Neutral Citation Number: [2025] EWHC 172 (Ch)

Case No: BL-2023-000642

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Date: 31st January 2025

Before :

JOANNE WICKS KC
sitting as a Deputy Judge of the High Court

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Between :

XENFIN FUND 1 TRADING LIMITED (IN LIQUIDATION)	**Claimant**
- and –	
(1) GFG LIMITED **(2) NICHOLAS HOFGREN** **(3) STUART CHEEK** **(4) ALI RAZA AHMAD**	**Defendants**

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Alexander Brown (instructed by Stewarts Law LLP) for the **Claimant**
Bridget Lucas KC (instructed by Keystone Law Limited) for the **First Defendant**
Oliver Phillips (instructed by Bivonas Law LLP) for the **Second to Fourth Defendants**

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 31st January 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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JOANNE WICKS KC sitting as a Deputy Judge of the High Court:

Introduction

1. This is my judgment on a number of applications concerned with issues of service and jurisdiction, namely:

   i) an application by the Second Defendant ("**Mr Hofgren**") for a declaration that the Claimant failed to serve the claim form on him in accordance with CPR Part 6 within the period required by CPR 7.5 and therefore that the court has no jurisdiction to try the claim against him;

   ii) an application by the Fourth Defendant ("**Mr Ahmad**") seeking to set aside an order of Master Pester dated 11 October 2023 giving permission for service on Mr Ahmad out of the jurisdiction and by alternative means, on the grounds (a) that the claim against him does not have a reasonable prospect of success; (b) that England and Wales is not the proper place in which to bring the claim; (c) that there were neither exceptional circumstances nor good reason to grant permission for service by alternative means; and (d) the Claimant failed to make full and frank disclosure to Master Pester;

   iii) an application by Mr Hofgren, Mr Ahmad and the Third Defendant ("**Mr Cheek**") (to whom I shall refer together as "**the Individual Defendants**") pursuant to CPR 11(1)(b) for an order that the court should not exercise its jurisdiction and for a stay of the claim against them on the grounds that the courts of the Bailiwick of Guernsey are a more appropriate forum ("**the Appropriate Forum Application**"); and

   iv) an application by the First Defendant ("**D1**") that, in the event that the court decides that it should not exercise jurisdiction against the Individual Defendants, the court should also grant a stay pursuant to CPR 11(1)(b) in respect of the claims against D1 ("**D1's Application**").

2. The Claimant is a Guernsey non-cellular company incorporated on 10 March 2017. It is beneficially owned by GFG Funds PCC Limited ("**GFG PCC**"), a Guernsey protected cell company which was authorised by the Guernsey Financial Services Commission ("**GFSC**") as an open-ended collective investment scheme. Under Guernsey law, a protected cell company is a single legal entity, comprising a core with core assets and cells with cell assets, such assets being ring-fenced both within the protected cell company and as against third party creditors of that company. The Claimant was the special purpose vehicle through which one of GFG PCC's cells, Xenfin Securities Debt Fund 1 Cell ("**Xenfin Cell**"), made investments.

3. D1 is a Guernsey non-cellular company licensed and regulated by the Guernsey Financial Services Commission ("**GFSC**"). The Claimant contends that D1 acted as the Claimant's investment manager.

4. The Claimant, D1 and GFG PCC are all now in liquidation.

5. Mr Hofgren and Mr Cheek were directors of the Claimant and GFG PCC and the ultimate beneficial owners of D1. Mr Hofgren was also a director of D1.

6. The Claimant alleges that Mr Ahmad was a *de facto* director of the Claimant.

7. The Claimant's case is that D1 owed it contractual duties to act in the Claimant's best interest and with reasonable care, skill and diligence in managing the Claimant's investments; that the relationship between the Claimant and D1 was one of trust and confidence such that D1 owed the Claimant a fiduciary duty to avoid conflicts of interest and that D1 owed the Claimant a duty in tort to exercise reasonable care, skill and diligence in managing the Claimant's investments. There is a potential dispute as to whether the relationship between the Claimant and D1 is governed by English or Guernsey law, as I shall explain in more detail below.

8. The Claimant's pleaded case is that Mr Hofgren and Mr Cheek, as directors of the Claimant, and Mr Ahmad as a *de facto* director of the Claimant, owed it duties under Guernsey law to act in what they honestly believed to be in the Claimant's best interests, to avoid conflicts of interest and to exercise reasonable care, diligence and skill.

9. The Claimant contends that the Defendants acted in breach of these obligations (a) in causing the Claimant to enter into a loan of £9.55m to Dolphin Capital 158 Projekt GmbH & Co KG on 11 May 2017 ("**the DC158 Loan**"); (b) in causing the Claimant to enter into a loan of £3.2m to 7.EP Projekt GmbH Co. KG on 10 May 2018 ("**the 7EP Loan**") (the DC158 and 7EP Loans being together "**the Loans**"); (c) in the conversion of the Claimant's security under the Loans into shares in Vordere Limited ("**Vordere**") in June 2019 ("**the Vordere Transaction**"); and (d) in causing payments to be made to two companies associated with Mr Ahmad, Aurora Capital Limited and Core Properties Limited.

10. For the purposes of these applications, it was common ground between the Claimant and the Individual Defendants that the relevant Guernsey limitation periods (applicable to the claims by virtue of the Foreign Limitation Periods Act 1984) should be taken to be six years. This is on the basis that, in the absence of evidence to the contrary, foreign law should be presumed to be the same as English law: *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] UKSC 45, [2022] AC 995 and that, under English law, the limitation period for claims of breach of duty against directors, except in cases involving a misapplication of pre-existing corporate assets or fraud, is six years: *Davies v Ford* [2020] EWHC 686 (Ch) at [319]. Consequently, I approach these applications on the basis that the limitation period for the claims against the Individual Defendants in respect of the DC158 Loan and 7EP Loan expired on 11 May 2023 and 10 February 2024 respectively.

Mr Hofgren's service application

11. The claim form in these proceedings was issued on 5 May 2023, shortly before the expiry of the limitation periods referred to above. Under CPR 7.5, it was valid for service until 5 September 2023. The claim form was amended on 29 August 2023.

12. Under CPR 6.9(2), the claim form was required to be served on Mr Hofgren at his "usual or last known residence". "Last known" refers to the serving party's actual knowledge, or knowledge that he could have acquired exercising reasonable diligence: *Collier v Williams* [2006] EWCA Civ 20, [2006] 1 WLR 1945 at [71]. By CPR 6.9(3), if the Claimant had reason to believe that the address was one at which Mr Hofgren no longer resided, it was obliged to take reasonable steps to ascertain the address of his

current residence. By CPR 6.9(6), a claimant may serve the claim form on a defendant's usual or last known residence where it cannot ascertain the defendant's current residence and cannot ascertain an alternative place or alternative method by which service may be effected.

13. The Claimant contends that service was effected upon Mr Hofgren, in accordance with CPR 6.9, by sending the amended claim form by first class post on 30 August 2023 to Flat 4, 28 Cleveland Square, London W2 6DD, that being Mr Hofgren's "last known residence". Mr Hofgren disputes that as good service, on the basis that (a) the letter sending the Claim Form was not "properly addressed" within the meaning of section 7 of the Interpretation Act 1978, because the address contained a mistake: the package was addressed to "Flat 4, 28 Cleveland Square, Thomas More Street, London W2 6DD". Thomas More Street is a road in East London, rather than Paddington, which is where 28 Cleveland Square is; and (b) 28 Cleveland Square was not Mr Hofgren's "last known residence" because the Claimant could, with reasonable diligence, have found a more recent residence, namely 42 Kyrle Road, London SW11 8BA. It is not suggested that there was any alternative method by which Mr Hofgren could have been served, he having chosen (in response to the Claimant's request) not to instruct his solicitors to accept service on his behalf.

14. Mr Hofgren's evidence as to where he in fact lived from time to time is set out at paragraphs 7-10 of his witness statement dated 27 September 2023. He had lived with his ex-wife at 28 Cleveland Square until February 2020, following which it had been rented out. The Kyrle Road address was the house of a friend for whom Mr Hofgren had been house-sitting between 15 November 2022 and 27 July 2023. At the time of his witness statement (and when the claim form was served), Mr Hofgren says he had no permanent residence.

15. The Claimant's evidence as to what steps it took to ascertain Mr Hofgren's address for service is set out in paragraphs 12-18 of the second witness statement of Thomas Edward Clark dated 1 May 2024 ("**Clark 2**").

