and GFIF expressly agreed to subscribe to them and to pay the consideration. The specific activities of which complaint is made are therefore precisely those which fall within the scope of the Subscription Agreements.

27. I accept that GFIF's claims against FFISA are brought on the basis that it was simply a small "cog" in the machinery of the overall conspiracy against the Funds. If, however, one concentrates on the part that that "cog" is alleged actually to have played in that overall conspiracy, rather than the part played by others, it is one that is centred on the activities provided for in the Subscription Agreements.

28. The fact that the claims brought are in tort or for equitable remedies, rather than for breach of contract, does not, in my judgment, take those claims outside that relationship. On the contrary, as Professor Cuniberti explains in paragraph 43 of his report, there is a clear trend in the decisions since 2010 of the French *Cour de Cassation* (which are treated as persuasive by the courts of Luxembourg) to interpret the material scope of widely drafted jurisdiction clauses such as this broadly, particularly in the context of tortious claims.

29. As for the "litmus test" of surprise, FFISA is a Luxembourg Securitisation Vehicle, which has issued notes governed by Luxembourg Law and which are listed on the Luxembourg Stock Exchange. There is, in my judgment, no reason to believe that the directing minds of FFISA (including Mutaz Otaibi and David Whitworth) would be surprised by the idea that claims concerning FFISA's activities as the Issuer of the Aviation Notes would have to the litigated in Luxembourg.

30. Against that background, it seems to me to be impossible to say that the claims made against FFISA are not claims "originating from the legal relationship in connection with which the agreement was concluded".

31. As to the scope of the clause, there is no indication, either in any extrinsic evidence, or in the intrinsic evidence in the terms of the contractual relations between GFIF and FFISA, that it was the subjective intention of the parties to exclude these sorts of claims from the scope of the Jurisdiction provisions in the Subscription Agreements.

32. As for extrinsic evidence, none has been suggested other than the acts relied on as participation in the conspiracy. But those acts provide no evidence of such a shared subjective contrary intention. As for the intrinsic evidence provided by the terms of the Subscription Agreement (and the incorporated Conditions), the wording chosen – "*all* matters arising from or connected with"[23] - seems to me strongly to support a broad, rather than a narrow, interpretation as giving effect to the subjective intention of the parties.

33. It was suggested by one of the experts in the *Public Institution for Social Security* case at first instance[24] that, as a matter of Luxembourg law, even a broadly worded jurisdiction clause needs to be read down to refer to disputes that were reasonably foreseeable to the parties at the moment of contracting. That suggestion was rejected by Henshaw J on the basis of the evidence given in that case by Professor Cuniberti, and I similarly reject it on the basis of the Professor's evidence.

34. I do not accept the evidence of Ms Clara Mara-Marhuenda that, in Luxembourg law, there is a theory of indivisibility, which means that, where a dispute that is *prima facie* subject to a jurisdiction clause forms an indivisible part of a larger dispute, the clause can be construed narrowly by reference to the parties' common will[25]. The materials relied upon by Ms Mara-Marhuenda are not directly in point, and provide little support for her argument. In the circumstances, it seems to me that the evidence of Professor Cuniberti that there is no such rule in Luxembourg law and that, if such a rule did exist, it would in any event be a rule of private international law and not a rule of interpretation, is (at least for present purposes) to be preferred.

35. On the issue of whether the claims made in the present action fall within the jurisdiction clause in the Subscription Agreements, it therefore seems to me that FFISA, rather than the claimants, has much the better of the argument. One has only to pose the question the other way round, and to ask whether it could sensibly be said that the Aviation Notes claims are *unconnected* with the very Subscription Agreements under which GFIF subscribed for those Notes, to see why.

36. That conclusion means that it is unnecessary for me to deal with the parties' arguments in relation to the jurisdiction provisions in the Conditions. However, in case the Set Aside Application should go further, I will state my conclusions briefly.

