Neutral Citation Number: [2020] EWHC 2669 (Comm)

Case No: CL-2019-000147

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT (QBD)**

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

Date: 09/10/2020

**Before** :

**MRS JUSTICE MOULDER**

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**Between :**

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| **(1) DILI ADVISORS CORPORATION**<br>**(2) MR VADIM SHULMAN** | **Claimants** |
| **- and –** | |
| **(1) PRODUCTION INVESTMENT MANAGEMENT LIMITED**<br>**(2) IMPOOL LIMITED**<br>**(3) ADDISON ALLIANCE LIMITED**<br>**(4) MR YURIY IVANYUSHCHENKO**<br>**(5) MR IVAN AVRAMOV**<br>**(6) MS IRYNA IVANYUSHCHENKO** | **Defendants** |

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**BEN HUBBLE QC** and **JOSHUA FOLKARD** (instructed by **Pillsbury Winthrop Shaw Pittman LLP**) for the **Claimants**
**BRIAN KENNELLY QC** and **SHANE SIBBEL** (instructed by **Stephenson Harwood LLP**) for the **Defendants**

Hearing dates: 8 and 9 September 2020

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# Approved Judgment

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

**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30 on 09 October 2020.**

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THE HONOURABLE MRS JUSTICE MOULDER

**Mrs Justice Moulder :**

Introduction

1. This is the court's reserved judgment on the applications ("the Applications") to set aside the order for service out of the jurisdiction, the application having been made by the fourth and sixth defendants on 8 October 2019 and by the fifth defendant on 18 November 2019. The fourth defendant is Mr Yuriy Ivanyushchenko ("D4" or "Mr Ivanyushchenko"), the fifth defendant is Mr Ivan Avramov ("D5" or "Mr Avramov") and the sixth defendant is Ms Iryna Ivanyushchenko ("D6"). In the alternative the Applications are to strike out such claims as the court considers appropriate.

Evidence

2. The court has evidence in the form of a number of witness statements referred to below as well as a number of expert reports on Ukrainian and Monegasque law and the Ukrainian judicial system. The core bundle runs to 683 pages with an exhibits bundle of some 4600 pages. There is also a supplementary bundle of 359 pages and an authorities bundle of 110 documents.

3. In the light of the current pandemic the hearing of the Applications was held remotely but the court had the benefit of full written and oral argument from leading counsel as well as transcripts of the hearing.

Background

4. The claimants in this matter are Dili Advisors Corporation ("Dili") and Mr Vadim Shulman ("Mr Shulman"). Dili is a company registered in Panama and beneficially owned and controlled by Mr Shulman.

5. There are three sets of claims which fall to be considered separately and these are:

   i) the Project Claims;

   ii) the Personal Loan Claim; and

   iii) the Aircraft Claim.

6. The background to the Project Claims is summarised in the first witness statement of Ms Deborah Ruff, a partner of Pillsbury Winthrop Shaw Pittman LLP ("Pillsbury") having conduct of the matter on behalf of the claimants from which (largely) I take the following summary.

7. The Project Claims arise from an investment of US$21.8 million (the claimants say made by way of a share purchase and a loan) made by Mr Shulman (through Dili) in May and June 2008 in a project (the "Project") to acquire and (the claimants say) to develop, land adjacent to the 7th kilometre industrial market near Odessa, Ukraine (the "Land").

8. The claimants' case is that in or around May 2008 Mr Shulman and D4 concluded an oral joint-venture agreement in relation to the Project (the "Oral JVA") and that Mr Shulman was told by Mr Ivanyushchenko and/or Mr Avramov that the Project would

be developed through the third defendant, Addison Alliance Limited ("Addison") which would, directly or indirectly, hold the Land and the other Project assets.

9. Dili entered into a written agreement dated 23 May 2008 with the first defendant, Production Investment Management Limited ("PIML") for the sale of 40% of the shareholding in Addison for the price of US$21.8 million (the "Sale Agreement"). Notwithstanding the written terms of the Sale Agreement, the claimants' case is that half of Mr Shulman's investment (i.e. US$10.9 million) was made as a loan to Mr Ivanyushchenko with interest at 5% per annum compounded monthly ("the Project Loan").

10. The Project Loan was repaid by PIML to Dili in instalments between 4 April 2012 and 27 December 2012. That repayment by instalments followed a written agreement for re-sale of the 40% shareholding in Addison to PIML for the full US$21.8 million which had originally been paid ("the Re-Sale Agreement").

11. The claimants' case is that the Land remains undeveloped farmland, during the relevant period no interest in the Land or other Project assets have shown in Addison's accounts, and that neither Mr Shulman nor Dili have been repaid the full US$21.8 million paid by Mr Shulman.

12. The first, second and third defendants are English companies. PIML is owned (indirectly) by D5, D6 and the daughter of D6 through companies, Pallace Limited and Rollexa Limited. The second defendant, Impool Limited ("Impool") has since 30 November 2009 been a Director of Addison and owns 60% of the share capital of Addison.

13. It is the claimants' position that D5 acted throughout in relation to the Project D4's agent and "right-hand man".

14. D6 was the wife of D4, the couple having apparently divorced in 2005. It is the claimants' case that D4 told Mr Shulman that D6 would be a shareholder in Addison and that she was present when many of the alleged misrepresentations relating to the Project were made.

<u>Personal Loan Claim</u>

15. The claimants' case is that pursuant to an oral agreement concluded in December 2010, Mr Shulman agreed to lend Mr Ivanyushchenko US$ 6.3m, repayable on reasonable demand ("the Personal Loan Agreement").

16. Mr Shulman's case is that he demanded repayment of the Personal Loan in July 2013 but has not received any payment of interest or capital.

<u>Aircraft Claim</u>

17. In July 2009, Mr Shulman owned a Bombardier Learjet 60XR aircraft ("the Learjet") and was considering buying a Bombardier Challenger 605 aircraft ("the Challenger"). It is Mr Shulman's case that he and Mr Ivanyushchenko orally agreed in July 2009 that if Mr Shulman bought the Challenger and allowed Mr Ivanyushchenko to use the Learjet and Challenger 50% of the time, Mr Ivanyushchenko would pay Mr Shulman

50% of the operating expenses of the Learjet and the Challenger, plus 50% of the depreciation value of those aircraft then they were sold ("the Aircraft Agreement").

18. Mr Shulman claims that despite allowing Mr Ivanyushchenko to use the Learjet and Challenger 50% of the time, Mr Ivanyushchenko has failed to pay Mr Shulman any money towards the operating expenses of both jets, or the 50% of their depreciation.

Procedural history

19. The Claim was issued on 8 March 2019. An amended claim form was filed on 11 June 2019.

20. Permission to serve the Fourth to Sixth Defendants with the Claim Form out of the jurisdiction was granted on the papers by the Order of Mr Justice Jacobs dated 20 June 2019 (the "Service Order").

21. The particulars of claim (the "Particulars of Claim") were filed on 29 July 2020.

22. Permission to serve D5 (in Ukraine) by alternative means was granted on the papers by an Order of Phillips J dated 27 August 2019.

23. On 10 September 2019, D4 and D6 filed Acknowledgements of Service indicating an intention to contest jurisdiction and on 21 October 2019 D5 filed an acknowledgment of service to the same effect.

Issues for determination and summary of findings

24. The written skeletons for the hearing of the Applications raised a large number of contested legal and factual issues. The issues raised can be grouped under four headings: serious issue to be tried; jurisdictional "gateways"; is England the proper place in which to bring the claims; and material nondisclosure. As to the last, this was not pursued in oral argument and in my view it is unnecessary to consider that in this judgment.

25. In view of the interrelationship between the various issues and the jurisdictional grounds relied upon, it is convenient and helpful to summarise my conclusions at the outset. I have not found it necessary to resolve all the issues raised in order to determine the Applications and in light of the large number of issues raised have focused on those issues which appeared to me, based on the oral submissions, to be the key areas of dispute between the parties. I have also not considered it to be necessary in this judgment to rehearse all of the submissions advanced but have nevertheless considered all the submissions in reaching my conclusions.

26. The principal focus of the oral submissions was:

i) the alleged existence of oral jurisdiction and governing law agreements made between Mr Shulman and D4 which the claimants say was an agreement as to English law and English jurisdiction in respect of the Project Claims, the Aircraft Claim and the Personal Loan Claim;

ii) whether the claims were time-barred as a matter of the relevant applicable law.

27. In order to establish jurisdiction in respect of the various claims, numerous gateways were relied upon by the claimants but the applicability of the various gateways to the claims is dependent in part on whether the claims would survive a notional summary judgment or strike out application.

28. In my view (for the reasons discussed below) there is no serious issue to be tried in respect of the following claims:

    i) the declaration;

    ii) the claims which are governed by and time barred under Ukraine and Monegasque law;

    iii) the claims against D6;

    iv) the implied terms;

    v) the claims against PIML in respect of acts alleged post 2008.

29. In respect of the available gateways for the remaining claims (having regard to the findings on the merits), I find that the claimants have not shown a good arguable case:

    i) that oral jurisdiction and governing law agreements were made as part of the joint venture agreement in May 2008, the Personal Loan Agreement in 2010 and the Aircraft Agreement in 2009;

    ii) that the (remaining) contractual claims and the (remaining) tortious claims against D4 and D5 fall within any of the gateways relied upon.

30. Even if I were wrong on that, I am not satisfied that the English courts are the proper place to bring the claim within the meaning of CPR 6.37.

<u>Legal framework for service out of the jurisdiction</u>

31. CPR 6.36 and 6.37 provide:

> "6.36 In any proceedings to which rule 6.32 or 6.33 does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply."
>
> 6.37
>
> (1) An application for permission under rule 6.36 must set out –
>
> (a) which ground in paragraph 3.1 of Practice Direction 6B is relied on;
>
> (b) that the claimant believes that the claim has a reasonable prospect of success; and

> (c) the defendant's address or, if not known, in what place the defendant is, or is likely, to be found.
>
> (2) Where the application is made in respect of a claim referred to in paragraph 3.1(3) of Practice Direction 6B, the application must also state the grounds on which the claimant believes that there is between the claimant and the defendant a real issue which it is reasonable for the court to try.
>
> (3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.
>
> …"

32. Practice Direction 6B sets out the grounds or "gateways" of which the relevant gateways relied upon by the claimants are set out below.

> "3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –
>
> …
>
> 3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.
>
> (4) …
>
> (4A) A claim is made against the defendant in reliance on one or more of paragraphs (2), (6) to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts.
>
> …
>
> Claims in relation to contracts
>
> (6) A claim is made in respect of a contract where the contract –
>
> (a) …
>
> (c) is governed by English law; or

> (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.
>
> …
>
> …
>
> Claims about property within the jurisdiction
>
> (11) The subject matter of the claim relates wholly or principally to property within the jurisdiction, provided that nothing under this paragraph shall render justiciable the title to or the right to possession of immovable property outside England and Wales.
>
> (15) A claim is made against the defendant as constructive trustee, or as trustee of a resulting trust, where the claim arises out of acts committed or events occurring within the jurisdiction or relates to assets within the jurisdiction.
>
> (16) A claim is made for restitution where –
>
> (a) the defendant's alleged liability arises out of acts committed within the jurisdiction; or
>
> (b) the enrichment is obtained within the jurisdiction; or
>
> (c) the claim is governed by the law of England and Wales."

