Neutral Citation Number: [2020] EWHC 1381 (QB)

Case No: QB-2019-000187

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/06/2020

Before :

MASTER COOK

- -

Between :

(1) JEFFERIES INTERNATIONAL LIMITED	**Claimants**
(2) JEFFERIES HONG KONG LIMITED	
(3) JEFFERIES LLC	
- and -	
(1) CANTOR FITZGERALD & CO	**Defendants**
(2) CANTOR FITZGERALD EUROPE	
(3) CANTOR FITZGERALD (HONG KONG) CAPITAL MARKETS LIMITED	
(4) CARLOS GUSTAVO CANDIL GARCIA	
(5) AFONSO SALEMA	
(6) JORDEN LACEY	

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Daniel Oudkerk QC and **James Sheehan** (instructed by **Herbert Smith Freehills LLP**) for the **Claimants**
Andrew Stafford QC (instructed by **Kobre & Kim (UK) LLP**) for the **First to Third Defendants**
Diya Sen Gupta QC (instructed by **Doyle Clayton**) for the **Fourth to Sixth Defendants**

Hearing date: 28 April 2020

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Approved Judgment

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

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Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down are deemed to be 10:30 am on 2 June 2020.

MASTER COOK:

1. This is the hearing of applications made by the First to Third Defendants and the Fourth to Sixth Defendants issued on 19 and 21 February 2019 respectively to challenge the jurisdiction of the court to hear this action, alternatively to stay the action on case management grounds.

2. The First to Third Claimants [together Jefferies] and the First to Third Defendants [together Cantor] carry on business in the financial services industry internationally, including investment banking and capital markets business and in particular in the international power and renewables sector. The First Defendant is a general partnership organised under the laws of New York. The Second Defendant is an unlimited company registered in England and regulated by the Financial Conduct Authority. The Third Defendant is a limited liability company incorporated in Hong Kong.

3. The Fourth to Sixth Defendants are former employees of Jefferies who resigned and took up employment with Cantor in circumstances which give rise to this action and are each domiciled in the jurisdiction of this court.

4. This action arises out of what has become known as a team move. Jefferies' case is that on 20 November 2017 twenty-six of its employees each resigned in materially identical terms, almost all of the resignations took place at 11.00 am London time notwithstanding that this was outside the normal working hours of those who worked in New York and Hong Kong, each of the employees in each jurisdiction instructed the same solicitors and each now works for Cantor.

5. Jefferies asserts that Cantor has directed each of the twenty-six employees to refuse to honour repayment obligations in respect of certain "Replacement Awards" and "Bonuses" which were triggered by their resignations and subsequent employment by Cantor.

6. It is Jefferies' case that the resignations and subsequent non-payment of monies due to it were directed and co-ordinated by Cantor. In particular Jefferies relies upon the following matters:

    i) Shortly before the *en masse* resignations the head of Jefferies' power and renewables group, Mr Chandra (who also resigned), had arranged for a London based employee, Ms Beament, to collect the mobile telephone numbers of employees and asked that they be available to speak to him on Sunday 19 November 2017 (i.e. the day before the resignations).

    ii) Mr Chandra had also met with the Sixth Defendant (again English domiciled) together with Ms Beament at the Pepys pub in London on 13 November 2017, see paragraph 15.7(a) particulars of claim.

iii) The sixth defendant appears to have been centrally involved in the co-ordination, providing details of the repayment structure for Jefferies' associate bonus scheme (i.e. the repayment obligations forming the subject matter of this dispute). These details were emailed from London to Mr Chandra head the of power and renewables group on 14 November 2017 and Jefferies infers they were passed to Cantor, see paragraph 15.7(b) particulars of claim.

7. On 17 January 2019 Jefferies sought and obtained an order from Master Thornett granting permission to serve the claim form, particulars of claim and any other document in the proceedings on the First Defendant in New York and on the Third Defendant in Hong Kong. The application was supported by the first witness statement of Jonathan Ions dated 11 December 2018. Mr Ions' statement set out the grounds on which Master Thornett relied to make his order. The grounds were that Jefferies believed it had a good arguable case that the claims against the First and Third Defendants fell within the jurisdictional gateways in CPR 6B PD para. 3.1(3) and (9)(a).