37. The Series B Aviation Notes are intermediated securities, GFIF at no point became a "holder" and therefore, under English law would not have been a party to the contract on the Notes. The position under Luxembourg law, which was the governing law of

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23 Emphasis added

24 *The Public Institution for Social Security v Al Rajan* [2020] EWHC 2979 (Comm) at [275] to [276]; affmd [2022] EWCA Civ 29, [2022] 1 WLR 4193.

25 Expert Report of Ms Mara-Marhuenda at [30] to [37].

the Notes, may well have been different[26], but neither party led any evidence of the relevant Luxembourg law because the express incorporation of the Conditions into the Subscription Agreements makes the point irrelevant.

38. It seems to me that, on the true interpretation of the Subscription Agreements in accordance with the principles of Luxembourg law, the specific provision dealing with jurisdiction in the Subscription Agreements themselves was intended to take precedence over the jurisdiction provisions incorporated only by reference from the Conditions. To the extent that the scope of the two sets of provisions overlap, the provisions in the Subscription Agreements therefore take precedence.

39. Had I come to the view, on the basis of Mr Chapman's arguments concerning the overarching conspiracy, that the claims made against FFISA in this action fell outside the scope of the jurisdiction provisions of the Subscription Agreements, I would similarly have held that they fell outside the jurisdiction provisions in the Conditions. I would have held that the claimants had the better of the argument that the parties did not have the subjective intention to subject such wider claims to the jurisdiction provisions of the Conditions, to the extent that those claims were not within the scope of the specific jurisdiction provisions of the Subscription Agreements.

40. Had I come to a different conclusion, and held that the claims brought in the present action *did* fall within the jurisdiction provisions in the Conditions, I would have held that that clause did not fall within the scope of the Hague Convention 2005. It is an asymmetric jurisdiction clause to which, for the reasons set out in paragraph 15. above, the Convention does not apply. In that event, I would also have held that there were strong reasons for me not to enforce the clause by granting a stay. From the point of view of GFIF, the present claims were not foreseeable at the point at which it entered into the contract. The overarching conspiracy claim has, for the reasons given by Mr Chapman, a very strong connection with England: and, given that the claims against all other defendants are to be tried here, it is plain that England would (on this hypothesis) be overwhelmingly the appropriate jurisdiction for the trial of this action as a whole, including the claims against FFISA.

41. Nevertheless, my conclusion that the claims in the present action fall within the jurisdiction provisions of the Subscription Agreements means that I have no alternative but to suspend or to dismiss the proceedings in England against FFISA.

42. FFISA's application notice asks the court either to stay or to dismiss the action against FFISA. Neither party addressed any sustained argument to me about which of these courses would be the more appropriate. Having regard to the fact that the claims against all other defendants will continue here, and that there are potential limitation issues, it seems to me on balance that the appropriate course is for me at this point

[26] See *Secure Capital SA v Credit Suisse AG* [2017] EWCA Civ 1486, [2017] 2 Lloyd's Rep. 599 at [5] and [19]-[23], per David Richards LJ.

simply to stay the proceedings against FFISA, with permission to apply for dismissal if and when it becomes clear that those proceedings will serve no further useful purpose.

(C.2) Non-disclosure

43. My conclusions as to jurisdiction also mean that I can deal comparatively shortly with FFISA's application to set aside the order of Knowles J on the basis of non-disclosure.

44. The law in this area was helpfully summarised by Carr J (as she then was) *in Tugushev v Orlov*[27]. Neither party took issue with any aspect of that familiar summary, and I need not lengthen this judgment by repeating it.

45. As to the facts, it is common ground that:

    45.1 The Joint Liquidators were aware of the existence of the Subscription Agreements for at least four months before the application to Knowles J. Their solicitors, Wilkie Farr, referred to the Subscription Agreements in a letter dated 30 September 2022.

