CFI 032/2020 Kaamil v (1) Kaawa (2) Kaabii (3) Kadija (4) Kaemon (5) Kahnay (6) Kahoni (7) Kaiha (8) Kailas (9) Kaida

DECEMBER 22, 2021 COURT OF FIRST INSTANCE - ORDERS

Claim No: CFI 032/2020

IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

KAAMIL

Claimant

and

(1) KAAWA
(2) KAABII
(3) KADIJA
(4) KAEMON
(5) KAHNAY
(6) KAHONI
(7) KAIHA
(8) KAILAS
(9) KAIDA

Defendants

ORDER OF H.E JUSTICE ALI AL MADHANI

UPON reviewing the Claimant's (**"C"**) application for permission to amend her Particulars of Claim (**"PoC"**) dated 27 May 2020 filed on 21 September 2020 (the **"Amendment Application"**)

AND UPON reviewing the Third Defendant's (**"D3 Ltd"**) application for immediate judgment filed on 26 July 2020 (the **"Immediate Judgment Application"**)

AND UPON reviewing the Second Defendant's, the Fourth Defendant's and Fifth Defendant's (**"D2"**, **"D4"** and **"D5 Ltd"**) applications contesting the DIFC Courts' jurisdiction to hear and determine the claim filed on 11 May, 19 May and 27 July 2020, respectively (the **"Jurisdiction Applications"**)

AND UPON reviewing the Second Defendant's, the Fourth Defendant's and another of the Second Defendant's applications for orders requiring the Claimant to provide further information pursuant to RDC r. 19.1 filed on 21 June, 20 July and 21 September 2020, respectively (the **"Part 19 Applications"**)

AND UPON reviewing the Claimant's application for orders requiring the First Defendant ("D1") and the Second Defendant to comply with the Information Orders in the freezing order issued on 22 April 2020 (the **"Information Orders"** and the **"Second DIFC Injunction"**) filed on 9 September 2020 (the **"Compliance Application"**)

AND UPON the Second Defendant's application for a variation of the Second DIFC Injunction (the **"Variation Application"**)

AND UPON hearing counsel for the Claimant, the Second Defendant, the Third Defendant and the Fourth Defendant and Fifth Defendant at the hearing from 2 to 4 November 2020

AND UPON considering the judgment of the Joint Judicial Tribunal issued on 25 July 2021 in Cassation Appeal 11/29

AND UPON reviewing the relevant documents and written submissions on the Court's file

IT IS HEREBY ORDERED THAT:

1. The Amendment Application is granted. The Claimant shall within seven days of this order file with the Court her Amended Particulars of Claim dated 21 September 2020 (the **"APoC"**). A copy of the APoC and of this order shall be served on every party to the proceedings. In accordance with to RDC r. 18.27, the Claimant shall pay the Defendants their costs of the application, on the standard basis, to be assessed by a registrar if not agreed.

2. The Immediate Judgment Application is granted. It is declared (for the reason explained in [183] and [184] of the Schedule of Reasons) that C is barred from claiming in respect of any losses which have been or might be suffered by her in her capacity as a shareholder of any of the companies in the corporate structures whose ultimate subsidiaries hold the assets the subjects of this claim (as both defined in [1] of the Schedule of Reasons). For the avoidance of doubt, had the Amendment Application not been granted, immediate judgment would have been given against the Claimant on the whole of the claim. Costs in the case.

3. The Jurisdiction Applications are dismissed and the Second Defendant, the Fourth Defendant and the Fifth Defendant shall pay the Claimant her costs of the applications on the standard basis, to be assessed by a registrar if not agreed.

4. The Part 19 Applications are dismissed, and the Second Defendant and the Fourth Defendant shall pay the Claimant her costs of the applications on the standard basis, to be assessed by a registrar if not agreed.

