Neutral Citation Number: [2024] EWHC 673 (Comm)

Case No: CL-2022-000230

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

Rolls Building
Fetter Lane
London
EC4A 1NL

Friday 22 March 2024

Before:

MRS JUSTICE COCKERILL DBE

- -

Between:

RANA AL-AGGAD

Claimant

- and -

(1) TALAL AL-AGGAD
(2) TAREK AL-AGGAD
(3) LAMA AL-AGGAD

Defendants

- -
- -

Anthony Peto KC and Shane Sibbel (instructed by **PCB Byrne**) for the **Claimant**
Stephen Houseman KC and Richard Hoyle (instructed by **Jones Day**) for the **First and Second Defendants**
Fionn Pilbrow KC and Vanshaj Jain (instructed by **Forsters LLP)** for the **Third Defendant**

Hearing dates: 7, 8 February 2024

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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 the judge and circulated to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 22 March 2024 at 12:45

Mrs Justice Cockerill:

INTRODUCTION

1. These proceedings concern – unusually in the Commercial Court – a family dispute. The parties are the four children of Omar Aggad ("Mr Aggad") and Malak Murad ("Mrs Murad"), now deceased. The Claimant Rana Al-Aggad ("Rana") has launched proceedings in this court against the First Defendant ("Talal"), the Second Defendant ("Tarek") (collectively, the "Brothers") and the Third Defendant ("Lama"), who are all siblings and Saudi nationals. She claims in unlawful means conspiracy and also for breach of an agreement between the siblings.

2. The personal circumstances of Rana are key both to the claim and to the issues in this action. Because of the need for the Court to be addressed on confidential (including personal) matters there are two versions of the judgment: this is a redacted version which is publicly available ("the Open Judgment") and a Confidential Judgement. That approach follows on from a dispute between the parties as to the appropriate approach to confidentiality which was the subject of a separate hearing before a deputy judge in October 2023. The Court has also been addressed upon and has considered the fundamental principle of open justice and the need to ensure that derogations from it are limited to those which are necessary and proportionate. The redactions applied to produce this Open Judgment have been made with that principle in mind.

3. For present purposes it suffices to say that Rana was educated in England but thereafter returned to Saudi Arabia where her family was based. Her father had given her a factory there and she proceeded to run it and the confectionary business associated with it very successfully. In 2004 she returned to Saudi Arabia to obtain a divorce, but in 2005 she, and her parents left Saudi Arabia. Rana was granted asylum by the Canadian Refugee Board on 12 July 2011.

4. From 2005 therefore the family was divided. Rana and her parents lived in Canada and her siblings remained in Saudi Arabia. This faultline between two groups of the family lies at the heart of the dispute. It is perhaps the family aspect to the dispute which has caused it to be so very hard fought. As will be explained further below the Defendants have taken every point which could conceivably be taken in fighting this jurisdictional battle. The case was originally listed for hearing in October 2023 but was adjourned following a late application by Rana to serve rejoinder evidence (in particular in relation to a new case on Canadian law raised by the Brothers), which then prompted a responsive application by the Defendants to serve surrejoinder evidence. The costs for both sides are enormous: Lama's costs to date exceed £400,000 – and the bulk of the running on this application has been made by the other parties.

5. This lends a certain degree of irony to the fact that before me it was said by both the Brothers and Lama that they have great sympathy and concern for their sister.

6. The claim is brought on two grounds:

1) The first claim is in breach of contract. The contract in question relates to the Aggad Investment Company ("AICO"), a Saudi company founded in 1975 by Mr Aggad in which Mr Aggad, Mrs Murad and the parties were shareholders, owning the entire shareholding of the company amongst them. Disputes arose between the two groups of the family. On 25 January 2009, Mr Aggad, Mrs Murad, Rana, Lama, Talal, Tarek and AICO concluded an agreement (the "2009 Agreement"), whereby, inter alia, AICO was to transfer to Rana certain sums of money. In return, Rana agreed to give up her shareholding in AICO. Rana's first claim in these proceedings is that she was never paid the sums owed to her pursuant to the 2009 Agreement.

2) The claim in conspiracy arises out of the fate of AICO after the death of Mr Aggad in January 2018. Rana contends that the Defendants conspired by unlawful means in 2018 to procure a judgment in Saudi Arabia behind her back and, thereafter, the filing of amended articles of association for AICO. It is said that because she was based outside Saudi Arabia and it was either difficult or impossible for her to appear in Saudi proceedings this had the effect of depriving her of the practical ability to exercise rights under or dispose of shares in AICO inherited from her father.

3) In slightly more detail the allegations are that:

    a) Pursuant to Sharia law, Rana was entitled to inherit 5,250 AICO shares;

    b) The Defendants knew that because of Rana's personal history she did not want to hold assets situated in the Middle East in her own name;

    c) Rather than become an AICO shareholder, Rana wished to dispose of these shares but was concerned that she would not get their value from her siblings;

    d) AICO's articles of association had to be amended following Mr Aggad's death. The co-operation of Rana and Mrs Murad was necessary for this to progress. Rana wished to stall this process, knowing that would provide her leverage in negotiations with the Brothers who were the principal movers in the business;

    e) Rana alleges that the Brothers commenced secret proceedings in Saudi Arabia for the distribution of the inherited AICO shares, to enable them to amend the AICO articles of association and omitted her address and telephone number from the Statement of Claim, as well as failing to disclose to the Saudi Court that Rana had not been properly served;

    f) Rana says she was injured by the registration of AICO shares in her name, and the amendment of AICO's articles of association, that claim being equivalent to the economic value of the AICO shares that she inherited. This is because in order to exercise her rights under the relevant AICO shares or sell those shares she would have (directly or via a power of attorney) to participate in proceedings in Saudi Arabia which is (she says) impossible for her.

7. The hearing before me has been brought to determine the jurisdiction challenges brought by Rana's siblings. For the purposes of this jurisdiction dispute (though not for other purposes) it is accepted that Rana cannot return to Saudi Arabia.

8. There are two challenges. The first is brought by the Third Defendant, Rana's sister Lama. Lama was served as of right by personal service within the jurisdiction (at Heathrow Airport) on 15 July 2022. This is said to have been an opportunistic service while Lama was on a "short visit". Her ties to this jurisdiction are in issue, though it is common ground that Lama spends time here every year. The Part 11 Application contends the claims against her should be stayed on *forum non conveniens* grounds in favour of Saudi Arabia. She makes no case that there is a third jurisdiction which would be the *forum conveniens*, although she has indicated a willingness to submit to the jurisdiction of the courts of Jordan (in connection with the Brothers' case on Jordan as *forum conveniens*).

9. Lama was used as the "anchor" defendant to obtain permission to serve the Brothers out of the jurisdiction under the 'necessary or proper party' gateway in CPR PD 6B, paragraph 3.1(3). The Brothers were served out of the jurisdiction pursuant to the Order of Butcher J on 11 August 2022. There is no challenge to the contention that the First and Second Defendants are necessary and proper parties to the claims against the Third Defendant if those claims proceed – or that jurisdiction cannot be established against them if service on Lama is set aside. The Brothers' Part 11 Application seeks to set aside service out on *forum conveniens* grounds, contending that Saudi Arabia, alternatively Jordan, is the appropriate forum.

10. There are therefore two key disputes – although the parties have agreed a list of issues which runs to nine main issues with a multiplicity of sub issues. The first is whether Saudi Arabia is the *forum conveniens*.

11. The legal test applicable in a *forum non conveniens* application remains that outlined in Lord Goff's judgment in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"). The test has two limbs whereby:

    1) First, the burden is on the defendant to establish that there is another forum which is "*clearly or distinctly more appropriate than the English forum*": *Spiliada*, 477E ("Stage 1"). This has also been put thus: the "only sensibly available forum" to try the action: see *Gulfvin v. Tahrir* [2022] 4 WLR 66 at [18]-[23]. If the defendant does not discharge this burden, the application fails.

    2) Secondly, if the defendant discharges its burden under Stage 1, then the burden of proof shifts to the claimant to show, using cogent evidence, that "*there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country*": *Spiliada*, 476E ("Stage 2").

12. Rana accepts (for the purposes of *Spiliada* stage 1) that Saudi Arabia is the natural forum, though she maintains that there are a number of connecting factors with England. But she contends that nonetheless Saudi Arabia is not the most suitable forum to try the claims, for *Spiliada* stage 2 reasons. She says that:

1) There is a real risk that that she will be unable fairly to commence and pursue proceedings against her siblings in Saudi Arabia. As considered in further detail below this is an argument which focusses on the requirements of Saudi law as regards the recognition of the validity of foreign powers of attorney, it being accepted for the purposes of this dispute that it is not feasible for Rana to return to Saudi Arabia and litigate there personally;

2) There is a real risk that she will be unable to obtain substantial justice in Saudi Arabia given her personal history and the nature of her claims. The question here is whether in the light of her personal history and the nature of her claims, the Claimant have a well-founded basis not to commence proceedings in Saudi Arabia? This argument is structured under the following headings: (i) well-founded basis not to bring these claims there; (ii) real risk that the Claimant cannot fairly commence proceedings there; (iii) real risk that the Claimant cannot fairly participate there: the Claimant relies upon those factors both individually and cumulatively.