<u>Oral jurisdiction and governing law agreements</u>

33. It is convenient to deal firstly with the alleged oral jurisdiction and governing law agreements as it affects the jurisdictional analysis in various ways (notably Gateways 6, 16, 3 and 4A).

34. The oral jurisdiction and governing law agreement are alleged to have been agreed as follows (paragraphs 12 and 13 of the Particulars of Claim):

> "12. In February 2008, Mr Ivanyushchenko approached Mr Shulman in the Fairmont Hotel at 12, Avenue des Spélugues, Monte Carlo, 98000, Monaco with a proposal to acquire and develop land adjacent to the "7th Kilometre Industrial Market" near Odessa, Ukraine ("the Market") into a transport and logistics hub ("the Project")."
>
> 13. <u>Early on in those discussions, Messrs Shulman and Ivanyushchenko orally agreed that any disputes arising from business dealings which they had together (including the Project) would be governed by English law and subject to the exclusive jurisdiction of the English courts</u>." [emphasis added]

35. Following further meetings between Mr Shulman and D4 the Oral JVA is alleged to have been concluded in May 2008 in Monaco (paragraph 17 of the Particulars of Claim) and the terms of that Oral JVA are alleged to have been that:

> "Pursuant to the Joint Venture Agreement, Mr Shulman and Mr Ivanyushchenko agreed that:
>
> a. Mr Shulman and Mr Ivanyushchenko (through a company to be determined by him and Mr Ivanyushchenko) would acquire and develop the Land into a transport and logistics hub ("the Project").
>
> b. Mr Shulman (through a corporate vehicle) would invest US$ 21,800,000 as "seed capital" in the Project which Mr Ivanyushchenko would use to fund the first phase of the development of the Project, in exchange for an initial 40% share in the Project.
>
> c. Mr Ivanyushchenko would bring in the Dutch Partner to contribute funds to enable the Project to be fully developed and that, once this further investment had been obtained, Mr Shulman's and Mr Ivanyushchenko's respective shareholding in Addison would ultimately be reduced to around 20% each.
>
> d. Upon Mr Ivanyushchenko's request, half of the initial "seed" investment (i.e.US$ 10,900,000) was to take the form of a loan to Mr Ivanyushchenko repayable to Mr Shulman personally on demand with reasonable notice, which loan was agreed to be used by Mr Ivanyushchenko for the purposes of advancing the Project ("the Project Loan"). The Project Loan would carry interest at 5% per annum compounded monthly, accruing from the date of the Project Loan.
>
> e. As previously agreed between Messrs Shulman and Ivanyushchenko, the Joint Venture Agreement was to be subject to English law and to the exclusive jurisdiction of the English courts…"

36. In his first witness statement made in support of the claimants' application for service out, Mr Shulman's evidence was as follows:

> "23. <u>As was my practice at the time</u> (and, I understood from him, Mr Ivanyushchenko's practice also and, to the knowledge of us both, that of most Ukrainian and CIS businessmen) in dealing with commercial contracts, <u>we agreed at an early stage in the negotiations</u> that the entire joint venture arrangement for the Project would be governed by English law, that all disputes arising from it would be resolved only in courts in England and that this would apply to all of our business dealings with each other. It was normal practice among businessmen working in the Eastern block at that time, because the legal systems of their

> "home" countries were still in early stages of development of the USSR while English courts had a reputation of being neutral and fair." [emphasis added]

37. In his second witness statement Mr Shulman gave further evidence concerning the agreement including the following (at paragraph 41):

> "<u>Straight away in our first conversation in February 2008 at the Fairmont Hotel, Mr Ivanyushchenko and I discussed issues concerning the judicial system in Ukraine</u>, and how neither of us considered that we could trust the Ukrainian courts. We immediately agreed that any disputes in relation to the project and our future business dealings would only be resolved in London, as both he and I were of the same view that the English courts were neutral and fair. At the same time, we agreed that English law would apply to any disputes we might have." [emphasis added]

38. And at paragraph 43:

> "…In early 2008, Mr Ivanyushchenko was my friend and I trusted him. We reached agreements orally on the substance of the Joint Venture and the Project and my investment in it. Whilst of course I now regret trusting Mr Ivanyushchenko, I did not see at the time why an agreement on jurisdiction should be dealt with any differently to those oral agreements we made."

39. It was common ground that the applicable test to determine whether any of the gateways in Practice Direction 6B and the formality requirements of Article 25(1) of the Brussels Recast Regulation are met is whether the claimants have shown a "good arguable case".

40. It was submitted for the defendants that where there is a factual issue relevant both to the merits test and jurisdiction the tougher standard for the claimants under good arguable case subsumes the more generous standard of serious issue to be tried *Cecil v Byatt* [2010] EWHC 641 (Comm) at [19].

41. In relation to the test of "good arguable case", the standard of proof has been recently considered by the Court of Appeal in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10 explaining how the test formulated by Lord Sumption in *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 and endorsed by the Supreme Court in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 was to be applied.

42. In *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 Lord Sumption stated at [7]:

> "7. An attempt to clarify the practical implications of these principles was made by the Court of Appeal in Canada Trust

Co v Stolzenberg (No 2) [1998] 1 WLR 547. Waller LJ delivering the leading judgment observed, at p 555:

"'Good arguable case' reflects … that one side has a much better argument on the material available. It is the concept which the phrase reflects on which it is important to concentrate, i.e. of the court being satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction."

When the case reached the House of Lords, Waller LJ's analysis was approved in general terms by Lord Steyn, with whom Lord Cooke of Thorndon and Lord Hope of Craighead agreed, but without full argument [2002] 1 AC 1, 13. The passage quoted has, however, been specifically approved twice by the Judicial Committee of the Privy Council: Bols Distilleries BV (trading as Bols Royal Distilleries) v Superior Yacht Services Ltd [2007] 1 WLR 12, para 28, and Altimo Holdings, loc cit. In my opinion it is a serviceable test, provided that it is correctly understood. The reference to "a much better argument on the material available" is not a reversion to the civil burden of proof which the House of Lords had rejected in Vitkovice. What is meant is <u>(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it.</u> I do not believe that anything is gained by the word "much", which suggests a superior standard of conviction that is both uncertain and unwarranted in this context." [emphasis added]

43. Although this underlined passage was obiter it was subsequently adopted by the Supreme Court in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 at [9].

44. In *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ10 the Court of Appeal considered how the test was to be applied:

"[73] it is in my view clear that, at least in part, the Supreme Court confirmed the relative test in *Canada Trust*… This is plain from the express endorsement of that test in *Brownlie*… And nothing in *Goldman Sachs*… detracts from that analysis but on the contrary operates upon the basis *Brownlie* was correct. Reference to "plausible evidential basis" in limb (i) is

> hence a reference to an evidential basis showing that the claimant has the better argument…
>
> [78] Limb (ii) is an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it "reliably" can. It recognises that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence. The court is not compelled to perform the impossible but, as any judge will know, not every evidential lacuna or dispute is material or cannot be overcome. Limb (ii) is an instruction to use judicial common sense and pragmatism, not least because exercise is intended to be one conducted with due dispatch and without hearing oral evidence… Where there is a dispute between witnesses it might be possible to focus upon the documentary evidence alone and see if that provides a sufficient answer which then obviates the need to grapple with what might otherwise be intractable disputes between witnesses.
>
> [79]…[Limb (iii)] arises where the court finds itself simply unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument.
>
> [80]… The solution encapsulated in limb (iii) addresses this situation. To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily upon relative merits."

45. It was submitted for the defendants that although the test in England is still that of "good arguable case" the court also has to have regard to the requirements that such a jurisdiction agreement must be "clearly and precisely demonstrated": *Estasis Salotti* (Case 24-76).

46. In *Kaefer* at [83] Green LJ said that:

> "I consider that in a case such as the present where the background legal context is Article 25 some regard must be paid to the fact that, as was held in Bols, the "clear and precise" test must be taken into account as a component of the domestic test and the melding of the two is necessary to ensure that domestic law remains consistent with the regulation. As with so much of the language used in this context, that which is "clear and precise" is not easy to define with precision. But I would rely upon it as providing at least an indication of the quality of the evidence required. It supports the conclusion that the prima facie test (in limbs (i) and (ii)) is a relative one; and in so far as the court cannot resolve outstanding material disputes (limb

> (iii)) it accords an indication as to the sort of evidence that a court will seek."

Has the claimant established a good arguable case as to the existence of the gateway based on the alleged oral jurisdiction and governing law agreements?

47. It was submitted for the claimants that Mr Shulman has either supplied a "plausible evidential basis" that an agreement was reached (*Brownlie* limb (i)) and the court can "reliably" conclude that Mr Shulman has the better of the argument on this point or he has advanced a "plausible albeit contested" evidential basis (*Brownlie* limb (iii)).

48. It was submitted for the defendants that:

    i) It is inherently improbable that experienced, resourced businessmen would fail to document any alleged jurisdiction and choice of law agreement yet there is not a single contemporaneous written communication or other document which refers to the existence of such agreements;

    ii) the existence of such agreements was only raised after the claim form was issued when the claimants issued their service out application;

    iii) there is no detailed evidence from Mr Shulman as to what was said and where;

    iv) Mr Shulman's evidence that this was part of his "practice at the time" is contradicted by his stance in other cases.

Discussion

49. The court has the evidence of Mr Shulman that an oral jurisdiction and governing law agreement was reached.

50. Mr Ivanyushchenko has denied that any agreement was made (paragraph 5 of his witness statement dated 28 July 2020). It was submitted for the claimants that this was a "general and bare" denial. I accept the submission for the defendants that it is difficult to prove a negative and it is difficult to see what else D4 could say by way of evidence in this regard. In any event the evidence of Mr Shulman is challenged by the evidence of Mr Ivanyushchenko and it is for the claimants to discharge the burden on them of showing that it is within the relevant gateway. As stated by Lord Neuberger in *VTB Capital v Nutritek International Corpn* [2013] UKSC 5 at [90]:

> "The mere fact that the defendant is challenging jurisdiction does not somehow impose a duty on him to specify his case. The onus is on the claimant to satisfy the court that there is a serious issue to be tried on the merits of the claim, and not on the defendant to satisfy the court that he has a real prospect of successfully defending it."

51. The evidence of Mr Shulman cannot merely be taken at face value. Mr Shulman asserts that he made this agreement as to what would happen if they fell out "early on" in the discussions about the Project. (In his second witness statement he says that the agreement was in February 2008).

52. However the plausibility of this agreement as to law and jurisdiction has to be viewed in the context of the relationship between the two men. Mr Shulman describes him as a friend whom he trusted and gave this as a reason why the oral jurisdiction and governing law agreements agreed up front were not documented. His evidence was as follows (paragraph 7 of his first witness statement):

> "I have personally known the Ivanyushchenkos for a number of years, at least since 2007 when my family moved to Monaco,… I came to consider Mr Ivanyushchenko as a personal friend, which was one of the reasons why I was prepared to accept what he told me about a business opportunity, and why I did not research it as thoroughly or document as many safeguards as, with high, I perhaps should have done."

53. In my view, contrary to the submission for the claimants, the fact that Mr Shulman and D4 were friends and that Mr Shulman "trusted" him casts doubt on the plausibility of Mr Shulman's evidence that they would have or did discuss and agree what would happen in the event of a dispute between them at the outset of their discussions, let alone even before they reached an agreement on the joint venture (which on Mr Shulman's evidence was in May 2008).