5. The Compliance Application is partially granted. It is declared that the Information Orders in the Second DIFC Injunction have been in effect since they were made and the Defendants subject to them have been bound since notification of the Second DIFC Injunction to comply with the Information Orders. The D1 and the D2 are ordered to comply with the Information Orders and to pay the Claimant her costs of the application on the standard basis, to be assessed by registrar if not agreed.

6. The Variation Application is dismissed, and the Second Defendant shall pay the Claimant her costs of the application on the standard basis, to be assessed by a registrar if not agreed.

Issued by:
Amna Al Owais
Chief Registrar
Date of Issue: 22 December 2021
Time: 4 pm

SCHEDULE OF REASONS

1. This is a civil fraud claim brought by a wealthy businesswoman and investor (C) against her former advisors, their associates and five companies affiliated with those advisors and associates, four of which she claims to beneficially own. C alleges that the Defendants are either perpetrators of or vehicles used in a conspiracy against her through which one of her assets, a yacht (the **"Yacht"**), has been misappropriated and another of her assets, a Spanish real estate property (the **"Spanish Property"** and the **"Assets"**), faces continued risk of misappropriation. The Assets are together valued at around USD 81.5 million. Each of the Defendants against whom an allegation is made categorically denies the allegation.

The Defendants

2. The D1 and the D2 were C's financial advisors.

3. The D3 Ltd is a DIFC-registered company, licensed to provide accounting, risk and compliance and management consultancy services. D2 was a shareholder in D3 Ltd until 14 July 2019 and was its director until 21 July 2019.

4. The D4 is a businessman and associate of D1 and D2.

5. The D5 Ltd is a Cyprus-registered company.

6. The Sixth Defendant (**"D6"**) is a paralegal and was, until 16 April 2020, the sole director of D5 Ltd. D6 held the shares in D5 Ltd on trust for the Eight Defendant (**"D8 Ltd"**) (it has been said that D6 is no longer the sole director of D5 Ltd nor trustee of its shares, but it is not clear that these changes have as yet been reflected in the relevant companies' register).

7. The Seventh Defendant (**"D7 SL"**) is a Spain-registered special purpose entity which holds the Spanish Property. D7 SL is owned by D5 Ltd.

8. D8 Ltd is a Hong Kong-registered company. As mentioned above, D6 held the shares of D5 Ltd on trust for D8 Ltd until 16 April 2020.

9. The Ninth Defendant (**"D9 Ltd"**) is a Seychelles-registered company which owns D8 Ltd. D4 is the registered shareholder of D9 Ltd.

10. Until its sale in July 2019, the registered owner of the Yacht was a certain Gibraltar-incorporated company (**"EY Ltd"**). The registered owner of EY Ltd is another Gibraltar company (**"QH Ltd"**). And the registered owner QH Ltd is another Gibraltar company (**"RN Ltd"**), of which D2 is the director and registered shareholder. Unlike the companies that comprise the corporate structure whose ultimate subsidiary owns the Spanish Property, these companies are not party to the instant proceedings.

11. C claims, and D2 denies, that D2 holds RN Ltd's shares on trust for her and claims, and D4 denies, that D4 holds D9 Ltd's shares on trust for her also.

The Priority Hearing

12. At a priority hearing on 2 to 4 November 2020 (the **"Hearing"**), 10 applications were heard. In the order that they were filed, these are:

i) D2's application contesting the DIFC Courts' jurisdiction to hear and determine the claim dated 11 May 2020;

ii) D4's application contesting the DIFC Courts' jurisdiction to hear and determine the claim dated 19 May 2020;

iii) D2's application for orders requiring the C to provide further information pursuant to RDC r. 19.1 dated 21 June 2020;

iv) D4's application for orders requiring the C to provide further information pursuant to RDC r. 19.1 dated 20 July 2020;

v) D3's application for immediate judgment against C dated 26 July 2020 (the "**Immediate Judgment Application**);

vi) D5's application contesting the DIFC Courts' jurisdiction to hear and determine the claim dated 27 July 2020 (together with D2's and D4's jurisdiction applications, the **"Jurisdiction Applications"**);

vii) C's application for orders requiring the First Defendant and the Second Defendant to comply with the Information Orders in the freezing order issued on 22 April 2020, dated 9 September 2020.