16. Mr Phillips, for Mr Hofgren, took me to authorities warning claimants of the dangers of waiting until the last moment to serve proceedings: *Anderton v Clwyd Council Council (No 2)* [2002] EWCA Civ 933, [2002] 1 WLR 3174 at [2], [3]; *Barton v Wright Hassall LLP* [2020] UKSC 12, [2020] 1 WLR 1119 at [22], [23]; *R (Good Law Project) v Secretary of State for Health and Social Care* [2022] EWCA Civ 355, [2022] 1 WLR 2339 at [41], [83]. He also relied on *White v Weston* [1968] 2 QB 647 at 661-662 for the proposition that a prospective defendant is under no obligation to inform the prospective claimant of any change in his address.

17. Mr Phillips also submitted that it would have been open to the Claimant to have effected service on Mr Hofgren in other ways, including by reliance on section 1140 of the Companies Act 2006. However, I agree with Mr Brown for the Claimant that the existence of alternative methods of service does not take the matter much further. What I have to decide is whether service was properly effected via the method the Claimant chose to use.

18. I deal first with the issue as to whether the package containing the claim form was "properly addressed". Mr Phillips contends that, by sections 21 and 23(1) of the

Interpretation Act 1978, section 7 of that Act applies to service under the CPR. This provides:

> "Where an Act authorises or requires any document to be served by post (whether the expression "serve" or the expression "give" or "send" or any other expression is used) then, unless the contrary intention appears, the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."

I am myself doubtful whether section 7 applies to service under the CPR. The CPR have their own regime for service: CPR 7.5(1) sets out the steps which must be completed by midnight on the calendar day four months after the date of issue of the claim form. Where the method of service is first class post, document exchange or other service which provides for delivery on the next business day, the relevant step is "posting, leaving with, delivering to or collection by the relevant service provider". CPR 6.14 deems service of a claim form served within the United Kingdom in accordance with CPR Part 6 to take place on the second business day after completion of the relevant step in CPR 7.5(1). These provisions may be said to sufficiently cover the field to constitute a "contrary intention" for the purpose of section 7. However, Mr Brown was content to accept that the requirement in section 7 that the letter be "properly addressed, pre-paid and posted" applies to the service of claim forms. Moreover, it seems to me that even absent any application of section 7, there must be some implication, in the reference to "posting" in CPR 7.5(1), that what is posted bears the appropriate address.

19. In my judgment, the package containing the claim form was "properly addressed" for the purpose of section 7 of the Interpretation Act 1978 or any such implication in CPR 7.5(1). A letter or package may be "properly addressed", even though it contains an error, if the error would not have been likely to affect the place to which Royal Mail would deliver it. In this case, the flat number, the house number and street and the postcode were all correct. Royal Mail will have ignored the reference to a street which was not in that postcode. Indeed, the Claimant's evidence is that the Post Office generates a delivery sticker using only the flat number and the postcode. That the addition of the reference to Thomas More Street made no difference is evidenced by the fact that Royal Mail twice attempted delivery to the correct address in Cleveland Square: it was unable to deliver the package because it was "not called for" (i.e. not collected following attempted delivery), rather than because there was no such address.

20. I turn then to the question whether Cleveland Square was Mr Hofgren's "last known residence" or whether, as he contends, the Claimant could with reasonable diligence have discovered that he had lived more recently at the Kyrle Road address. Having considered the evidence on both sides, I am satisfied that the Claimant's solicitors took all reasonable steps to identify Mr Hofgren's residence. Their enquiries indicated that Mr Hofgren lived at 28 Cleveland Square with his wife and her son; the Claimant did not know that Mr Hofgren had been divorced until he served his evidence for these applications and there is nothing to suggest that they could have found out about the divorce any earlier. Property records indicated that 28 Cleveland Square was owned by Mr Hofgren's wife. The Claimant's solicitors reviewed emails, diary entries, Uber receipts and KYC documents which repeatedly referred to 28 Cleveland Square as Mr

Hofgren's residence. Moreover, proceedings commenced against Mr Hofgren by Vordere in December 2021 gave Cleveland Square as his address on the claim form. The Claimant found that there was an association between Mr Hofgren and his wife with a residence in Wiltshire, which the Claimant reasonably understood to be a second home, but in any event Mr Hofgren does not argue that service should have been effected at the Wiltshire address.

21. Mr Hofgren contends that the Claimant should have realised that the Kyrle Road address was more recent than the Cleveland Square address because a search at Companies House would have revealed it as a correspondence address for RW Capital Limited, of which Mr Hofgren was appointed director in July 2023 and a Google Maps search would have shown that to be a residential property. Mr Brown submits that Kyrle Road was not even a "residence", since Mr Hofgren's evidence is that he was only house-sitting for a friend there. I do not accept this latter submission, since Mr Hofgren was living at Kyrle Road in a settled way for a number of months, sufficient to constitute that property his "residence" for the purposes of service. However, I agree with Mr Brown's submission that a Companies House search is intended to show corporate correspondence addresses, not a residential address for Mr Hofgren. Given that a search would have revealed that Mr Hofgren had eight different appointments, each giving a different correspondence address, there was no reason for the Claimant to conclude that he was living at Kyrle Road rather than Cleveland Square. Since he was occupying only as licensee, a search at HM Land Registry would not have shown any connection between Mr Hofgren and the property.

22. Mr Phillips also submits that the Claimant could have asked Mr Hofgren for his address, as it did Mr Cheek. I do not consider that there is any force in this argument. The Claimant had sent letters before action to Mr Cheek and Mr Hofgren in April 2023 both by post and email. The letter to Mr Hofgren used the Cleveland Square address. Mr Hofgren had responded acknowledging receipt of the email, but did not say that he no longer lived at the Cleveland Square address. In contrast Mr Cheek had said that there had been a delay in him receiving the letter before action because the Claimant had used an old physical address and a defunct email address. Mr Cheek's solicitors were therefore asked in August 2023 to provide an up-to-date address for him, but the same request was not made of Mr Hofgren. This was because the correspondence with Mr Hofgren gave the Claimant no reason to think that he was not still living at Cleveland Square. In any event, I cannot see how it can be said that enquiries of Mr Hofgren would be likely to have revealed the Kyrle Road address, since by August 2023, Mr Hofgren was no longer living at Kyrle Road and, indeed, his position appears to be that he did not have any residence at which service could be made at that time.

23. I therefore conclude that service of the claim form was properly effected on Mr Hofgren in accordance with the CPR.

Mr Ahmad's application

24. By an application notice dated 9 October 2023, the Claimant applied without notice for permission to serve the proceedings on Mr Ahmad out of the jurisdiction and for permission to serve Mr Ahmad by alternative means, namely by SMS, WhatsApp or similar means to a stated telephone number and by email to a stated email address. That application was granted by Master Pester's order of 11 October 2023. Mr Ahmad applies to set aside Master Pester's order (in so far as it relates to him).

25. On an application for permission to serve out of the jurisdiction, a claimant must establish (1) a good arguable case that the claims fall within one of the gateways in CPR PD 6B, paragraph 3.1; (2) a serious issue to be tried on the merits; and (3) that England is the appropriate forum for trial and the court ought to exercise its discretion to permit service out of the jurisdiction: *FS Cairo (Nile Plaza) LLC v Brownlie*, above, at [25]. Mr Ahmad challenges the existence of the second and third conditions. The third condition, appropriate forum, overlaps with the Appropriate Forum Application and D1's Application and I shall address it in that context below, albeit recognising that if England is not the appropriate forum, that is a ground for setting aside the order for permission to serve out and not merely a ground for a stay of proceedings.

26. As regards the application for service by an alternative method, Mr Ahmad is resident in the United Arab Emirates, with whom the United Kingdom has entered into a treaty on Judicial Assistance in Civil and Commercial Matters dated 7 December 2006 ("**the Treaty**"). This allows for requests for service to be made by the Senior Master of the King's Bench Division, transmitted through diplomatic channels to the UAE, which will effect service. In *Cesfin Ventures LLC v Al Ghaith Al Qubaisi* [2021] EWHC 3311 Master Kaye held that the Treaty does not preclude service by alternative means. She noted a debate in the authorities as to whether it was necessary to find special or exceptional circumstances to justify an order for alternative service or whether there simply needs to be a good reason to permit service by alternative means, saying at [30]:

> "It seems to me that when one considers the authorities in the round, including the decision in *Abela v Baadarani* [2013] UKSC 44, that when the Treaty does not make service by the Diplomatic Channels exclusive the court may not need to go as far as exceptional circumstances even if the appropriate test is exceptional circumstances rather than good reason."