8. As for CPR 6B PD para 3.1(3) Jefferies asserted the First and Third Defendants were necessary and proper parties to the claims against the Second and Fourth to Sixth Defendants which fall to be tried in this jurisdiction in any event. In his witness statement Mr Ions put the matter in the following way:

> "Jefferies' proposed claims against the First and Third Defendants are very closely bound up together. They arise on the same facts and involve the same issues, and the determination of these claims will depend on one investigation. The Court will need to investigate the circumstances in which the Employees have refused to make repayment to Jefferies, the context of the Team Move, and the truth or falsity of any explanation given by Cantor as to its involvement in those matters. As I indicated above, Jefferies' case is that Cantor and its executives made a concerted global *effort* to ensure that the Employees did not repay the amounts due to Jefferies in respect of the Bonuses. Moreover, and pending disclosure, it is likely that officers of Cantor who were involved in perpetrating this wrongdoing (including in respect of the Fourth to Sixth Defendants, but also the other Employees) will have been employed by or acting as agents of the First and/or Third Defendants as well as the Second Defendant. For example, Jefferies believes that Sage Kelly, Anshu Jain and Howard Lutnick are each likely to be employed by and/or agents of the First Defendant, and further to have been acting as agents of the Third Defendant at least when recruiting Employees in Hong Kong and inducing those Employees not to make repayments, as well as agents of the Second Defendant in respect of employees in England. In addition, certain of the indemnities granted to the Employees are likely to have been from the First and/or Third Defendants."

9. As for CPR 6B PD para. 9(a) Jefferies asserted that as a consequence of Cantor's tortious acts it had suffered damage within the jurisdiction. In his witness statement Mr Ions put the matter as follows:

> "As a consequence of Cantor's alleged tortious acts, as set out at paragraph 26 of the Particulars of Claim, Jefferies has sustained damage within the jurisdiction. In particular: (a) the First Claimant has been deprived of sums which would otherwise have been repaid in this jurisdiction by those Employees who owe repayment obligations to the First Claimant (i.e. each of the Fourth to Sixth Defendants), (b) the First Claimant has also sustained damage here, by way of wasted management time in that the time of its employees and officers in the jurisdiction has been substantially diverted in addressing the consequences of Cantor's unlawful conduct, and (c) the First Claimant has expended costs and expenses here in enforcing Jefferies' rights under the repayment agreements. As I indicated above, pending disclosure Jefferies' case is necessarily inferential and it infers that each of the First to Third Defendants has caused the losses suffered by Jefferies in England."

10. For the purpose of CPR 6.37(3) Jefferies asserted that England was the proper place to bring the claim. In his witness statement Mr Ions put forward the following matters in support:

> "(1) The First Claimant and the Second Defendant are domiciled in England. The Fourth to Sixth Defendants are also domiciled in England.
>
> (2) Jefferies' claims against the Second and Fourth to Sixth Defendants will already be tried here, as I have described above. The English Court has jurisdiction over them as of right (by virtue of Article 2 of the Brussels I Regulation Recast). There is no scope for any stay of these proceedings, as *forum non conveniens* does not apply to Article 2 jurisdiction *(Owusu v Jackson* C-28/102 [2005] 1 QB 801). Therefore, unless the Court hears the claim against all the Cantor Defendants together, there is every prospect of a multiplicity of proceedings against Cantor in relation to the same facts and issues and also a risk of irreconcilable judgments.
>
> (3) In addition, a further Employee (Ranulf Couldrey) has repayment obligations under a contract with the First Claimant which is English law governed and is subject to the jurisdiction of the English courts (pages 204 to 206).
>
> (4) A number of witnesses are located in England (e.g. relevant employees of the First Claimant who will address, amongst other things, the conduct of the Employees employed by the First Claimant, the amounts owed by the relevant Employees to

> the First Claimant and the steps taken by the First Claimant to recover the sums owed, as well as each of the Fourth to Sixth Defendants). Further, a significant proportion of the relevant documents are already present in this jurisdiction, including documents held by the First Claimant and by the Fourth to Sixth Defendants.
>
> (5) Loss and damage has been, or will be, suffered in this jurisdiction, as I explained above.
>
> (6) It is in the interests of efficient administration and justice to have the claims against the First and Third Defendants tried and determined together in one forum with the claims against the Second and Fourth to Sixth Defendants. The nature of Jefferies' claims against each Defendant (and the evidence for such claims) is necessarily interwoven, making it highly desirable that there be a single investigation of the facts and cross-examination of all the relevant witnesses. This would also avoid the risk of inconsistent findings on overlapping or underlying issues, so far as Cantor's conduct is concerned. If Jefferies were not permitted to serve proceedings on the First and Third Defendants outside the jurisdiction, it would be required to issue separate proceedings for inducement of breach of contract against the First Defendant in the USA and the Third Defendant in Hong Kong, with inevitable and wholly undesirable duplication of time and cost (which would be extremely expensive) and a risk of inconsistent and irreconcilable judgments in different jurisdictions on the same underlying issues as to what Cantor did and when, and whether it had the necessary knowledge and intention. I respectfully suggest that this is contrary to a developed system of conflict of laws."