viii) C's application for permission to amend Particulars of Claim dated 27 May 2020 PoC dated 21 September 2020.

ix) D2's Variation Application to vary the Information Orders dated 21 September 2020; and

x) D2's second application for orders requiring C to provide further information pursuant to RDC r. 19.1 dated 21 September 2020 (together with D2's first Part 19 Application and D4's Part 19 Application)

xi) At the Hearing, attended by counsel for C, D2, D3 Ltd and D4 and D5 Ltd, the applications were heard in the following order: the Amendment Application, the Immediate Judgment Application, the Jurisdiction Applications, the Part 19 Applications, the Variation Application and finally the Compliance Application. I determine the applications in the order that they were heard, apart from the last two applications which I determine in the reverse order.

Background

13. For the purposes of the present proceedings, the facts must be taken to be as alleged by C. The principal repository of C's factual case is the PoC. If C is successful in the Amendment Application, an APoC filed on 21 September 2020 will replace the PoC in this function. The Amendment Application will be determined first below. For now, C's factual case—substantially disputed by the Defendants—is as follows.

14. C was introduced to D1 in around 2011. D1 represented that he was part of a certain well-known commercial investment group (**"KAILOS"**). D1 introduced D2 to C as his business partner. C began using the services of D1 and D2, believing them to be respected advisers and part of KAILOS.

15. In around June 2017, D1 and D2 moved to Dubai. D1 told C that he had connections with the Dubai ruling family and advised that her assets would be safest if they were structured and administered through a family office in the DIFC.

16. A DIFC company was incorporated for this purpose and originally had a name similar to that of KAILOS (**"KAILOS DIFC"**). This company, which since changed its name, is D3 Ltd.

17. D2 was director and shareholder of D3 Ltd. C believed D3 Ltd to be part of KAILOS and continued to instruct and allow D1 and D2, acting through D3 Ltd, to manage her assets.

18. In around April 2018, C wished to acquire by way of an asset swap with a Russian businessman (the **"Russian Businessman"**) the Spanish Property and the Yacht. C instructed D1 and D2, through D3 Ltd, then UA DIFC, to advise her on the acquisition and subsequent ownership of the Assets. Contracts were concluded in respect of each of the assets, pursuant to which these services were to be provided in exchange for the payment of commission (the **"Contracts"**).

19. D1 and D2 advised C that the Assets should be held through a structure of companies with nominee directors and shareholders in order that C's confidentiality and the Assets be protected from politically motivated attacks, something C understood herself to be at risk of on account of her husband's involvement politics. In reliance on this advice, C consented to the purchase of and the ownership structures proposed for the Assets.

20. C gave up her valuable rights in shareholdings in several Moldovan companies (the **"Moldovan Assets"**) in exchange for the Assets which were then placed into holding structures advised, set up and controlled by D1 and D2.

21. The Spanish Property is held within the following corporate structure:

i) the registered owner of the Spanish Property is D7 SL, a company incorporated in Spain;

ii) the shares in D7 SL are owned by D5 Ltd;

iii) the shares in D5 Ltd are/were owned by D6;

iv) D6 holds/held the shares in D5 Ltd on trust for D8 Ltd, pursuant to an express declaration of trust;

v) the shares in D8 Ltd are owned by D9 Ltd; and

vi) the shares in D9 Ltd are owned by D4.

22. As to the Yacht, it has been sold. But before this, it was held within the following corporate structure:

i) the Yacht was owned by EY Ltd;

ii) the shares in EY Ltd were owned by QH Ltd;

iii) the shares in QH Ltd were owned by RN Ltd; and

iv) the shares in RN Ltd were owned by D2.