In *Caterpillar Financial Services (Dubai) Limited v National Gulf Construction LLC* [2022] EWHC 914 (Comm) Miss Julia Dias, sitting as a Deputy High Court Judge, treated *Cesfin* as establishing that it was not necessary to show exceptional circumstances, although I do not read Master Kaye's judgment as quite that unequivocal, not least since she decided that there were, in fact in that case, exceptional circumstances (see [33]). In any event, Mr Ahmad seeks to set aside Master Pester's order on the basis that there were no good reasons (let alone exceptional circumstances) for departure from the Treaty's methods of service.

27. On any application made without notice, the applicant owes a duty to give full and frank disclosure of all matters relevant to the application, including all matters of fact or law adverse to the applicant. In *4VVV Ltd v Spence* [2023] EWHC 1 (Comm) at [90], HHJ Pelling KC, sitting as a judge of the High Court summarised the principles as follows:

> "the duty of the applicant is to make a full and fair disclosure of all the facts which it is objectively material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers; the duty is a strict one and includes not merely material facts known to the applicant but also additional facts which he would have known if he had made proper enquiries—see Konamaneni v Rolls Royce Industrial Power (India) Ltd [2002] 1 WLR 1269, per Lawrence Collins J as he then was at [180].

> Material facts are those which a judge would need or want to take into account in deciding whether to make the order sought—see Alliance Bank JSC v Zhunus [2015] EWHC 714 (Comm) per Cooke J at [65] and National Bank Trust v Yurov [2016] EWHC 1913 per Males J as he then was [18(a)]. However, there are limits to this and there is no obligation to disclose points there is no reason to anticipate that the other side would raise if present and more generally, the principle should not be carried to extreme lengths in the hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantial merits of the case—see Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350 per Slade LJ at 1359B-E…The ultimate touchstone is whether the presentation to the judge was fair in all material respects—see Federal Republic of Nigeria v Royal Dutch Shell Plc [2020] EWHC 1315 (Comm) per Butcher J at [90]."

Mr Ahmad contends that the Claimant failed to give sufficient disclosure of various points in his favour and for that reason, too, the Master's order should be set aside.

Serious issue to be tried on the merits

28. The requirement to show a "serious issue to be tried on the merits" requires the applicant for permission to serve out of the jurisdiction to show that its claim has a reasonable prospect of success. The test is essentially the same as that for resisting summary judgment, the well-known principles for which were set out in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. In *Lungowe v Vedanta Resources Plc* [2019] UKSC 20, [2020] AC 1045 at [9]-[11] and *Okpabi v Royal Dutch Shell Plc* [2021] UKSC 3, [2021] 1 WLR 1294 at [20]-[23], the Supreme Court has warned about the importance of observing proportionality in determining the question as to whether there are reasonable prospects of success (and other issues) in the context of a jurisdiction dispute. Judicial restraint, and the need to avoid a mini-trial, are vital. In *Okpabi*, Lord Hamblen JSC said at [22]:

> "Where, as will often be the case where permission for service out of the jurisdiction is sought, there are particulars of claim, the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. Any particulars of claim or witness statement setting out details of the claim will be supported by a statement of truth. Save in cases where allegations of fact are demonstrably untrue or unsupportable, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue."

29. I commend Mr Phillips for heeding the Supreme Court's guidance and properly concentrating his fire, in respect of this issue, on the case which is pleaded against Mr Ahmad. The complaint is that paragraphs 16 and 17 of the Particulars of Claim, where the facts on which the Claimant relies for the contention that Mr Ahmad was a *de facto* director are set out, fail to plead a proper case that Mr Ahmad undertook functions that can only be discharged by a director. Whilst the Claimant has adduced a substantial volume of evidence to support its case on this issue (Clark 2 at paragraphs 93-189), the evidence adduced by Mr Ahmad is confined to two witness statements from his

solicitors. A statement from Roland James Ellis essentially sets out the submissions about the effect of the pleadings and documents which Mr Phillips has elaborated at the hearing. A statement from John Francis Bechelet produces various agreements under which Mr Ahmad's companies were appointed to be an adviser and states Mr Ahmad's denials of any activity which would constitute him a *de facto* director.

30. Mr Phillips referred me to the law on *de facto* directors in England and Guernsey as set out by Her Honour Hazel Marshall QC, Lieutenant Bailiff of Guernsey, in *Carlyle Capital Corporation Limited (in liquidation) v Conway*, judgment of the Royal Court of Guernsey 38/2017 and by Millett J in *Re Hydrodan (Corby) Limited* [1994] 2 BCLC 180. In the words of Millett J,

> "To establish that a person was a *de facto* director of a company it is necessary to plead and prove that he undertook functions in relation to the company which can properly be discharged only by a director. It is not sufficient to show that he was concerned in the management of the company's affairs or undertook tasks in relation to its business which can properly be performed by a manager below board level."

Mr Phillips laid emphasis on the need for a claimant to "plead and prove" that the defendant was undertaking directorial functions, which language is also picked up in the judgments of Lords Walker and Clarke in *Revenue and Customs Commissioners v Holland* [2010] UKSC 51, [2010] 1 WLR 2793 at [111] and [128] respectively. However, I note that the *ratio* of that decision, which concerned alleged breach of duty by causing the payment of dividends without making provision for liabilities, is given in the judgment of Lord Collins (see *Smithton Ltd (formerly Hobart Capital Markets Ltd) v Naggar* [2014] EWCA Civ 939, [2015] 1 WLR 189 at [26]). At [93] Lord Collins said:

> "It does not follow that "de facto director" must be given the same meaning in all of the different contexts in which a "director" may be liable. It seems to me that in the present context of the fiduciary duty of a director not to dispose wrongfully of the company's assets, the crucial question is whether the person assumed the duties of a director. Both Sir Nicolas Browne-Wilkinson V-C in *In re Lo-Line Electric Motors Ltd [1988] Ch 477*, 490, and Millett J in *In re Hydrodam [1994] 2 BCLC 180*, 183, referred to the assumption of office as a mark of a de facto director. In *Fayers Legal Services Ltd v Day* (unreported) 11 April 2001, a case relating to breach of fiduciary duty, Patten J, rejecting a claim that the defendant was a de facto director of the company and had been in breach of fiduciary duty, said that in order to make him liable for misfeasance as a de facto director the person must be part of the corporate governing structure, and the claimants had to prove that he assumed a role in the company sufficient to impose on him a fiduciary duty to the company and to make him responsible for the misuse of its assets. It seems to me that that is the correct formulation in a case of the present kind. See also *Primlake Ltd v Matthews Associates [2007] 1 BCLC 666*, para 284."

31. In *Naggar* at [27]-[29], Arden LJ noted that in *Holland's* case, the issue was whether Mr Holland had acted as *de facto* director of the relevant companies, or as *de jure*

director of their corporate director, that is to say, that the question was the capacity in which he had carried out acts which were plainly directorial in nature. In other cases the issue will be whether the acts relied on are actually the acts of a director at all. In a passage adopted and applied by the Lieutenant Bailiff in the *Carlyle* case and relied upon by Mr Brown for the Claimant, Arden LJ helpfully summarised the effect of the authorities as follows:

> "Practical points: what makes a person a de facto director?
>
> 33. Lord Collins JSC sensibly held that there was no one definitive test for a de facto director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. However, a number of points arise out of Holland's case and the previous cases which are of general practical importance in determining who is a de facto director. I note these points in the following paragraphs.
>
> 34. The concepts of shadow director and de facto are different but there is some overlap.
>
> 35. A person may be de facto director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.
>
> 36. To answer that question, the court may have to determine in what capacity the director was acting (as in Holland's case).
>
> 37. The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.
>
> 38. The court is required to look at what the director actually did and not any job title actually given to him.
>
> 39. A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.
>
> 40. The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances "in the round" (per Jonathan Parker J in *Secretary of State for Trade and Industry v Jones [1999] BCC 336).*
>
> 41. It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.

42. Relevant factors include: (i) whether the company considered him to be a director and held him out as such; (ii) whether third parties considered that he was a director.

43. The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.

44. Acts outside the period when he is said to have been a de facto director may throw light on whether he was a de facto director in the relevant period.

