Neutral Citation Number: [2022] EWHC 451 (Ch)

Case No: PT-2021-000836

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

Rolls Building
Fetter Lane
London, EC4A 1NL

7 March 2022

Before :
JUDGE JONATHAN RICHARDS
Sitting as a Deputy Judge of the High Court

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Between :

(1) AMMAR AL ASSAM **Claimants**
(2) MOHAMED KHALID AL ASSAM
(3) AHLAM ABU AL TIMEN
(4) ZEENA AL ASSAM
(5) HAIDER AL ASSAM
(6) JULIANA ANDRIANA KHALIL BAMIEH
(7) LAITH AL ASSAM
(a child by Ammar Al Assam, his litigation friend)
(8) FARIS AL ASSAM
(a child by Ammar Al Assam, his litigation friend)
(9) AAA GROUP INC
(10) HROSTENCO CORPORATION

- and –

DIMITRIOS TSOUVELEKAKIS **Defendant**

Simon Adamyk and **Jessica Powers** (instructed by **DWF Law LLP**) for the **claimants**
David Head QC and **Clarissa Jones** (instructed by **Peters & Peters LLP**) for the **defendant**

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APPROVED JUDGMENT

Covid-19 Protocol: This judgment is handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30 AM on 7 March 2022.

Judge Jonathan Richards:

1. The Defendant lives in England. The Claimants have served proceedings on him in England. The Defendant takes no point on the efficacy of that service and accepts that the English courts have jurisdiction to try the claim. However, by application notice dated 29 October 2021, he has applied for an order that the English courts decline jurisdiction and stay the claim on the basis that Cyprus is the more suitable and appropriate forum for determination of the claim. Applications of this type have long been referred to by their Latin tag of "*forum non conveniens*" but in the interests of readability I will use the term "appropriate forum". This is my judgment on the Defendant's application.

2. I had evidence of fact from Mr Woodland, the Defendant's solicitor, and from Mr Twomey, the solicitor for the Claimants. Both sides also put forward expert evidence on Cyprus law. The Claimants relied on expert evidence from Dr Marcos Dracos, a barrister qualified in both Cypriot and English law and practising in both Cyprus and England and Wales. The Defendant relied on expert evidence from Dr Polyvious Polyviou, who is both an academic and a practising lawyer in Cyprus. Neither party challenged the expertise or independence of the other's expert.

THE PROCEEDINGS

The legal claims and the background to them

3. C1 and C2 are settlors of two trusts (the "AAA Trust" and the "Hamza Trust" and together the "Trusts"). C1 to C8 are members of the same family and are beneficiaries of the Trusts which were both established under the International Trusts Law of the Republic of Cyprus.

4. The Trusts both held funds and investments through two asset-holding companies: C9 ("AAA Group") in the case of the AAA Trust and C10 ("Hrostenco") in the case of the Hamza Trust. AAA Group is incorporated in Panama. Hrostenco is incorporated in the British Virgin Islands.

5. The trustee of each of the Trusts was Latimer (Management Services) Limited ("Latimer"). Latimer is incorporated in Cyprus and is subject to financial and fiduciary service regulation in Cyprus. Latimer exercised its functions as trustee through Mr Antonis Partellas and Mr Stelios Kiliaris, its directors and shareholders both of whom are resident in Cyprus. Mr Partellas and Mr Kiliaris are also directors of and equal shareholders in Alliott Partellas Kiliaris Ltd ("APK"), which is also incorporated in Cyprus. All payment instructions when investments were made by the Trusts were made by way of instruction letters on AAA Group or Hrostenco headed paper, signed by Ms Antonia Kyriakou (an employee of APK).

6. Between July 2010 and May 2015, some 60% of the total funds that C1 and C2 contributed to the Trusts were represented by investments in two telecommunications companies ("Rolaware" and "Dremoplex"). Both of these companies were incorporated in Cyprus but carried on businesses in mainland Greece involving the exploitation of telecommunications and broadcasting licences. From time to time shares acquired by the Trusts in Rolaware and Dremoplex were held by a nominee company Hamervate Limited, incorporated in Cyprus. APK was the auditor of both Rolaware and Dremoplex.

7. By their claims, the Claimants seek to make the Defendant liable for losses suffered in connection with the Trusts' investments, including those made in Rolaware and Dremoplex. The claims are put in the following ways:

   i) *Claim 1 (negligence)* – C1 and C2 contend that the Defendant assumed personal responsibility to them to take reasonable care to invest funds in accordance with the agreed objective of the Trusts, which was to ensure capital preservation. He breached that duty by giving poor investment advice to Latimer and caused loss.

   ii) *Claim 2 (breach of fiduciary duty)* – C1 and C2 contend that there was a long history of dealings between them and the Defendant and the trust and confidence that they reposed in him caused him to owe fiduciary duties, including a duty to act in good faith, and not to put himself in a position of conflict. He had an involvement with Rolaware and Dremoplex which gave rise to a conflict of interest. More generally he breached his fiduciary duty and caused loss.

   iii) *Claim 3 (deceit)* – C1 and C2 contend that the Defendant lied to them by providing false portfolio reports and making other misrepresentations including misreporting the existence of USD millions in cash which did not exist. Had they known the true position earlier, they would have intervened earlier and prevented much of the loss.

   iv) *Claim 4 (dishonest assistance in Latimer's breach of trust)* – C1 to C8 contend that Latimer breached its duties as trustee by making speculative high-risk investments and failing to monitor them properly and that the Defendant's actions amounted to dishonest assistance in those breaches.

   v) *Claim 5 (alternative tortious claim under Swiss law)*. The Claimants pleaded a Swiss law claim in tort as an alternative. However, since it appears that the Defendant agrees that any claim in tort would be governed by Cyprus law, it appears unlikely that this claim will need to be advanced.

   vi) *Claim 6 (contractual claim under Swiss law)* This claim is made by AAA Group and Hrostenco alone. It is said that AAA Group and Hrostenco executed documents, governed by Swiss law, that gave the Defendant power to place orders on accounts held with a Swiss financial institution ("Kendra"). It is said that the Defendant owed AAA Group and Hrostenco contractual duties of "diligence" and "fidelity" that he breached by causing the challenged investments to be made and caused loss as a result.