13. The Brothers submit that even if Rana prevails on the stage 2 arguments, such that Saudi Arabia is not the *forum conveniens*, Jordan is also a more convenient forum than England and Wales. Rana however contends that in circumstances where the question only arises if the claim proceeds against Lama here, Jordan cannot be the more appropriate forum for claims which overlap very substantially with the claims against Lama.

14. For points on Saudi law and practice, Rana relies on the expert reports of Chibli Mallat ("Professor Mallat"), a Lebanese lawyer who has held numerous professorial posts and published extensively on the law of the KSA. Lama and the Brothers rely on the reports of Ali Faraj Alogla ("Mr Alogla") and Dafer Alsubaie ("Mr Alsubaie"), experienced Saudi practitioners. For points concerning Rana's ability to obtain identification documents under Canadian law, Lama and the Brothers rely on the reports of Warda Shazadi Meighen ("Ms Meighen"), and Rana relies on the report of Rosalie Brunel ("Ms Brunel"). Rana also relies on a witness statement from her Canadian lawyer, to explain her personal circumstances.

15. Because of Lama's status as the jurisdictional lynchpin, I will therefore deal first with the Lama jurisdiction dispute, and then pass on to the Brothers' jurisdiction dispute.

Procedural note

16. There is one procedural/practice point which I should first highlight, however. This case was listed for two days with a day's pre-reading time for the judge. Under paragraph F7.5 of the Commercial Court Guide each party was entitled to serve a skeleton of no more than 25 pages unless permission was given for a longer skeleton. Any application for permission has by paragraph F6.5 of the Guide, to be made " *sufficiently in advance of the deadline for service to enable the Court to rule on it before that deadline*". Realistically with one day's reading that length was a maximum if the judge were to be enabled to read any further/underlying documentation as well as the skeletons.

17. In this case the Brothers' legal team applied for permission to serve a 50 page skeleton a mere 2 hours before that skeleton was due to be served. That was followed by a request from Rana's counsel to serve a 67 page skeleton. The parties in addition agreed that I should pre-read 10 witness statements and 10 expert reports, plus parts of 3 key authorities which they optimistically suggested would take in total 5.5 hours.

18. This was a classic example of the problem which this court has repeatedly highlighted of unrealistic reading time as well as non-compliance with the provisions of the Guide as regards seeking permission for a longer skeleton sufficiently far in advance to enable the Court to rule on it.

19. This problem is highlighted because those involved in litigating in this Court should be aware that compliance with the Court's rules is taken seriously, and non-compliance has consequences. In this case I refused permission for the longer skeletons. I required the parties to serve compliant skeletons and made no use of the longer skeletons purportedly served. Neither party will be entitled to recover the costs of those longer skeletons from any other party.

THE LEGAL FRAMEWORK

20. The principles applicable to the *Spiliada* analysis were not much in issue. At Stage 1, the Court will look to various factors that could point to the case having a closer connection with a foreign forum, including the subject matter of the dispute, the governing law, the location where relevant conduct occurred, the location of witnesses and evidence, the place of incorporation of any companies connected with the dispute, and the personal connections that the parties have with that forum: Briggs, Civil Jurisdiction and Judgments (7th edn., 2021), 421-425.

21. The Defendants also relied on the observation of Lord Goff in *Spiliada*, 477F that, "*if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas*".

22. The Defendants also pointed to *Gulfvin v Tahrir* [2022] EWHC (Comm) [2022] 4 WLR 66 [23] where it was conceded that because the necessary and proper party gateway is a wide one "*particularly close scrutiny is called for of the assertion by a claimant able to rely only on that gateway that this jurisdiction is the proper forum for the claim in question."*

23. At stage 2 the claimant is required to prove "*objectively by cogent evidence*" the circumstances which require the English court to proceed with the claim, notwithstanding the fact that it is not the appropriate forum to hear it: *Spiliada*, 478D. It is not sufficient for the claimant's evidence to simply *"raise grave doubts"* about such circumstances, as this will not cross "*the threshold of cogency that the jurisprudence requires*": *Pacific International Sports Club v Soccer Marketing International* [2009] EWHC 1839 (Ch), [92]-[93] (upheld in [2010] EWCA Civ 753).

24. The burden on the defendant at Stage 1 is simply to show that there is an alternative forum with competent jurisdiction to try the claim. The question of whether that forum is, in practice, available to and accessible by the claimant due their particular circumstances is a question for Stage 2: *Municipio de Mariana v BHP Group* [2022] 1 W.L.R. 4691), [340]; *Askin v Absa Bank* [1999] I.L.Pr. 471, [28]-[30]; Briggs, 416-419. Consequently, the burden of proving the lack of practical availability of a forum falls solely upon the claimant, and this must be discharged by cogent and objective evidence. Indeed, as noted by Blackburne J in *Pacific International* at [33]:

> "…allegations as to why the appropriate forum should be displaced must amount to an allegation that that forum is or will be unavailable for the trial of the claim. This must be clearly demonstrated against an objective standard and supported by positive and cogent evidence".

25. The Defendants contended by reference to *Limbu v Dyson Technology* [2023] EWHC 2592 (KB), [82] that in assessing the cogency of the claimant's expert evidence under Stage 2, a Court must evaluate this evidence on a relative basis by testing it against the expert evidence adduced by the defendant on the same question to see whether it is "*clear, logical and convincing or persuasive"*. While the proposition is one underpinned by general good sense, this is not a binding test, the passage in question being obiter, not ratio.

26. Further, where there is a "divergence of opinion" between the experts on a question of foreign law or practice at Stage 2, such that the "answer is not clear" to the Court, "considerations of comity and caution" preclude the Court from concluding that the foreign forum would not deliver justice to the claimant: *Al Assam v Tsouvelekakis* [2022] EWHC 451 (Ch), [67]. As it was put in submissions: a score draw is not enough. Instead, "*the Court will start with the working assumption, for which comity calls, that courts in other judicial systems will seek to do justice in accordance with applicable laws, and will be free from improper interference or restriction*": *Cherney v Deripaska* [2008] EWHC 1530 (Comm), [238] (upheld in [2009] 2 CLC 408).

27. Moreover, where the claimant's claim would "undoubtedly be defeated" if it were brought in the foreign forum, such as where it is time-barred, practical justice should be done and a stay should not be granted provided "*the claimant acted reasonably in commencing proceedings in England, and did not act unreasonably in not commencing proceedings in the foreign country*": *Altimo Holdings v Kyrgyz Mobil* [2012] 1 WLR 1804, [88].

"Real risk" or facts?

28. One pertinent dispute on the law was that the Defendants submitted that there is a difference in the standard of proof applied to an allegation under Stage 2 that the claimant will not practically be able to access the foreign forum due to her personal circumstances, and an allegation that she will not receive justice in that forum. For the latter allegation, a claimant is only required to prove with cogent evidence that there is a "real risk" that substantial justice will not be obtained. The "real risk" test means that there is no need to prove facts to a trial level – i.e.

on the balance of probabilities: *Cherney v Deripaska* [2009] 2 CLC 408 per Waller LJ at 29.

29. However, it is said that this lower standard of proof does not extend to allegations of the first kind, concerning availability of the forum.

30. While Rana points to the judgment of the Privy Council in *Altimo Holdings* at [95]: "*…depending on the circumstances as a whole, the burden [on the claimant at Stage 2] can be satisfied by showing that there is a real risk that justice will not be obtained in the foreign court by reason of incompetence or lack of independence or corruption*" the Defendants submitted that the Court's finding on this lower standard of proof was directed to circumstances where there were concerns regarding the forum's ability to provide justice, and not to concerns regarding the accessibility of the forum. They submit that there is no basis to suggest that all allegations under Stage 2, including those concerning accessibility, are to be proved to this lower standard of proof and submit that any such suggestion is contradicted by the Court of Appeal's exposition of Stage 2 in *Municipio de Mariana* at [333]:

> "If the defendant satisfies the burden [in Stage 1], the court will nevertheless refuse a stay if the claimant satisfies it, by cogent evidence, that there are circumstances by reason of which justice requires such refusal, including in particular if it is established by cogent evidence that there is a real risk that the claimant will not obtain justice in the foreign forum: Spiliada at p 478D—E, Kyrgyz Mobil at paras 91—95. This is stage two."

31. The Defendants submit that the phrase "in particular" patently acknowledges that not all allegations under Stage 2 are to be directed to the lower "real risk" standard of proof. If that is right, concerns about accessibility are to be proved on the balance of probabilities.

32. In my judgment this is not a compelling argument. No such cut and dried line is discernible. The overarching test is one of real risk that the claimant will not obtain justice in the foreign forum. That test must look forward, and hence real risk is the appropriate test. However, the Defendants are right to draw attention to the fact that where a fact is capable of being proved one way or the other because it relates to something which has happened, that fact comes into the equation as a fact and is required to be proved on the balance of probabilities.