23. C claims that, in respect of both the Spanish Property's and the Yacht's corporate structures, she owns 100% of the shares of the companies at the top of each structure, D9 Ltd and RN Ltd Ltd, respectively, with the respective nominee directors and shareholders, D4 and D2, holding those shares on trust for her; C was, and would always remain, the ultimate beneficial owner of the Assets by virtue of her beneficial ownership of those companies.

24. Notwithstanding this, in around July/August 2019 and without permission or instruction, the First to Sixth Defendants took steps to sell the Spanish Property and D1 and D2 took steps to sell, and did sell, the Yacht.

The Amendment Application

General Principles

25. Pursuant to RDC r. 18.2, where PoC have been served, they may only be amended thereafter with the written consent of all the other parties or, in the absence of such consent, with the permission of the Court. C has served particulars of claim, being the PoC. The Defendants have not consented to her proposed amendments. C therefore requires the permission of the Court to make them.

26. In order to obtain the Court's permission, a proposed amendment must be properly pleaded and have a real prospect of success (*Orion Holdings Overseas Ltd v Al Haj and ors* CFI-033-2015 (8 February 2018) at [22]).

27. As the White Book 2021 relevantly explains at [17.3.6]:

> … the court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation…
>
> Given the purpose of the statement of truth verifying an amendment… a party will not be permitted to raise by amendment an allegation which is unsupported by any evidence and is therefore pure speculation or invention…
>
> A claimant should not be granted permission to amend their claim in order to raise a claim which is not maintainable in established law…

28. The Court was not taken to the judgment *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), but at [38] the Court noted important principals worth citing here:

> … whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted…

29. These are some of the principles relevant to applications for permission to amend statements of case generally. Principles of more particular relevance to the Amendment Application will be referred to below within the discussions of the issues which fall to be determined.

C's Proposed Amended Claim

30. There are proposed amendments spread across much of the APoC. I do not propose to discuss every one of them. In my view, the most important proposed amendments are those which concern C's alleged ownership of the Assets, and in particular the way C's interests in them is said to have arisen, and those which concern D3 Ltd's role in the alleged conspiracy.

31. The proposed amendments concerning ownership of both the Spanish Property and the Yacht are substantially the same. To avoid prolixity, I will discuss the amendments in relation to the Spanish Property only, but my conclusions apply to those pertaining to the Yacht also.

32. To proceed, in the APoC, C states that her interest in the Spanish Property arose as follows, with text inserted underlined and text deleted struck through, here and henceforth:

> 24. In the premises, upon [C's] purchase of the Spanish Property, the ownership/holding structure of the Spanish Property as advised by and set up by [D1] and [D2] (acting through and/or with [D3 Ltd], and (whether directly or indirectly by others acting at their direction) was and is as follows:
>
> a. [C] retained at all times the beneficial ownership of the Spanish Property and the right to control the ownership/holding structure of the same.
>
> …
>
> 25. [D4] does not have (nor did he ever have) any beneficial interest in the Spanish Properly or the [D9 Ltd] Shares. The ultimate beneficial owner of the Spanish Property is and was at all material times [C], holding the controlling and/or beneficial interest in the same by virtue of an express, alternatively implied express trust alternatively resulting trust of the Spanish Properly and/or the corporate holding/ownership structure established for her benefit and/or of the shares of each of the companies in the corporate holding structure her beneficial ownership of the PBVL Shares and/or by reason of [C's] right to require [D4], as nominee and fiduciary (and likewise the directors of each and every other company in the corporate

holding/ownership structure), to follow her instructions. in accordance with the ownership structure set up by [D1] and [D2]. More particularly, [C's] beneficial ownership of the Spanish Properly and/or the corporate holding ownership structure and/or of the shareholding in each of the companies in the corporate holding structure arose because:

a. It was the express intention of all of those parties involved in the setting up of the corporate holding/ownership structure (including the First to Fourth Defendants) that [C] would retain the entire beneficial ownership of the Spanish Property.