8. The parties appear agreed that Claims 1 to 4 will be governed by Cyprus law although the Defendant emphasised that his position might evolve as the litigation progresses. They also appear agreed that the Cyprus law applicable to these claims is broadly similar to applicable English law.

Issues that are likely to arise

9. As Lord Clarke noted in paragraphs 192 to 194 of his judgment in *VTB Capital plc v Nutritek International* [2013] 2 AC 337, in a case where the appropriate

forum for proceedings is in dispute, it is essential to identify those issues that are likely to arise at the trial of the action on the merits. Only when those issues are identified is it possible to identify the suitability of the various candidate jurisdictions.

10. The Defendant has not to date served any Defence. However, the skeleton argument of Mr Head QC and Ms Jones, and also the witness statement of his solicitor, Mr Woodland provide an indication of the points that he is likely to make in his defence. Predicting the course of litigation such as this is necessarily going to be somewhat uncertain, but I have concluded that the following issues, at least, are likely to arise:

    i) *The way in which the Trusts made their decisions to make investments and the legal framework within which those decisions were made.* This issue will be thrown into focus by the Defendant's assertion that it was, in all cases, Latimer's decision, in its capacity as trustee, whether particular investments were made or not. This issue will also involve an analysis of whether the Trusts' investment strategy was intended to protect capital (as the Claimants say) or whether it was intended to be much more adventurous (as the Defendant says). It will also involve some consideration of what investments the Trusts might have made if they had not made the investments that the Claimants criticise.

    ii) *The nature and evolution of the relationship between the Defendant and the Claimants and between the Defendant and the Trusts*. That will set out a basis for establishing whether the Defendant did assume a degree of personal responsibility to the Claimants for the selection of successful investments and whether any fiduciary relationship was established. An understanding of that issue will help to address related points that the Defendant looks likely to raise in his defence namely that (i) to the extent he had any duties, they were owed to Latimer (in its capacity as trustee of the Trusts) and not to the Claimants in their capacities as settlors/beneficiaries (ii) that a company the Defendant controlled ("Tiger Capital") was appointed to manage the brokerage accounts of AAA Group and Hrostenco with Kendra, (iii) that the arrangement with Tiger Capital provided Tiger Capital with extensive protection by way of indemnities and acknowledged that investments might be made in assets in which Tiger Capital had an interest or involvement and that (iv) while the Defendant was authorised to place orders on the Kendra accounts, he was not authorised to withdraw funds or assets from those accounts.

    iii) As well as helping to establish the nature and scope of any duties that the Defendant owed the Claimants, issues (i) and (ii) will between them shed some light on the claim based on dishonest assistance since they will help to establish whether Latimer was indeed in breach of its duties as trustee in making particular investments and whether the Defendant gave dishonest assistance to any such breaches.

    iv) *The commercial wisdom of the Trusts' investments including, but not limited to, investments in Rolaware and Dremoplex and the circumstances in which, whether wisely or not, the decision was made to invest in those*

companies. Both issues: the actual commercial wisdom, and the process by which commercial wisdom was assessed, will have a bearing on the claim in negligence and for breach of fiduciary duty. Because it is asserted that the Defendant had a conflict of interest in respect of the investments in Rolaware and Dremoplex, and because it is said that he had something of an "inside track" as to the true situation of those companies, and so was not simply dependent on information that the companies provided to him, this issue is likely to involve a detailed examination of the actual financial position and businesses of Rolaware and Dremoplex.

v) *The circumstances in which portfolio statements were provided and the accuracy or otherwise of those statements.* This issue will have a direct bearing on the claim in deceit.

vi) *The value of the Trusts' investments at relevant times.* This may need to be established by expert valuation evidence and will go to the questions of the commercial wisdom of making those investments and the question of loss.

THE LEGAL PRINCIPLES TO BE APPLIED

11. The parties are agreed that the Defendant has lived in England and Wales since at least August 2016. The Claimants assert that he lived here before then, since 2013, but that is denied and I do not need to decide this issue. The Claimants served proceedings on the Defendant on 1 October 2021, after the end of the transition period relating to the UK's exit from the European Union. They did not need, or seek, permission to serve out of the jurisdiction because they served the Defendant in England where he lived, and still lives. Had the Claimants served their proceedings at a time when the Brussels Regulation Recast (Regulation 1215/2012) (the "Recast Regulation") applied in the UK the Recast Regulation would have provided that, unless a limited set of exceptions applied, the Defendant would have to be sued in England and Wales. However, it is common ground that the Recast Regulation does not apply to these proceedings, although the Claimants still argue that the effect of that Regulation, that the Defendant should properly be sued in England and Wales, remains the correct one.

12. The parties are, therefore, agreed that common law, rather than the Recast Regulation, establishes the framework for deciding whether the courts of Cyprus are the more appropriate forum for trial of these proceedings. Given that the English courts have jurisdiction, I have derived the following propositions of law, which I understood to be materially agreed, from the judgment of Lord Goff in *Spiliada Maritime Corporation v Cansulex Limited* [1987] 1 AC 460 ("*Spiliada*"):

i) There are two limbs to the test set out in *Spiliada*. Under limb 1 of the test, the Defendant must establish that the courts of Cyprus are both (i) "available" and (ii) are clearly or distinctly more appropriate than the English courts as a forum for determining the dispute.

ii) The burden of proof on limb 1 of *Spiliada* lies with the Defendant. It is not enough for him just to show that England is not the natural or appropriate

forum for the trial. He must also establish that the courts of Cyprus are clearly or distinctly more appropriate. This involves something more than an examination of "mere practical convenience".

iii) If limb 1 of *Spiliada* is not satisfied, then the enquiry should stop there. Lord Goff found it difficult to imagine circumstances in which a stay would be granted without another available forum, which is clearly or distinctly more appropriate, being identified and it is not suggested that any such circumstances are present in these proceedings.