45. In my judgment, the question whether a director is a de facto or shadow director is a question of fact and degree…"

32. Paragraphs 16 and 17 of the Particulars of Claim plead as follows:

"16. Mr Ali Ahmad performed the functions of a director of [the Claimant] and was therefore a de facto director of [the Claimant], at least in relation to the DC158 and 7EP Loans and the Vordere Transaction. In particular:

(1) Mr Ali Ahmad was sent extensive information about the Company's activities by Mr Hofgren and other and, in particular, sent and received a large number of significant emails in relation to the DC158 Loan, the 7EP Loan and the Vordere Transaction;

(2) Mr Ahmad was consulted about significant decisions in relation to [the Claimant] (including in the emails referred to in paragraphs 26 and 35 below);

(3) Mr Ali Ahmad appears to have had the final say in relation to certain major decisions made by [the Claimant], including decisions as to the amount to be advanced under the DC158 Loan and whether the Company should enter into the Vordere Transaction;

(4) Further, it appears from such emails that Mr Hofgren deferred to Mr Ali Ahmad's judgment in relation to key decisions concerning the affairs of [the Claimant], including decisions as to the terms of the DC158 Loan and the Vordere Transaction;

(5) Mr Ali Ahmad participated with Mr Hofgren in meetings on behalf of [the Claimant] with Dolphin and Vordere, at which the key commercial terms of the DC158 Loan, the 7EP Loan and the Vordere Transaction were negotiated and agreed ([the Claimant] relies in particular in this regard on the meetings referred to in paragraphs 27 and 53 below).

17. As a de facto director of [the Claimant], Mr Ali Ahmad owed the same duties to [the Claimant] as a de jure director, being those duties set out at paragraphs 15(1) to 15(3) above. In the alternative, Mr Ali

> Ahmad's involvement with [the Claimant], as set out in the preceding paragraphs, was such that, in all the circumstances, he owed [the Claimant] the duties set out at paragraphs 15(1) to 15(3) above."

33. Although the second part of paragraph 17 of the Particulars of Claim puts an alternative basis on which Mr Ahmad is alleged to have owed the Claimant the same duties as Mr Hofgren and Mr Cheek, Mr Phillips points out that the witness evidence put before Master Pester only characterised the claim against Mr Ahmad as one of *de facto* director.

34. Mr Phillips takes each set of particulars set out in paragraph 16 and submits that none of the matters pleaded in paragraphs 16(1), (2), (4) or (5) are sufficient to establish that Mr Ahmad was acting as a director. As to paragraph 16(3), in which it is alleged that Mr Ahmad had the "final say" in relation to major decisions, including as to the amount to be advanced under the DC158 Loan and whether the Claimant should enter into the Vordere Transaction, Mr Phillips submits:

    i) that the only pleaded allegation that Mr Ahmad was involved in the decision about the amount to be advanced under the DC158 Loan is a reference in paragraph 26 to an email exchange in which it is said to be "a question for Ali" to determine the currency conversion rate, which is not sufficient evidence of Mr Ahmad performing directorial acts; and

    ii) that the only pleaded allegation against Mr Ahmad in relation to the Vordere Transaction is at paragraph 53 of the Particulars of Claim, in which it is alleged that in around March 2019, Mr Hofgren and Mr Ahmad "held discussions" with Dolphin Group in relation to a proposal to convert the Claimant's security under the DC158 and 7EP Loans into shares in Vordere. "Holding discussions" is not, submits Mr Phillips, a directorial act.

35. Mr Brown submits that paragraph 16 pleads the essential fact, namely that Mr Ahmad performed the functions of a director of the Claimant. Following the guidance given in *Okbapi*, I should assume that fact to be true. What follows in paragraph 16 are only particulars of that central factual allegation. Some of those particulars, for example at paragraph 16(3) and (4) are in themselves evidence of Mr Ahmad performing directorial functions. Other particulars will have to be seen in their overall context at trial. This hearing is not, he submits, the place to determine the proper interpretation of, for example, the emails which Mr Phillips has referred me to. He also refers me to the evidence adduced by the Claimant which I have referred to above, and to the likelihood of further evidence becoming available by the time of a trial. In particular he notes that the GFSC has carried out an investigation into D1, GFG PCC and Mr Hofgren and produced a report. Whilst I have not permitted that report to be adduced in evidence on these applications, its existence indicates the likelihood of there being further material available to the parties by the time of a trial, which is not currently before the court.

36. I consider that the Claimant has shown that there are reasonable prospects of success in its claim that Mr Ahmad was a *de facto* director (or otherwise owed the Claimant the same duties as Mr Hofgren and Mr Cheek), essentially for the reasons given by Mr Brown. Whether a person has become a *de facto* director is a question of fact and degree: a judgment will need to be made in the round on all the evidence available at trial, which will include disclosure and witness evidence not currently available to the

court. Whilst I accept Mr Phillips' submission that not all of the particulars under paragraph 16 of the Particulars of Claim, viewed individually, constitute evidence of Mr Ahmad acting as a director of the Claimant, some of them, particularly paragraph 16(3), do. The other particulars may, or may not, support the general proposition which is pleaded at the beginning of paragraph 16 when they are properly considered together and in context at a trial. The central proposition of fact which is pleaded in paragraph 16 is that Mr Ahmad performed the functions of a director of the Claimant, at least in relation to the relevant transactions, and that is supported by Mr Clark's evidence. The fact that Mr Ahmad, through Mr Bechelet's evidence, disputes that he acted as director merely shows that there is a triable issue. The advisory agreements produced by Mr Bechelet are clearly relevant and it may be that when the matter comes to trial Mr Ahmad will be able to show that he was acting only in an advisory capacity, pursuant to those agreements. However, the existence of the agreements is not conclusive: *Henderson & Jones Ltd v Ross* [2023] EWHC 1276 (Ch) at [400]. This is not a case where there is an obvious answer in law to the Claimant's claim or the Claimant's pleaded case is so obviously unsustainable that there is no need for a trial to determine whether it can be made good.

No good reason/exceptional circumstances for service by alternative means

37. Mr Ahmad contends that there was no good reason (or exceptional circumstance) justifying an order for service by alternative means in circumstances where the Treaty would have allowed for service. Mr Phillips argues that, pursuant to Articles 7-10, the UK may request a particular method of service and the UAE may serve by that method if it does not contravene its own domestic law. It would therefore have been open to the Claimant, he contends, to apply for the UK authorities to have requested that the UAE serve by SMS/WhatsApp or email, as Master Pester's order permitted.

38. It might be thought that this is a somewhat odd position for Mr Ahmad to adopt, since he is arguing that he should have been served by SMS, WhatsApp or email, as he in fact was served, but only after the lengthy processes under the Treaty had taken place, rather than more speedily pursuant to Master Pester's order. Proper service of proceedings is undoubtedly important, but this is clearly a technical argument, rather than one of substantial justice.

39. In support of its application to Master Pester, the Claimant adduced evidence from Nicola Jackson, a Legal Director of Clyde & Co in Dubai. She explained that she had been instructed by the Claimant to effect personal service on Mr Ahmad at an address given (with misspellings corrected) as "Unit 6, Diamond Building, Tiara Residence, Palm Jumeirah, Dubai, United Arab Emirates". Not having been able to get an answer at either Apartment G06 on the ground floor or Apartment D06 on the deck level (first floor), Ms Jackson sought help from the security personnel to identify Mr Ahmad's apartment and showed them a photograph of him. This led to a security guard telephoning Mr Ahmad, who passed the phone to Ms Jackson. When Ms Jackson explained that she had a package for him from iLaw in the UK (the Claimant's previous solicitors), the person on the phone became irate and started shouting "return to sender" repeatedly. He refused to provide his apartment number and ended the call. The person on the phone subsequently called the security guard back and said that he should tell Ms Jackson to go and not give her any information.

40. Ms Jackson's witness statement refers to the Treaty and notes that it is arguable whether or not it is mandatory, referring to the discussion in the *Cesfin* case. She also gave evidence that the Central Authority in the UAE ordinarily serves documents by hand. Historically this had been by a court bailiff, but is now done by an authorised courier company. The courier will attend the recipient's address and, if there is no answer, may either affix the documents to the door of the premises or return them to the Central Authority for return to the UK. Where service is to be effected on an individual, the latter is more likely. Ms Jackson expressed the view that, given Mr Ahmad's behaviour when she attempted service, it was highly likely that the Central Authority in the UAE would not be able to complete service on Mr Ahmad by hand in Dubai.

41. Before Master Pester, the Claimant also adduced evidence from Mr Clark (witness statement 9 October 2023 ("**Clark 1"**), paragraphs 85-96) that Mr Ahmad had refused to give any current address but that the telephone number it had was likely to bring the proceedings to his attention. He also explained that the Foreign Process Section were then experiencing a three-month backlog in the processing of claims and that service in Dubai was likely to take several months. Whilst acknowledging that delay on its own might not be a sufficient reason for attempting to serve in Dubai, he suggested that when it was coupled with the likelihood that service under the Treaty was unlikely to be effective, the extended period was a further factor in favour of permission to serve by alternative means.