    45.2 The Subscription Agreements were exhibited to the sixth witness statement of Mr Mutaz Otaibi dated 23 November 2022, which was filed in the Cayman winding up proceedings. As is confirmed in paragraph 239 of Mr Burrell's fourth witness statement, the Joint Liquidators had copies of the Subscription Agreements among their papers.

    45.3 Mr Burrell did not exhibit the Subscription Agreements to his first witness statement, and the existence of the jurisdiction provisions on which the Set Aside Application has been based was not mentioned to Knowles J.

    45.4 Knowles J was also not told that the Particulars of Claim advanced claims that were not included in the Amended Claim Form, and that the limitation period for those claims had expired since the Amended Claim Form was filed.

46. Mr Burrell's fourth witness statement, in seeking to explain these matters, took a robust line, asserting that he did "not consider that any of these allegations [of failures in the duty of full and frank disclosure] have merit". His explanation in paragraphs 237 to 240 of that witness statement took the stance that the failure even to mention the relevant jurisdiction provisions was not "material since the Claimant's position is that the claims against [FFISA] do not fall within the alleged exclusive jurisdiction clauses in the Subscription Agreement".

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[27] [2019] EWHC 2031 (Comm) at [7] and [8].

47. In my judgment, that entirely misunderstands the nature of the duty of full and frank disclosure. It should be known to all practitioners that what is material to place before the judge on a without notice application is not be judged solely from the point of view of the applicant. Material facts are those which it is material for the judge to know in dealing with the application as made. That duty requires an applicant to make the court aware of the issues likely to arise, which includes making the court aware of the possible difficulties which the applicant may face, either in the claim or in the particular application. What is required is a fair presentation. Although that need not extend to a detailed analysis of every possible point which may arise, it necessarily involves making the court aware of the main difficulties which the application, if contested, could face and of the principal arguments which the other side would be likely to raise.

48. Fortunately, Mr Burrell's fifth witness statement adopts a more sensible approach, accepting that these matters ought to have been drawn to the attention of Knowles J, and seeking to explain the failure by reference to the protracted winding up proceedings in the Cayman Islands and the difficulties which the Joint Liquidators have faced in getting information, given that the Funds were (on the claimants' case) under the control of the Floreat Principals until the appointment of the Joint Liquidators.

49. I have considerable sympathy for the position in which the Joint Liquidators found themselves on taking control of the Funds and seeking to find out from a mass of documents what had happened over a protracted period to the assets of the Funds. It is nevertheless well established that an applicant must make proper enquiries before making a without notice application, and that the duty to disclose extends to matters of which the applicant would have been aware had reasonable enquiries been made.

50. The Funds and their Liquidators were aware of the existence of the Subscription Agreements and had access to copies of them. It should have been obvious to them (and to those advising and/or acting for them) that the Subscription Agreements might contain jurisdiction clauses, and that it would be of great importance on an application for permission to serve outside the jurisdiction for the court to be informed about the existence and terms of any such jurisdiction provisions. It is no excuse for the claimants to say, as Mr Burrell very frankly does in his fifth witness statement, that "due to the focus on the breaches of fiduciary duties by the Floreat Principals, my firm did not review the Subscription Agreements because that was not the nature of the claim we were bringing". In colloquial terms, that is simply a confession that those representing the claimants took their eye off the ball.

51. I accept that those representing FFISA had time following the letter before action sent on 18 January 2023 to draw the claimants' solicitors' attention to these jurisdiction provisions, but did not do so. I also accept that the failure to draw these matters to the attention of Knowles J was not deliberate, and was intentional only in the sense that

these matters were wrongly thought not to require further investigation. It was, however, a serious failure to comply with the duty placed on an applicant.

52. In all the circumstances, it seems to me that the claimant's failure to comply with the duty of full disclosure was sufficiently serious to warrant the immediate discharge of the Order of Knowles J insofar as it affects FFISA.