iv) If the Defendant can establish that limb 1 of *Spiliada* is satisfied, it becomes necessary to consider limb 2. Limb 2 requires a consideration of whether, even if the courts of Cyprus are an available forum that is clearly or distinctly more appropriate for the trial of the action than the courts of England, justice nevertheless requires that a stay of the English proceedings should not be granted. One factor that might support such a conclusion is if it is established objectively, by cogent evidence, that there is a real risk that the Claimants would not obtain justice in Cyprus. (In his formulation of limb 2 in *Spiliada* itself, Lord Goff framed the question at 478D of the reported judgment as being whether "the plaintiff will not obtain justice in the foreign jurisdiction". However, in the later case of *Altimo Holdings and Investment Ltd and others v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, Lord Collins spoke of a "real risk that justice will not be obtained" and the parties were agreed that I should follow the latter formulation of the test).

v) The burden of proof on limb 2 of *Spiliada* lies with the Claimants.

LIMB 1 OF *SPILIADA*

13. The Claimants argue that the Defendant has not established either that the courts of Cyprus are an "available" forum in the requisite sense or that those courts are "clearly or distinctly more appropriate" than the English courts for the determination of this claim.

"Availability"

14. The courts of Cyprus will be "available" if, at the date the application was heard, it would be open to the Claimants to institute proceedings in Cyprus. The parties were agreed that, in principle, I could, if I entertained doubts on "availability" which could be cured by the Defendant making a submission to Cypriot jurisdiction, or executing an agreement conferring jurisdiction on the Cypriot courts, make any stay of the English proceedings conditional on such a submission or agreement. For my part, I thought that there might be some difference between imposing a condition relating to the Defendant's submission to jurisdiction (which the Defendant could make unilaterally) and a condition relating to an agreement as to jurisdiction (which would require some co-operation from the Claimants who are known not to agree that Cyprus is the appropriate jurisdiction). However, I need not say anything further on this issue given the conclusions set out below.

15. Therefore, the relevant questions are:

    i) Absent any agreement between the parties conferring jurisdiction or any undertaking by the Defendant to submit to jurisdiction in Cyprus, would the Cypriot courts accept jurisdiction to hear the claims in Cyprus ("jurisdiction under general principles")?

    ii) If the answer to question (i) is "no" would the position be cured by the Defendant submitting to jurisdiction or the parties executing an agreement conferring jurisdiction on the Cypriot courts?

Question (i): jurisdiction under "general principles"

16. I have reached the following conclusions on Cypriot law based on Dr Dracos's and Dr Polyviou's expert reports:

    i) Cyprus is a member state of the EU. The Recast Regulation applies in Cyprus. However, since the Defendant is not domiciled in a member state of the EU, then, in considering jurisdiction under "general principles", the Recast Regulation would require Cyprus to apply its own (domestic) law in deciding whether it has jurisdiction to hear claims against the Defendant.

    ii) Under the domestic law of Cyprus, two requirements must be met in order for a court in Cyprus to have jurisdiction:

        a) The Cypriot courts must have jurisdiction generally under the Cypriot rules of private international law. (I will adopt Dr Dracos's useful shorthand description of "international jurisdiction").

        b) A specific district court in Cyprus (such as the District Court in Nicosia) must have jurisdiction under s.21 of the Cypriot Courts of Justice Law. (I will refer to this as "territorial jurisdiction").

    iii) Cypriot rules on international jurisdiction are similar to the traditional common law rules in England. The case must fall within one of the gateways set out in Order 6, rules 1 to 3 of the Cypriot Civil Procedure Rules (which are similar to, but fewer than their equivalents under the CPR applicable in England and Wales). The permission of the Cypriot court would be needed to serve process out of Cyprus, though no such permission would be needed if the Defendant visited Cyprus and was served with proceedings while there. As part of the process of granting permission, the Cypriot court would need to be satisfied that the Claimants have a "prima facie good cause of action" and that the case is a proper one for service out of Cyprus.

    iv) Territorial jurisdiction will be present if the "basis of the action" has arisen "in whole or in part" within the boundaries of the relevant District Court. The experts agree that this is not intended to set out a very high test. However, it is still necessary to point to some act that is significant to the cause of action having taken place within the boundaries of the relevant District Court.

v) The Cypriot courts will determine the presence or otherwise of territorial jurisdiction for each cause of action separately. Accordingly, where different causes of action are pleaded as part of the same overall claim, it is possible that there could be territorial jurisdiction for some causes of action but not others.

17. I am satisfied from the expert reports of Dr Dracos and Dr Polyviou that it is more likely than not that (i) the threshold for establishing "international jurisdiction" would be met and that (ii) a Cypriot court would grant the Claimants permission to serve out. The Claimants did not really seek to challenge these propositions, focusing their challenge on the question whether "territorial jurisdiction" of a particular District Court would be present.

18. Dr Dracos said that it was not possible to express an opinion as to whether a District Court in Cyprus would have territorial jurisdiction in respect of all or any of the Claimants' pleaded claims because the Particulars of Claim had not been drafted with the relevant Cypriot requirements in mind.