54. Further if the issue of jurisdiction and governing law was so important to Mr Shulman that he was careful to make an agreement to that effect at the outset of his business dealings and that it was his "practice" due to the concern that the legal system of his "home" countries were not sufficiently developed, then one would assume that it is a matter which was sufficiently important that he would take care to record this agreement. Mr Shulman's evidence (paragraph 30 of his first witness statement) is that he involved his lawyer in Ukraine (Mr Sirota) and instructed him "to iron out the details of the deal". However, on Mr Shulman's case even though his lawyer was involved to deal with the detail of the joint venture, the alleged jurisdiction and governing law agreement was not documented and no document either internal or external has been produced which makes reference to any such agreement.

55. I also reject the submission for the claimants that the oral jurisdiction clause is "corroborated" by the fact that the Sale Agreement and the Re-Sale Agreement included an English law and jurisdiction clause. In my view it is somewhat surprising that the Sale Agreement does not refer to the joint-venture agreement or arrangements at all. Even if there was an Oral JVA as alleged, these documents were for a sale (and resale) of shares in an English company (Addison) by a seller (PIML) which is an English company. It is therefore unsurprising that they have English governing law and jurisdiction clauses. Mr Shulman's rationale for such an oral agreement in relation to the Project Claims was that this was his practice in relation to disputes which would otherwise be dealt with in the courts of Ukraine. The fact therefore that the Sale and Re-Sale agreements entered into by Dili, a Panamanian company, with an English company to purchase shares in an English company, contain English law and jurisdiction provisions provides no real support for the evidence of Mr Shulman.

56. By contrast the Settlement Agreement prepared on behalf of Mr Shulman to resolve the outstanding disputes between Mr Shulman and D4 in 2014, does not contain any jurisdiction and governing law clause. Although it was submitted for the claimants that this was merely a draft agreement, it was prepared by Mr Shulman's lawyer

(paragraph 67 of Mr Shulman's first witness statement) and apparently sent to Mr Ivanyushchenko in anticipation that it would be signed (in that form). The evidence of Mr Shulman is:

> "At the end of 2013, Mr Ivanyushchenko responded that he was ready to repay me all the money he owed… I was relieved that, at last, I would get my money back. I immediately asked for a draft agreement to be prepared, and my lawyer …sent this draft to Mr Ivanyushchenko's lawyers on 8 January 2014. However, Mr Ivanyushchenko did not do anything about signing it."

57. Notwithstanding the importance of this agreement (according to Mr Shulman Mr Ivanyushchenko said that he was ready to repay all the money he owed) and Mr Shulman's evidence that it was his practice to agree English law and jurisdiction in dealing with commercial contracts, there is no such provision in the draft Settlement Agreement.

58. Turning then to the three other cases identified by the defendants in which Mr Shulman has been involved and the extent to which they support Mr Shulman's evidence that it was his "practice" at the time to agree at the outset of negotiations for commercial contracts that disputes would be resolved in the English courts. The first two are cases in the United States. In *Kisano Trade & Invest Limited v Dev Lemster* Mr Shulman brought proceedings in 2011 through two companies owned by him (Kisano and Trasteco) (and was joined personally) alleging fraud on the part of a business partner Mr Sapir (and others). The US court was concerned with what was the appropriate forum but it is notable that in arguing that the US courts were the appropriate forum, there was no suggestion (in the judgment of the Court of Appeal for the Third Circuit) that Mr Shulman alleged the existence of an oral jurisdiction clause, although I also accept that it was not concerned with entities from Ukraine or other CIS states.

59. The other US case relied on by the defendants is *Bracha v Warren Steel Holdings* in Ohio. This case involved a joint venture between Mr Shulman and two Ukrainian citizens, Mr Kolomoisky and Mr Bogolyubov and allegations of fraud being committed in relation to an investment which involved a BVI company. The appeal included an argument as to whether the BVI was the appropriate forum. Even though this case did involve Ukrainian businessmen there was no argument advanced by Mr Shulman that (in accordance with his alleged practice and that of businessmen working in the Eastern bloc) he had reached an oral jurisdiction agreement with Mr Kolomoisky and Mr Bogolyubov, let alone for English jurisdiction and law.

60. As to the third case, *Shulman v Kolomoisky* [2018] EWHC 160 (Ch) these were proceedings in the English courts and it is clear that Mr Shulman had alleged in that case that an oral agreement as to English law and jurisdiction had been reached. At [5] the judge noted:

> "For the sake of completeness, I record that C contends that at the beginning of the parties' relationship an oral agreement was made between C and D1 to the effect that any disputes should be resolved by the English courts applying English law. However, I was told that C accepts that this

> alleged agreement is ineffective for the purpose of Article 23 of the Lugano Convention. In this application Mr Jonathan Crow QC, who appeared for C, placed no reliance upon any such agreement. I therefore say no more about it."

In my view this English case is evidence that Mr Shulman has (relatively recently) advanced a similar contention that he made an oral jurisdiction agreement for English jurisdiction and law but that contention was not tested before the courts and as it was not pursued, there is no finding by that court as to whether this assertion was in fact made out. In my view the fact that Mr Shulman has made a similar assertion in proceedings before the English courts does not amount to substantive corroboration of his evidence as to his practice.

Conclusion on oral jurisdiction and governing law agreement

61. In my view the claimants have not established a "plausible evidential basis" that an oral jurisdiction and governing law agreement was reached in respect of the Oral JVA (*Brownlie* limb (i)) and the court can reliably conclude that the defendants have the better of the argument on this issue. Even if I was wrong on that and this was a case within limb (iii) of *Brownlie* in my view the Claimants have not shown a "plausible (albeit contested)" evidential basis.

Jurisdiction agreements in respect of the Personal Loan Claims and the Aircraft Claims

62. The claimants also assert that the agreement as to governing law and jurisdiction was to extend to all dealings and would therefore encompass the Personal Loan Claim and the Aircraft Claim. The claimants rely on Article 25(1)(b) of the Brussels Recast Regulation that there was a practice of the parties using oral jurisdiction agreements which would apply for the Personal Loan Agreement and the Aircraft Agreement.

63. Article 25(1) provides (so far as material):

> "If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction… The agreement conferring jurisdiction shall be either:
>
> (a) in writing;
>
> (b) in a form which accords with practices which the parties have established between themselves; or…" [emphasis added]

Aircraft Claim

64. In the original claim form the claimants alleged that pursuant to an oral agreement D4 agreed to pay 50% of the purchase prices of the two jets on demand and further or alternatively D4 agreed to pay half of the running costs of the two aircraft. It was alleged that in July 2013 Mr Shulman demanded payment but D4 failed to pay the sums due.

65. In the amended claim form it was alleged that the oral agreement was that D4 would pay 50% of the difference between the purchase prices of the aircraft and their resale prices i.e. the depreciation. It was also asserted that the agreement was that in addition, and not alternatively, D4 agreed to pay half the running costs. The sum claimed was $9.75 million plus interest.

66. D4 denies the claims and asserts that D5 agreed that D4, D6 and others would rent the aircraft on hourly rates which were paid.

67. Notwithstanding the explanation proffered on behalf of the claimants of a misunderstanding in instructions, the amendment to the claim form in this regard is both striking and difficult to understand given the significance of the change to the quantum of this claim.

68. It is also notable that the draft Settlement Agreement in the recitals refers to "unfulfilled obligations" to pay $10.9 million in accordance with the terms of the Sale Agreement and $1.75 million "in respect of the aircraft". Even though Mr Shulman claims that he had demanded payment of the amount due in respect of the aircraft in July 2013 and the evidence of Ms Ruff is that the amount payable became due on the sale of the aircraft in September 2013, the reference to the Aircraft Claims in the Settlement Agreement drafted in January 2014 is only to the sum of $1.75 million which is clearly a fraction of the sum now claimed. There is an explanation provided by Mr Shulman (paragraph 77 of his second witness statement) that he did not include all of the sums because he was keen to get D4 to start engaging with him regarding repayment and "not to scare him off" by putting in all the sums due to him in that document. Given Mr Shulman's evidence that he had already demanded payment the previous year and the inconsistencies in the change in the claim now advanced, this evidence is in my view not plausible.

69. Against these matters which cast doubt as to the plausibility of the underlying Aircraft Claim, I have regard to the absence of any documentation to support the alleged jurisdiction and governing law agreement in this respect and the requirement under Article 25 that the agreement must be clearly and precisely demonstrated.

70. As to whether the claimants have shown a good arguable case, I also take into account the evidence and conclusion in respect of the Project Claims.

71. In my view in relation to the Aircraft Claim, the claimants have not shown that they have the better of the argument as to the existence of this alleged oral jurisdiction and governing law agreement.

<u>Personal Loan Claim</u>

72. It is striking that there is no mention of this claim in the draft Settlement Agreement even though Mr Shulman was by then on notice that the Project was not being progressed and D4 allegedly had said he was ready to repay all the money he owed.

73. Again I have regard to the absence of any documentation to support the alleged jurisdiction and governing law agreement and the other matters referred to in relation to the Project Claims. In my view the claimants have not shown a good arguable case

that there was an agreement within Article 25(1)(b) in relation to the Personal Loan Claim.

Governing Law

74. I turn now to consider the issue of the governing law of the claims.

75. It is the claimants' case that all the claims are governed by English law. The claimants' case is that the applicable law of the Joint Venture Agreement, the Sale Agreement and the Aircraft Agreement is English law pursuant to Article 3(1) of Rome Convention:

> "The contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case…"

76. It is the claimants' case that the Personal Loan and the Resale Agreements were governed by English law under Article 3(1) of Rome I which is to similar effect for the purposes of this case:

> "A contract will be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case."

77. It was submitted for the defendants that the claims (other than the claim for a declaration which it is accepted is governed by English law since it relates to the Sale and Re-Sale Agreements) are governed by Ukrainian law or Monaco law and that under such laws the claims are time barred. The defendants' case is that the tort claims against D4, D5 and D6 are governed by Ukrainian law and/or Monegasque law; the contractual claims against D4 concerning the Project are governed by Ukrainian law; the contractual claims against D4 concerning the Aircraft and the Personal Loan are governed by Monegasque law and the knowing receipt claim is governed by Ukrainian law.

78. The governing law is relevant to the applicability of Gateways 6, 3 and 16 as well as the issue of whether there is a serious issue to be tried by reason of certain of the claims being said by the defendants to be time barred.

Tort claims

79. As to the tort claims (and the claims for dishonest assistance and conspiracy) it is accepted that a distinction needs to be drawn between the pre January 2009 claims and post January 2009 and the key date is the date of the event which gives rise to the damage: *Homawoo v GMF Assurances* C-412/10.

80. The tort claims which therefore are pre January 2009 are the tort claims based on the alleged misrepresentations between February and May 2008 and the dishonest assistance and conspiracy claims based on these alleged misrepresentations and the investment by Mr Shulman in June 2008.

81. Section 11 of the Private International Law (Miscellaneous Provisions) Act 1995 (the "1995 Act") provides:

> "(1) The general rule is that the applicable law is the law of the country in which the events constituting the tort or delict in question occur.
>
> (2) Where elements of those events occur in different countries, the applicable law under the general rule is to be taken as being—
>
> …
>
> (c) in any other case, the law of the country in which the most significant element or elements of those events occurred."