The timing issue

33. The second point is a rather interesting timing point. There is a question as to whether the perspective from which one judges the various possibilities is the time of the application for both applications, or whether there is a difference between service out cases and challenges to a jurisdiction established as of right.

34. There is a distinction between the perspective required from a point of view of the two challenges in addressing Stage 2 of the *Spiliada* test.

1) So far as the challenge brought by the Brothers is concerned, the perspective is taken from the date when the permission to serve out order was made: 11 August 2022.

2) However as regards the Lama challenge the Court is entitled to consider evidence about the availability of the foreign forum as at the date of the hearing, rather than at the date on which the application of *forum non conveniens* was made, taking into account any change of circumstances that may have occurred in the interim: *Lubbe v Cape Plc* [2000] 1 WLR 1545, 1556-1558; *Mohammed v Bank of Kuwait and the Middle East KSC* [1996] 1 W.L.R. 1483, 1493; Briggs, 414.

35. The Defendants submit that this distinction is odd to the point of being anomalous in circumstances where the claimant has chosen the venue and timing of the claim – and where (as the Defendants would say) Lama is by no means the primary target of the litigation. That may be right. However, the position on the law appears to be clear.

36. The orthodox analysis is that for the purposes of a "service out" case (like that of the Brothers), the assessment of whether England was the proper forum falls to be determined as at the date that permission to serve the defendants out of the jurisdiction was granted *ex parte*. This is clear from see the notes at CPR 11.1.3; *ISC Technologies v Guerin* [1992] 2 Lloyd's Rep 430 per Hoffman J at 434; *Golubovich v Golubovich* [2022] EWHC 1605 (Ch) per Edwin Johnson J at [65-67]; *HC Trading Malta Ltd v KI International Ltd* [2022] EWHC 1387 at [10-12].

37. The Brothers submit that the court's approach has in fact moved on somewhat and that a less rigid approach is nowadays evident, pointing to *Vedanta v Lungowe* [2019] UKSC 20 [2020] AC 1045 where the Supreme Court's conclusion that the judge had erred in not taking into account an offer to submit to another jurisdiction which had only come in post permission, carries with it an implication that the court's view is not firmly fixed on the time of permission. Some allusion was also made in passing to *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 which establishes that when defending a jurisdiction challenge, permission to serve out may be maintained on different jurisdictional grounds to those initially successfully relied upon at the ex parte stage.

38. On that basis they submit that the Court is entitled to take routes which are now available (such as the Apostille Convention) into account, even though they were not available at the time of the application to serve out, and have only become available thereafter.

39. Despite the Defendants' best attempts I conclude that the Claimant is right on this point. The time for testing the judicial gateway is a date of the relevant permission order but subsequent matters might be relevant insofar as it casts light on position at the time. Authority for this approach is in Gloster LJ's *Erste Group Bank AG London Branch v J7 'VMZ Red October' & Ors* [2015] EWCA Civ 379 [44-45] (reflecting earlier authority in *Mohammed v Bank of Kuwait* [1996] 1 WLR 1493 (CA), 1492-1493 and followed inter alia in *Golubovich v Golubovich* [2022]

EWHC 1605 (Ch) [65] and *HC Trading Malta Ltd v KI International Ltd* [2022] EWHC 1387).

THE LAMA DISPUTE

40. The essence of Lama's case is that:

1) The claim has very little indeed to do with Lama and that it would be a permissible inference that the claim has been extended to include her solely for jurisdictional advantage. The substance of Rana's claim is directed at the Brothers;

2) The claim has very little indeed to do with this jurisdiction. It is brought by a Saudi national now living in Canada, against her siblings, who are Saudi nationals residing in Saudi Arabia (Talal and Lama) and Jordan (Tarek). It is, in essence, a Saudi family dispute. It concerns a contractual claim under the 2009 Agreement, which is written in Arabic, was likely concluded in Saudi Arabia and (it is common ground) likely to be governed by Saudi law. It also concerns an unlawful means conspiracy claim likely to be governed by Saudi law, where all relevant conduct took place in Saudi Arabia, and the only particulars of loss alleged by Rana concern the value of her shares in AICO, a Saudi company. This is plainly a dispute that should not be litigated in England and Wales;

3) The emotive nature of Rana's case does not equate to evidence sufficient for the court to conclude that there is real risk that Rana cannot fairly commence or participate in proceedings there or that there is a well-founded basis not to bring these claims there.

4) Rana's evidence concerning the inaccessibility of the Saudi forum is deeply flawed. It is said that her expert is not an expert and has no experience of Saudi litigation, and that his reports have clearly misrepresented Saudi legal provisions on several occasions.

Stage 1 of Spiliada

41. To an extent this is common ground. At Stage 1 Saudi Arabia is clearly and distinctly the more appropriate forum for this claim bearing in mind the following points:

1) Rana's claim is concerned with her shareholding in AICO, a Saudi company;

2) The 2009 Agreement is written in Arabic and was likely signed by the Defendants in Saudi Arabia;

3) The Agreement concerned arrangements between Mr Aggad, Mrs Murad and their four children (the parties to this dispute), AICO and AICO International Company, a Bahraini company;

4) None of the alleged unlawful conduct took place in England. Rather, the claim is concerned with conduct that took place in Saudi Arabia;

5) The only particulars of loss alleged are concerned with the value of Rana's shares in AICO;

6) The claims are likely to be governed by Saudi law;

7) The Majority of witnesses and documents connected with the claim are likely to be situated in Saudi Arabia;

8) Moreover, Lama is a citizen and permanent resident of Saudi Arabia. She is the CEO and owner of Almulraka Trading Company, which is incorporated in Saudi Arabia, and a partner in AICO;

9) The other parties are also citizens of Saudi Arabia, and Talal and Lama are resident in Saudi Arabia;

10) All Defendants are willing to submit to the jurisdiction of Saudi courts.

42. That said, the case is not without ties to this jurisdiction which it is agreed the court may weigh in the balance at Stage 2:

1) The 2009 Agreement was concerned in part with the disposition of English property;

2) There are at least three other agreements forming part of the relevant background between the parties which are governed by English law (and, for two, jurisdiction): the 2017 Agreement, the 2018 Co-Ownership Agreement and the Settlement Agreement. The parties used English lawyers to draft those agreements;

3) Each of the Defendants own property in England, including a shared "second home" called "Round Oak";

4) Each of them visits England at least annually, for up to one month at a time. This reflects their broader ties with England. The First and Third Defendants were, like the Claimant, educated in England. The Second Defendant was educated in the United States. They all speak English fluently. The Second Defendant's wife and children are all UK citizens;

5) Having regard to the number and value of each of the Defendants' properties in England, judgment obtained in England would be fully enforceable here without the additional risk and expense associated with enforcing a foreign judgment here. That is a *fortiori* where a judgment obtained in Saudi Arabia or Jordan would need to be recognised and enforced at common law: see e.g. *Arab Jordan Investment Bank plc v Sharbain* [2019] EWHC 860 (Comm);

6) The First and Second Defendants have instructed Jones Day, a firm of English solicitors, to act on their behalf in respect of their disputes with the Claimant since at least 2018. The Third Defendant has instructed Forsters for the same purposes since 2020. These proceedings have been ongoing since 2022. The "*Cambridgeshire*" factor can be a powerful one depending on the facts (see *Spiliada* p. 471; *Samsung Electronics Co Ltd v LG Display Co Ltd* [2022] EWCA Civ 423 per Males LJ at [32];

7) Much of the relevant documentary evidence has already been obtained and (where not in English originally) translated into English. The principal witnesses (being the parties) are spread between various jurisdictions (the Claimant is in Canada, the First and Third Defendants are in Saudi Arabia, the Second Defendant is in Jordan). The English Courts are well equipped to deal with such cases, *a fortiori* post Covid-19: *Lifestyle Trading LLC v United Fidelity Insurance* Co [2022] EWHC 2049 (Comm), per Cockerill J at [99] (reversed on other grounds [2023] EWCA Civ 61);

8) England is also a "neutral" and highly respected forum: *Qatar Airways Group v Middle East News FZ LLC* [2020] EWHC 2975 at page 378;

9) Whilst the governing law is likely to be Saudi law, if the Claimant establishes the facts alleged (in particular non-payment, no set-off and the conspiracy), Saudi law is unlikely to provide for a materially different outcome to English law. This is therefore a factor of limited weight in this case: *VTB v Nutritek* [2013] 2 AC 337 per Lord Mance at page 46; Briggs at 22.15; Dicey at 12-035.

Stage 2 of *Spiliada*

43. It is common ground that the burden therefore shifts to Rana to prove, using cogent and objective evidence, that there are special circumstances which nonetheless justify the refusal of a stay. The basis for the application is the "the Substantial Justice principle". In essence this is that a stay will not be granted (and service out will not be set aside) where there is a real risk that the claimant will not obtain substantial justice in the *forum conveniens*. As Dicey explains at paragraph 12-046, the real risk of an unfair trial is an example, or sub-set, within that category: other qualifying risks include lack of access to necessary funding, representation or expertise. It is not in issue that the kinds of issues which Rana invokes - such as inability to commence or participate in proceedings - are apt, if established, to fall within this principle.