11. As he was required to do, in the context of a without notice application, Mr Ions' witness statement drew the Court's attention to three possible arguments the Defendants might wish to deploy in the following way:

> "32. First, the Defendants are likely to deny liability in all respects. In respect of the Team Move, Cantor has already made this clear in correspondence. In particular, I refer to paragraphs 13, 28 and 29 of Cantor's letter to HSF dated 26 January 2018 (at pages 63A to 63F). Some of the Employees have asserted moreover that their repayment obligations are unenforceable. I refer to a letter from Herrick Feinstein LLP to the Third Claimant dated 14 August 2018, a copy of which is at pages 63G to 63H. Some of the employees have also asserted that they have not engaged in "Competitive Activity" in any relevant period. Again, this argument is raised in Herrick Feinstein LLP's letter dated 14 August 2018. It is likely therefore that Cantor will say that there has been no breach of contract by the Employees and no inducement of such breach

by Cantor. It is possible that the First and Third Defendants would wish to assert, therefore, that there is no serious issue between them and Jefferies and, in any event, no real issue that it is appropriate for the Court to try as between Jefferies and the Second and Fourth to Sixth Defendants. If Cantor did take that position, it would not be realistic. Jefferies believes that the relevant repayment agreements are enforceable in their entirety, and that their provisions are plainly engaged (whether as to resignation, or "Competitive Activity"). So far as English law is concerned, such agreements have been enforced by the Court, including in litigation involving a group company of Cantor. I refer for example to *Tullett Prebon plc v BGC Brokers LP* [2010] EWHC 484 (QB) and *JLT Specialty Ltd v Craven* [2018] EWCA Civ 2487. Moreover, for the reasons set out above and in the Particulars of Claim, Jefferies believes that there is a strong inferential case of tortious wrongdoing against Cantor."

33. Secondly, the First and Third Defendants may wish to argue that part of the damage sustained by Jefferies was sustained in the USA or Hong Kong, in that some of the sums to be repaid were due to be repaid in the USA and Hong Kong. However, as I explained in paragraph 25 above, the First Claimant has sustained damage in England as a result of Cantor's conduct.

34 Thirdly, the First and Third Defendants may wish to assert that the USA or Hong Kong, rather than England, is the most appropriate forum for the claims against them, or that they are not necessary or proper parties to the claim against the Second and Fourth to Sixth Defendants. For example, it is possible that they will assert that relevant witnesses and documents are outside the jurisdiction, or that some part of the contractual and tortious claims are subject to New York or Hong Kong law, and that some of the relevant repayment agreements contain non-exclusive FINRA arbitration provisions. Further, Jefferies intends to commence proceedings in the USA and Hong Kong against the Employees listed in Schedule 2 to the Particulars of Claim who are domiciled in those jurisdictions. It is possible that the First and Third Defendants may wish to say that the existence of proceedings against some of the Employees in the USA and Hong Kong removes the need for the First and Third Defendants to be joined as parties to the English proceedings. Again, Jefferies does not believe that this is a realistic approach, in particular given the proceedings in this jurisdiction against the Second and Fourth to Sixth Defendants. The claims against the Second and Fourth to Sixth Defendants raise issues of New York and Hong Kong law, and are likely to involve witnesses and documents outside the jurisdiction in any event. But even if that were not so, Jefferies' concern is to ensure that all of the claims against the Cantor Defendants be tried and

> determined together in one forum, in the interests of efficient administration and justice and to avoid the risk of inconsistent findings, for all the reasons I have explained above. The fact that it is necessary to bring proceedings in contract against other Employees in the jurisdiction of their domicile does not mean that it is appropriate to commence three overlapping claims against Cantor in three different jurisdictions in respect of the same facts and issues. To do so would entail massive duplication in time and legal costs. …"

12. The claim form was issued on 18 January 2019 and served on the Defendants. Following service of the proceedings, the current applications were made. On 14 June 2019 I made an order granting permission to the parties to rely upon expert evidence on New York law. On 4 September 2019 I made a further order for directions and set a hearing date of 20 November 2019. Unfortunately, the hearing date had to be vacated by agreement because leading counsel for one of the parties was indisposed.

13. On 16 October 2019 Mr Ions made a third witness statement in which he provided an update on the issue of FINRA arbitration and other actions arising from the team move.

14. On 23 April 2019, after these proceedings had been served, The First Defendant [Cantor US] filed an action before FINRA. The FINRA proceedings are essentially a response to this claim, Cantor US seeks a declaration that the Third Claimant [Jefferies US] violated FINRA rule 13200(a) by commencing proceedings against Cantor US in England rather than in a FINRA arbitration and a declaration that that the repayment agreements between Jefferies and their former employees in relation to the repayment agreements are unlawful and therefore null and void. On 18 April 2019 the 10 individual employee respondents to the FINRA proceedings commenced by Jefferies US filed a motion seeking consolidation of the claims against them and on 18 April 2019 Cantor filed a motion seeking consolidation of its claim with those of the 10 employees. On 18 September 2019 FINRA granted the motions to consolidate. The effect of this is that the consolidated FINRA proceedings now involve claims between the Third Claimant and former employees in the US and claims between the First Defendant and the Third Claimant.