82. It was submitted for the defendants that pursuant to section 11 of the 1995 Act the claims for misrepresentation, dishonest assistance and conspiracy are governed by the law of Monaco and/or the law of Ukraine, because in relation to events predating 11 January 2009, the alleged misrepresentations are said to be made in Monaco or Ukraine, and Mr Shulman committed himself and Dili to transfer the US$21.8 million investment (or, as he contends investment and project loan) in either Monaco or Ukraine. The money was paid via Dili's bank account in Monaco to PIML's account in Latvia before being paid to Addison's bank account in Latvia.

83. It was submitted for the claimants that it was unclear from the evidence produced that the documents said to evidence the payments (and thus that the monies were paid outside England) related to the investment of the US$21.8 million.

84. The claimants rely on section 12 of the 1995 Act:

> "(1) If it appears, in all the circumstances, from a comparison of -
>
> (a) the significance of the factors which connect a tort or delict with the country whose law would be the applicable law under the general rule; and
>
> (b) the significance of any factors connecting the tort or delict with another country,
>
> that it is substantially more appropriate for the applicable law for determining the issues arising in the case, or any of those issues, to be the law of the other country, the general rule is displaced and the applicable law for determining those issues or that issue (as the case may be) is the law of that other country.
>
> "(2) The factors that may be taken into account as connecting a tort or delict with a country for the purposes of this section include, in particular, factors relating to the parties, to any of the events which constitute the tort or delict in question or to any of the circumstances or consequences of those events."

85. It was submitted for the defendants that the threshold to rely on section 12 is very high: *VTB Capital plc* at [205] and [206]:

> "[205] The editors [of *Dicey, Morris & Collins, The Conflict of Laws* 15th ed para 35-148] note that the general rule has been displaced on very few occasions. They further observe that, although section 12 applies in all cases to which section 11 applies, it would seem that the case for displacement is likely to be most difficult to establish in the case of section 11(2)(c) because the application of that provision itself requires the court to identify the country in which the most significant element or elements of the tort are located. Importantly they stress the use of the word "substantially", which they describe as the key word, and conclude that the general rule should not be dislodged easily, lest it be emasculated. The party seeking to displace the law which applies under section 11 must show a clear preponderance of factors declared relevant by section 12(2) which point to the law of the other country.
>
> [206] That approach is borne out by the cases. The idea that "substantially" was the key word was derived from the judgment of Waller LJ in *Roerig v Valiant Trawlers Ltd* [2002] 1WLR 2304, at para 12 (v). The principles were considered in more detail by Brooke LJ in R(Al-Jedda) v Secretary of State for Defence [2007] QB 621, at paras 103 and 104, where he noted that the 1995 Act derived from a report of the Law Commission, from which he quoted. He added that Lord Wilberforce, who was a member of the House of Lords Committee which considered the Bill, had expressed the view that it would be a "very rare case" in which the general rule under section 11 would be displaced: "Prima facie there has to be a strong case"." [emphasis added]

86. The claimants submitted that if the contract claims for D4 under the Oral JVA are governed by English law then all the Project Claims against D4, D5 and D6 are displaced under Section 12 and governed by English law: *Trafigura v Beheer BV v Kookmin Bank* [2006] EWHC 1450 (Comm).

87. It was submitted for the defendants that the facts of that case are very different and the case of *Fiona Trust v Privalov* [2010] EWHC 3199 is closer to the facts of the present case. At [174] the judge observed that:

> "…Because the schemes concerned shipping, the contractual arrangements by which they were conducted were governed by English law…However the focus of the conspiracy remained Russian and collusion was based in Russia although the schemes were played out elsewhere."

Discussion

88. As found above, the claimants have failed to show a good arguable case as to the oral jurisdiction and governing law agreements. As to the other factors relevant by virtue of section 12(2), the parties who were alleged to have made the misrepresentations or agreements (either on their own account or by virtue of attribution) were all resident outside England and the consequences for the claimants were in Ukraine (in the sense of the location of the purpose of the joint venture, the Land) or their jurisdiction of domicile which is outside England. The investment was made through the purchase of shares from an English company of shares in an English company but the investment was then structured as an investment in several Ukrainian companies.

89. In my view therefore and bearing in mind the high threshold, the claimants have not shown a good arguable case that a "clear preponderance of factors declared relevant by section 12(2)" point to the law of England such as to displace the general rule under section 11 and the country in which the most significant element occurred is Monaco or Ukraine.

Post January 2009 claims

90. In relation to events post-dating 11 January 2009 it was common ground that Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations ("Rome II") determines the law applicable to the remainder of the tort claims (namely the claims concerning misrepresentation post 11 January 2009, any alleged dishonest assistance after that date and any alleged conspiracy after that date).

91. Article 4 of Rome II provides:

> "1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be <u>the law of the country in which the damage occurs</u> irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
>
> 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
>
> 3. <u>Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply</u>. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question." [emphasis added]

92. Article 12 states:

> "1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.
>
> 2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:
>
> (a) the law of the country in which the damage occurs,…; or
>
> (b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or
>
> (c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country."

93. Article 10 (1) dealing with unjust enrichment provides:

> "If a non-contractual obligation arising out of unjust enrichment, including payments of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship."

94. Article 14 (1) provides:

> "The parties may agree to submit non-contractual obligations to the law of their choice:
>
> …
>
> (b) Where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.
>
> The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties."

95. It was submitted for the defendants that:

i) The only pleaded loss is the payment by Mr Shulman of his investment in June 2008 and this loss was not suffered in England.

ii) To the extent the claimants seek to rely on Article 4 (3) that the claims are "manifestly more closely connected" with England, Article 4 (3) is an exceptional route and the burden is on the claimant to establish it: *Avonwick Holdings Ltd v Azitio Holdings Ltd & Ors*. [2020] EWHC 1844 (Comm) Picken J at [154] - [156].

iii) The only factors relied upon are the alleged oral jurisdiction agreement and the fact that the Sale and Re-Sale Agreements are governed by English law. These are not sufficient to shift the centre of gravity from Ukraine or Monaco to England.

iv) so far as the claims brought by Mr Shulman against D6 are concerned, D6 was habitually resident in Monaco when the alleged loss occurred: Article 4(2);

v) Mr Shulman committed himself and Dili to transfer the US$21.8 million in either Monaco or Ukraine: Article 4(1);

vi) if and insofar as the governing law under Articles 4(1) or 4(2) of the Rome II Regulation would be Monaco, Ukraine may be manifestly more closely connected with the torts complained of: Article 4(3) of the Rome II Regulation;

vii) if and insofar as the misrepresentations complained of arose out of dealings prior to the alleged Oral JVA, so as to engage the doctrine of *culpa in contrahendo* (Article 12), then those claims would be governed by the same law as governs the alleged Oral JVA (which is the law of Ukraine); and

viii) Article 12 could not be relied upon as D5 and D6 were not parties to the relevant agreements.

96. In relation to Article 12 it was submitted for the claimants that the tortious Project Claims have a very close connection between the torts and the contracts in question, particularly the Oral JVA and in addition that there are the Sale and Resale Agreements which are the “background” to these events.

97. I note the following in *Avonwick Holdings Ltd*.:

> “[155] The same point was made by Flaux J (as he then was) in *Fortress Value Recovery Fund ILLC v Blue Skye Special Opportunities Fund LP* [2013] 2 BCLC 351 at [47] when explaining that, <u>in order for a tort to be manifestly more closely connected to another country, the centre of gravity of the tort or the clear preponderance of factors must point toward it, as follows:</u> “...[Art 4(3) Rome II] is only to be used on an exceptional basis. The defendants rely upon [35–032] of Dicey, Morris & Collins: The Conflict of Laws which states that Article 4(3) should only be applied where there is a ‘clear preponderance of factors’ pointing to another country than that indicated by Articles 4(1) and (2). The Explanatory Memorandum refers to the ‘centre of gravity’ of the tort.”” [emphasis added]

> [156] As to "all the circumstances", as referenced in Article 4(3), these might include a variety of features. Thus, relevant matters include: where the alleged wrongdoing "was planned, orchestrated and implemented" which, as Flaux J put it in Fortress Value at [74], may involve <u>focusing on the country in which "the 'puppet masters' pulling the strings" carried out the relevant alleged acts, even if other entities carried out other alleged acts in one or more other countries;</u> the places of domicile of the parties (Gaynor at [8]); the location of the "damage arising from the tort, whether direct or indirect"(Gaynor at [50]); <u>the location of assets which are "at the heart of" the alleged wrongdoing, even if this is not the place where the direct damage occurred for the purposes of Article 4(1) (Fortress Value at [71])</u>; and, as expressly stated in Article 4(3) itself <u>the "pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question</u>", in contradistinction to "mechanisms by which the allegedly dishonest scheme was implemented" (Fortress Value at [73]). The fact that proceedings have been brought in a particular jurisdiction is "not a strong connecting factor" since, as Slade J explained in Gaynor at [61], the "choice of forum does not determine the law of the tort"; it is important, in other words, not to conflate the issue of jurisdiction with the separate governing law issue." [emphasis added]

98. Here although acts were carried out in England namely the purchase of the shares in Addison (to the extent that the acts of PIML are alleged to be attributed to D4**,** D5 and D6) it could not be said that those "pulling the strings" of PIML were in England nor in my view were the shares in Addison the "heart" of the wrongdoing. Addison was a holding company through which the investment was routed and thus merely the mechanism by which the alleged scheme was implemented. In the light of my finding above on the alleged oral jurisdiction and governing law agreement, there was no "pre-existing relationship" to be taken into account for the purposes of Article 4(3).

99. I therefore find that the claimants have not shown a good arguable case that the governing law of the torts committed post January 2009 is English law.

<u>Article 10 of Rome II</u>

100. It was submitted for the defendants that the only relevant receipt was pre 11 January 2009 and therefore the common law rules apply. Under the old rules that would be Ukrainian law.

101. Even if there were claims falling within Article 10, the claimants rely on the "close connection" with a contractual/tortious relationship to establish that English law is the applicable law which for reasons discussed elsewhere the claimants have failed to establish.

Article 14 of Rome II

102. This does not apply as the oral jurisdiction and governing law agreement has not been made out.

Contract claims

103. Given my findings above, the claimants have not shown a good arguable case that English law and English jurisdiction applies to the contractual claims.

104. If there was no applicable agreement on choice of law, it appeared to be common ground that the contractual claims against D4 under the alleged Oral JVA would be governed by Ukrainian law under Article 4 of the Rome Convention (it related to Ukrainian land and was the investment of sums in companies situated in Ukraine) and the breach of fiduciary claims are governed by the same law that would govern the alleged Oral JVA since they are said to arise out of that relationship.

Serious issue to be tried

Relevant legal principles

105. In relation to the merits of the claims, the claimants have to show that there is a serious issue to be tried on the merits of the claim i.e. a substantial question of fact or law or both and a real, as opposed to a fanciful, prospect of success on the claim: *VTB Capital* at [164]. It was common ground that the relevant test is whether the claims would defeat a notional summary judgment or strike out application.

106. The court was referred by counsel for the defendants to the principles applicable to applications for summary judgment formulated by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 at [15] (set out in the notes to the White Book at 24.2.3): the court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success and a "realistic" claim is one that carries some degree of conviction and is a claim that is more than merely arguable, the court must not conduct a "mini trial" but this does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court and that the court must take into account not only the evidence placed before it but also the evidence that can reasonably be expected to be available at trial.