44. There was a dispute about whether the burden on Rana is a heavy one. The Defendants submitted by reference to Briggs, pp. 412-413 that, if a defendant discharges its burden under Stage 1, "*the presumption in favour of a stay is a heavy one*" and the claimant *"should expect to have a hard task to show, at the second stage, that there is still sufficient reason why the case should be heard in England rather than in the forum clearly more appropriate for it"*. Rana disputes this.

45. On this I would tend to agree with the Defendants' argument to some extent. In *Lubbe v Cape* [2000] 1 WLR 1545 at 1553 Lord Bingham said that it is "*not an easy condition for the plaintiff to satisfy*". And I concur with the passage from Briggs in this sense – while the burden is "real risk", the nature of the allegation is such that the court will naturally scrutinise such a case closely, and want to be properly satisfied that there is a real risk. As Lord Briggs said in *Lungowe v. Vedanta* [2020] AC 1045 at [11]:

> "… an issue whether substantial justice is obtainable in one of the competing jurisdictions, may require a deeper level of scrutiny, not least because a conclusion that a foreign jurisdiction would not provide substantial justice risks offending international comity."

46. That deeper scrutiny is to some extent analogous to the concept of "anxious scrutiny" more often encountered in judicial review contexts. It is a term actually used in *Vedanta*, which was picked up recently in *Limbu v Dyson Technology* [2023] EWHC 2592 (KB) at [45, 124, 125, 166].

The challenge to Professor Mallat's expertise

47. To discharge the burden placed on her under Stage 2 of *Spiliada*, Rana relies on the expert reports of Professor Mallat on Saudi Arabian law. The Defendants submit, essentially as a threshold point, that those expert reports cannot, in principle, meet this threshold. Their submissions in writing tended to argue that there was a total lack of expertise. In oral submissions this was somewhat glossed, the thrust of the argument being that, eminent as Professor Mallat is, he is not a practitioner in Saudi Arabia and that he accordingly lacks expertise – particularly in relation to the procedural aspects of the dispute. It was submitted that the matters on which there is disagreement between the parties at this hearing are issues of procedure and practice before the Saudi courts and as a non-practitioner Professor Mallat's opinions are no better than those of a lay person. As a result, his evidence on those questions cannot be considered "cogent", particularly in so far as he seeks to contradict the opinions of Mr Alogla and Mr Alsubaie (the Defendants' experts) who are both experienced practitioners within Saudi Arabia, and therefore do have direct first-hand knowledge of procedure and practice before the Saudi courts.

48. For example, there was an attack on his evidence as regards the Najiz portal and the Absher accounts on the basis that Professor Mallat acknowledges that he does not himself possess an Absher account (as he is not a Saudi citizen) and that he cannot independently access the Najiz portal, and it was suggested without contradiction that Professor Mallat does not frequent the Najiz portal even with the support of his Saudi colleagues. In the circumstances, it was submitted that he has no actual expertise on the use of these facilities.

49. As to this I am not persuaded that (to the extent that the threshold point was maintained) that it was a good one – as a threshold point. True it is that Professor Mallat works in law offices in Beirut, Lebanon, and has been registered with the Lebanese bar and that the only relevant work he describes in relation to the Saudi jurisdiction is academic work. However, that does not mean that he cannot be expert in Saudi law.

50. There may be questions about why he would be chosen, but given the breadth of the arguments employed I regard it as perfectly comprehensible that a non practising lawyer might be chosen.

51. As for the judgment of Fancourt J in *Byers v Samba* [2021] EWHC 60 (Ch), it is of course perfectly comprehensible that the Defendants seek to rely upon it, given

that Fancourt J focussed on Professor Mallat's lack of direct experience of Saudi court proceedings and expressed certain concerns and reservations about his evidence. I do of course also note that an experienced judge expressed (albeit with characteristic politeness) certain concerns about inconsistencies leading to reservations about "*the reliability of Professor Mallat as a witness … giving his unvarnished, independent opinion*".

52. However, a full reading of *Byers* discloses that this is not entirely a one way street. Much of Professor Mallat's evidence was accepted as reliable. His evidence was also recently accepted in a jurisdiction challenge in *Haider v Delma Engineering Projects Co LLC* [2023] EWHC 218 (Ch) [100-104].

53. As to the content of the evidence, that is a matter best dealt with in relation to the particular issues, where the nature of the question, the level of his expertise and the evidence he gives can be assessed in the round – against the competing evidence. I therefore accept the submission that I should concentrate on the ball, not the man, and that I should evaluate the content of Professor Mallat's evidence on the basis that he is competent to give expert evidence.

<u>The Defendants' case: no real risk that Rana will be unable to commence/participate in proceedings in Saudi Arabia</u>

54. The Defendants say that Rana has not discharged the burden upon her in that:

    1) She can commence proceedings by appointing a Saudi lawyer through a POA legalised by the Saudi embassy in Canada;

    2) Following the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents ("Apostille Convention") coming into force in Canada on 11 January 2024, Rana can issue an apostilled POA, providing for a Saudi lawyer to issue and represent her in Saudi proceedings;

    3) Rana can commence proceedings by issuing a POA to a third party who can, in turn, appoint by power of attorney a Saudi lawyer to issue Saudi proceedings;

    4) Rana could have commenced proceedings directly through the Najiz portal without an Absher account until October 2022;

    5) Rana could have commenced proceedings via her father, Mr Aggad, prior to his death in January 2018;

    6) Those acting for her have previously indicated that she was prepared to execute a power of attorney;

    7) She will be able to participate effectively in such proceedings.

55. As regards commencement of proceedings, the main focus of the Defendants' argument was on the first two points and I accordingly take the points in that order and deal with those arguments most fully.

Backdrop: Rana's current legal status in KSA

56. However, I will first deal with Rana's position *vis a vis* the records and authorities of KSA. This provides relevant backdrop to many of the individual points and, unlike much of the expert evidence, is not controversial.

57. The starting point is that Rana was, when she left KSA, a Saudi citizen. She had a Saudi national identity number. She did not however have a Saudi National ID card. The Civil Status Law of 1986 CE originally introduced identity cards as an option. The system by which Saudi nationals had to possess an identity card only came into effect after she had left the country. Saudi National ID Cards are now obligatory for all Saudi nationals over the age of 15, including women, following a 7 year phased introduction from 2013. They are now the only means by which a Saudi woman may prove her identity under Saudi law (in the words of the 2013 Decree *"A Saudi woman is obliged to obtain a national ID card on the basis of a phased plan, but without exceeding seven years. Afterwards, a national identity card shall be the only way to prove her identity."*).

58. The Civil Status Law, Article 70 explains that:

> "It is not permissible for any government agency, entity, or public institution, including universities, institutes, schools, nor companies, associations, private institutions, and individuals to accept, use, or maintain in their service as an employee, worker, student, or in any other capacity any Saudi person who has completed fifteen years of age unless they are carrying an ID card."

59. Rana had a Saudi passport. That will now have expired and it has not been renewed.

60. Rana was granted refugee status in Canada. As such it appears uncontroversial that it would have been open to her to apply for various Canadian identity documents. Whether she did or could or should have done so is to some extent controversial and will be dealt with below. However, what is not controversial is that (i) grant of refugee status did not affect her Saudi nationality and (ii) that renunciation of Saudi citizenship involves approval to renounce her citizenship.

61. The uncontradicted evidence of Professor Mallat is that:

> "Dual citizenship is not permitted or recognised for a Saudi national under Saudi law. Should a Saudi national wish to acquire a nationality, he must first obtain prior permission from the Prime Minister, as specified in the nationality law, then follow the procedures under its executive regulations. A Saudi national can be recognised with a new nationality once the Saudi nationality has been formally revoked, recorded and replaced by the new one. Art.11 of the law says a Saudi citizen is not permitted to acquire a foreign citizenship without prior permission from the Prime Minister. A Saudi citizen who acquires a foreign citizenship prior to obtaining that

> permission shall continue to be considered a Saudi citizenship unless the government of His Majesty the King deems it appropriate to withdraw his citizenship".

62. Accordingly the position is that Rana, in taking any steps to involve herself in proceedings in KSA (whether by direct POA or indirect POA), would have to do so in circumstances where (i) she is a citizen of that country who has not sought approval to renounce her citizenship and (ii) she does not possess a Saudi National ID card.

63. All of the possibilities below have to be evaluated taking those facts into account.

POA legalised by the Saudi Embassy in Canada

64. The most obvious possibility is that (i) Rana could execute a POA appointing a Saudi lawyer via a Canadian notary public and (ii) that lawyer could then act for her in Saudi proceedings. Rana says that this, and the other routes suggested, simply will not work. I conclude that she is right. Starting with this direct route, there are problems at both ends: Canada and KSA.