15. Mr Ions also outlined the position with regard to the Hong Kong employees. Actions were commenced against Mr Couldrey and Mr Prompers in the Hong Kong Labour Tribunal in respect of their replacement cash awards. These proceedings have been settled by repayment of the sums claimed by the employees. There are also proceedings in the Hong Kong High Court against Mr Prompers and Mr Aw in respect of amounts due under their bonus repayment agreements. Mr Prompers and Mr Aw have challenged the jurisdiction of the Hong Kong High Court on the basis that their agreements contain an exclusive jurisdiction clause in favour of the New York Courts. The Second Claimant has consented to a stay of the Hong Kong proceedings on the basis that Mr Prompers and Mr Aw have consented to accept service of proceedings to be brought in New York.

The issues

16. For the purposes of this hearing counsel helpfully agreed the following list of issues:

    i) Are the claims of Jefferies US against Cantor US subject to an arbitration agreement between Jefferies US and Cantor US, and if so should those claims be stayed pursuant to the Arbitration Act 1996 section 9?

    ii) Should Jefferies' claims against Cantor US and Cantor HK be stayed because England is not the proper place for determination of those claims?

    iii) Should Jefferies' claims against Cantor US and Cantor HK be stayed because Jefferies breached its duty of fair presentation on its without notice application for permission to serve out?

    iv) Do Jefferies' claims against Cantor US and Cantor HK, insofar as they relate to repayment agreements governed by New York law, have no reasonable prospects of success, because those repayment agreements are unenforceable as a matter of New York law?

    v) Should service of the claim form and particulars of claim on Cantor US and Cantor HK and the Order of Master Thornett granting permission to serve Cantor US and Cantor HK out of the jurisdiction be set aside on any of the above grounds?

    vi) Should the proceedings (or any part of them not otherwise stayed on the above grounds) be stayed on case management grounds pending final award in the FINRA arbitration?

    vii) Should Jefferies' claims against the Employee Defendants be stayed as a result of exclusive jurisdiction clauses in relevant repayment agreements favouring the courts of the State of New York?

    viii) Should Jefferies' claims against the Employee Defendants be stayed on case management grounds pending final award in the FINRA arbitration?

17. At the outset of the hearing I was informed that issue (iv) was no longer in dispute. The parties accepted that the issue was not fit for summary determination and that a real issue arose between parties as to whether or not the relevant repayment agreements are unenforceable by reason of New York law.

Issue 1

18. The first issue arises only between the Third Claimant and the First Defendant. Mr Stafford QC argues that Jefferies US and Cantor US are FINRA members. The FINRA rules require members to resolve disputes arising from their business activities through arbitration to be conducted according to the FINRA Code of Arbitration Procedure for Industry Disputes. He points to FINRA rules 13200 and 13209 which provide:

> "FINRA Rule 13200: "Except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among … Members…"

> "FINRA Rule 13209: "During an arbitration, no party may bring any suit, legal action, or proceeding against any other party that concerns or that would resolve any of the matters raised in the arbitration."

19. Mr Stafford QC points out that the meaning and effect of FINRA Rule 13200 has been considered by Mr Frumento and Mr Curley, the parties' experts in New York law, and that Mr Frumento's unchallenged evidence is that Rule 13200 takes effect as an agreement to arbitrate and that such an agreement is a written agreement to arbitrate which would be enforceable in the United States pursuant to s.2 of the Federal Arbitration Act, which provides;

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

20. Mr Stafford QC submits that the question of whether there is an arbitration agreement for the purposes of section 9 of the Arbitration Act 1996 is a matter of United States law. In support of this proposition he points out that under section 2 of the Act, section 9 applies "*even if the seat of the arbitration is outside England and Wales or Northern Ireland or no seat has been designated or determined*", whereas section 5 of the Act, which imposes the requirement for the arbitration agreement to be in writing and defines in very broad terms when it can be said that there is an agreement in writing, only applies "*where the seat of the arbitration is in England and Wales or Northern Ireland.*"

21. Mr Stafford QC submits the FINRA Code does not designate or determine the seat of its arbitrations. But in any case, a FINRA arbitration conducted between Jefferies US and Cantor US, both of which are headquartered in New York is overwhelmingly likely to be conducted in New York and to have its seat in the State of New York. Further the law governing the arbitration agreement, where both parties are United States companies headquartered in New York, and where the arbitration agreement arises from the effect of the rules of a United States regulator, could not be anything other than New York law, see Dicey, Morris & Collins, *the Conflict of Laws,* Rule 64-1.

22. I cannot accept this submission. It seems to ignore the actual terms of section 6(1) the Arbitration Act 1996 and is contrary to the observations of Andrew Smith J in *Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd* [2012] 2 CLC 279.

23. Section 6 of the Arbitration Act 1996 provides the definition of an arbitration agreement as follows;

> "(1) In this Part an "arbitration agreement" means an agreement to submit to arbitration present or future disputes (whether they are contractual or not).
>
> (2) The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement."