107. For the claimants it was submitted that it was a relatively low threshold and in order to succeed in setting aside service on this ground an applicant must identify a focused "killer point" or "killer blow": Flaux J in *Erste Group v JSC "VMZ Red October"* [2013] EWHC 2926 (Comm) at [12]:

> "However, the reality is that, unless RT and RT Capital had some "killer point" which demonstrated that Erste's case on the facts was unsustainable (and, for reasons I will develop in detail below, they do not have any such "killer point"), the expending of so much time and energy on a full-scale evidential challenge is a fruitless exercise. All it succeeds in doing is demonstrating that Erste has raised serious issues to be tried."

Defendants' case

108. It was accepted for the defendants that the hearing of the Applications was not the trial of the alleged fraud and that there is a serious issue to be tried in respect of the fraud (save, it was submitted, in respect of D6).

109. It was submitted for the defendants that service of the claims should be set aside because the claims raise no serious issue to be tried since the claims governed by foreign law are time barred and/or lack any real prospect of success. It was also submitted that there was no real prospect of success in respect of:

i) the claims against D6;

ii) the declaration;

iii) the implied contractual claim against D4;

iv) the attribution of PIML;

v) the knowing receipt claim against D5.

Limitation under Ukrainian law

110. It seems to be common ground between the experts (Mr Alyoshin instructed by the defendants and Mr Marchukov instructed by the claimants) that under Ukrainian law the general limitation period is three years and time runs from the day when the affected party "became aware (or could reasonably have become aware) of the violation of his right or the identity of a person that has violated the right" under Article 261 of the Ukrainian Civil Code.

111. It is the claimants' evidence (Ms Ruff's first witness statement at paragraph 40) that by July 2013 the claimants knew that the Project was not just delayed but would not be progressed and that the money invested was not in fact invested and/or had been diverted for the benefit of D4, D5 and D6 (although the claimants' case is that the English law limitation period applies). The claim form was issued on 8 March 2019 and accordingly claims governed by Ukrainian law are outside the general limitation period of three years.

112. Article 267(5) of the Ukrainian civil code states that:

> "when a court considers that the limitation period has been missed for valid reasons, the violated right shall be enforced".

113. Mr Alyoshin states in his report (at paragraph 88 of his first report) that:

> "The court will only do so where it finds external circumstances that exist independently of the claimant's will (beyond his control) which either significantly impair the claimant's ability to bring the relevant claim within the limitation period or render it altogether impossible. Whether such circumstances are made out is a question of fact and depends on the surrounding circumstances. The court will

> assess whether it was objectively impossible or significantly difficult for the claimant to bring the claim on time, while also taking into account whether the claimant showed the necessary diligence to protect their violated right. This is a high bar for claimants to overcome." [emphasis added]

114. It is the claimants' case that the failure to bring proceedings in Ukraine within the limitation period was for a valid reason which was outside their control, namely that they believed that the proceedings were governed by English law. In his third report at paragraphs 16-18 Mr Marchukov states:

> "16. I would like to explain that Article 267(5) of the Civil Code does not explain what "valid reasons" are. The Ukrainian lawmaker has left this issue to be decided by the courts applying their discretion when considering particular cases based on the specific facts.
>
> 17. I have not seen a similar case in the Ukrainian court practice where the limitation period would have been "missed" (on the Defendants' 4-6 case) for the same reason as in the present case. Therefore, I am not surprised that the tests formulated by the courts, to which Mr Alyoshin refers in §27 of OA2, do not take the present situation into account. However, this does not mean that the situation would automatically be ruled out, since, as I explain, this issue is to be treated on a case by case basis. I understand from §23 of VS1 that Mr Shulman had (and, apparently, continues to have) a bona fide belief that the English law of limitation would apply.
>
> 18. The only reason why it may now appear that the Claimants have "missed" the limitation period is only if this Court finds – as I understand, to the surprise of the Claimants – that Ukrainian law should apply instead of English one [sic] (including to the issue of the limitation period). Given that this will not be the decision within the Claimants' control and that the Claimants had believed that – when bringing their claims – they should, rather, be guided by the limitation period under English law (and not Ukrainian), in my opinion, there are good reasons for the Court to apply its discretion in favour of the Claimants.
>
> 19. In my opinion, the above demonstrates that the limitation period in the present case has been "missed" for, indeed, valid reasons and that the Claimants determination to comply [sic] in good faith with what they believed was the relevant limitation period (i.e. the one under English law) should not be held now against them." [emphasis added]

115. Mr Alyoshin in his second report is of the view that (paragraphs 27 and 28):

> "27. Valid reasons are certain external circumstances that exist independently of the Claimant's will (beyond his control) which either significantly impair the Claimant's ability to bring the relevant claim within the limitation period or render it altogether impossible. Mr Shulman's subjective perception of the duration of the limitation period or applicable law would not qualify as a valid reason by a Ukrainian court, since, firstly, it is not an external circumstance existing beyond the claimant's will (being Mr Shulman's subjective belief) and, secondly, it neither significantly impairs bringing the claim nor renders it impossible.
>
> 28. Moreover, basing a decision on Mr Shulman's subjective belief when deciding on disapplication of the limitation period undermines the principle of legal certainty - that, according to the Constitutional Court of Ukraine, requires clarity and uniguity [sic] of legal norms, in particular their foreseeability(predictability) and stability. The purpose of the limitation period is to apply despite anyone's subjective belief. Only in exceptional circumstances that go beyond a claimant's will, may it be disapplied (as case law referred to in the First Expert Report demonstrates)." [emphasis added]

116. It was submitted for the claimants that these are matters for trial and not matters which the court can decide at this stage so as to conclude that there is no serious issue to be tried. It was submitted that there would need to be expert evidence from the experts at trial and the court would need to make findings in relation to that expert evidence and a finding as to Mr Shulman's belief that English law applied to the claims.

117. It was submitted for the defendants that this is a short point of construction and the court can therefore grasp the nettle and determine the point.

118. There have been three expert reports from the expert for the claimants and two in response from the expert for the defendants. These reports have been prepared over a period of months and the experts have therefore had a considerable period within which to research the issue and identify any relevant authorities. In my view therefore it cannot reasonably be expected that any further evidence as to Ukrainian law will be required or forthcoming at trial.

119. As to the evidence of Mr Shulman he has provided no evidence as to his belief, even though he has provided three witness statements in support of his case, the most recent being on 1 September 2020.

120. I am therefore satisfied that the court has all the evidence necessary for the proper determination of the question and the parties have had an adequate opportunity to address it in argument.

121. The claimants' case is that a subjective belief will be sufficient to extend the limitation period under Ukrainian law. However no authority is cited in support of this

proposition by their expert. It seems to me having regard to the principle of legal certainty under the law of Ukraine, that "valid reasons" within the meaning of Article 267(5) do not extend to a subjective belief on the part of a claimant which would have the effect of extending a limitation period.

122. Further even if that as a matter of Ukrainian law a subjective belief were sufficient to extend the limitation period under Ukrainian law, in my view the claimants have not shown a realistic prospect that they can establish that Mr Shulman could not have brought the claim in time. Accordingly, to the extent that the claims are governed by Ukrainian law and are outside the 3 year limitation period, the claimants have not shown that there is a serious issue to be tried in respect of such claims.

<u>Limitation under Monegasque law</u>

123. Under Article 2044 of the Monegasque Civil Code the limitation period is five years from the date when "the claimant became aware or should have become aware of the facts granting him/her standing" (Expert report of Ms Noghes paragraph 18).

124. If and to the extent Monegasque law applies, the claimants' case is that the claims are not time barred because of a tacit waiver under Article 2073 of the Monegasque Civil Code.

125. At paragraph 32 of her report, Ms Noghes (instructed by the claimants) states:

> "ln the JCG Report (para. 16 to 22), no mention is made about a possible waiver of a limitation period that has expired. This waiver is accepted under Monegasque law. It may be express or tacit; <u>tacit relinquishment arises out of a fact presupposing the abandonment of an established right</u> (Article 2073 MCC). Again, it would be for a judge to establish whether there is or is not sufficient evidence of such a waiver." [emphasis added]

126. In this regard the claimants rely on the evidence from Mr Shulman (paragraph 68 and 69 of his first witness statement) that D4 promised at a party on 22 February 2014 that he would repay everything and D5 told Mr Shulman that D4 in November 2018 would like to make amends and pay what was due. It is the claimants' case that this amounts to a tacit relinquishment which arises out of the fact presupposing the abandonment of an existing right. It is submitted for the claimants that this is a matter which can only be determined at trial.

127. In response the defendants' expert, Mr Gardetto, expresses the view (at paragraphs 32 and 33 of his second report) that:

> "32 Article 2073 provides: "A waiver of a limitation period may be express or tacit; tacit relinquishment arises out of a fact presupposing the abandonment of an established right."
>
> 33. This provision provides that <u>a defendant can waive their right to rely on any applicable limitation period as a defence to a claim made against them</u>. It does not mean (to the extent it is suggested) that limitation can be waived in the sense that

it is being suspended, interrupted or in any way cease to have effect. "

128. There has been no further evidence in response from the claimants' expert.

129. Taking the claimants' evidence at its highest, even if there was, as alleged, a promise by D4 to repay the amounts alleged to be owing, in my view the claimants have not shown a real prospect that the defendants thereby waived their right to rely on the limitation period as a defence and that the demand for repayment amounted to a tacit waiver of the limitation period.

Conclusion on Monegasque law

130. In my view to the extent that the claims are governed by the laws of Monaco and outside the 5 year limitation period, the claimants have not shown that there is a serious issue to be tried in relation to such claims.

Limitation periods under English law

131. The claimants submitted that the Personal Loan Claim was repayable on demand and demand was made in July 2013 so no limitation issue arises. However as the court has found that the claimants have not established a good arguable case that there was as alleged an oral jurisdiction and governing law agreement in relation to the Personal Loan and the Aircraft Claim and that there is no serious issue to be tried in respect of the claims under foreign law (by reason of limitation), English limitation periods are not relevant to the issue of jurisdiction in respect of these claims.

132. It was submitted for the defendants that if English law governs the Project Claims all or most of them are time barred: in particular that so far as the damages claims are concerned the claimants' case depends on the availability of section 32 of the Limitation Act 1980.

133. The claimants submitted in their skeleton that to the extent they have claims for breach of fiduciary duty under English law there is no relevant limitation period by virtue of s21 Limitation Act 1980. This submission was abandoned in oral submissions in light of *First Subsea v Balltec* [2018] Ch 25.

134. It was submitted for the claimants that certain of the claims are within the primary limitation period, namely where the cause of action accrued after 8 March 2013. The claimants identify the claim pursuant to the implied term where demand was only made in July 2013. The defendants dispute that this is the relevant date for the purposes of limitation. However the claim based on the implied term does not need to be considered in light of the court's finding (below) in this regard in relation to the merits of that claim.

135. In view of my findings in this judgment on the other issues, the issue of limitation under English law falls to be considered primarily (if not wholly) for the purposes of establishing jurisdiction against PIML as an "anchor defendant" under Gateway 3.

136. Section 32 of the Limitation Act provides (so far as material):

> "(1) …, where in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant; or
>
> (b) any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or
>
> (c) the action is for relief from the consequences of a mistake;
>
> <u>the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.</u> References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.
>
> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty…" [emphasis added]

137. The test is set out in *Arcadia Group v Visa* [2015] EWCA Civ 883, namely did the claimants have facts sufficient to plead a case?