Canada

65. The first step in this process would be getting a Canadian notary to execute the POA. The evidence was clear (as one would expect) that any Canadian notary would require an individual executing a POA to prove that they were the person purporting to execute the document. The Canadian notary would, in order to do this, need to verify and take a copy of the executor's identity documents. The evidence was that they would require two forms of ID, one of which must be photographic. That of course is a familiar paradigm in this jurisdiction. And equally unsurprisingly the notary would need to see any foreign ID document – including ID containing a foreign ID number – before notarising a POA which refers to that ID number. If the executor were a Saudi citizen and they wished to execute a POA referring to their KSA identity number, that would mean providing their Saudi identification.

66. So if Rana were to rely on her Saudi identity documentation either to verify who she was (ie as her identification to the notary), or because she wanted/needed to refer to it via number in the POA, she would need to produce that Saudi identity documentation for inspection. Leaving aside for the moment the question of whether the inclusion of that number is necessary, it was common ground that if a Saudi National ID number is to be included on the POA, Rana would need to produce a Saudi document containing that number. But a problem immediately presents itself for Rana in that a Canadian attorney could not issue the POA in a form including the Saudi identity number because they could not verify the number since she does not possess a Saudi National ID Card and she does not have any other documentation which verifies her pre-2013 identity number. I will revert to the question of whether that hurdle could be overcome after considering the next step – legalisation.

67. It was common ground that following this route any such POA which had been issued by a Canadian notary (i.e. assuming the hurdles above had been

surmounted) would need to be legalised by the local Saudi Embassy (and would then have to be registered with the Saudi Ministry of Justice and Ministry of Foreign Affairs). Only then could it be used to commence Saudi proceedings.

68. The point taken by Rana here is that it would be necessary for her as a Saudi individual to submit a valid Saudi National ID Card and a valid passport in order to have her POA legalised by the Saudi Embassy. This is because to be valid under Saudi law, the POA must identify the person by her Saudi National ID number.

69. In relation to this iteration of the argument the Defendants submit that Rana has not provided "cogent" or "objective" evidence to demonstrate that she cannot have a POA legalised by the Saudi Embassy, using (1) an expired passport, (2) an alternate travel document, or (3) a foreign passport.

70. This seems a thoroughly unrealistic argument. Professor Mallat here has much the better of the argument as it played out in the reports. So Mr Alsubaie acknowledged that the Saudi Embassy in Canada does appear to ask applicants to attach a copy of their passport, and he simply posed the question as to whether the Embassy would accept other documents that allow a person to travel internationally, or would accept copies of an expired passport, but did not provide any evidence that it would. The mere raising of such unsubstantiated and counterintuitive questions does not amount to providing a basis for detracting from the cogent status of evidence adduced by Rana. The weak and speculative nature of the arguments deployed here by the Brothers is underlined by the points to which I will come below on legalization in KSA. There is no reason why the Embassy would take a different approach to the Ministry of Justice.

71. Essentially therefore, on the basis that Rana is a Saudi citizen, the direct POA route would fail on two levels at the Canadian end, (i.e. notarisation by the Canadian notary and legalisation by the KSA Embassy), before the matter ever progressed to the stages which it is agreed would require to occur in KSA. That inherent weakness was reflected by the Brothers' spirited resort to two other arguments. The first was the very noticeable priority given in argument the Apostille Convention route. The second was the attempt to get round the Canadian end difficulties deriving from the ID document by contending that Rana could and should have taken Canadian citizenship or residency and used it to leap the ID hurdles at this end.

KSA

72. It is common ground that to be valid as a matter of Saudi law the foreign POA must be authenticated by the Saudi Ministry of Justice.

73. The issue is whether a POA with Rana's pre 2013 ID number will be accepted or rejected by the system, where the Saudi National ID Card system has been introduced since she fled, and where she does not have a Saudi National ID card. Professor Mallat says the MOJ will reject the POA where an applicant of Saudi nationality has no ID card registered on its system. This reflects the system by which identity is now verified for nationals in Saudi Arabia, both generally and having regard to requirements applicable to Saudi notaries.

74. That evidence is reflected in Articles 6 and 7 of the Implementing Regulations of the Civil Status Law:

> "Article 6
>
> All incidents related to the citizen shall be registered in a numbered civil registry and each incident shall be given an electronic number.
>
> Article 7
>
> All incidents related to the citizen shall be registered in a numbered civil registry, and each incident shall be given an electronic number. The civil registry number mentioned in Art.6 of these regulations shall be noted when any service is provided to the citizens in all government and private sectors, and shall be accredited in all legal deeds, power of attorney, official letters and all requests."

75. That evidence would seem, as submitted by Professor Mallat, to reflect a requirement for a civil registry number on POAs executed by Saudi citizens. It is corroborated by a letter documenting inquiries made of the department in the Saudi MOJ specialising in this process (to which I shall refer further in the context of the Apostille route). Mr Alsubaie, in his second report at paragraph 14 also tends to support this: *"The registry number, as indicated in Article 7 of the Implementing Regulations, corresponds to the ID number assigned to every Saudi national upon birth"*. He cites no regulation or policy or worked example demonstrating the contrary; and his reliance on acceptance of foreign POAs provided by foreign citizens (as opposed to an example based on a Saudi citizen) tends rather to confirm this.

76. It follows from this that the substantial argument as to whether, assuming Canadian citizenship could have been obtained, Rana could have used it to have a POA issued, is an arid dispute. At the legalisation stage Rana, as a Saudi citizen, would have to give her Saudi ID number, even if she did manage to get a Canadian POA issued. Also logically that means she would have to include it in the Canadian POA also, and the Canadian notary could not verify it. It follows that regardless of the vibrant debate on the possibility of obtaining Canadian documents of one sort or another this route would fail on at least two bases.

77. There was a debate as to whether (regardless of the legal requirements) the KSA MOJ would know that Rana was a citizen, so as to object to the lack of the identity number. This is an argument which could only apply if one were dealing with a situation in which Rana were appearing as a Canadian (as opposed to Saudi) citizen. But to the Rana did so appear I conclude that this is a matter which must logically and procedurally arise. This comes back to the context in which the POA is being used – Rana's claim. The action which Rana seeks to bring relates to assets in KSA owned by citizens of KSA. She is suing KSA citizens. Her claim is, in its essence, based on her own background as a citizen of KSA, invoking actions she performed or did not perform as a citizen.

78. For completeness I should record that Professor Mallat also contested whether if an individual in Rana's circumstances did (somehow) use a foreign passport to have their POA legalized and authenticated that POA would be accepted by Saudi courts. His opinion was that a Saudi Court would have knowledge that she is a Saudi national from the case documents, would reject her POA and dismiss her claim "*[i]n the absence of proof that the Saudi nationality has been legally revoked and replaced by the new nationality*". The Defendants disputed this on the basis that Professor Mallat cites no source for this proposition, and has no personal experience that he can rely on to support an assertion as to how a Saudi Court is likely to behave. Mr Alsubaie says that according to his experience, Saudi Courts do not investigate potential discrepancies in the nationality relied on to issue a POA and the nationality described in the underlying documents of a claim.

79. Were the argument to proceed to this level I would tend to the view that the Defendants have on the evidence the better of this argument. However the point does not arise because of the prior issues.

The Apostille Convention

80. Because of the Canada-side difficulties, the Defendants' first and preferred line of attack was via the Apostille Convention since Saudi Arabia and Canada are both parties to the Convention. The Convention came into force in Saudi Arabia on 7 December 2022 and in Canada on 11 January 2024. The Defendants say that from 11 January 2024, Rana has been able to execute a POA before a Canadian notary which is not subject to authentication or legalisation via the Saudi Embassy or Consulate; and since December 2022 she or a third party with a POA has been able to execute a POA before a US notary which is not subject to authentication or legalisation via the Saudi Embassy or Consulate.

81. For the reasons I have already given there is a Canada-side problem which cannot be evaded via this route: the need for the Canadian notary to verify Rana's identity. Unless Rana had Canadian documents the argument fails here.

82. If Rana had (or could get) Canadian documents there are two issues between the parties. The more straightforward one is the question of timing. As noted above technically the Brothers' application proceeds on the basis of what was possible at the time that leave to serve out was obtained in August 2022. It follows that as regards them, the Apostille Convention was not an available route at the time, and for the reasons I have given above, they cannot themselves rely on the Apostille Convention. However, this is a slightly artificial point because if Lama can prevail, of course service out against the Brothers falls also.

83. The next question is whether even under the Apostille Convention there is a process required in KSA which is inaccessible to Rana. The question is whether the Apostille Convention cuts through all the requirements, or only some. The Defendants pointed to paragraph 283 of the Practical Handbook on the Operation of the Convention as demonstrating that there is no requirement – or permissibility - of a process of independent verification:

> "The Convention does not specify any grounds on which a Contracting Party may reject an Apostille. As a rule, Apostilles should be routinely accepted unless there are serious defects with the Apostille or its issuance. If a receiving authority has doubts about the validity of an Apostille, it should take reasonable steps to resolve any issues, including contacting the Competent Authority that issued the Apostille, before resorting to rejecting the Apostille. This approach also respects the sovereignty of the State of origin to determine when to issue an Apostille."