24. In the circumstances Mr Oudkerk QC is right to submit that the power to stay under section 9(1) of the Act is only engaged if the court concludes that there is an arbitration agreement in accordance with section 6(1) and that this a mixed question of fact and English law.

25. Mr Oudkerk QC relied on the case of *Mercato Sports (UK) Ltd v Everton FC* [2018] EWHC 1567 (Ch) where HHJ Eyre QC said at [26]:

> "The approach which I am to take as a matter of law is as follows. For there to be an arbitration agreement between two litigants there must be a contract between those persons. Such a contract can only exist if the circumstances are such as enable the court to find a contract by application of the normal rules governing the formation of contracts. An implied contract between two persons who have not engaged directly with each other ("a horizontal contract" to adopt the language used by HH Judge Pelling QC in *Bony v Kacou & others* [2017] EWHC 2146 (Ch)) can arise where each of those persons has a separate contract ("a vertical contract") with the same third party committing them to abide by particular rules laid down by or stipulated for by that third party."

26. In the circumstances I agree with Mr Oudkerk QC that the critical question is whether the particular facts and circumstances justify the implication of an agreement between the Third Claimant and the First Defendant.

27. Mr Oudkerk QC identified the relevant circumstances at paragraph 49 of his skeleton argument:

> "49.1. FINRA is the US Financial Industry Regulatory Authority, which regulates securities broker-dealers in the US.
>
> 49.2. Most broker-dealers – including Jefferies US – are required by US law (namely the Securities Exchange Act of 1934 ("**the Exchange Act**)" to be FINRA members, in practice all broker-dealers with diverse businesses will be FINRA members.
>
> 49.3. The content of FINRA rules is prescribed by statute, and properly promulgated rules (such as Rule 13200) have the same force of law as the Exchange Act. In other words, the obligation to arbitrate is in effect an obligation under US

> primary legislation. Mr Curley also observes that the FINRA rules are mandatory in nature, and that violation is subject to discipline, including fines and even expulsion.
>
> 49.4. Thus, whilst Mr Frumento seeks to characterise the obligation to arbitrate as a matter of contract as far as US law is concerned, this appears to be on the basis that an application for membership of FINRA is required to contain an agreement to comply with its rules, including Rule 13200. In circumstances where most broker-dealers are in turn required by US law to be members of FINRA, to present this as a matter of consensus is doubtful to say the least."

28. In my view Mr Oudkerk QC's summary accurately reflects the evidence of the experts on US law. In the *Citigroup* case Andrew Smith J considered the FINRA regime and found at [79] that FINRA proceedings are:

> "not brought under an arbitration agreement of the usual kind made consensually between the defendants and a third party, but are brought under a regulatory regime…"

29. I therefore accept Mr Oudkerk QC's submission that the regulatory obligation arising between the Third Claimant and the First Defendant is not a matter a matter of contract between them as FINRA members and therefore section 9(1) if the 1996 Act cannot apply.

Issue 2

30. Mr Stafford QC submitted that the Claims of the Third Claimant against the First Defendant and Third Defendant have virtually no connection with the jurisdiction of England and Wales and were more substantially connected with New York. He relied upon the following matters;

    i) Jefferies US and Cantor US are United States companies headquartered in New York.

    ii) Every potential witness in the case is in New York: the employees, their managers and former managers at Cantor US and Jefferies US respectively, and the Cantor executives named in the Particulars of Claim.

    iii) 24 out of 26 of the repayment agreements in issue relating to former Jefferies US employees are governed by New York law, as are the allegations relating to inducement of breach of contract.

    iv) The remaining 2 repayment agreements are subject to English law: the enforceability of those agreements under English law is already in issue in a FINRA arbitration between Jefferies US and Hari Chandra.

31. Mr Stafford QC also points to the fact that there is no tortious behaviour attributed to the Third Defendant (Cantor HK) in the particulars of claim and suggests that the claim against it is manifestly weak.

32. CPR 6.37 provides that "*The court will not give permission [to serve the claim form out of the jurisdiction] unless satisfied that England and Wales is the proper place in which to bring the claim*". The relevant considerations were classically set out by Lord Goff in *The Spiliada* [1987] AC 460 and more recently in *Lungowe v Vendanta Resources Plc* [2019] 1 WLR 1051 (SC). The fundamental principle is that the Court is looking for a single forum in which the cases against all the Defendants can be most suitably tried. The burden is on the Claimant to show that England and Wales is the appropriate forum. Where any of the Defendants seek to raise matters supporting an alternative forum, they beare the evidential burden in relation to those matters. Whilst the requirement to avoid a multiplicity of proceedings and the risk of inconsistent judgments is a very important factor, where the claims are likely to proceed against an "anchor defendant" in England and Wales that will often be a decisive factor in favour of England and Wales notwithstanding all other factors appear to favour a foreign jurisdiction, see *Lungowe* at [69] and [70].