42. On these applications, Mr Ahmad has, through Mr Ellis, contended that he was not the person to whom Ms Jackson spoke by telephone, who may have been a former employee. Mr Clark however notes that he received a phone call from Mr Ahmad himself on that number on 7 November 2023.

43. On the application of the Treaty, Mr Ellis says that he had made enquiries of a lawyer practising in the UAE as to whether service by the Central Authority by SMS, WhatsApp or email would be unlawful. Mr Ellis says that he does not waive privilege in his communications with this lawyer, but that it is his understanding that there would be nothing unlawful in this. It seems to me that very little weight can be placed on this as evidence of UAE law or practice. The lawyer is not identified and Mr Ellis specifically says that he is not waiving privilege in his communications with them. He does not purport to relay the contents of the communications he has had, but rather to offer his own opinion or understanding of UAE law (in which he does not claim to be qualified).

44. In contrast, the Claimant relies upon a letter from Clyde & Co in Dubai, which disagrees with Mr Ellis's evidence. The letter states that it is unlikely that service can be effected in the UAE via the Central Authority by SMS, WhatsApp or email, although there is no express provision stating that it is not possible. The Clyde & Co dispute resolution team are not aware of the Central Authority ever serving documents electronically; there is no express provision for it to do so and they are not aware of any practice of doing so. Further, the relevant law (Article 10(6) of the UAE Federal Law No. 42 of 2022) implies that if a serving party can serve proceedings electronically with permission of the foreign court, it is required to do so, with service through diplomatic channels being a last resort.

45. In all the circumstances, it seems to me that the Claimant has shown good reason (or, to the extent necessary, exceptional circumstances) justifying an order for service by alternative means under CPR 6.15 rather than under the Treaty. This is because:

    i) there is clear evidence that Mr Ahmad has sought and would seek to evade service of the proceedings on him. This comes, not only from Ms Jackson's evidence, but from evidence of other evasive behaviour on his part. He refused to give the Claimant's solicitors his current address and even on the application to set aside Master Pester's order, offers no details as to where he lives or what his contact details are. Mr Bechelet's witness statement states his instructions that Mr Ahmad is a resident of Dubai, but does not give an address. Further, in response to the submission that Mr Ahmad had not offered to submit to the jurisdiction of the Guernsey court (with which I shall deal further below), Mr Bechelet says that "Mr Ahmed tells me he does not welcome litigation in any jurisdiction". This is a polite way of saying that Mr Ahmad would not undertake to submit to the submission of the Guernsey court. Consequently, in my judgment, there is a high chance that any attempt to serve Mr Ahmad personally in Dubai would be unsuccessful; and

    ii) there is, to put it at its lowest, very significant doubt as to whether electronic service could be effected by the UAE authorities under the Treaty. Given the backlog at the Foreign Process Section and the time it would likely take for the UAE authorities to process any request, once made, there is a high chance that it might be finally ascertained only after many months had passed that the UAE authorities were unable or unwilling to accede to any request to serve by electronic means. Expecting the Claimant to wait until that process had resulted in a dead end before making an application for permission under CPR 6.15 would not serve the ends of justice. It is part of Mr Phillips' complaint, on behalf of Mr Ahmad, that this claim was issued at the very end of the limitation period. It would not be in the interests of any of the parties or conducive to the proper administration of justice for the proceedings to have been prolonged by a failed attempt to utilise the Treaty service procedures.

Failure to give full and frank disclosure

46. Mr Ahmad contends that the Claimant failed to make full and frank disclosure to Master Pester in the following ways:

    i) in relation to the strength of the claim against Mr Ahmad, it is said that there was no discussion before Master Pester of the law relating to *de facto* directors and no analysis of paragraphs 16 and 17 of the Particulars of Claim, also that no reference was made to any other capacity in which Mr Ahmad may have been acting;

    ii) in relation to the issue of forum, it is said that the Claimant needed to, and failed to, ensure that the points which Mr Hofgren and Mr Cheek were by then making on jurisdiction were properly brought to the court's attention, including their

reliance on an Investment Management Agreement dating from April 2014 ("**the 2014 Agreement**"), the relevance of which I shall address below;

iii) in relation to service under the Treaty, it is said that there was really no reference to the possibility of service by electronic means under the provisions of the Treaty; and

iv) that there was no sufficient attempt to address the issue as to whether Mr Hofgren had been properly served.

47. Clark 1 addressed the obligation to give full and frank disclosure over 31 paragraphs, dealing with a number of different topics.

48. In relation to the claim that Mr Ahmad was a *de facto* director, Mr Clark referred at paragraph 10 of his witness statement to Mr Ahmad being an adviser to D1 and the ultimate beneficial owner of two advisory companies. He made clear that the Claimant was contending that Mr Ahmad was also a *de facto* director of the Claimant and, at paragraphs 16-17 of the witness statement and by reference to supporting documents, set out the basis for this claim. I do not consider the Claimant was required to go further and analyse the Particulars of Claim (which were shown to Master Pester) or refer to authority. When a claimant contends that a defendant occupies a certain position or plays a certain role, it is obvious that the defendant may contest the facts on which that contention is made or that they meet the legal test required. I do not consider that the Claimant was required to go further than it did to present the claim fairly to Master Pester in all material respects.

49. In relation to the forum arguments, Mr Clark referred (at paragraph 66) to Mr Hofgren and Mr Cheek's challenge to jurisdiction. At paragraphs 80-84 he set out why the Claimant contends that England is the appropriate forum, and in doing so referred (at paragraph 82) to the arguments which Mr Hofgren and Mr Cheek had made in pre-action correspondence. He specifically referred to the 2014 Agreement and noted that it contains Guernsey arbitration, governing law and non-exclusive jurisdiction clauses. At paragraph 83(5), he set out the Claimant's rebuttal. This was sufficient for Master Pester to understand that there was a real issue as to proper jurisdiction and that the arguments to be had would include arguments about the application of the 2014 Agreement: more was not, in my view, necessary to present the position fairly.

50. In relation to the Treaty, both Ms Jackson and Mr Clark expressly referred to the Treaty and to the debate as to whether it provides a permissive or exclusive method of service, highlighting the issue as to whether the test for departing from the Treaty methods of service is one of "good reason" or "exceptional circumstances". It is true that this evidence does not focus on the potential for service under the Treaty by electronic means, but in circumstances where (as shown by the Clyde & Co letter) Ms Jackson and her colleagues had no experience of the UAE authorities ever serving in that way, that is hardly surprising. An applicant without notice cannot be expected to anticipate every single legal argument which the respondent's solicitors or counsel might subsequently land upon. Again, I do not consider that the way it was put to Master Pester involved a failure to give full and frank disclosure.

51. As regards service on Mr Hofgren, Mr Clark brought to the court's attention (paragraphs 123-126 of Clark 1) Mr Hofgren's application and the arguments which he

was making. He did not specifically refer to caselaw, but did make Master Pester aware that if Mr Hofgren was right, he would not be an anchor defendant for the purposes of the relevant gateway (paragraph 123). That was the key material issue of which Master Pester needed to be aware. It is true that Mr Clark did not refer to the incorrect addition of "Thomas More Street" in the address, but that was because it had not been noted at that time: it was raised for the first time by Mr Bechelet in July 2024. Nothing more was required of the Claimant in my judgment to present the position fairly to Master Pester.

The Appropriate Forum Application and D1's Application

52. The Individual Defendants argue that the appropriate forum for determination of this dispute is Guernsey. D1's position is that it is entirely neutral on the question of forum, but that it is important that all claims are heard together, whether in England or in Guernsey.

The 2014 and 2017 Agreements

53. In this context there was a dispute about the applicability of two agreements, the 2014 Agreement I have briefly referred to above, and an agreement made in 2017 ("**the 2017 Agreement**").

54. The 2014 Agreement is dated 3 April 2014 and is made between D1, referred to as the "Investment Manager" and GFG PCC, referred to as "the Company". Clause 24 provides:

> "This Agreement shall be governed by and construed in accordance with the laws of the Island of Guernsey and subject to clause 22 (Arbitration), the parties agree to submit to the non-exclusive jurisdiction of the courts of the island of Guernsey."

55. By clause 2.1 of the 2014 Agreement, GFG PCC appoints D1 to manage its investment affairs and, by clause 3.1, D1 is to manage the investment and reinvestment of the "Cellular Assets". For these services, by clause 6, D1 is to receive a fee from GFG PCC. "Cellular Assets" is defined as:

> "the assets of the Company attributable to a Cell…"

"Cell" is defined as:

> "the cells listed in Schedule 2 together with each Additional Cell, each being a cell of the Company created in accordance with and subject to the provisions of [the Companies (Guernsey) Law 2008 as amended]".