84. In addition they pointed to paragraph 308 which states:

> "An Apostille may not be required to have further legalisation or certification. Under the Convention, the only formality required to certify the authenticity of the origin of the underlying document is an Apostille, and the signature, seal, and stamp on the Apostille are, themselves, exempt from all certification. Accordingly, any additional certification placed on an Apostille cannot produce additional legal effect under the Convention, and Competent Authorities should refrain from legalising or otherwise further certifying the issuance of an Apostille."

85. The starting point for a consideration of these arguments is that it is common ground that the idea underlying the Apostille Convention is to simplify process. However, the apparent purpose is one confined to the need for consular legalisation. This is seen from the text of the Convention itself at Articles 2-3: "*Desiring to abolish the requirement of diplomatic or consular legalisation for foreign public documents*".

86. It is therefore agreed that if, employing the Apostille Convention, an individual can issue a POA through a Canadian notary public there is no need for this POA to be legalised by the Saudi Embassy in Canada or by the Saudi Ministry of Foreign Affairs.

87. Rana however submits that there is one fatal procedural hurdle for such a POA: that it would still need to be legalised by the Ministry of Justice in KSA in accordance with its requirements. The experts are actually agreed upon this. Where they disagree is in what this involves. The Defendants submit that it should not (under the Convention) and does not require any sort of independent verification which would lead to the ID card issue raising its head.

88. Interestingly at this point both parties turn to the hearsay evidence. Rana relies on the evidence of Mr Al Harbi via Professor Mallat: he engages directly with the issue and says, on the basis of a conversation with an individual in the Saudi Ministry of Justice, said to be the "person in charge" of the department specialising in authenticating foreign POAs that "*in the event that the person granting the said power of attorney is a Saudi national who does not hold a valid national ID card the system will reject authenticating and registering the power of attorney*".

89. The Defendants say that this is certainly far from the standard of "cogent", "objective" evidence required by this Court in that:

    1) Professor Mallat relies on nested hearsay statements, which are entirely outside his knowledge and expertise, to assert the requirement for a national ID card.

    2) The person with whom the conversation was had is unnamed, which makes it impossible for the Defendants to verify his credentials or the authenticity of what was said.

90. Secondly, the Defendants say that the statement from Mr Al Harbi suggests that the process of authentication described to him "*applies to all foreign powers of attorney*". Insofar as this suggests that a foreign POA cannot be registered without a Saudi national ID card, it is plainly implausible since it suggests that no foreign nationals could ever register a POA within the jurisdiction.

91. The Defendants rely via Mr Alogla on the evidence of Mr Alsaif (principal of the Saad Alsaif Law Office, who between 2018 and 2022 (i.e., encompassing the period under discussion) held the position of Deputy Minister at the Ministry of Justice) as told to Mr Alogla:

> "I note further from my conversations with Mr Alsaif that he was surprised by Professor Mallat's suggestion that in order to authenticate a foreign power of attorney, including an Apostilled power of attorney issued by a Saudi national, the Saudi national must hold a valid national ID card, failing which the system will reject registering the power of attorney. In Mr Alsaif's experience at the Ministry of Justice, many individuals successfully issue proceedings within the Kingdom of Saudi Arabia using foreign-issued powers of attorney even where they do not hold the ID in question."

92. It was acknowledged in closing that subject to questions of burden and standard of proof I would have to take my choice about which evidence to prefer. In the end I do not consider that it is necessary to do so because Mr Alsaif and Mr Alogla do not squarely engage with the issue. Mr Alsaif does not in terms address the situation of a Saudi national with no ID card. What he says simply applies to foreign issued powers of attorney without that rider.

93. I regard that failure to engage with the actual question to be significant. That significance is emphasised by the fact that the Defendants are backwards in coming forward on this. Of course the burden is on Rana; but she has produced evidence which not only explains the law, but in practical terms suggests how and why the approach would not work. The Defendants do not engage on this practical level. They do not provide evidence of how the process would work, and how a number which has not been used in the new system would be verified/accepted.

94. Further, the evidence of Mr Al Harbi and the case advanced for the Claimants is consistent with the situation demonstrated on the primary sources.

95. Thus, Professor Mallat relies on Article 7 of the Implementing Regulations of the Civil Status Law quoted above. Prima facie this provision suggests the need for the ID number both because a service is being provided (in terms of approving a POA) and also because it specifically refers to the need for the number to be given in all official documents including (specifically) powers of attorney.

96. Professor Mallat also asserts that his position aligns with Articles 69 and 70 of the Saudi Civil Status Law, which he says "*prohibit any government body or agency from providing any services to Saudi nationals if they do not have a valid national ID card*". The Defendants say that this is a clear misrepresentation of the content of the provisions. Article 69 requires a Saudi citizen to carry their identity card and to present it while conducting transactions that require proof of identify, and Article 70 prohibits employing individuals unless they are carrying an identity card. They do not contain the blanket prohibition that Professor Mallat suggests and, in any event, have absolutely no relation to the process for legalising an apostilled POA with the Ministry of Justice.

97. However, the overall thrust of the primary legislation and the precise terms of the Regulation do dovetail. Further that conclusion is consistent with the apparent purpose of the system: the identity number is there to verify the legal personality of the requestor. The nature of the legislation is such that if you do not have a number you are not acknowledged as a citizen. If you do not have a number because you are not a citizen that is one thing; plainly there are ways of recognising the foreign legal personality of such persons. However, if someone is a citizen without a number (i) the condition for the recognition of that person's legal personality are not fulfilled and (ii) the logical correlate of the position is that the person has breached the requirement to get an ID card. On either analysis the legislation says that government entities will not assist/provide services to such a person.

98. Accordingly, I conclude that Rana is correct on this point and for these reasons. There is cogent evidence providing a basis for rejecting the argument that (even if Rana could get a POA issued by a Canadian notary, contrary to the above, or because she had or could obtain Canadian nationality) an Apostilled POA can now provide a route for legalising a POA in Saudi.

99. This conclusion as to the "dead hand" effect of the combination of Saudi citizenship with an absence of a Saudi ID card is therefore key to the failure of both the obvious direct route considered above and the Apostilled route. It also cuts through a lot of the remaining issues in dispute – for reasons to which I will come.

100. For completeness however, I should add that Professor Mallat also cites Articles 37 and 38 of the Saudi Notarization Law and Article 19 of the Executive Regulations for the Notarization Law in support of this proposition. The Defendants submit that it is entirely unclear what the relevance of the Notarization Law is for the purposes of legalisation before the Saudi Ministry of Justice given that (i) notarising and legalising are entirely distinct steps and (ii) Articles 37 and 38 of the Notarization Law contain no mention of a requirement for a national ID number or a valid National ID card. On this I agree with Mr

Alsubaie that the citation of these provisions is not helpful. They add nothing to the point made above and tend rather to obscure the argument than to elucidate it.

POA to a third party who appoints a Saudi lawyer (the double POA route)

101. Mr Alsubaie identifies the possibility known as "the double POA route". He suggests it is possible:

    1) For Rana to appoint her Canadian lawyer (or indeed any third party) through a POA in her local jurisdiction, granting them authority to appoint a Saudi lawyer to commence proceedings in Saudi courts on her behalf;

    2) That individual could then sign a POA appointing the Saudi lawyer on Rana's behalf by (i) physically travelling to Saudi Arabia and issuing the POA before a Saudi notary public; (ii) issuing and notarising the POA before the Saudi Embassy in Canada; (iii) signing it before a Canadian notary public and then authenticating it before the Saudi Embassy in Canada; or (iv) issuing an apostilled POA before a Canadian notary public after 11 January 2024.

102. The first issue on this is whether a valid original POA could be executed. This goes back to the issue of whether Rana could satisfy the requirements for a Canadian notary to execute a POA to the third party. As already established, on the basis that she is a Saudi citizen with no valid proof of identity, she could not. This means that the point fails here. Also for reasons I have already given, the possibility of Canadian documents does not provide a route round here either.

103. The other issue between the parties is whether if an original POA (Rana to third party) could be executed, the second POA appointing the Saudi lawyer would or would not be electronically authenticated/registered by the Saudi Ministry of Justice without the originating POA from Rana also being authenticated and registered by the Ministry. That is academic since I have concluded that the original POA could not be executed. Were the point live it is one on which I would conclude that Rana has the best of the argument. If it stood alone whether it could be said to constitute "cogent evidence" is, however, doubtful.

104. Professor Mallat says that such authentication would be required and hence this route is also unavailable, relying on an Administrative Circular no. 13/T/8753 dated 08-07-1443 H/09-02-2022 CE.