19. Dr Polyviou expressed the opinion that the Nicosia District Court would have territorial jurisdiction. He reasoned as follows:

i) He assumed that the Trusts were analogous to "fully discretionary trusts" constituted under English law so that the interests of the beneficiaries in the Trusts were not in the nature of a proprietary interest in underlying trust property, but rather consisted of the right to require Latimer to consider exercising its discretion in the beneficiaries' favour.

ii) Such an interest would, under principles referred to in *Dicey & Morris on Conflict of Laws*, 15th edition, Volume 1 paragraph 22-048 be located where the beneficiaries could bring an action to enforce their rights. Cypriot law would follow the same approach and so would regard the beneficiaries' interests as located within the jurisdiction of the Nicosia District Court, because Latimer had its registered office in Nicosia.

iii) Therefore, to the extent that the Claimants are claiming that they suffered damage in their capacity as beneficiaries of the Trusts, the damage in question arose in the Nicosia district.

iv) Moreover, in addition to this reasoning, to the extent that the Claimants seek to establish that (i) the Defendant gave investment recommendations to persons (such as Latimer located in the Nicosia district), (ii) persons in the Nicosia district acted on such recommendations by, for example executing documents or issuing instructions in the Nicosia district, and (iii) when acting on those recommendations, they made investments in shares of Cypriot companies with a registered office in the Nicosia district, that would independently result in a sufficient part of the "basis of the action" being located in the Nicosia district so as to satisfy the requirements necessary for territorial jurisdiction. (Even though Dr Polyviou's expert report separated these circumstances with the conjunction "and" it is clear that he meant that any of the three ingredients singly would establish territorial jurisdiction. He could not have meant that all three ingredients

needed to be present because ingredient (i) would be redundant on that approach as there could not be any acting on a recommendation falling within ingredient (ii) without the recommendation falling within ingredient (i) first having been made).

20. The Claimants argue that Dr Polyviou's analysis does not address all the claims with the result that I should not be satisfied that Cyprus is an "available" jurisdiction to hear Claim 3, the claim in deceit, or Claim 6, the Swiss contractual claim. That, they argue, raises the unpalatable prospect of the Cypriot courts being able to determine only some of the claims, with the remainder having to be determined in a different forum.

21. The Claimants argue that Claim 3 invites a consideration of a counterfactual scenario. If C1 and C2 had not been deceived by dishonest portfolio reports, they would have realised that the Trusts had invested in risky assets of which they did not approve and would have "stepped in" before still further sums were invested. In that case, because Latimer was accustomed to act in accordance with their wishes, C1 and C2 would have requested, and received, larger distributions from the Trusts than they actually received following depletion of the Trusts' assets. No litigation involving Latimer would have been needed. They submit that, once it is properly understood that this is the nature of Claim 3, it can be seen that it is not covered by Dr Polyviou's analysis.

22. I do not accept this submission. The core of Claim 3 is a complaint that, but for the Defendant's deceit, the assets of the Trusts available to make distributions to C1 and C2 would have been greater. In my judgment, Dr Polyviou's analysis applies to Claim 3 in just the same way as it applies to Claim 1 and Claim 2. It may be that the Claimants can establish at trial that Latimer would inevitably have acceded to their requests for greater distributions, or for changes in the underlying assets of the Trusts, without the need for litigation. But Dr Polyviou's analysis does not hinge on actual litigation with Latimer taking place. Rather, his point is that C1 and C2's interests in the Trusts should be regarded as located in the Nicosia District, so that damage to those interests is similarly regarded as taking place in the Nicosia District.

23. The Claimants say that Claim 6 has nothing to do with the interests in the Trusts. Rather, it is a claim by AAA Group and Hrostenco (in their own names) for a breach of a contract between them and the Defendant. That AAA Group's and Hrostenco's shares happened to be held as trust property of the Trusts is mere coincidence that has no effect on the nature of the claims, with the result that Dr Polyviou's reasoning does not apply to that claim and I should not be satisfied that Cyprus is an available jurisdiction in relation to Claim 6.

24. I agree that, for the reasons the Claimants give, Claim 6 is not covered by the aspects of Dr Polyviou's reasoning that I have set out in paragraphs 19.i) to 19.iii) above. However, I consider that it is squarely covered by the reasoning summarised in paragraph 19.iv) above. The Particulars of Claim plead that the Defendant breached his contracts with AAA Group and Hrostenco by recommending to Latimer that particular investments be acquired and, in fact Latimer acted on those recommendations in a way that, at least as regards

Rolaware and Dremoplex, resulted in the acquisition of shares in companies incorporated in Cyprus.

25. Thus, I consider that Dr Polyviou has expressed an independent professional opinion that the Nicosia District Court would have "territorial jurisdiction" to hear all of the Claimants' claims. The Claimants nevertheless urge me to be cautious in concluding that the Nicosia District Court is actually "available". Without in any way challenging Dr Polyviou's eminence or expertise, they submit that there will inevitably be some doubt as to whether a sufficient part of the "basis for the action" arose within the boundaries of the Nicosia District Court and that I should not, therefore, stay the English proceedings and leave the claims to an uncertain fate in Cyprus.

26. I reject that submission. Both Dr Polyviou and Dr Dracos are giving expert evidence precisely because they have both the requisite expertise and independence. Dr Polyviou and Dr Dracos evidently disagree to some extent on the issue of territorial jurisdiction. Dr Dracos thought that it was "not possible" to opine on whether the Cyprus courts would have territorial jurisdiction because the Claimants' Particulars of Claim were not drafted with Cypriot rules in mind. Dr Polyviou, by contrast has given an opinion on this issue. However, read in context, Dr Dracos could not have meant that it was simply impossible to express a view on the issue. After all, if necessary, the courts in Cyprus would have to decide the matter, whether the Claimants' Particulars of Claim were drafted with Cypriot rules in mind or not. Therefore, while I can accept that Dr Dracos found the question difficult, he cannot have meant that it was impossible to answer. Moreover, he has not expressed any doubt as to Dr Polyviou's reasoning. Of course, Dr Polyviou is expressing his opinion only and not providing a guarantee. However, that is what lawyers are for: not every legal issue to which answers are sought has been the subject of a binding determination by the highest court in a particular jurisdiction. In my judgment, Dr Polyviou's opinion is sufficient for me to conclude that the courts of Cyprus are "available" in the requisite sense.

Question (ii) – Jurisdiction if there is a submission to jurisdiction and/or an agreement

27. Given the conclusion I have reached above, question (ii) under this heading does not strictly arise. However, since I heard full argument on it, I will give my conclusions.