138. As to whether the fraud could reasonably have been discovered, it was common ground that the test was:

i) as set out in *Granville Technology Group Limited v Infineon Technologies AG* [2020] EWHC 415 (Comm) at [45] (and referred to, and approved by, the Court of Appeal in *DSG Retail v Mastercard Inc* [2020] Bus LR 1360):

> "whether the claimant was on notice of something which merited investigation, with the courts holding that in the absence of such a "trigger", the claimant could not be said to have failed to exercise reasonable diligence in its investigations."

ii) whether once there had been a notice or "trigger" the claimant exercised reasonable diligence in its enquiries.

139. It was submitted for the claimants that Mr Shulman discovered the fraud in mid-2013 and could not have discovered the fraud with reasonable diligence before that date. Further it was submitted that:

i) the test at this stage is only whether the claimants' case is reasonably arguable;

ii) the question of whether a claimant with reasonable diligence would have discovered the relevant concealment is a question of fact which is a matter for trial;

iii) the claimants had assurances that the Project was progressing and it was not until conversations in early 2013 that it became clear to Mr Shulman that this Project was never going to be progressed and in particular Mr Shulman's lawyer was told that there were five other investors who had taken interest in the land but there was no evidence or reassurance that they had provided any money for it.

140. It was submitted for the defendants that by early 2012 the "trigger" had occurred:

i) The first trigger was in 2011 when Mr Shulman discovered that Mr Ivanyushchenko had taken over the Market outside Odessa and that had been concealed from him and he was upset because Mr Ivanyushchenko had taken over the very thing which their joint project was designed to service.

ii) The second trigger was that by early 2012 it became clear that the Project was nowhere near completion and that Mr Shulman was getting information through his lawyer in effect that the Project was making no progress whatsoever.

iii) Mr Shulman knew the essential elements by March 2013 - he did not know other investors had been introduced without a capital contribution but this was not an essential element of the claim; he also did not know where the money went but this was also not essential to plead his claim.

141. It was submitted for the defendants that Mr Shulman did nothing and he could have found out that there had been no progress on the ground for 5 years.

142. The evidence of Mr Shulman in this regard is as follows:

> "[50] At that point, around autumn/winter 2011 I started becoming concerned about the progress the Project was making and whether my investment was still safe. I was worried that because Mr Ivanyushchenko had acquired the Market itself, he would have less time to dedicate to the Project. Besides, it certainly seemed to me that he had lost interest in pursuing it already.
>
> [51] I therefore started thinking about how I could protect the funds I had tied in the Project in the best way possible, i.e. by developing a hub on my own without Mr Ivanyushchenko's involvement, perhaps on a reduced scale, or exiting it altogether…
>
> [55] However, by early 2012, despite regularly chasing Messrs Ivanyushchenko and Avramov for updates, it started to become clear to me that the Project was nowhere near completion. Based on the information I was getting, and the information [my lawyer] was getting in Ukraine which he reported to me regularly, it appeared to me that I would not be getting my returns on the Project in the reasonably near future.

> [56] in the first quarter of 2012 I told Mr Ivanyushchenko that I wanted to exit the Project or at least get repaid the Project Loan… ”

143. Mr Shulman's evidence is that by the first quarter of 2012 he wanted "to exit the Project". The claimants rely in this regard that Mr Shulman's evidence (paragraph 61 and 62 of his witness statement) is that in early to mid-2013 he received assurances from D4 and D6 that the Project was moving "full steam ahead" but was suffering a "few setbacks and delays" and that his lawyer attended a presentation by the "project manager".

144. It is alleged in this case that Mr Ivanyushchenko and/or Mr Avramov had no genuine intention to use the money paid by Mr Shulman to advance and/or practically begin or complete the Project and/or the Joint Venture. Since May 2008, no practical progress has been made on the Project and the Land remains farmland on which no development has taken place. It is further alleged that Mr Ivanyushchenko and/or Mr Avramov did not use Mr Shulman's money to invest in the Project and/or the Land. The alleged fraud is that the land remains undeveloped and no development has taken place.

145. Whilst in my view the defendants have made strong arguments based on the current evidence in support of their case, I accept that the question of whether a claimant with reasonable diligence would have discovered the relevant concealment is a question of fact which cannot be resolved at this stage and must go to trial when all the evidence as to the surrounding circumstances will be before the court and can be explored in cross-examination.

<u>Declaration</u>

146. The declaration sought against all defendants (paragraph 75 of the POC) is that Dili owns 40% of the shares in Addison.

147. It was submitted for the defendants that there is no dispute that Dili currently owns 40% of Addison and therefore the declaration sought by the claimants serves "no useful purpose". It was submitted that the reasonable inference is that this claim was a "ruse" to try and bring in an English domiciled defendant.

148. The defendants submitted that the test is set out in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387 at [120] and *Financial Services Authority v Rourke* [2002] CP Rep 14 at p10-11. In *Rolls Royce* the principles (so far as relevant to this case) were said to be as follows:

> "For the purposes of the present case, I think that the principles in the cases can be summarised as follows.
>
> (1) The power of the court to grant declaratory relief is discretionary.
>
> (2) <u>There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them</u>. However, the claimant

> does not need to have a present cause of action against the defendant.
>
> (3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.
>
> (4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue;…" [emphasis added]

149. Even though the grant of a declaration is discretionary, in my view this is not a case which depends on the circumstances at trial (*Altimo Holdings v Kyrgyz Mobil Tel Ltd* at [125]-[126] [2011] UKPC 7 considered). In my view there is no serious issue that there is a real and present dispute as to the existence or extent of a legal right in this regard: it is the claimants' case (Ruff 1 at [12]) that pursuant to clause 3.3 of the Re-Sale Agreement default in performance relieved the parties of any future obligations and accordingly the failure to repay the Project Loan meant that Dili retained the 40% shareholding in Addison. The share register shows that Dili owns 40% and this entitlement has been accepted by the defendants and confirmed by counsel for the defendants in open court. I cannot see that a declaration would serve any purpose in these proceedings other than to provide an anchor defendant and that is not a purpose for which the court will grant a declaration.

Claims against D6

150. The evidence before the court is that D5 and D6 entered into a Partnership Agreement dated 15 March 2005 (the "Partnership Agreement").

151. The recitals record that D4 had been ill and that D4 and D6 have divorced. (The claimants challenge the truth of these statements). It then records that D4 and D5 having previously carried on a joint business have agreed that D4's share in the business should be transferred to D6. It also records that D5 has been the main business partner of D4.

152. As amended, the Partnership Agreement provided (clause 1) that:

> "The Parties have agreed to join efforts to conduct the Joint Business, including its foundation, management, monitoring and acquisition of income. The Joint Business includes, but is not limited to, the following companies:
>
> [Redacted]
>
> PRODUCTION INVESTMENT MANAGEMENT LTD (registration number 4842930)
>
> ADDISON ALLIANCE LIMITED (registration number 5350443)
>
> [Redacted]"

153. Clause 4 states:

> "[D6] authorizes [D5] to conduct the current Joint Business."

154. Clause 3 provides for each party to have a 50% share in the capital and clause 5 provides for the income from the Joint Business to be distributed equally.

155. It was submitted for the defendants that D6 was therefore a passive investor and there was no evidence to suggest she had any knowledge or provided any assistance. It was further submitted that the evidence of Mr Shulman and relied on in this regard, was only that D6 was present at social events when the conversations between Mr Shulman and D4 took place. At paragraph 27-29 of his witness statement Mr Shulman's evidence is:

> "27. During 2009 and 2010, Mr Shulman, Mr Ivanyushchenko and Ms Ivanyushchenko continued to be friends. When they saw each other and communicated by telephone. Mr Shulman repeatedly asked Mr Ivanyushchenko about the status of the Project.
>
> 28. Mr Ivanyushchenko responded that the Project was progressing (though not as rapidly as had been originally envisaged), that he was fully involved in taking it forward, and that he had been using the money invested by Mr Shulman to develop the Project.
>
> 29. <u>Ms Ivanyushchenko was present at social events when these conversations took place and condoned those statements by her conduct and/or did not indicate that she disagreed with her husband's assessment of the Project's status</u>." [emphasis added]

156. The pleaded case against her is as follows: as to dishonest assistance (paragraph 65):

> "Mr Avramov <u>and/or Ms Ivanyushchenko</u> and/or PIML (acting through its agents and/or representatives including Mr Avramov and Ms Ivanyushchenko) <u>assisted Mr Ivanyushchenko in his breaches of the fiduciary duties</u> set out at paragraphs 53 and 64 above. Without prejudice to the generality of the foregoing (and subject to disclosure in this case):
>
> a. Mr Avramov made the Representations set out at paragraph 53 above to Mr Shulman and/or Dili, on his own behalf or as agent or representative of Mr Ivanyushchenko.
>
> b. <u>Ms Ivanyushchenko was present when many of the said Representations were made and impliedly and/or by conduct condoned those representations and/or did not correct those misrepresentations.</u>

> c. PIML received the US$ 21,800,000 paid by Mr Shulman/Dili, of which Mr Avramov and Ms Ivanyushchenko became indirect shareholders.
>
> d. Mr Avramov and Ms Ivanyushchenko concealed the facts and matters set out above, their knowledge that Mr Shulman's money had not been used for the purposes of the Project, and/or that the Project / Joint Venture was not being developed.
>
> e. By 10 July 2018 Mr Avramov and Ms Ivanyushchenko each indirectly owned between 25% and 50% of Addison's shareholding and so have significant and/or outright control of Addison.
>
> f. PIML received the US$21,800,000 paid by Mr Shulman/Dili (of which US$10,900,063 remains unreturned) and Mr Avramov and Ms Ivanyushchenko became indirect shareholders in PIML through Pallace and Rollexa, respectively" [emphasis added]

157. As to the case on knowing receipt:

> "67. Further or alternatively, the circumstances set out at paragraphs 57 to 66 above would or should have indicated to Mr Avramov and/or Ms Ivanyushchenko and/or PIML (acting through its agents and/or representatives including Mr Avramov and Ms Ivanyushchenko) that any sums paid by Mr Shulman through Dili to PIML and/or received by Mr Avramov and/or Ms Ivanyushchenko (and/or companies owned or controlled by them) and/or any traceable proceeds of the same were transferred in breach of fiduciary duty such that it would be unconscionable to retain their benefit. Paragraphs 65(e)-(f) above are repeated." [emphasis added]

158. As to the case on conspiracy

> "68. Between February 2008 to date Mr Ivanyushchenko, PIML (through its agents and or representatives, including Mr Ivanyushchenko and Mr Avramov), Mr Avramov and Ms Ivanyushchenko wrongfully and with intent to injure Mr Shulman and/or Dili by unlawful means conspired and combined together to defraud Mr Shulman and/or Dili and to conceal such fraud and the proceeds of such fraud from Mr Shulman and/or Dili. Paragraphs 65(e) and (f) above are repeated." [emphasis added]

159. The evidence in Mr Shulman's witness statement (paragraphs 41 and 42) is as follows:

> "In 2009 and 2010, nothing much changed. We continued our friendly relationship and meeting and having telephone calls on

> a regular basis. I was interested to know about how the project was progressing, and asked Mr Ivanyushchenko about it pretty much every time we met. Mr Ivanyushchenko was happy to tell me that the Project was moving forwards, albeit not as quickly as he had originally hoped. From these updates, I understood that he was "on top" of the Project and that he had been using the money I paid to progress the Project.
>
> 42.His wife, Ms Iryna Ivanyushchenko, was often present when we had these discussions. Mr Ivanyushchenko had previously told me that he was going to make her a shareholder in the project company. I do not remember her saying much about the Project, however she never disagreed with anything he said about it."