105. The Defendants call into question the authenticity of the Administrative Circular, and say that it contains obvious (and frankly suspect) mis-translations that benefit Professor Mallat's argument, feeding into their concerns about the reliability and quality of his evidence. Dealing with their issues in turn:

    1) The Defendants say that Administrative Circular appears to be a confidential intra-department communication that has not been publicly disclosed, and its authenticity cannot be confirmed, but they raise no serious issue with its validity;

2) The Defendants say that the English translation of it is "erroneous and misleading". The translation is however apparently an official translation as opposed to a translation by instructed lawyers or the expert himself;

3) On this basis they suggest that the Circular only requires the secondary POA to be electronically authenticated and registered with the Ministry, and not the originating POA. This point does not follow clearly from the Defendants' own translation;

4) Mr Alsubaie says that in his personal experience, it is possible to register and authenticate the secondary POA without doing so for the originating POA and that Professor Mallat has no comparable experience and cannot, therefore, speak to the actual practice of the Ministry of Justice in registering POAs. However this goes only to a secondary POA which does not refer back to a KSA ID;

5) The Defendants also query whether any notary public "*will abide by the circular issued by the Minister of Justice*" and will therefore reject the secondary POA if he cannot verify the originating POA, since the Circular is a confidential document of which even practising lawyers in Saudi Arabia such as Mr Alsubaie have no awareness. The answer to this lies in Article 37 of the Notarization Law, which states that "*A notary public or licensee shall accept documents issued outside the Kingdom which are not in conflict with Sharia or law and are authenticated by the Ministry...*"

106. The reality is that Professor Mallat's evidence is no more than common sense; as well as being in line with Article 37 of the Notarization Law. It comes back to the point dealt with in the primary argument: Rana remains in the eyes of the Saudi system a Saudi citizen. At the end of the day the fact that the notaries are acting for her – and that she cannot comply with the local laws on the fundamental point of identity is a point which cannot be avoided. Once that is established, the chain of authority from her has to be verified. This then leads back to the proof of her own identity via her Saudi ID number – which on the evidence cannot work.

Using the Najiz portal directly

107. This argument, though the subject of detailed expert evidence, was not the primary focus of argument. Indeed by the date of the hearing there was a degree of common ground here and the point was not the subject of any detailed oral argument. It is broadly agreed that as at today's date Rana cannot herself commence proceedings remotely via the Najiz portal. As at today's date the portal can only be accessed via an "Absher Account". Without a Saudi National ID Card, she cannot obtain an Absher Account because Saudi National ID Cards are obligatory for all Saudi nationals. Rana does not have one and it is now common ground that she cannot get one.

108. Lama does suggest that there is an exception under Supreme Council Resolution 86831, but that has no application here, as it refers to defendants not claimants.

109. More contentious is the dispute as to whether the requirement for an Absher Account was only introduced in October 2022 such that Rana could have used the Najiz portal before that.

110. The argument runs thus. Mr Alogla's first report was prepared on 11 October 2022. On that date, he noted that it was open to Rana to use the Najiz portal directly to commence proceedings in her name in Saudi Arabia. Mr Mallat disputed this. In reply Mr Alogla contended that while it was open to an individual to use the Najiz portal to issue a claim without an Absher account at the time of his first report (and, indeed, for several years beforehand), there were changes made to the Najiz portal shortly after this report which made the use of the Absher account mandatory. He confirmed this with Mr Alsaif, who was a Deputy Minister at the Saudi Ministry of Justice at the time this change was made to the portal. Mr Alsaif informed him that the change was part of the Ministry's drive towards paperless systems introduced post-Covid.

111. Therefore, the Defendants say that while it is true that Rana can no longer use the Najiz portal to issue a claim, due to the lack of an Absher account, it was certainly open to her at the time she issued the Claim Form in these proceedings and for several months thereafter.

112. On this, for all the sniping about Professor Mallat's expertise, I prefer his evidence. His evidence appears to be supported by contemporaneous documents. He exhibits a 2020 regulation, screenshots of a 2021 Najiz manual, and screenshots of an MOJ video posted on 16 June 2020, each of which evidence the requirement from those dates. Mr Alogla's evidence is vague and unsupported by documentation. I accept that on the evidence before me Rana cannot commence proceedings directly via the Najiz portal.

113. In the circumstances the argument as to timing does not arise. On this the Defendants argued that to the extent that Rana can no longer issue proceedings through the Najiz portal due to requirement of an Absher account, this position ought to be treated analogously to those where a claimant commences proceedings in English courts and, although able to commence proceedings in a more appropriate foreign forum at the same time, chooses not do so and is subsequently time barred, pointing to *Altimo Holdings*, [88].

114. Had it been necessary to determine this point the question of reasonableness would need to be considered in the light of the wider picture. On that basis, despite the obvious issues as to jurisdiction here, I would conclude that it was not unreasonable not to commence protective proceedings in Saudi Arabia because of all the various factors which have underpinned the detailed arguments before me. Even if it were the case that Rana could commence proceedings and pursue them in KSA, it is quite clear that doing so would not be straightforward for her and that litigating in KSA would involve extra complication and worry about points which might arise, which would not make it an attractive venue for protective proceedings.

Commencing proceedings through Mr Aggad

115. The desperation of the Defendants' arguments is evidenced by the fact that they pursued the argument that Rana could have issued proceedings in KSA courts through her father; saying that this again goes to the reasonableness of her conduct. In circumstances where this would go only to part of the claim, the conspiracy claim dating from after Mr Aggad's death, this is not an attractive argument, and it was notable that none of the Defendants' counsel were prepared to deal with it orally.

Participating effectively in Saudi proceedings

116. The second part of the argument relates to whether if, contrary to the above, Rana could commence proceedings in Saudi Arabia, she could then participate effectively in them.

117. This argument proceeds on the basis of the assumption that Rana cannot attend the hearing in person. For the Defendants Mr Alogla notes that, pursuant to the Ministry of Justice's Resolution 8056 and Circular 13/T/8135, "*a claimant is not required to be physically present in Saudi Arabia nor at court premises as the resolution mandates all courts to hold proceedings including filings, hearing, issuance of judgement, appeal, enforcement through electronic services including virtual hearings*".

118. Rana says that this is neither here nor there pointing, via Professor Mallat, to a number of factors including accessing remote hearings and appearing to give evidence.

119. The point can be considered via these two headings. As to the first, at the very least Rana would, in order to give effective instructions, need to be able to access the remote hearing. It is common ground for the purposes of this jurisdictional hearing that she cannot be present in person in KSA, though that issue will be live at the substantive stage of any trial.

120. The evidence on which she relies suggests that as a Saudi national, she would require an Absher account and valid Saudi national ID card in order to access remote hearings. Professor Mallat supports that view by reference to the relevant regulations, and relying upon the fact that remote access is through the Najiz portal. Mr Alsubaie disagrees but cites no policy or authority to the contrary.

121. As for attendance, Mr Alsubaie says that it is very rare in his experience for a Saudi Court to ask a litigant to personally appear before it: This is a point also made by Mr Alogla in his first report. The Defendants therefore say that there are two experienced Saudi practitioners who plainly consider it very unlikely for Rana to be asked to appear before the Saudi Courts, were she to pursue proceedings there; and that the evidence of Professor Mallat (who has no experience of Saudi litigation) cannot prevail.

122. However, neither Mr Alsubaie or Mr Alogla have grappled with the mechanics of this case. I find it impossible to comprehend how the case which Rana wishes to run - which is effectively all about her personal concerns and her family's

understanding of them could be properly run and tested without her appearing as a witness. It is fair to say that neither party has grappled with the law of KSA in relation to the claim she pleads; but that being the case I am entitled (and required) to assume that the law of KSA is materially similar to English law on the relevant points. It appears to me to be a case where, if the law of KSA approximates to that of England, Rana would have to appear as a witness in order to prove her case. The arguments addressed to the rarity of such appearance being necessary therefore go nowhere.

123. The next stage is to grapple with how, if Rana has to be a witness, this could be done if the trial were in KSA. There are at least two problems. The first is the logistics – this is a similar point to the remote access point. The Defendants suggest that a remote link can be sent to Rana's lawyer and she can access the hearing with him. However, there is no suggestion that Rana's lawyers would be outside KSA, and as noted above it is accepted (at least for the purposes of the current argument) that Rana cannot be within KSA. So this argument is a non-sequitur.

124. Secondly there is a question of the mechanics of giving evidence. Professor Mallat says that in order to testify or give an oath during the litigation Rana would have to give a valid Saudi National ID Card and an Absher account. Professor Mallat cites Ministry of Justice Resolution 8056 for the proposition that a party must have a valid National ID Card when they appear to testify or give an oath before a Saudi Court and Resolution 921 for the proposition that an individual cannot testify or give an oath except through the Najiz portal using their personal Absher account.

125. Mr Alsubaie suggests that there is no requirement for a litigant to have a Saudi National ID Card to appear before Saudi Courts. He contends that Professor Mallat has blatantly misrepresented the content of Resolution 8056. This appears to be a sematic point which does not assist him on the thrust of the argument. The full quote of the relevant provision in the Resolution is as follows: "*The parties must be present and provide their full names in Arabic, as it appears in their national identity card, residency card or commercial register, in the user field*". While this does not say in terms that the National ID Card is essential, Mr Alsubaie does not explain how the name is to be verified as being "as it appears in …" unless that document is produced. I conclude that Professor Mallat is correct in substance.