53. Given that this is an action involving serious allegations of dishonesty and misfeasance, it is nevertheless necessary to keep a sense of proportion and to bear in mind the overriding objective of dealing with cases justly and at proportionate cost. I am therefore prepared to re-grant permission to the claimants to serve FFISA out of the jurisdiction and to dispense with re-service, but only on terms which will ensure that the claimants would derive no limitation benefits from their failure to draw the attention of Knowles J to the disparity between the case set out in the Amended Claim Form and that in the Particulars of Claim. That seems to me, in the particular circumstances of this case, to be the most sensible and practical way forward. In my judgment, that order (with its attendant costs consequences for the claimants) is a sufficient sanction to mark the gravity of the claimants' failure to comply with their duty.

(D) Permission to amend

54. After the hearing, I received a letter from the claimants' solicitors, confirming that all affected parties other than FFISA have consented to the claimants' application to re-amend the Claim Form and to amend their Particulars of Claim.

55. That letter also enclosed a revised form of the proposed Amended Particulars of Claim. The originally proposed amendments had included, in paragraph 12A, a lengthy quotation from the written reasons for decision given by the Honourable Justice Kawaley in the Grand Court of the Cayman Islands when granting winding-up orders in respect of PIF and Long View. This section has been removed from the revised form of draft at my suggestion, as being (for several distinct reasons) inappropriate for inclusion in a statement of case in an action in the Commercial Court.

56. As Leggatt J (as he then was) observed in *Tchenguiz v Grant Thornton UK LLP*[28]

> **.. Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric ..**

The practice of simply telling the story and/or of including long quotations from the documentary evidence and/or of including prejudicial commentary, sometimes adopted in the drafting of statements of case in arbitrations, has no place in litigation

[28] [2015] EWHC 405 (Comm), [2015] 1 All ER (Comm) 961 at [1]

in the Commercial Court. As is stated in paragraph C1.1 of the *Commercial Court Guide*:

> **.. Special care should be taken to set out (with proper particulars) only those factual allegations which are necessary to establish the cause of action, defence, or point of reply being advanced .. to enable the other party to know what case it has to meet.** ***Evidence should not be included, and a general factual narrative is neither required nor helpful ..***[29]

57. Subject to the deletion of this inadmissible passage, I will give permission for the proposed amendments as against the defendants other than FFISA.

(E) Disposition

58. For these reasons, I will set aside the Order of Knowles J insofar as it affects FFISA. I will re-grant permission to serve FFISA out of the jurisdiction, and will dispense with re-service, on the terms which I have indicated. Otherwise, I will stay the proceedings against FFISA and give FFISA permission to apply in the event that it becomes clear that the continuance of proceedings in this jurisdiction against FFISA serves no further useful purpose. As against the defendants other than FFISA, I will give permission to the claimants (on the usual terms as to consequential amendments and to costs) to re-amend the Claim Form and to amend the Particulars of Claim substantially in the form of the drafts which have been produced to me.

59. I invite the parties to attempt to agree the terms of a Minute of Order giving effect to this judgment and dealing with all consequential matters. In the event that agreement cannot be reached by 4pm on Friday 24 May 2024, the parties should make arrangements through the usual channels for a short further hearing. Pursuant to CPR PD 52A 4.1(a), I adjourn any application for permission to appeal together with all other consequential applications to be determined in that way and extend time under CPR Pt 52.12(2)(a) until 21 days after that determination.

60. I am very grateful to counsel and to the teams behind them for their assistance.

61. This judgment will be handed down remotely by circulation to the parties' representatives by email and release to the National Archives. No attendance by the parties is necessary.

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[29] Emphasis added.