33. It is common ground that the Second Defendant and the Fourth to Sixth Defendants must be sued in England and Wales under articles 4 and 22 of Brussels Recast.

34. In paragraph 34 of his witness statement Mr Hayes asserts that the proper place to bring the claims against the First and Third Defendants is by way of FINRA arbitration or in the Courts of New York State. He gives the following four reasons:

> "(1) I am informed that the Third Claimant and the First Defendant are headquartered and domiciled in New York.
>
> (2) The overwhelming focus of the claims made against the First and Third Defendants, in terms of number, value, applicable law, and location of employees, is New York, for the reasons set out in paragraph 9 above.
>
> (3) Further, New York law of inducement of breach of contract will need to be applied in so far as damage has been sustained in New York. The more appropriate forum for that to take place is in New York.
>
> (4) The Particulars of Claim identify, and make allegations against, the following individuals who are all based in New York: Howard Lutnick, Anshu Jain and Sage Kelly."

35. Mr Oudkerk QC submitted that none of these reasons stands scrutiny. First, the only New York based defendant, the First Defendant, is not offering to have the claims against it determined in a single forum. The First and Second Claimants could possibly sue in the New York courts, but the First Defendant asserts that the Third Claimant can only bring its claims in FINRA arbitration. Second, the First and Second Claimants could not pursue their claims in the arbitration and none of the claims against either the Second or Third Defendant could be brought in FINRA arbitration. Third, there is no evidence to suggest that either the Second or Third Defendant could be sued in the courts of New York and so the Second Defendant has not discharged the burden upon it to argue that New York is a more appropriate forum. In my view there is some merit in these criticisms.

36. Mr Stafford QC points to Mr Hayes' evidence concerning the number and value of the claims summarised at paragraph 5 of his skeleton argument:

Breakdown by Domicile – 16 Jefferies hires		
3 x UK Hires	10 x US hires	3 x HK hires
Total claimed $980,902	Total claimed $6431,367	Total claimed $745,315
Total USD $8,157,854		

Breakdown by governing law – 44 separate contract claims		
6 English law contract claims	36 NY law contract claims	2 HK law claims
Total claimed $655,039	Total claimed $7,484,444	Total claimed $18,371
Total USD 8,157,854		

37. Mr Stafford QC makes the point that the claims made by Jefferies US account for 79% of the value in these proceedings. However, in my judgment this slightly avoids the real issue that the court must decide in relation to the facts of this case. The evidence before me shows that there is a good arguable case that the tort claims against the Cantor Defendants are based on conduct which was concealed from the Claimants and that key elements took place in London. Mr Oudkerk QC points to the evidence which demonstrates that by location, at the time of the team move 10 of the team were based in London, 12 were based in New York, 3 were based in Hong Kong and 1 was based in Dubai. He makes the valid point that while this may appear finely balanced the three employees who are party to these proceedings were also some of the most senior employees. In the circumstances I accept Mr Oudkerk QC's submission that for the purpose of determining jurisdiction I should not place much weight on the number of contractual claims, most of which are not pursued in this litigation. I accept of course that different considerations may apply in relation to Issues 6 and 8, where a stay is being sought on case management grounds.

38. I also accept Mr Oudkerk QC's submission that while the Cantor Defendants have asserted that the focus of this case is New York they have not made any attempt to support the assertion by producing evidence of where they say the relevant events took place. In the circumstances they have not discharged the evidential burden upon them, see *Spiliada* at (476).

39. An important factor in this sort of litigation is the location of the witnesses. As has already been noted the three English domiciled defendants were some of the most senior employees involved. Mr Stafford QC did not identify any particular witnesses in the United States who would be called on the basis of the claim as pleaded. It is not unusual in international litigation of this kind for witnesses to be based out of the jurisdiction and there are many ways of managing such evidence to mitigate the cost of attendance.

40. Another important factor is the location of relevant documents. Mr Oudkerk QC makes the obvious point that most if not all of the documents in the case will be held electronically. In the circumstances the relevance of the location of the documents to forum must be limited.

41. The governing law is another factor that has relevance to the question of forum. The tort claim is currently pleaded under English law. I did not understand Mr Stafford QC to suggest any alternative to English law. However if the applicable law were to reflect the location of each Claimant there would be three governing laws, English, New York and Hong Kong. The English Court will already be considering issues in relation to each of these governing laws in the Claimants' against the Second and Fourth to Sixth Defendants.

42. In the circumstances it seems to me that England and Wales can be the only realistic candidate for jurisdiction. I accept Mr Oudkerk QC's submission that this is the only jurisdiction where the claims can be tried with a minimum of multiplicity and fragmentation and that no credible alternative forum has been identified.