28. The parties were agreed that a multilateral agreement that complies with Article 25 of the Recast Regulation would, more likely than not, result in the courts of Cyprus having jurisdiction even if, applying purely domestic law as set out in s.21 of the Courts of Justice Law territorial jurisdiction was absent. That follows from the fact that Article 25 is directly applicable in Cyprus, is expressed to apply whatever the domicile of the parties to that agreement and would result in the Cyprus courts having jurisdiction under the Recast Regulation.

29. Both Dr Dracos and Dr Polyviou agreed in their respective reports that, if there is no "territorial jurisdiction" in respect of a particular claim, there is material doubt as to whether the Defendant could "cure" that issue simply by purporting to submit to jurisdiction pursuant to Article 26 of the Recast Regulation. That is because Cypriot domestic law makes it clear that jurisdiction cannot be conferred

by consent if it would not otherwise be present. While Article 26 of the Recast Regulation is directly applicable, and so could in theory confer jurisdiction in Cyprus even if domestic law does not, it is not clear that Article 26 would apply to a purported submission to jurisdiction by a person such as the Defendant who is not domiciled in a member state. That doubt arises because, while Article 25 is expressed to apply regardless of the domicile of parties to an agreement, no equivalent expression is present in Article 26.

30. Dr Dracos in his report said that it was "strongly arguable" that a purely voluntary submission by the Defendant could not cure a lack of territorial jurisdiction. Dr Polyviou agreed that the position was "unclear" but said that it was "at least arguable" that a voluntary submission to jurisdiction would cure a lack of territorial jurisdiction and gave reasons for that opinion.

31. In his oral submissions, Mr Head QC invited me to go further than his expert was prepared to go. He argued that the decision of the Court of Justice of the European Union ("CJEU") in Case C-412/98 *Group Josi Reinsurance v Universal General Insurance Company* showed that, contrary to Dr Dracos's opinion, little significance should be attached to the fact that Article 26 is not expressed to apply regardless of the domicile of the parties, in contrast to Article 25. That prompted Mr Adamyk in his submissions to point out that *Group Josi* was concerned with the predecessor to the Recast Regulation and that taking into account differences in the provisions of the predecessor wording, despite the comments in *Group Josi* on which the Defendant relied, it remained significant that Article 26 was not expressed to apply regardless of the parties' domicile.

32. Of course, I accept that Article 26 is directly applicable in Cyprus. My task, however, is not to resolve questions of law on the interpretation of Article 26. Rather, my task is to determine, as a matter of fact, whether the courts in Cyprus would accept jurisdiction to hear the claims. Whatever view I form of Article 26 would not be binding on the courts in Cyprus. Therefore, I see no reason to depart from the conclusion that Dr Polyviou and Dr Dracos share, namely that there is, to say the very least, a material risk that the Cyprus courts would not accept jurisdiction if "territorial jurisdiction" is absent under Cypriot law, even if the Defendant were to make a voluntary submission to jurisdiction.

Whether the courts of Cyprus are clearly or distinctly a more appropriate forum

The approach I will take

33. Since my task is to decide whether the courts of Cyprus are clearly or distinctly a more appropriate forum for the determination of this dispute, I will start by examining those factors which point in the direction of the dispute being tried in Cyprus (following the approach indicated at 477G to 478B of Lord Goff's speech in *Spiliada*).

34. The Defendant suggested that it is appropriate to group this consideration under various thematic headings of a) personal connections; b) factual connections; c) evidence/convenience/expense; d) applicable law and e) the "overall shape of the litigation". I am content to follow this suggestion. However, I remind myself that

these headings are just used to give some structure to the analysis. I will exercise my discretion having regard to all factors.

Personal connections

35. I will not resolve the dispute between the parties as to whether the Defendant moved to England in 2016 or earlier. Nevertheless, whatever the precise length of his residence in England, the Claimants place significant weight on his residence here. They say that the Defendant is the "star witness in this case: the entire case revolves around him" and that it is, accordingly, natural that the claims should be tried in England where he lives.

36. Of course, if the Recast Regulation continued to apply in this country, this would be a powerful, perhaps unanswerable, point. However, in the different legal landscape that applies following the UK's departure from the European Union, I consider that it has less weight than that for which the Claimants argue.

37. Certainly the Defendant will be an important witness and findings as to his actions will be important. However, the formulation of the issues that I have set out in paragraphs 10.i) and 10.ii) above suggests to me that is not just the Defendant's actions that will be examined. Also under scrutiny will be the relationships that he formed with the Claimants, Latimer and others and the actions of others, such as Latimer. To say that the dispute "revolves around" the Defendant is, in my judgment, to understate the significance of the actions, beliefs and motivations of others.

38. Nevertheless, the Defendant's residence in England remains of some significance. The fact that the Defendant has been appropriately sued in his jurisdiction of residence is, as Mr Head put it in his oral submissions, "priced into" the requirement imposed on the Defendant to show that Cyprus is "clearly or distinctly" a more appropriate forum than England, so I need not say anything further on that issue. However, the fact that the Defendant lives in England also establishes some personal connection with England. While certain of the likely witnesses in this action live in Cyprus (which I will address in the heading of "evidence/convenience/expense" below), none of the parties reside in Cyprus.

39. Therefore, while I consider that the Claimants have somewhat overstated the significance of the Defendant's personal residence here, that residence remains a relevant factor pointing towards the English courts being the appropriate forum.

Factual connections

40. Under this heading, the Defendant is referring, in essence, to where relevant events took place and not the question of where evidence and witnesses will be located (which I consider in the next section). Of course, one will expect some linkage between these issues because witnesses will often be located in the same place as the relevant events took place. However, I will seek to keep my analysis of these aspects separate as the Defendant has in his submissions.

41. The place of commission of the alleged torts is, of course, a significant consideration. In *VTB Capital plc v Nutritek*, Lord Mance described the place of

commission as a "relevant starting point" when considering the appropriate forum for a tort claim.