"Additional Cell" means:

> "any additional cell of the Company for which the Investment Manager has, from time to time, agreed to provide the Services, as set out in Schedule 3 to this Agreement."

Xenfin Cell is not listed in either Schedule 2 or Schedule 3. At clause 19 is a provision which states that no amendment or variation of the agreement will be valid unless

confirmed as agreed in writing by an authorised signatory of each party and, if required under Guernsey collective investment scheme rules, the GFSC.

56. The 2017 Agreement is dated 24 March 2017 and is made between D1, referred to as the "Manager", the Claimant, referred to as the "SPV" and Xenfin Capital Ltd ("**Xenfin Capital**"), referred to as the "Advisor". By clause 29.1:

> "This Agreement shall be construed and governed in accordance with English law. Disputes arising under, out of or connected with this Agreement shall be subject to the non-exclusive jurisdiction of the English courts to which the parties hereby submit."

The 2017 Agreement has a series of recitals. By recital (A), it refers to the incorporation of GFG PCC, referred to as "the Company", and its authorisation by GFSC as a Class B open-ended investment scheme. The recitals then continue:

> "(B) The Manager was appointed as the investment manager of the Company, and by implication all protected cell sub-funds of the Company, on 3 April 2014.
>
> (C) Xenfin Securitised Debt Fund 1 ("Cell") is a protected cell of the Company. The SPV is a wholly owned subsidiary of the Cell and is used as an investment vehicle for the benefit of the Cell. It is managed by the Manager.
>
> (D) The SPV has assets in an Account with the Bank.
>
> (E) In respect of the sums deposited by the SPV in the Account (or such sums as are otherwise agreed between the Manager and the Advisor), the Manager wishes to appoint the Advisor to present it with proposed investments and, following Manager approval, place those investments using its platform and the Advisor is willing to accept the appointment on the terms and conditions contained in this Agreement."

57. For the purposes of the Appropriate Forum Application, the Claimant relies, as against D1, on the English law and English non-exclusive jurisdiction clause in the 2017 Agreement. On the other hand, the Individual Defendants rely on the Guernsey law and Guernsey non-exclusive jurisdiction clause in the 2014 Agreement as a connection to Guernsey. This is even though the Individual Defendants are not themselves parties to the 2014 Agreement. D1, which is a party to the 2014 Agreement, is, as I have said, neutral on the question of forum but keen to ensure that all claims are heard together. Consequently, because it was the Claimant's position (at least up until the hearing before me) that the jurisdiction clause in the 2017 Agreement was sufficient to require the claims against D1 to be tried in England even if the claims against the Individual Defendants were heard in Guernsey, Ms Lucas addressed me on the two Agreements on behalf of D1.

58. In seeking to decide the question whether either jurisdiction clause applies, at this stage of the proceedings the court faces two issues. First, the Claimant is not named as a party to the 2014 Agreement, indeed it was not incorporated until after the 2014 Agreement. Whether the Claimant is bound by the jurisdiction clause is a matter of Guernsey law.

On this point, I have been provided with expert reports from Advocate Gordon Dawes on behalf of the Individual Defendants and Advocate Robert Breckon on behalf of the Claimant, however at this interlocutory stage, neither of the experts have been subject to cross-examination. Moreover, it is apparent, reading the reports, that the Guernsey law analysis is likely to turn on questions of fact which will not be determined until the trial. Secondly, if the jurisdiction clauses in both the 2014 and 2017 Agreements potentially apply to the claims in these proceedings, then it is necessary to construe the two clauses to see which one applies. This construction process, however, may also turn on questions of fact (particularly the context in which each Agreement was made) and on questions of Guernsey law, which the expert reports do not address, as to the construction of the 2014 Agreement.

59. The parties were all agreed that it was necessary for me to consider the effect of the 2014 and 2017 Agreements in order to determine the applications before me but that any decision I may make can only be a provisional one and will not bind the trial judge.

60. In *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, [2018] 1 WLR 3683 at [9], the Supreme Court confirmed the test for dealing with a disputed fact in the context of a jurisdiction issue at an interlocutory stage:

> "This is, accordingly, a case in which the fact on which jurisdiction depends is also likely to be decisive of the action itself if it proceeds. For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had 'the better of the argument' on the facts going to jurisdiction. In *Brownlie v Four Seasons Holdings Inc [2018] 1 WLR 192* , para 7, this court reformulated the effect of that test as follows: '(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.' It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced."

In *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] EWCA Civ 10, [2019] 1 WLR 3514 the Court of Appeal endeavoured to state how that test should be applied in practice. As summarised in Dicey, Morris and Collins on The Conflict of Laws 16th edn paragraph 12-083, *Kaefer* establishes:

> "that, first, the party relying on the existence of the agreement must supply an evidential basis showing that it has the better argument (and *not* much the better argument); second, 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, third, 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 existence of the agreement if there is a plausible (albeit contested) evidential basis for it."

61. As regards competing jurisdiction clauses, Dicey, Morris and Collins at 12-082 says (this summary being adopted by Henshaw J in *Clifford Chance LLP v Societe Générale SA* [2023] EWHC 2682):

> "The complexity of international commercial and financial transactions has resulted in the frequent use of inter-linked contracts. Because jurisdiction clauses are not generally the subject of close negotiation or scrutiny, it frequently happens that there are inconsistent jurisdiction clauses, or situations in which one or more contracts have jurisdiction clauses and others do not. Which, if any, jurisdiction clause applies to a dispute is entirely a matter of construction, and where English law governs the jurisdiction agreement, a matter of the application of established principles of contractual construction. It may be that the many decisions in this area have over-elaborated the application of familiar principles of construction, but the following propositions can be derived from them: (1) Jurisdiction clauses should be construed widely and generously. (2) An agreement which is part of a series of agreements should be construed by taking into account the overall scheme of the agreements. (3) It is generally to be assumed that just as parties to a single agreement do not intend as rational business people that disputes under the same agreement be determined by different tribunals, parties to an arrangement between them set out in multiple related agreements do not generally intend a dispute to be litigated in two different tribunals. (4) Where there are multiple related agreements, the task of the court in determining whether the dispute falls within the jurisdiction clauses of one or more related agreements depends upon the intention of the parties as revealed by the agreements (at the time when they were entered into) as against these general principles. (5) Rational business people are unlikely to intend that disputes between them should fall within the scope of two inconsistent jurisdiction clauses. (6) What is required is a broad, purposive and commercially-minded construction, in the light of the transaction as a whole, taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme. (7) This may include enquiring under which of a number of inter-related contractual agreements a dispute actually arises, and seeking to do so by locating its centre of gravity and thus which jurisdiction clause is closer to the claim. (8) Nevertheless the normal process of construction may not be able to avoid a degree of fragmentation and overlap."

62. Because it comes first in time, I will consider first the 2014 Agreement. It is the Individual Defendants who rely on clause 24 in this contract and who therefore must show a good arguable case that it applies to the claims against D1, in accordance with the requirements set out above. Advocate Dawes provided an initial expert report dated 1 November 2023, in which he addressed (a) the nature of the legal relationship between a protected cell company, its cells and its cells subsidiaries and/or SPVs; and (b), in

light of (a) and the 2014 Agreement, whether clauses 22 (arbitration) and 24 (governing law and jurisdiction) are binding on the Claimant. He says:

> "In answer to the question posed, I believe it is strongly arguable that the [2014 Agreement] provisions (including clauses 22 and 24) bind [the Claimant] vis-à-vis [D1]. I am not aware that there was every any express contract made directly between the [Claimant] and [D1]. However, we know from the [2014 Agreement] that it was intended [D1] should be the investment manager for the whole structure given that [GFG PCC] is a single legal entity acting for all cells (which, as noted, have no separate legal personality and cannot themselves contract) and cell assets such as [the Claimant] (the existence of such entities being expressly contemplated by the 2008 Law as above) formed a part of that structure; see generally clauses 2.1 and 3.1 of the [2014 Agreement] and the reference to "Cellular Assets" and the definition of that term at clause 1.2. One could argue for GFG PCC acting both for Xenfin Cell (being a part of the same legal entity) and as agent for the [Claimant] as a (then future) Cellular Asset in making the [2014 Agreement]. And of course [the Claimant] did not exist at the time the [2014 Agreement] was made."