Issue 3

43. It is common ground that because Jefferies' application for permission to serve out of the jurisdiction was determined without notice they were subject to a duty of fair presentation. The nature of this duty was summarised in *Brink's-Mat Ltd v Elcombe and others [1988] 3 All ER 188* and considered more recently in *Alliance Bank v Zhunus [2015] EWHC 714 (Comm).* These cases disclose three core principles:

    i) The applicant must disclose material facts that are known to it or would be known to it if it made reasonable enquiries.

    ii) The test of materiality of a matter not disclosed is whether it would be relevant to the exercise of the court's discretion. A fact is material if it would have influenced the judge when deciding whether to make the order or deciding upon the terms upon which it should be made. The question of materiality is a matter for the court and not the subjective judgment of the applicant or his lawyers.

iii) The matters to be disclosed may be matters of fact or law, and may be adverse to the applicant. This would include any defence to the claim that may be available to the respondent.

44. Mr Stafford QC pointed to paragraphs 31 to 34 of Mr Ions' first witness statement where the duty of full and frank disclosure was addressed. He identified two potential failings in disclosure. First, a failure to mention the fact that Jefferies US was subject to a mandatory obligation to submit its claims against Cantor US to FINRA arbitration and that shortly after Master Thornett's order was made Jefferies US commenced 10 separate sets of arbitration against each of the US employees. Second, that Jefferies failed to adequately disclose that the repayment agreements governed by New York law were arguably unenforceable.

45. In my judgment there is nothing in either of these points. As Mr Ions points out in his second witness statement this issue had not been raised by Cantor at any point in the pre-action correspondence which included service of a draft particulars of claim. It was not therefore an argument he had anticipated would be made. In any event I have accepted Mr Oudkerk's argument that this issue is in reality an attempt by Cantor US to conjure a bilateral agreement with Jefferies US out of what is in reality a regulatory obligation. The potential unenforceability of the repayment agreements was specifically addressed by Mr Ions at paragraph 32 of his witness statement, see paragraph 11 above.

46. In the circumstances I am satisfied that there was no failure to disclose material matters of either fact or law which would have impacted on the decision of Master Thornett.

Issue 5

47. Issue 5 is answered by my conclusions to Issues 1 to 3.

Issues 6 and 8

48. I will consider these two issues together as they give rise to similar considerations. The Court has wide powers of case management specifically under CPR r3.1(1)(f) which provides that the Court may, "*stay the whole or part of any proceedings or judgment either generally or until a specified date or event.*" This power must be exercised in accordance with the overriding objective which requires the Court to deal with cases justly and at proportionate cost, allotting to it an appropriate share of the Court's resources. The relevant principles have been considered in a number of cases; *Reichhold Norway ASA and another v Goldman Sachs International* [2000] 2 All ER 679, *Klöckner Holdings GmbH v Klöckner Beteiligungs GmbH* [2005] EWHC 1453 (Comm), *Curtis v Lockheed Martin UK Holdings Ltd* [2008] 1 CLC 219 and *Mazur Media Limited v Mazur Media GmbH* [2004] 1 WLR 1966 and can be stated as follows;

i) Whilst the Court has an inherent jurisdiction to order a stay on case management grounds, it will only do so in "*rare and compelling circumstances*": *Reichhold* at [690h-j].

ii) Such a stay should only be granted if the benefits of doing so clearly outweigh any disadvantage to the other party: *Reichhold* at [684f-g].

iii) In general, a stay will not be appropriate if the other proceedings will not even bind the parties to the action stayed, let alone finally resolve all the issues in the case to be stayed: *Klöckner Holdings* at [21(iv)].

iv) Similarly, a stay will not, at least in general, be appropriate where the parties to the other proceedings are not the same: *Klöckner Holdings* at [21(v)].

v) Whilst the avoidance of the risk inconsistent decisions is, in principle, capable of providing grounds for a case management stay, this is only where a stay would actually avoid that risk: *Curtis* at [18].

vi) It is impermissible to order a case management stay where that would circumvent the jurisdictional regime under Brussels Recast, whether by reliance on disguised *forum conveniens* factors or otherwise: *Mazur Media* at [69].

49. Mr Stafford QC submitted that this was a paradigm case for the imposition of a case management stay for three main reasons. First, the core claims of Jefferies UK against Cantor UK were worth approximately $980,902 or £767,277 and therefore it would be impossible to conduct the litigation proportionately. Second, the core issues as regards the enforceability of the repayment obligations had already been put before FINRA by Jefferies US and so this court is being asked to make a second determination. Third, if the Court were minded to stay the claims between Jefferies US and Cantor US for FINRA arbitration then the same factual allegations would be considered in the FINRA arbitration as would be considered here.