42. The Defendant says that the legal and practical relationship between him and Latimer will be of central importance. I agree: see my formulation of issues 10.i) and 10.ii). However, I consider that the Defendant overstates the significance of Latimer being incorporated in Cyprus, and of Mr Partellas and Mr Kiliaris being located in Cyprus as demonstrating that relevant events "took place" in Cyprus. I accept that the claims, to a large extent, involve the proposition that duties were breached and loss caused by the Defendant giving poor advice to Latimer, who was based in Cyprus. However, that is not the only relevant issue to be considered. It will also be relevant to consider how the Defendant interacted with C1 and C2 and few of these interactions would have taken place in Cyprus. In addition, there is no easy answer to the question of where any deceit involved in the submission of portfolio reports was practised. In his oral submissions, Mr Adamyk put forward a good case that a good number of the portfolio reports that are criticised were sent after the Defendant moved to live in England.

43. Moreover, given the nature of the allegations made against the Defendant, and given the fact that the Defendant lived in a different country from the Claimants, the factual enquiry in this case is likely to involve an analysis of electronic communications and documents. I doubt that it will be particularly meaningful to examine "where" those electronic communications can be regarded as made. More important will be an analysis of what those communications said or meant and in principle (subject to considerations with which I will deal in the next section), that could be ascertained by an English court just as well as a court in Cyprus. In my judgment, this is the kind of "international transaction" that Lord Mance would have had in mind when he said, at [51] of his judgment in *VTB Capital v Nutritek*:

> *"But, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation or by itself, when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors"*

44. I agree with the Defendant that the commercial wisdom or otherwise of the investments in Rolaware and Dremoplex will be a significant issue (see 10.iv) above). However, the fact that these two companies were incorporated in Cyprus is in my judgment of comparatively little weight. The Claimants' case is that these were bad investments because they performed badly and were too risky and that the Defendant should have realised as much. The validity or otherwise of that accusation does not, to my mind, depend materially on where the companies were incorporated. I accept, of course, that the companies' incorporation in Cyprus, and the fact that they were carrying on business in Greece, may mean that some of the evidence as to commercial wisdom may either be located in Cyprus/Greece and may be in the Greek language and I return to that issue in the next section.

45. Moreover, Rolaware and Dremoplex are not the only investments being criticised. Other investments, including Lisa Locca, Givol and NewLead are relevant. The

Defendant seeks to downplay the significance of these investments, pointing out that much less is said about them in the Particulars of Claim than is said about Rolaware and Dremoplex. However, these other investments do represent around a quarter of the total sums claimed. Moreover, as matters stand, the Claimants say that they simply do not know sufficient factual details about the investments to analyse their commercial wisdom. To the extent that it is necessary to understand matters such as why loans of some USD 880,000 were made to NewLead just months after the SEC said that it was balance sheet insolvent, those answers may have to come from the Defendant himself, providing a link to England given that is where the Defendant lives now.

46. Overall, I do not consider that matters under this heading point to Cyprus being clearly or distinctly a more appropriate forum,

Evidence/convenience/expense

47. I start by considering the location and first languages of witnesses who are likely to be giving evidence on the issues I have identified in paragraph 10. Of course, it is not possible to say with certainty who will, or will not, be giving evidence but it seems safe to assume that the following at least will be important witnesses:

    i) The Defendant himself. He lives in England. He speaks Greek as a first language, but is fluent in English.

    ii) C1 and C2, the settlors of the Trusts. They live in Dubai. They speak Arabic as a first language, but are fluent in English. (C3 to C6 seem to be less important witnesses. They are party only to the claim in dishonest assistance and it might be thought unlikely that they can shed much light in their evidence on whether Latimer truly did breach its obligations and, if so, whether the Defendant gave dishonest assistance. C7 and C8 are minors).

    iii) Mr Kiliaris and Mr Partellas who will, in their capacity as shareholders and directors of Latimer have relevant evidence to give on issues 10.i), 10.ii), 10.iii) and in their capacity as directors of APK may have something to say on issue 10.iv) as well. They speak Greek as a first language, but are fluent in English.

    iv) Some representatives of AAA Group and Hrostenco might be needed to give evidence on issue 10.ii) as it relates to their claims. Day to day management and corporate administration of AAA Group and Hrostenco is currently carried on by a law firm (Morgan & Morgan) in Panama whose members speak Spanish and neither Greek nor English. However, the Claimants' pleaded case is that, at times material to the claim, AAA Group was managed by Latimer under a general power of attorney and Hrostenco had a corporate director (Vector) with Mr Andreas Partellas (Mr Partellas's father) being a director of Vector. If that is correct, it would suggest that evidence as to the operation of AAA Group and Hrostenco might come from Mr Kiliaris and Mr Partellas.

v) Some expert evidence is possible on valuation matters and on the level of competence that could be expected of a professional international investment manager. The Claimants have indicated that the experts they are likely to instruct speak English, but not Greek.

vi) Expert evidence on Cypriot law will be needed if the proceedings are in England, but obviously not if they are in Cyprus. To date that evidence has been provided, in English by Dr Polyviou (based in Cyprus) and Dr Dracos (who lives in England).

vii) Expert evidence on Swiss law will be needed in relation to Claim 5 (if pursued) and Claim 6. The Claimants' Swiss law expert is based in Switzerland but has prepared a previous expert report in English.

48. I am prepared to accept that there may be other witnesses of fact. For example, it is clear that the Defendant's father-in-law had some involvement in events. I am told he lives in Greece, and speaks some English. It may be that Ms Kyriakou, who worked with Mr Kiliaris and Mr Partellas, may also have relevant evidence to give. She lives in Cyprus and while she speaks some English it appears from Mr Twomey's witness statement that she is not fluent.