He then refers to the Claimant's resolution of 27 March 2017 which, he says, takes it as given that D1 is the Claimant's investment manager and to the Xenfin Cell annual report for the year ended 30 April 2018. He also says that it could be inferred that the investment management fees are paid by reference to the Claimant and the management of its assets.

63. Advocate Breckon, in response, draws attention to the lack of any reference to Xenfin Cell in Schedule 2 to the 2014 Agreement. He says that, in order to adopt the 2014 Agreement, both Xenfin Cell and the Claimant would need corporate authority to approve accession thereto. He can find no appointment of D1 by the Claimant in the minutes dated 27 March 2017. Moreover, he says, the 2014 Agreement provides for a specific contractual route through which additional cells are appointed, pursuant to Schedule 3. Any accession by the Claimant, which is not a cell, would constitute an amendment to the 2014 Agreement, which, pursuant to clause 19 thereof, is only valid if agreed in writing. He concludes:

> "On the evidence before me, the [2014 Agreement] does not amount to a legally binding agreement with [the Claimant]."

64. A further report from Advocate Dawes was produced in reply to that of Advocate Breckon and in response to witness evidence served by the Claimant. He states his opinion that the absence of Xenfin Cell from Schedule 3 is not conclusive and that it is a matter of fact as to whether D1 had "agreed to provide the Services" to any additional cells. The evidence which he had seen and referred to in his earlier report suggested that it had. The issue was why Schedule 3 was not added to and whether this was deliberate or an oversight. Having referred to the familiar principle of English contract law, also applicable in Guernsey, that contractual relations may be made or altered by conduct, at paragraph 15 he says:

> "And again it is not strictly a question of whether the [2014 Agreement] became legally binding between [D1] and [the Claimant] (because [the

> Claimant] would not become a party even if the Xenfin Cell had been identified under Schedule 3) as opposed to [D1] owing duties as investment manager to [the Claimant] under [the 2014 Agreement], itself governed by Guernsey law, arbitration and jurisdiction."

Similarly, in responding to the additional witness evidence he says at paragraph 27:

> "…I do not say that [the Claimant] became a party to the [2014 Agreement] but I stand by the suggestion that it is at least strongly arguable that the [2014 Agreement] governed the investment management relationship between [D1] and [the Claimant]."

65. If the Claimant is bound by the 2014 Agreement and, in particular by its governing law and jurisdiction clause, then there is, as I understand it, no dispute that the claims which it brings against D1 would fall within the scope of that clause, subject to any later variation of the clause. It seems to me from the Guernsey law expert reports that there may be three different questions to be answered before it can be known whether the Claimant is so bound. The first is the question of fact, whether the relationship between the Claimant and the First Defendant was treated as governed by the 2014 Agreement. The second is whether clause 19 would, as a matter of Guernsey law, prevent the Claimant being bound by the 2014 Agreement even if it was. The third is, in any event, whether the Claimant would be treated as having submitted to the non-exclusive jurisdiction of the Guernsey courts as a matter of the construction of clause 24, given that in that clause "the parties" agree to submit to that jurisdiction, and on any basis, it appears from Advocate Dawes' evidence, the Claimant would not have been "a party" to the 2014 Agreement.

66. As to the question of fact, it seems to me that this is an issue on which I am able to take a view, albeit on the limited materials available to the court at this hearing and recognising that much more evidence will be available to the trial judge following disclosure and witness statements. In my judgment, the Individual Defendants have the better argument in contending that the relationship between the Claimant and D1 was treated as governed by the 2014 Agreement. Recitals (B) and (C) to the 2017 Agreement are strong evidence of this although, like Advocate Breckon, I find it difficult to see any such evidence in the minutes to which Advocate Dawes refers. Importantly, however, it is part of the Claimant's pleaded case that the agreement between the Claimant and D1, under which D1 would act as the investment manager to the Claimant was made orally or by conduct soon after the Claimant's incorporation (paragraph 10 of the Particulars of Claim). As Ms Lucas points out, the argument which is made in some of the Claimant's evidence for this hearing, namely that D1 was appointed the Claimant's investment manager by the 2017 Agreement, is made only as an alternative case in paragraph 11 of the Particulars of Claim. The Claimant has moved away from its own pleaded case in order to argue the points which the Individual Defendants have raised in relation to jurisdiction.

67. However, I am unable to make a reliable assessment as to the answer to the two points of Guernsey law referred to in paragraph 65 above, given the conflicting expert reports and absence of cross-examination. Treating evidence of foreign law as a question of fact, and therefore subject to the principles discussed in *Kaefer*, Advocate Dawes' evidence provides a plausible evidential basis for the Claimant being bound by the jurisdiction clause of the 2014 Agreement, even though that evidence is contested by

Advocate Breckon. Consequently, in my judgment the Individual Defendants have shown a good arguable case that (subject to any later effect of the 2017 Agreement), the contractual relationship between the Claimant and D1 is governed by Guernsey law and the Claimant is to be taken as having agreed to submit to the non-exclusive jurisdiction of the Guernsey courts in relation to the claims against D1.

68. The next question is the effect of the 2017 Agreement. Here the burden of showing a good arguable case that the jurisdiction clause applies to the claims against D1 lies on the Claimant. Both the Claimant and D1 were parties to the 2017 Agreement, so there is no issue which arises in that respect. The question must be whether, applying the principles set out in paragraph 61 above, the jurisdiction clause in the 2017 Agreement was intended to cover the claims made against D1 and (if the Individual Defendants are right about the effect of the 2014 Agreement) supersede or vary clause 22 of the 2014 Agreement. There would appear to be no issue over the application of clause 19 of the 2014 Agreement, as any such variation made by the 2017 Agreement has been made in writing by an authorised signatory of the Claimant and D1.

69. Unlike the 2014 Agreement, the overriding purpose of the 2017 Agreement is not to appoint D1 as investment adviser to the Claimant. On the contrary, the recitals treat that appointment as having already occurred. Rather the purpose is to appoint Xenfin Capital to present D1 with suitable investments to be made by the Claimant and then to execute those investments on behalf of the Claimant.

70. Mr Brown's argument is that the wording of clause 29.1 of the 2017 Agreement is substantially wider than clause 22 of the 2014 Agreement. It covers "disputes arising under, out of or connected with this Agreement". Thus, says Mr Brown, this dispute is covered by the clause because it is "connected with" the 2017 Agreement, even if the 2017 Agreement does not govern the investment management relationship between the Claimant and D1.

71. In my judgment it is a necessary first step in this argument for the Claimant to show that the 2017 Agreement at least related to the Loans or the Vordere Transaction. I do not see how, even on the broad, purposive approach mandated by the authorities, the claim against D1 can even be said to be "connected with" the 2017 Agreement, if the transactions on which the claims are brought were not made on the advice of Xenfin Capital or executed by Xenfin Capital on behalf of the Claimant pursuant to the 2017 Agreement. On this point, the evidence is extremely thin. The most that Mr Brown can point to is a passage in Clark 2 (paragraph 65), in which he is describing individuals and entities relevant to the claim. In this context he refers to Xenfin Capital and its CEO and shareholder, Mr MacInnes, saying:

> "Mr MacInnes helped raise funds which the Company eventually loaned out, including the DC158 and 7EP loans."

This is not, as it seems to me, an assertion that Xenfin Capital was acting under the 2017 Agreement in respect of the three relevant transactions, but rather that Mr MacInnes assisted with the raising of funds for the Claimant. The Particulars of Claim do not plead that Xenfin Capital was involved in the transactions or that they were undertaken pursuant to the 2017 Agreement (which is pleaded). For the purposes of a jurisdiction dispute, I cannot see that this amounts even to a "plausible, if contested"

evidential basis for the contention that the 2017 Agreement applies to the claims in these proceedings.

72. For that reason I do not need to consider the potentially difficult question as to whether the governing law and jurisdiction clause in the 2017 Agreement would, as a matter of construction, have superseded or varied the relevant clause in the 2014 Agreement, assuming that (on the facts and evidence at trial) it is shown that the 2014 Agreement applies to the claims against D1.