ANNEX 1 – CLAIMANTS

(1) COSIMO BORRELLI
(AS JOINT OFFICIAL LIQUIDATOR OF GLOBAL FIXED INCOME FUND I LIMITED ("GFIF") (IN OFFICIAL LIQUIDATION), JOINT LIQUIDATOR OF REAL ASSETS (RA) GLOBAL OPPORTUNITY FUND I LTD. ("RAGOF") (IN LIQUIDATION), JOINT OFFICIAL LIQUIDATOR OF PRINCIPAL INVESTING FUND I LIMITED ("PIF") (IN OFFICIAL LIQUIDATION), AND JOINT OFFICIAL LIQUIDATOR OF LONG VIEW II LIMITED ("LONG VIEW") (IN OFFICIAL LIQUIDATION)
(2) COLIN WILSON (AS JOINT LIQUIDATOR OF RAGOF)
(3) MITCHELL MANSFIELD (AS JOINT OFFICIAL LIQUIDATOR OF PIF, GFIF, AND LONG VIEW)
(4) GLOBAL FIXED INCOME FUND I LIMITED (IN OFFICIAL LIQUIDATION)
(5) REAL ASSETS (RA) GLOBAL OPPORTUNITY FUND I LTD (IN LIQUIDATION)
(6) PRINCIPAL INVESTING FUND I LIMITED (IN OFFICIAL LIQUIDATION)
(7) LONG VIEW II LIMITED (IN OFFICIAL LIQUIDATION)
(8) SPRINGS FARM LIMITED
(9) SPRINGS FARM SERVICES LIMITED
(10) SHANTI
(11) ~~MAHI LENDING SERVICES LIMITED~~
(12) CHESHAM HOLDCO
(13) 1 CHESHAM CLOSE LIMITED
(14) 3 CHESHAM CLOSE LIMITED
(15) 4 CHESHAM CLOSE LIMITED
(16) RAGOF HEUSEN~~T~~STAMM S.A.R.L.
(17) WANDERERS HOLDCO LIMITED
(18) SILVERTOWN LIMITED
(19) CASTLETOWN LENDING LIMITED
(20) MREF IIII HAYES LTD
(21) RAGOF 33 GROSVENOR STREET LIMITED
(22) RAGOF COLMORE ROW LIMITED
(23) RAGOF SPENCER HOUSE LIMITED

ANNEX 2 - DEFENDANTS

(1) MUTAZ OTAIBI
(2) HUSSAM OTAIBI
(3) JAMES WILCOX
(4) FLOREAT REAL ASSET INVESTMENT MANAGEMENT LTD
(5) FLOREAT INVESTMENT MANAGEMENT LIMITED
(6) FLOREAT GLOBAL FIXED INCOME MANAGEMENT LIMITED
(7) FLOREAT PRINCIPAL INVESTING LIMITED
(8) LV II INVESTMENT MANAGEMENT LIMITED
(9) FLOREAT REAL ESTATE LIMITED (UK)
(10) FLOREAT CAPITAL MARKETS LIMITED (IN LIQUIDATION)
(11) FLOREAT MERCHANT BANKING LIMITED
(12) FLOREAT WEALTH MANAGEMENT LIMITED
(13) FLOREAT HOLDING LIMITED
(14) FLOREAT REAL ESTATE LIMITED (JERSEY)
(15) FLOREAT PRINCIPAL INVESTMENT MANAGEMENT LIMITED
(16) STUDIO 51 NORTH LIMITED
(17) SPRINGS EQUESTRIAN ESTATE LIMITED
(18) FFI AVIATION PORTFOLIO LIMITED
~~(19) TRUSTEE OR TRUSTEES (IDENTITY OR IDENTITIES UNKNOWN) OF THE FLOREAT PURPOSE TRUST~~
(20) FFI AVIATION MSN 1407 (GUERNSEY) LIMITED
(21) FFI AVIATION MSN 1518 LIMITED
(22) ~~FLOREAT~~ FFI AVIATION MSN 1310 LLC
(23) FLOREAT FIXED INCOME SA
(24) IR RELATIONS LTD.
(25) FLOREAT AVIATION SERVICES LIMITED
(26) BENJAMIN CHURCHILL
(27) OUMAR DIALLO
(28) ZAKI MOHAMMED NUSEIBEH