49. Unsurprisingly, considerations of evidence/convenience or expense point in different directions. Factors that point in favour of Cyprus under this heading include:

i) No expert evidence would be needed on matters of Cypriot law if the case were heard in Cyprus. However, to date, the experts have been broadly agreed that the applicable Cypriot law is similar to English law. Therefore, while expert evidence on Cypriot law would involve incremental expense, I am not satisfied that it would be large in the context of costs as a whole.

ii) If the proceedings were in Cyprus, the flight costs of witnesses may be lower. There are more witnesses based in Cyprus (or Greece) than there are based in England. Moreover, witnesses in Dubai would face a 4-hour direct flight to Cyprus, but a 7 ½ hour direct flight to England. That may be counterbalanced by the fact that witnesses travelling from Panama would have a longer flight to Cyprus than they would to England, but there is an open question as to whether witnesses would need to travel from Panama given the points I have made in paragraph 47.iv). However, a simple consideration of relative flight times is not the only relevant consideration. Procedure in Cyprus is not always to arrange "block" trials that are heard on consecutive days until their conclusion. Witnesses may need to leave Cyprus and come back, which would obviously add to flight costs as compared with a hearing in England.

50. Factors pointing in favour of England include:

i) The costs of interpreting oral evidence are likely to be lower since, if the proceedings are in Cyprus, an interpreter would be needed for any witness giving evidence in a language other than Greek. Therefore, interpreters would be needed for the oral evidence of C1 and C2 (both significant

witnesses), and experts on valuation and investment management matters (also potentially significant). There would be some countervailing benefit in that Ms Kyriakou could give her evidence in Greek if the proceedings were held in Cyprus but may require an interpreter if giving evidence in English legal proceedings, but her evidence strikes me as less extensive than that of C1, C2 and valuation/investment management experts.

ii) Accommodation costs of witnesses are likely to be lower if the trial is held in England. The court in Cyprus sits only between 10.30 am and 1.30 pm. Therefore, witnesses are likely to be in Cyprus for longer, which is particularly significant for the Defendant who would be travelling from London and giving evidence for a reasonably long time

51. Factors that I regard as neutral, or which cannot be said to point in favour of England or Cyprus include:

i) I do not regard considerations as to the location of documents to be particularly important in this case. These days documents are often electronic, stored on computers or cloud storage facilities and the concept of where such documents are "located" is not particularly significant. Similarly, even with documents that are in hard copy form and can be said to be "located" somewhere, it is a relatively easy task to scan them in electronic form so that they can be rapidly read by people in various locations throughout the world.

ii) If the proceedings are in England, then some documents will need to be translated from Greek into English in order to be admitted into evidence. By contrast if the proceedings are in Cyprus some documents are likely to be needed to be translated into Greek in order to be admitted into evidence. It is not possible to form anything more than an educated guess as to which costs would be the more significant. On the one hand, it is reasonable to expect that there will be a significant corpus of documents (in Greek) relating to the commercial wisdom of investments in Rolaware and Dremoplex that would need to be translated into English if the proceedings were in England and Mr Twomey's evidence was that around 12 to 16% of documents in his possession are in Greek. However, it is not possible to evaluate in advance the other aspect of the balancing exercise, namely the extent to which documents would need to be translated into Greek in Cypriot proceedings. The Cypriot rules of procedure permit English documents to be received in evidence and there is a broad familiarity with English on both sides of the dispute, so it appears unlikely that any party would require documents to be translated into Greek. But the judge may wish documents to be translated for his or her benefit and it is not possible to predict in advance the extent of such a requirement.

52. I have concluded that considerations of evidence/convenience/expense do not point in favour of Cyprus being clearly or distinctly a more appropriate forum.

Applicable law

53. Lord Mance said, in paragraph 46 of his judgment in *VTB Capital v Nutritek*, that it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. He said that this factor is of particular force if issues of law are likely to be important, and if there is evidence of relevant differences in legal principles between the laws of the two countries in contention.

54. The Defendant point to the Claimants' contention that Cypriot law applies to Claims 1 to 4. While reserving his position for the future, he indicates agreement and submits that this factor points in favour of the proceedings being in Cyprus. I will not accept the Claimants' invitation to discount the significance of this point on the basis the Defendant has not unequivocally accepted that Cypriot law applies. The Defendant has not, since he is asking for a stay, yet served a Defence. It is appropriate for him to reserve his position until he does so.

55. It follows that I accept that the applicability of Cypriot law provides some indication pointing in favour of Cyprus being the appropriate forum. I do not consider that the indication is diminished by the fact that some claims are governed by Swiss law. Four claims are governed by Cypriot law. None are governed by English law, so the indication is towards Cyprus.

56. I consider, however, that this is a relatively slender indication. First, there is broad agreement between the parties that the law of Cyprus is similar to English law in relevant respects. The courts of England and Wales routinely hear disputes involving questions of foreign law. In view of agreed similarities between English and Cypriot law, I do not consider that English courts would have any particular difficulty in applying Cypriot law if necessary. Second, Claim 6 means that, even if the proceedings were in Cyprus, it would not simply be a case of Cyprus applying its own laws to determine the dispute. There would still be a material Swiss law component.

"Overall shape of the litigation"

57. The Defendant argues that it is significant that, in April 2019, the Claimants brought (and subsequently discontinued) proceedings in Cyprus in respect of claims overlapping with the current claims and naturally took the position before the Cypriot courts that these previous proceedings were properly brought in Cyprus. I regard this as a weak pointer. In the previous proceedings the primary claim was against Latimer, whom the Claimants were obliged to sue in Cyprus by the Recast Regulation. In April 2019, the Defendant lived, as he currently does, in England. It is not surprising that the claim against the Defendant was joined to the Cyprus proceedings against Latimer in reliance on Article 8(1) of the Recast Regulation. In my judgment, joining the Defendant to those proceedings in Cyprus offers relatively little by way of indication as to the appropriate forum for proceedings brought against the Defendant alone.

58. The Defendant also invites me to look ahead and take account of the possibility that he may wish to join Latimer as a defendant for the purposes of seeking a contribution. The Claimants suggest that this would be something of a high-stakes decision for the Defendant to make. That may be correct, but does not prevent it

from being a possible outcome and I have, therefore, considered it. However, in my judgment, even if Latimer were joined as defendant, I do not consider that the "overall shape" of the litigation would change materially. As I have noted, the relevant personnel at Latimer are Mr Partellas and Mr Kiliaris. Both are likely to be giving evidence anyway and the claim for dishonest assistance is likely to involve a detailed analysis of Latimer's actions whether or not it is joined as a defendant. Any claim for a contribution against Latimer would involve an application of different aspects of Cypriot law from those being analysed as part of the main claim against the Defendant. However, as I have noted, Cypriot law is similar to English law.