160. In his second statement at paragraph 48:

> "I am surprised that Mr Bercow is saying that Mr Ivanyushchenko transferred his interest in Addison, the Project company, in 2005 to Ms Ivanyushchenko. As explained at paragraph 21 of my first witness statement, Mr Ivanyushchenko told me in 2008/2009 that he was going to make his wife a shareholder in the Project company (which would have made no sense had that company already been transferred in 2005) and, as explained above in paragraphs 30 et seq., he never suggested that any transfer of assets to her would take part of any 'separation' or 'divorce'. He certainly never suggested or said that the intention of making his wife a shareholder meant that he would have no interest whatsoever in the Project company or the Project as a whole. On the contrary, it was clear to me that he simply meant that he would find it advantageous for certain of his assets to be held in the name of his wife. I do not know whether or not Mr Ivanyushchenko intended Ms Ivanyushchenko to have a beneficial interest in the Project, as that was a matter for them. He was the person who negotiated the joint venture with me and structured the Project in 2008, and he was the one who kept me updated about it. <u>However, as I explain above, Ms Ivanyushchenko was fully aware of our agreement to jointly develop the Project with her husband because we discussed that in front of her. She never asked me or him to explain what the Project was. She therefore definitely knew about the Project, and at least some of the detail of what it entailed."</u> [emphasis added]

161. The court on an interlocutory hearing such as this cannot determine whether the Partnership Agreement was genuine. However, on its face, it is evidence that it is D5 who was authorised to conduct the joint business. If it is not genuine that would suggest that control of the business remained with D4 and D6 was not involved other than as a shareholder. The only evidence advanced against D6 in the two witness

statements of Mr Shulman is to the effect that she was present and the Project was discussed in front of her and she was an indirect shareholder in PIML and Addison.

162. The claimants rely on *Madoff v Raven* [2013] EWHC 3147 (Comm) at [351]. It was submitted for the defendants that the paragraph relied upon shows that the claimants have to show that D6 knew or suspected that the transaction is such that her participation was dishonest.

163. The relevant passage in *Madoff* states:

> "But in any event I feel unable to accept the submission as legally sound. In my judgment it fallaciously treats the ingredient of assistance as having to encompass the mental element which renders the conduct of the fiduciary a breach of trust or fiduciary duty; whereas what is required, or at least is sufficient, for the ingredient of assistance, is simply conduct which in fact assists the fiduciary to commit the act which constitutes the breach of trust or fiduciary duty. A dishonest participant in a transaction takes the risk that it turns out to be a breach of trust or fiduciary duty. <u>It is not necessary for the assistant to know, or even suspect, that the transaction is a breach of trust, or the facts which make it a breach of trust, or even what a trust means; it is sufficient if he knows or suspects that the transaction is such as to render his participation dishonest</u>: Agip (Africa) Ltd v Jackson [1990] Ch 265, per Millett J at 294, Barlow Clowes International Ltd v Eurotrust International Ltd [2006] 1 WLR 1477 per Lord Hoffmann at [28]; Abou-Rahmah v Abacha [2007] 1 All ER Comm 827 per Rix LJ at [39]. So accessory liability on the part of a dishonest assistant requires no more from his point of view <u>than the actus reus of assisting by participation in the transaction, and the mens rea of dishonesty</u>. It is not necessary that the assistance should play any part in the mental state of the fiduciary, still less that it should assist the mental state of the fiduciary in a way which is necessary to render the fiduciary's act a breach of trust or fiduciary duty." [emphasis added]

164. It was submitted for the defendants that the pleaded facts relied on by the claimants (allowing the misrepresentations and condoning the misrepresentations by her conduct) does not establish that she knew they were false and is insufficient to show knowing assistance: *Brinks v Abu-Saleh* 1996] C.L.C. 133.

165. As to receipt of funds, it was submitted for the defendants that they are not obliged to give disclosure at this stage but have provided documentary evidence showing that the money went to Addison and then to the Ukrainian companies.

166. It was also submitted for the claimants that there was a serious issue to be tried as to whether PIML was acting as nominee or agent for D5 or D6. In response the defendants submitted that this is entirely unpleaded and that if anyone was acting as a

nominee it would be as a nominee for D4: the evidence relied upon by the claimants is Mr Shulman's statement at paragraph 12:

> "I assumed that his interests were held through his wife or other nominees, through corporate entities, which he later confirmed in the context of our subsequent business discussions…"

I accept the defendants' submissions.

167. Finally the claimants rely on the *CMS Dolphin* principle but again this was unpleaded and I do not therefore propose to deal with it.

Conclusion on claims against D6

168. In my view the claimants have not shown a serious issue to be tried in relation to the pleaded claims against D6: the evidence that she was aware of the Project and was present when discussions took place in a social context is not sufficient to establish that there is a serious issue to be tried that she had the relevant degree of knowledge or intent.

169. Even if D6 participated in the alleged transaction by receiving profits indirectly through her shareholdings in PIML and Addison, in order to establish a realistic case in dishonest assistance it is not enough to show that D6 was a participant. In my view the claimants have not shown that there is a serious issue to be tried that D6 had the requisite mens rea of dishonesty.

170. For these reasons, I find that the claimants have not shown a serious issue to be tried in dishonest assistance, knowing receipt or conspiracy on the part of D6.

Implied terms

171. The alleged implied term (at 52 of the POC) is as follows:

> "Pursuant to the Joint Venture Agreement, Mr Ivanyushchenko owed Mr Shulman the following implied contractual obligations:
>
> "To repay the sums paid by Dili to PIML within a reasonable time of it becoming clear that the Project could or would not be completed and/or advanced and/or begun.
>
> To pay interest on the above sums at a commercial rate."

172. It was submitted for the claimants that such an implied term is necessary as a matter of business efficacy and it is obvious. The evidence of Mr Shulman was that the parties proceeded on the basis that the remaining US$10.9million was to be repaid. It was further submitted that the state of knowledge of the parties is important to the implication of terms in fact and thus it is a matter for trial.

173. For the defendants it was submitted that the alleged implied term was implausible as it involved Mr Shulman taking no risk in the joint venture. On the one hand it was

pleaded that the remaining US$10.9 million is "seed capital" but then Mr Shulman claims he is entitled to repayment with interest as soon as the Project is not advancing.

174. Further it was submitted for the defendants that whether the implied term existed has to be determined at the date of the alleged contract and the claimants cannot therefore rely on later representations that D4 would pay the US$10.9 million to buttress the alleged implied term.

175. It was submitted for the claimants that there was nothing "surprising" about an implied term that the money should be repaid if the Project was not begun or advanced or would not be completed. However I note on the authorities that it is not sufficient that it may be reasonable to imply a term; the test is whether it is necessary to give the contract business efficacy or is so obvious that it "goes without saying": *Wells v Devani* [2020] AC 129 at [28]. A term will not be implied merely because it appears fair or because one considers that the parties would have agreed it if it had been suggested to them: *Marks & Spencer v BNP Paribas* [2016] AC 742 at [21]. The claimants have not suggested that there is any evidence which it is reasonable to assume will be available at trial that will show that such a term is necessary to give the contract business efficacy or so obvious that it goes without saying.

176. In my view the claimants have not shown a realistic prospect of success that such a term would be implied and there is no serious issue to be tried in respect of this claim.

PIML: Attribution

177. It was conceded in oral submissions for the defendants that there could be a serious issue to be tried for the pre-2008 period in respect of the case that PIML's receipt of the money in 2008 was in knowledge (attributed) of a pre-existing breach of fiduciary duty by D4.

178. However it was submitted for the defendants that this does not apply post 2008 as post 2008 PIML was not receiving money: the Re-Sale Agreement did not involve the receipt of assets by PIML or breach of fiduciary duty. Although it was submitted for the claimants that there was no "logic" in attribution stopping in 2008, counsel for the claimants did not address how on the facts of the alleged events, claims could arise in relation to PIML after 2008. Accordingly it seems to me that the claimants have not shown a realistic case against PIML in respect of the claims post 2008 and such claims would not survive a strike out.

Jurisdictional grounds/gateways

179. The relevant test for these purposes is the "good arguable case" test as discussed above by reference to the authorities. Taking the grounds relied upon by the claimants in the light of the findings above, my findings are as set out below.

Gateway 6 (c) and (d)

180. Paragraph 6 provides (so far as relevant):

> "(6) A claim is made in respect of a contract where the contract
> –

> (a) …
>
> (c) is governed by English law; or
>
> (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract."

181. As set out above, I have concluded that the claimants have not shown a good arguable case that there was an oral agreement in respect of the Project Claims to the effect that the English courts would have jurisdiction and would be governed by English law.

182. It was also submitted for the claimants that the Project Claims were brought "in respect of" the Sale and Re-Sale Agreements and thus within Ground 6.

183. It was submitted for the defendants that the gateway cannot be used by reference to the Sale and Re-Sale agreements as none of D4, D5 or D6 was a party to these agreements: Tomlinson LJ in *Alliance v Aquanta* [2013] 1 All ER (Comm) 819 at [71]:

> "[71] Notwithstanding the width of the language used by Longmore LJ in the Greene Wood & McLean case, plainly that case does not compel us to decide that connection of a claim with a contract to which an intended defendant is not party is a qualifying jurisdictional link under gateway (6). That point was left open. <u>I am for my part attracted by the argument that a claim is not for that purpose properly described as 'made in respect of a contract' where the contract in question is not one to which the defendant is party. For my part I see great force in the argument that it is implicit in the rule that the contract upon which reliance is placed must be one to which the intended defendant is party.</u> I am also attracted by Mr Morgan's formulation which I would tentatively restate as follows: unless the claimant is suing in order to assert a contractual right or a right which has arisen as a result of the non-performance of a contract, his claim is not in this context properly to be regarded as one made in respect of a contract. I think it likely that ordinarily such claims can only be made in respect of contracts to which the intended defendant is party. However the case of the intended defendant, Warner, considered by Hamblen J in Cecil v Bayat may show that that will not always be so. It is sufficient to dispose of the point in this case to indicate that the required connection between claim and contract must inevitably be the more difficult to establish in a case where the intended defendant is not party to the contract upon which reliance is placed than in a case where he is party to it. Longmore LJ was able to say in the Greene Wood & McLean case [2009] 1 WLR 2013 that the claim for contribution clearly had a connection with the Templeton contract which established the liability of Templeton to the miners, because that (contractual) liability was a prerequisite to Greene Wood claiming contribution from Templeton. Here there is in my

> judgment no clear connection, or no connection with any real content, between the claims in tort or delict against Ds 6-9 and the Reachcom loan agreements. Those agreements may be an incidental product of the conspiracy but it puts the cart before the horse to describe the claim in respect of the conspiracy as a claim in respect of the contracts to which it may, incidentally, have given rise. It would be more natural, but still in my judgment artificial, to regard the claim as made in respect of the contracts of guarantee between Alliance and Reachcom rather than the loan agreements between Reachcom and Ds 3 and 4, since it was by the former that Alliance was deprived of its money. Similarly, I consider that the claims in unjust enrichment against the wrongdoers who allegedly participated in the scheme to divert Alliance's assets and the equitable claims for dishonest assistance and knowing receipt arising from the breach of fiduciary duty that arguably occurred when the contracts of guarantee were executed have a closer affinity to those contracts than to the contracts of loan. In these cases too however the necessary connection between the claim and the contracts is in my view lacking. In none of these formulations is Alliance suing Ds 6-9 in order to assert a contractual right or a right which has arisen as a result of the non-performance of a contract."