126. Mr Alsubaie in fact accepts that it is necessary for the Saudi court clerk to be able to verify a litigant's identity. While he says that there is no stipulation that this be done solely through a Saudi National ID Card, and any relevant identity document can be used: this appears to conflict with the legislation on ID Cards quoted above – in particular as they were introduced in relation to women. But secondly Rana does not have an alternative means of identifying herself. It is mischaracterising Rana's case to say (as the Defendants do) that her argument would mean that non-Saudi nationals are barred from appearing before Saudi courts since they do not possess such ID cards. Plainly foreign nationals can verify their identity by reference to their passports. Again the point is that Rana is a Saudi citizen. It matters not if a US citizen would not face the same problem.

127. Accordingly I accept the submission that Rana will be unable to participate fairly in the proceedings if they take place in KSA. For this reason too therefore the hurdle of "real risk" is met.

Conclusion on Lama's challenge

128. Turning to the overall evaluation in the case of Lama's challenge I approach this bearing in mind the guidance in *Gulfvin* cited above. The question of whether I should accede to that challenge has to be carefully considered in the light of the fact that jurisdiction against Lama was established fortuitously (if not quite, as was submitted, tenuously). Lama does not live here and the service in Heathrow Terminal 5 arrivals points that factor up. Having said that, the references to "fleeting visit" somewhat oversell the point since on the evidence it is clear that all of the siblings have been regular visitors, with property in the jurisdiction.

129. I also bear well in mind that Lama is not by any means the central defendant; that on the facts alleged it appears that the Brothers precipitated the situation as regards both claims. But again, this only goes so far. The same breaches of contract are alleged against Lama, and she is alleged to have joined and participated in the same conspiracy.

130. Even with these points carefully invoked, when one puts against them the two significant respects in which I have above concluded that Rana has demonstrated by cogent and objective evidence that she cannot access substantial justice in KSA (inability to commence proceedings and inability to participate in proceedings), the answer is clear: Lama's challenge must fail.

THE BROTHERS' CHALLENGE: JORDAN

131. The next stage of the argument is the contention by the Brothers that even if there is real reason to conclude that Rana cannot get justice in KSA, England should not be the forum for this dispute because Jordan provides an alternative jurisdiction for such claims. The argument in summary is that Tarek is domiciled there and holds substantial local executable assets – as well as his documents for the purposes of the dispute. Talal will submit to Jordanian jurisdiction (as will Lama if the court were minded to impose a case management stay). Rana need not enter Jordan to pursue her claim there. Key documents will be in Arabic and witnesses will be Arabic speakers. Procedures will be closer to KSA procedures. A judgment would be enforceable elsewhere, if necessary in light of Tarek's domestic assets. On this basis it is said that England cannot, by definition, be a more appropriate forum and that reliance on a joint and several claim against Lama here is a stark case of the tail wagging the dog.

132. This argument is ingenious but wrong.

133. The short answer to this was essentially that given by Rana. The argument only progresses to this stage if the arguments in favour of KSA fail. If that is the case Lama has been served as of right in a forum where Rana can achieve substantial justice and - absent a case management stay - the dispute with Lama proceeds here. In those circumstances it is simply illogical to conclude *vis a vis* the Brothers

that Jordan is the *forum conveniens*, given that the factual and legal issues on the claim against Lama almost entirely overlap with those in the claims against the Brothers. It is the same breaches of contract and the same conspiracy. While some of the acts within the conspiracy are said to have been committed by the Brothers alone, others are said to have been committed by all three.

134. That very obvious risk of multiplicity of proceedings producing irreconcilable judgments between the English and Jordanian Court, drives both the primary argument that multiplicity is the result of Rana's own choice and she must live with the consequences as well as the back up submission by the Brothers (though not explicitly by Lama) that the correct outcome is a case management stay *vis a vis* Lama, enabling proceeding to take place in Jordan.

135. I will deal with the latter point first. The short answer to this is that case management stays are only granted very rare or compelling circumstances: see per Lord Bingham MR in *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173 pp 185-186, and *Klöckner Holdings GmbH v Klöckner Beteiligungs GmbH* [2005] EWHC 1453 (Comm). This is not such a case.

136. That being the case, the Brothers contended that Rana must suffer the risk of multiplicity, that being the result of her own choice to sue in an (*ex hypothesi*) inconvenient forum. This argument, based on the case of *Vedanta Resources PLC v Lungowe and others* [2019] UKSC 20, featured nowhere in the Brothers' skeleton, but was advanced by Mr Houseman KC with a skill worthy of a better object.

137. *Vedanta* was a case where all the claimants, witnesses, alleged unlawful acts, and main defendant were located in Zambia. The claimants sued the anchor defendant in England, joining the main defendant as a necessary or proper party. The defendants applied for a stay on the basis that Zambia was the appropriate forum for the claims, the anchor defendant having offered to submit to Zambian jurisdiction. The relevant point for present purposes is that the Supreme Court did not consider the risk of irreconcilable judgments as a decisive factor in favour of the claims proceeding in England when the appropriate forum was elsewhere. This was because the claimants had themselves created that risk by choosing to sue the anchor defendant in England rather than having all the claims tried in Zambia. As it was put at [87] of the judgment:

> "If substantial justice was available to the parties in …Zambia it would offend the common sense of all reasonable observers to think that the proper place for this … litigation was England, if the risk of irreconcilable judgments arose purely from the claimants' choice [because justice is available against both of them in Zambia…]"

138. The Brothers submit that this reasoning is directly applicable to the present case indeed that the present case is a fortiori *Vedanta*: since all defendants have offered to submit to Jordanian jurisdiction, the risk of multiplicity of proceedings only arises due to Rana's choice to continue suing Lama in England.

139. The problem with this argument is that it effectively broadens out the decision in *Vedanta* to one which says that once there is an element of choice the prima facie important factor of multiplicity of proceedings goes out of the window. That is simply not what *Vedanta* says.

    1) The answer in *Vedanta* was explicitly one on the very particular facts of that case. That is clear from [79] of the judgment:

    > "At the heart of Leggatt J's judgment lies the proposition that, because a claimant has a right to sue the anchor defendant in England, there is "no reason why the claimant should be expected or required to relinquish that right in order to avoid duplication of proceedings". In my judgment, there is good reason why the claimants in the present case should have to make that choice…"

    2) At [84] the Court explicitly disclaims the proposition that the risk of irrelevant judgments is removed where an element of choice exists.

140. All that *Vedanta* says is that where there is choice the risk of irreconcilable judgments "ceases to be a trump card" [84]. The decision in that case was dictated by what the court found to be a situation where Zambia was *"overwhelmingly the proper place for the case to be tried"* [85]. It was a case where the Supreme Court could say that it would *"offend the common sense of all reasonable observers"* if Zambia were not held to be the forum.

141. This is a very different case. No-one can say here that Jordan is *"overwhelmingly the proper place for the case to be tried"*. The Brothers say that KSA is the *forum conveniens*. Jordan is an "also ran" forum; one possible alternative forum with some connecting factors pointing to it, while other factors point elsewhere. Talal and Lama have no connection to Jordan at all (nor, for that matter, does Rana), none of the material events occurred in Jordan, and the claims are not governed by Jordanian law. Unlike *Vedanta*, this is not a case where it would *"offend the common sense of all reasonable observers"* if the court concluded that Jordan was not the proper place for the claim to be heard because of the risk of irreconcilable judgments.

142. In my judgment the risk of multiplicity of proceedings and irreconcilable judgments is properly to be regarded in this case as an important factor. Some further weight is added by the point rightly made by Mr Sibbel in his very clear submissions that there is authority to the effect that the court is to be particularly vigilant on this score where the claim alleged is one in conspiracy – and the more so where (as here) the case seems likely to stand or fall against all or none. Mr Sibbel directed my attention to *Donahue v Armco* [2002] 1 Lloyd's Rep 425 at [34], where Lord Bingham gave "great weight" to the consideration that:

    > "it will be necessary for any such Court to form a judgment on the honesty and motives of the four alleged conspirators.... It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal"

143. It is notable that in that case that single factor was so important that it was sufficient to override an exclusive jurisdiction clause. The same point was made by Sir Nigel Teare in *PJSC National Bank Trust v Mint*s [2021] EWHC 692 (Comm).

144. Again, while I note the arguments regarding the supposedly tenuous nature of the jurisdiction in England, this can provide very limited ballast for the Brothers' argument where Lama's challenge has failed.

145. It follows that the argument in favour of Jordan also fails, and with it, the Brothers' jurisdiction challenge.

146. In the circumstances I do not need to deal with the other grounds and the applications of both the Brothers and Lama are dismissed. The remaining (confidential) grounds are addressed solely for completeness in a confidential section of the judgment.