59. I do not, therefore, consider that the "overall shape" of the litigation indicates that Cyprus is clearly or distinctly the more appropriate forum.

Conclusion

60. I have weighed up the various considerations under the thematic headings set out above. Considerations relating to Cypriot law provide some indication in favour of Cyprus although I consider that indication to be slender. Considerations relating to the Defendant's residence in England point, in my judgment, rather more strongly towards England even if, as I have concluded, the Claimants have somewhat overstated the significance of that factor. The analysis under the other headings provides no particularly strong indication in either direction. I have also stepped back and considered the matter in the round. Having done so, I have reached the clear conclusion that the Defendant has not demonstrated that the Cypriot courts are clearly or distinctly a more appropriate forum than the English courts. Limb 1 of *Spiliada* is not satisfied and I will not, therefore, order a stay of the English proceedings.

LIMB 2 OF SPILIADA

61. Given my conclusion on limb 1 of *Spiliada*, it is not necessary for me to express a conclusion on limb 2. However, since I heard full argument on limb 2, I will do so. The Claimants put forward two arguments in support of their submission that limb 2 is satisfied:

    i) First, it is said that civil proceedings in Cyprus suffer from such substantial delays as to amount to a denial of justice.

    ii) Second, it is said that, if the proceedings were determined in Cyprus, applicable Swiss law on limitation would result in some EUR 750,000 of claims becoming time-barred.

Applicable law

62. In considering the Claimants' argument based on injustice, I should avoid making a "somewhat chauvinistic comparison" (in the words of Bingham J (as he then was) in *The Al Wahab* [1982] 1 Lloyd's Rep 638 between the legal system and procedure in this country and Cyprus, particularly noting that Cyprus is a friendly state. The principle of judicial comity means that this court should be cautious

before expressing the view that the legal system in a friendly nation such as Cyprus would deny the Claimants justice were they to pursue their claim there (see paragraph [65] of the judgment of Coulson LJ in *Manek v IIFL Wealth (UK) Limited* [2021] EWCA Civ 625).

63. That said, there have been instances where the English courts have concluded that significant delays in the civil justice system of a friendly state justified refusing a stay on the basis that limb 2 of Spiliada was satisfied. See, for example, the judgment of the High Court in *The Vishva Ajay* [1989] 2 Lloyd's Rep 558 in which the court concluded that delays of up to 10 years in the Indian courts justified refusing a stay.

64. In *Spiliada*, Lord Goff considered limitation issues at 483D to 484D of the reported judgment. He noted, at 483G, that a "strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time-barred there". However, in the case before him, he considered that "practical justice should be done" and therefore considered the reasonableness or otherwise of the plaintiff's actions in not commencing proceedings in the other jurisdiction earlier. I will follow the same approach.

Analysis

65. Both Dr Dracos and Dr Polyviou were agreed that delay is a problem in civil litigation in Cyprus. However, they had different perspectives on the seriousness of that problem. Dr Dracos's opinion was that on average it would take 6 years for a case to come to trial after proceedings commenced. He considered that interlocutory applications might each take between 6 and 12 months to consider, further adding to the timetable. Dr Dracos said that delays in the Cypriot courts have been acknowledged by the European Commission to be among the worst in Europe. He pointed to a recent report on delays by a former judge of the Cypriot Supreme Court. He noted that Cyprus has been convicted by the European Court of Human Rights for delays.

66. Dr Polyviou's opinion was that things are getting better. Civil Procedure Rules in Cyprus are being reformed. District Court judges are being deployed to clear the backlog of cases so that new cases can proceed more quickly to trial. He acknowledges that interlocutory proceedings can take longer than they should to be determined but that, if parties co-operate, they can be determined much more expeditiously. He points out that, when the Claimants previously instituted proceedings in the Nicosia District Court against Latimer and the Defendant, an application for interim relief in those proceedings was considered and dismissed within 3 ½ months. He also indicates that much depends on the judge assigned to a case, but that since this is a large and complex claim, it could reasonably be expected that it will be allocated to a judge who has significant experience of large commercial disputes who will be well-placed to case manage the claim effectively.

67. The Claimants criticise Dr Polyviou for not putting forward his own estimate, as a practitioner, of how long it would take the case to come to trial in Cyprus. Such

an estimate would have been helpful, but even without it it is clear that there is a divergence of opinion between two eminent Cypriot lawyers. It is not possible for me to tell whether Dr Polyviou's more upbeat assessment is more accurate than the more gloomy assessment of Dr Dracos. Moreover, the fact that there is a divergence of opinion between such eminent figures suggests to me that the answer is not clear. Faced with an unclear picture, I have concluded that the considerations of comity and caution to which I have referred preclude me from concluding that the courts of Cyprus would not deliver the Claimants justice. I will not, therefore, make such a finding.

68. Nor am I satisfied that the limitation issues advanced justify a refusal of a stay under *Spiliada* limb 2. The relevant limitation period is of 10 years and applies in respect of the Swiss law contract claims. The Claimants have, therefore, had a good period of time to make these claims. I quite understand that there were material differences between the claims brought in Cyprus in 2019 and those that are brought against the Defendant now. However, having brought proceedings against the Defendant in Cyprus in 2019 and voluntarily discontinued them, in my judgment considerations of "practical justice" point firmly in favour of the Claimants bearing the consequences of that voluntary choice. I am only reinforced in that conclusion by the fact that the claims that would be likely to become statute barred represent a relatively small proportion of total claims.

69. Therefore, had it been necessary to decide the point, I would have concluded that limb 2 of the test in *Spiliada* is not satisfied.

DISPOSITION

70. The Defendant's application is dismissed. I will invite the parties to agree a form of order and will hear from them further on consequential matters to the extent agreement cannot be reached on those matters.