50. On behalf of the Fourth to Sixth Defendants Ms Sen Gupta QC submitted that it was in the interests of justice to impose a stay until the outcome of the FINRA arbitration for the same three reasons and the following additional reasons. First, the Claimants have commenced FINRA arbitrations against 10 former employees of Jefferies based in the US on the same legal issues, and the arbitral tribunal will determine matters of both English and New York law in the proceedings. Second, the stay is time-limited to the date on which the judgment is given in the FINRA arbitration, therefore the stay is a proportionate response to the current situation. Third, if the English proceedings continue, there a risk of inconsistent judgments between arbitral proceedings in New York and the proceedings in the High Court, which is contrary both to case management objectives of the English court and the Brussels I regime. Fourth, the outcome of the FINRA arbitrations may obviate the need to continue further here. Once the FINRA arbitrations have concluded, there is very likely to be a narrowing of the issues in dispute in these proceedings. A stay is, therefore, a proportionate response that furthers the overriding objective. Fifth, there is little to be gained from continuing the proceedings here before resolution of the FINRA arbitrations. Sixth, the parties will not be prejudiced by a stay pending the outcome of the FINRA arbitrations.

51. I am not impressed with Mr Stafford QC's point about proportionality. Proportionality is not simply a function of value as is made clear by the inclusion of sub paragraphs (b) to (e) in CPR r 44.3.(5). In this case the Claimants are seeking to uphold their

contractual rights in a commercial context. The Court will use its powers of active case management and cost management to ensure proportionality.

52. Much is made by the Defendants of the existence of the FINRA arbitration in New York. Putting aside the issue of whether the arbitration commenced by Cantor US was a purely tactical response to these proceedings it is important to note that of the 9 parties to this action only 2 are also parties to the FINRA arbitration. It follows that the result of the FINRA arbitration will not be determinative as it will not bind the First or Second Claimant who are not parties to it. In the circumstances I accept Mr Oudkerk QC's submission that a case management stay will not materially decrease or eliminate the risk of inconsistent decisions.

53. It also appears to me that the FINRA arbitration will only really consider the issue of the employees' repayment obligations under New York Law. On the basis of the material before me I cannot conclude that the FINRA arbitration will consider the arguments as to the enforceability of those provisions under English law. Nor on the basis of the evidence will the FINRA arbitration consider the Hong Kong law employment contracts. The FINRA arbitration cannot consider the tort claims against Cantor such as whether the Cantor Defendants were aware of and procured the breaches of the employees' repayment obligations or as to their involvement in the circumstances leading to the employee's non-payment. As has already been noted the claims against the Fourth to Sixth Defendants have to be pursued here under Brussels I Recast and in the circumstances I am not persuaded that these circumstances provide a basis for a case management stay.

54. The evidence shows that the FINRA hearing will not take place until at least April or May 2021 and a finding might not be made until the autumn of 2021. In the circumstances it seems highly unlikely that a trial of this case could take place until at least late 2022 or 2023. I accept Mr Oudkerk QC's submission that this would cause prejudice to Jefferies in the pursuit of its claims in these proceedings.

55. I am not impressed by the suggestion that there could be a prospect of double recovery. As Mr Oudkerk QC points out, Jefferies has separate causes of action in contract and tort which it is entitled to pursue and this cannot create a risk of double recovery as any monies recovered from a particular defendant will need to brought into account where necessary.

56. In the circumstances I am of the view that the interests of justice are best served by the claims against the Cantor and the Employee Defendants proceeding promptly and without further delay. I am not therefore persuaded that that I should grant a case management stay.

Issue 7

57. Ms Sen Gupta QC informed me the Employee Defendants acknowledge that the Court of Appeal has decided that an exclusive jurisdiction clause in favour of the courts of a non-EU Member State, contained in an agreement made with an employee for an award of a discretionary benefit, is to be disregarded (*EMC v Petter* [2015] EWCA Civ 828, following *Samengo-Turner and others v J&H Marsh & McLennan (Services) Ltd and others* [2007] EWCA Civ 723).

58. The Employee Defendants wished to reserve the right to argue in a higher court that these decisions are incorrect as a matter of law, having regard to the fact that the Supreme Court gave permission to appeal to EMC (though the case then settled before the appeal was heard).

Conclusion

59. For the reasons set out above my conclusions on the agreed issues are as follows:

    i) Issue 1. The claims should not be stayed pursuant to s.9 Arbitration Act 1996.

    ii) Issue 2. The claims against Cantor US and Cantor Hong Kong should not be stayed because England is not the proper place for the determination of those claims.

    iii) Issue 3. There was no breach by Jefferies of the duty of fair presentation.

    iv) Issue 4. There is a good triable issue as to the enforceability of the employees' repayment agreements under New York law.

    v) Issue 5. Service of the claim form on Cantor US and Cantor Hong Kong should not be set aside.

    vi) Issue 6. The claims against Cantor should not be stayed on case management grounds pending final resolution of the FINRA arbitration.

    vii) Issue 7. The claims against the Employee Defendants should not be stayed as a result of the jurisdiction clauses in the relevant repayment agreements favouring the courts of New York.

    viii) Issue 8. The claims against the Employee Defendants should not be stayed on case management grounds pending final resolution of the FINRA arbitration.

60. In the circumstances the Defendants' applications will be dismissed and the claim will proceed to trial in this court.