184. It was further submitted for the defendants that these agreements are not alleged to have been breached. The claim against D4 is for return of his investment but this is under the Oral JVA not the Re-Sale Agreement.

185. In my view the Project Claims arise out of the investment which on the claimants' case arose out of the oral discussions and alleged Oral JVA. The sale of the shares in Addison was part of the structure for the making of the investment but it cannot be said that the Project Claims are brought "in respect of" the Sale and Re-Sale Agreements. The shares in Addison were transferred by PIML to Dili and no claim is brought in that regard for non-performance of the Sale Agreement or the Re-Sale Agreement. The only claim is for the declaration as to which I have found there is no realistic claim. As expressed by Tomlinson LJ, the Sale and Re-Sale Agreements may be "an incidental product" of the Project Claims but "it puts the cart before the horse" to describe the Project Claims as a claim in respect of the contracts to which it may, incidentally, have given rise.

186. Accordingly the claimants have not shown a good arguable case that the Project Claims fall within Gateway 6.

<u>Gateway 3</u>

187. Gateway 3 is where:

> "(3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –

> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

188. The claimants rely upon this gateway in two respects:

i) Claims are made against PIML, Impool and Addison for a declaration and it is submitted for the claimants that D4, D5 and D6 are necessary and proper parties to those claims;

ii) Claims are made against PIML for misrepresentation, unlawful means conspiracy, dishonest assistance and knowing receipt and it is submitted that D4, D5 and D6 are necessary and proper parties to those claims, in particular as members of the alleged conspiracy.

189. It was submitted for the claimants that the test of whether a person is "a necessary or proper party" is whether they would be joined to the same action if they were both in the jurisdiction.

190. Although PIML, Impool and Addison are all English companies (and subject to the jurisdiction of the English courts by virtue of Article 4 of Brussels Recast), in light of the finding in respect of the declaration above, the claimants have not shown that there is a real issue in respect of the declaration claim which it is reasonable for the court to try.

191. In relation to the (non-contractual) claims against D4, D5 (and if I were wrong on the merits, D6), in the light of my findings above, the claimants have not shown a good arguable case that gateway 3 is satisfied because:

i) although there is a real issue for the court to try in respect of the claims against PIML (other than the post 2008 claims) and there is a real issue as to whether such claims are time barred under section 32;

ii) the claims against D4, D5 (and if I were wrong on the merits of claim in relation to D6) are governed by Ukrainian and/or Monegasque law and those claims are time-barred.

<u>Gateway 11</u>

192. This ground applies where the subject matter of the claim relates wholly or principally to property within the jurisdiction. (It was not relied upon by the claimants in relation to the Personal Loan Claim or the Aircraft Claim).

193. The claimants assert (third witness statement of Ms Ruff at paragraph 105) that it is clear from the Particulars of Claim that the breaches of non-contractual duties alleged relate to the shares in Addison and Ms Ruff refers to paragraphs 40 and 46 of the Particulars of Claim that Mr Shulman agreed to "remain a shareholder in Addison the project holding company" which he expected to increase in value and that he believed that "his investment in the Addison shares was safe".

194. It was submitted for the defendants that none of the claims (other than the claim for a declaration) is concerned with a claim relating to the shares in Addison. It is a claim about money fraudulently obtained from Mr Shulman and fraudulently diverted.

195. The essence of the Project Claims can be seen in the "Particulars of Fraud" at paragraph 61 of the Particulars of Claim. The complaint is that the Project remained undeveloped and the money was neither spent on the Project nor returned. It is alleged that there is no suggestion that any capital was injected into Addison. In the particulars of the alleged breaches of implied contractual and fiduciary duties it is alleged that D4 procured the investment without any genuine intention to complete and/or advance the Project and without any genuine intention to use Addison as a holding company for the Project.

196. In my view Addison is part of the structure which it is alleged formed part of the fraud and/or conspiracy but it is not a claim for damages for breach of the Sale or Re-Sale Agreement and in relation to the alleged Oral JVA, any breach insofar as it relates to property, relates to the land in Ukraine not the shares in Addison.

197. For these reasons I find that the claimants have not shown a good arguable case that the claims relate wholly or principally to property within the jurisdiction.

<u>Gateway 15</u>

198. This gateway applies where:

> "a claim is made against the defendant as constructive trustee, or as trustee of a resulting trust, where the claim arises out of acts committed or events occurring within the jurisdiction or relates to assets within the jurisdiction."

199. It was submitted for the defendants that it was accepted by the claimants that there were no acts committed in England and that any claim in knowing receipt relates to the money allegedly diverted from Mr Shulman which is not the shares in Addison.

200. This was not pursued orally for the claimants and in my view the claimants have not shown a good arguable case under this ground.

<u>Gateway 16 (c)</u>

> "(16) A claim is made for restitution where –
>
> (a) the defendant's alleged liability arises out of acts committed within the jurisdiction; or
>
> (b) the enrichment is obtained within the jurisdiction; or
>
> (c) the claim is governed by the law of England and Wales."

201. It was submitted for the defendants that the non-contractual claims are concerned with misrepresentation, dishonest assistance, knowing receipt and conspiracy and that none of these form part of the English law of restitution. Further it was submitted that this gateway is only available to the extent that the claims are governed by English law.

202. In light of my findings above in relation to the oral jurisdiction and governing law agreement, I find that the claimants have not established a good arguable case on this ground.

Gateway 4A

203. Gateway 4A is where:

> "A claim is made against the defendant in reliance on one or more of paragraphs (2), (6) to (16), (19) or (21) and a further claim is made against the same defendant which arises out of the same or closely connected facts."

204. Given my findings above this does not arise. In particular, since the claimants have not shown a good arguable case that the claims against D4 are within Gateway 6 they cannot bring the claims within Gateway 4A on this basis.

Is England the proper place in which to bring the claims?

205. In the light of my findings above I will take this shortly.

206. The test is whether the English courts are the "proper place" for the claims to be brought. (This condition does not apply to the Aircraft Claim and the Personal Loan Claim but in the light of my findings this does not assist the claimants). The court is looking for "a single jurisdiction in which the claims against all the defendants may most suitably be tried for the interests of all the parties and for the ends of justice": *Vedanta v Lungowe* [2019] UKSC 20 at [68]. The burden is on the claimants.

207. The claimants identified the following factors:

i) The existence of English jurisdiction clauses in the Sale and Re-Sale agreements;

ii) The jurisdiction over PIML, an English Company, pursuant to Article 4 of Brussels Recast;

iii) The jurisdiction over the declarations against PIML, Impool and Addison;

iv) The documents relevant to the claims are largely in English, the only party domiciled in Ukraine is D5 and Mr Shulman is not fluent in Ukrainian;

v) If the claim is time-barred in the foreign jurisdiction and the claimants acted reasonably in commencing proceedings in England and did not act unreasonably in not commencing proceedings in the foreign country, it may not be just to deprive the claimants of the benefit in English proceedings.

208. Alternatively it was submitted for the claimants that England is the proper place to bring the claims because the proceedings before the Ukrainian courts would "fall below the minimum acceptable standards of doing what justice would require": *Dicey* at [12–040]–[12–041].

209. It was common ground that any allegation of a "real risk of injustice" requires clear and cogent evidence. In this regard the court had reports from Mr Lough instructed by the claimants and Mr D'Anieri instructed by the defendants.

210. It was submitted for the claimants that there is a real risk of injustice by reason of:

i) the fact that D4 and D5 have resisted legal challenges to their takeover of the Market;

ii) the real risk that Mr Kolomoisky, an influential figure in Ukraine with significant media interests, would interfere with any litigation brought in the Ukraine either directly through corruption and/or lack of independence of the judiciary or indirectly through the use of "black propaganda";

iii) Mr Shulman's evidence that he is already facing "trumped up" charges of money laundering in Ukraine by virtue of Mr Kolomoisky's influence.

It was submitted for the claimants that, unlike the position in *Pacific International v Surkis* [2010] EWCA Civ 753 where the threshold of cogency had not been reached, in this case there are distinct allegations supported by positive and cogent evidence and the case has close connections with England.

211. In my view, looking at the connecting factors between the claims and the various jurisdictions:

i) the matters of practical convenience such as the residence of the parties and the availability of a common language to minimise the need for translation would not point to the English courts. It would appear that the parties would need translators if they were to give evidence in the English courts. The principals would appear to speak Ukrainian to a greater or lesser degree.

ii) such practical considerations are not conclusive. Other factors however also point away from the courts of England: the wrongful acts are alleged to have occurred outside England other than the purchase of the shares in Addison, an English company. The place where the harm in substance occurred is Ukraine where the Land which is the subject matter of the alleged fraud and other wrongdoing is located.

iii) the system of law is also relevant. In the light of my findings above on the alleged oral jurisdiction and governing law agreements this does not point to the English courts. As noted above although the Sale and Re-Sale Agreements are governed by English law there is no claim for breach of those agreements. The court has rejected the claims for a declaration on which the jurisdiction against Impool and Addison is founded.

iv) the court has to consider the fact that PIML as an English company will be sued in England. However given the nature of the claims against the various defendants and the role alleged to have been played by PIML, I think it is unlikely that in practice the claimants would in any event continue their claim against PIML and thus the risk of irreconcilable judgements arising from separate proceedings in different jurisdictions in this case is in my view low and in any event this factor is not decisive.

212. As to whether the claimants did not act unreasonably in not commencing Proceedings elsewhere, there is no evidence as to why proceedings were not brought earlier in Ukraine (or Monaco): the evidence from Mr Shulman on the alleged "currently politically motivated attacks" date on his own evidence from early 2019 so do not explain why proceedings could not have been issued within the relevant limitation periods in Ukraine and/or Monaco. The claimants have not shown therefore that this factor weighs in their favour.

213. As to the risk of substantial injustice in Ukraine, having considered the reports of Mr Lough for the claimants and Mr D'Anieri for the defendants, in my view the threshold of clear and cogent evidence has not been reached:

i) In relation to the alleged influence of D4 in Ukraine it seems clear that he was closely associated with the old regime which changed in 2014 with a new president. Under the new regime D4 was subjected to sanctions (albeit that these have now been lifted following litigation) which tends to reinforce the inference that any influence D4 had under the old regime is no longer maintained.

ii) As to the second matter relied upon by the claimants, the influence of Mr Kolomoisky is not in my view made out to the required standard having regard to the evidence in the expert reports and in particular I note that Mr Kolomoisky has not succeeded in respect of the takeover of Privatbank.

214. Further for the reasons discussed earlier in the judgment I reject the submission that this case has "close connections" with England.

215. Accordingly in my view the claimants have not shown that the English courts are the proper place for the claimants' claims to be brought within the meaning of CPR 6.37 (3).

<u>Conclusion</u>

216. For the reasons set out above, the Applications to set aside the Service Order succeed.