Appropriate Forum – Law

73. There was no real dispute between the parties as to the principles which I should apply to determine whether the court should decline to exercise the jurisdiction which it would otherwise be able to assert over the Defendants (or, in the case of Mr Ahmad, whether Master Pester's order should be set aside). These may be summarised as follows:

i) the task of the Court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice: *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 at 480G. That is the forum with which the action has the most real and substantial connection: *Spiliada* at 478A. The court is looking for a single jurisdiction in which the claims against all the defendants may most suitably be tried: *Lungowe v Vedanta Resources plc* [2019] UKSC 20 [2020] AC 1045 at [68];

ii) that task generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated: *Lungowe* at [66]. There are many potentially relevant factors and the weight to be given to them will vary from case to case: *Spiliada* at 465D, 481G. They may include (a) the connection between the factual elements of the dispute to the competing jurisdictions; (b) the law governing the transaction; (c) the location of the parties to the dispute, both at the time of the events giving rise to the dispute and also during the course of the proceedings; (d) whether proceedings relating to the dispute between the applicant and the respondent would be fragmented by any order for or against a stay which the Court might make, and whether there would be concurrent proceedings in more than one jurisdiction, with the risk of inconsistent judgments being obtained in those jurisdictions; (e) the location and availability of documentary evidence (although whether this is a material practical consideration depends on the ease with which such documents can be digitally copied and transferred and whether there are caches of documents which require review only at particular locations) and (f) the location and availability of witnesses (bearing in mind that this last consideration may be mitigated if evidence can or is to be given remotely consistent with the requirement of a just and fair proceeding): *Boettcher v Xio (UK) LLP* [2023] EWHC 801 (Comm) at [88]. What the court needs to do is stand back and ask the practical question as to where the fundamental focus of the litigation is to be found: *Erste Group Bank AG v JSC 'VMZ Red October'* [2015] EWCA Civ 379, [2015] 1 CLC 706 at [149];

iii) where a defendant seeks a stay on the ground of appropriate forum, the burden is on it to demonstrate that another overseas jurisdiction is available and is clearly the appropriate forum: *Spiliada* at 476D. Where a claimant seeks

permission to serve out the burden is on it to persuade the court that England is clearly the appropriate forum: *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [88];

iv) a defendant challenging jurisdiction must identify another candidate, which does have jurisdiction to determine the dispute, and the question will be tested by reference to the identified candidate: *Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* [2021] 1 All ER 1141 at [96];

v) even when a foreign court would not otherwise have jurisdiction over the defendant, an undertaking by the defendant to submit to its jurisdiction can make the foreign court an appropriate forum. However, the absence of such an undertaking may mean that the identified foreign court is not an available forum: *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] 3 WLR 659 (SC) at [102]-[104];

vi) where a claim is time-barred in the foreign jurisdiction and the claimant's claim would undoubtedly be defeated if it were brought there, practical justice should be done, so that if the claimant 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 claimant of the benefit of the English proceedings: *Spiliada* at 483D-484C; *Altimo* at [88].

Appropriate Forum – Decision

74. Mr Phillips argued that the appropriate forum is Guernsey, on the following grounds:

i) the claims against the Individual Defendants are governed by Guernsey law;

ii) the claims against D1 are governed by Guernsey law, by virtue of the 2014 Agreement or the general law;

iii) the investment structure is Guernsey-centred and based on a concept of Guernsey law – the protective cell company – which has no counterpart in English law. GFG PCC, D1 and C are all Guernsey companies with the Claimant being in liquidation in Guernsey;

iv) that investment structure is regulated by the GFSC, which has already taken action in relation to the matters complained of in Guernsey. Issues of admissibility of the GFSC's report are best handled by the Guernsey court and the existence of the report indicates that some of the available documents will be located in Guernsey;

v) the place where damage has been suffered is Guernsey, because the place of the obligation to repay the money loaned was Guernsey; and

vi) there is no difficulty with the enforcement of a Guernsey judgment in England.

In response to the Claimant's argument that it had not been shown that the Guernsey court had jurisdiction over the Individual Defendants, Mr Phillips referred to undertakings which had been given, shortly before the hearing of these applications, by all three, to submit to the jurisdiction of the Guernsey court. In any event, he argued

that it had been Mr Hofgren and Mr Cheek's position from the outset, voiced in response to the letters of claim, that the appropriate forum was Guernsey.

75. By the time it came to making oral submissions at the hearing, Mr Brown for the Claimant put his case for England being the appropriate forum very firmly on the principle in paragraph 73(vi) above. He contended that it was reasonable for the Claimant to have brought proceedings in England, given the number of connections with this jurisdiction and the absence (until shortly before the hearing) of any undertaking from the Individual Defendants to submit to the jurisdiction of the Guernsey court, and it would be unjust now to stay these proceedings (or, in Mr Ahmad's case, set aside Master Pester's order) given that proceedings in Guernsey on the Loans would be time-barred. Shifting from the position in his skeleton argument, Mr Brown argued that this was a case where there would be proceedings in England or not at all (because of the limitation issues) and there was therefore no question of different defendants being sued in different jurisdictions.

76. In my judgment, there are a number of important connections between the claims and England:

i) the Claimant's evidence (Clark 2, paragraphs 55-58) indicates that although the Claimant is incorporated in Guernsey, it was managed by Mr Hofgren and Mr Cheek from England, which is where they were both living. Both are English nationals with multiple directorships with English companies. Mr Phillips sought to undermine this evidence by referring to some documents in the bundle which indicate that some meetings were held in Guernsey. I agree with Mr Brown, however, that this is not sufficient to meet Mr Clark's evidence. If the Individual Defendants wished to contend that Mr Clark was wrong, they should have put in evidence that the Claimant was managed from Guernsey. They did not do so. Moreover, the emails on which the Claimant relies as evidence that Mr Ahmad was acting as *de facto* director (Clark 2, paragraphs 97-171) were sent from three email addresses connected to English companies. Mr Ahmad also has a UK mobile phone and fax number.

ii) As a consequence of the management of the Claimant from England, the key decisions, in relation to the relevant transactions, were made in England. Thus in so far as the claims are founded on those decisions constituting breaches of contract, of fiduciary duty or of a duty in tort to exercise reasonable care, skill and diligence (in the case of D1) and breaches of directors' duties (in the case of the Individual Defendants), the wrongdoing took place in England. The question of where loss was suffered is more controversial. Mr Brown argued that the damage in this respect was suffered in England because the payments were made to English accounts. Mr Phillips argued that loss was suffered when the payments were made out of the Claimant's account in Guernsey. It seems to me that the proper analysis may be that loss was suffered when the Claimant became bound, as a matter of contract, to make the Loans or to enter into the Vordere Transaction. In this respect, it is not clear where the documentation was signed on behalf of the Claimant.

iii) Vordere, in which shares were acquired, is an English company.

iv) The investors who invested in the Claimant – i.e. the Claimant's customers - are almost entirely based in England.

v) A number of relevant people, including potential witnesses, are identified in Clark 2, paragraph 65. It is clearly more convenient if witnesses based in England give their evidence here; it may only be possible to obtain evidence from some of these witnesses in England, where they are compellable.

77. In this context, I do not consider that the Guernsey connections are so strong as to make Guernsey the more appropriate forum. Formally the corporate entities are incorporated and regulated in Guernsey but, as I have said, the evidence indicates that the real people making the real decisions were based in England. The fact that some or all of the claims are governed by Guernsey law is relevant, but it appears likely that on most points Guernsey law will be the same as, or similar to, English law and there is no difficulty with the English court receiving expert evidence of Guernsey law. It does not appear likely that there will be any hotly contested area of Guernsey law which ought, properly, to be determined by the Guernsey courts. Most documents are likely to be available electronically, so their location is of little significance. The jurisdiction clause in the 2014 Agreement is (despite the amount of time spent arguing about it) in my judgment of little weight, given that it is non-exclusive: *Chopra v Bank of Singapore Limited* [2015] EWHC 1549 at [145] and that D1, which is the only defendant which could take advantage of it, is neutral on the question of forum.

78. Moreover, it would, in my judgment, be a significant injustice for the Claimant to be barred from bringing some of its claims because, having brought these proceedings in England, it is now time-barred in respect of those claims in Guernsey. It was reasonable for the Claimant to have commenced these proceedings in England given the degree of connection to England and given that, at the time it started the proceedings and indeed at all times until shortly before the hearing of these applications, the Individual Defendants had not submitted to the Guernsey jurisdiction. Thus, despite Mr Hofgren and Mr Cheek arguing from the outset that the claims against them should be brought in Guernsey, it was not an available forum. Moreover, as I have indicated above, Mr Ahmad made it very clear, through his solicitor, that he "did not welcome litigation in any jurisdiction" and there was therefore no reason to think that he would be prepared to submit himself to the jurisdiction of the Guernsey court.

79. In conclusion, the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice is England.

80. In the circumstances, the basis on which D1's Application is made (that the court decides that it should not exercise its jurisdiction in relation to the claims against the Individual Defendants) does not arise and I need not address that application further.

Disposition

81. In light of my findings above, I dismiss the applications of the Individual Defendants and make no order on D1's Application.