b. To the extent necessary, such express intention can be inferred from the fact that, as set out above, [C] provided the entire valuable consideration for the acquisition of the Spanish Property and instructed the First to Third Defendants to set up a corporate holding structure on her behalf with her as ultimate beneficial owner.

c. In the alternative, it was [C who] provided the entire valuable consideration for the acquisition of the Spanish Property as aforesaid and, she not intending to make a gift or gratuitous transfer of the same, it is held on resulting trust for her by [D7]/the corporate holding structure.

33. At the core of C's proposed amendment of [24] and [25] of the PoC is a claim that C is the beneficiary trusts over the Spanish Property. There is a materially identical proposed amendment in respect of the Yacht at [28] and [29]. C's claim is that the Spanish Property and the Yacht were held, upon/following their acquisition, on trust for her by way of express trusts (the **"Trusts"**) and/or resulting trusts.

34. So far as the case against D3 Ltd is concerned, the most important proposed amendment is located slightly earlier at [14] of the APoC: "… [C] entered into two separate contracts with [D3 Ltd], [D1] and [D2]", being the Contracts. In the APoC, therefore, C claims that D3 Ltd was party to the Contracts.

35. In the first witness statement of C's senior counsel dated 21 September 2020 and made in support of the Amendment Application, counsel explained the rationale behind the Amendment Application in this way:

> 9. The Claimant respectfully submits that the proposed amendments are necessary, reasonable and proportionate and that they serve in the interests of justice and the overriding objective to bring all matters fairly in dispute between the parties, and in particular between [C] and [D3 Ltd], properly before the Court.
>
> 10. In addition, the Claimant believes that the amendments proposed have been properly pleaded and have a real prospect of success.
>
> 11. The present Application has been made at an early stage of the proceedings, before any Defence has been delivered. Given the evolution of [C's] understanding of [D3 Ltd's] involvement in the wrongdoing she alleges, and of the very real difficulties she has faced… and still faces in getting to the truth of the relations and activities of the Defendants in relation to her assets and investments, the Claimant also respectfully submits that she has acted with all due promptness and diligence in making this Application.
>
> 12. It is also respectfully submitted that the amendments proposed will not procedurally prejudice [D3 Ltd's] or any other Defendant, as they are fairly and properly advanced in time for submissions and evidence in response to me made in respect of them. In addition, to the extent that this Application is made now, well in advance of the hearing of [D3 Ltd's] immediate judgment application rather than shortly before or even after that hearing, the Application is by way of assistance to [D3 Ltd] and to the Court in the exercise of any discretion it may exercise on the hearing of the Applications together.

36. In oral submissions at the Hearing, counsel for C further characterised the proposed amendments as clarifications of C's current case, made out of caution and for completeness only. In other words, the APoC does not present a new case.

The Defendants' Objections to the Proposed Amendments

37. In my view, the Defendants' objections to the proposed amendments fall into two categories: (1) objections which concern the way C has pleaded her case, with subcategories concerning whether proposed amendments are (i) in concurrence with C's case as previously pleaded, (ii) supported by evidence and (iii) sufficiently particularised; and (2) objections made on the basis, the Defendants submit, that particular proposed amendments are bad in law.

38. I will discuss the parties' arguments in these groupings. It is convenient also to consider the Defendants' objections first and then C's responses to those objections, notwithstanding that it is C's application and, importantly, that the burden is on C to demonstrate that the proposed amendments meet the requisite criteria, as C's initial submissions in support of the Amendment

Application were relatively general in nature while the Defendants' objections thereto and C's responses to those objections are much more specific.

39. Moreover, as was stated in *Berezovsky v Abramovich* [2010] EWHC 647 (Comm) at [146], "For the court to be satisfied that the claim has no real prospect of success it must entertain such a high degree of confidence that the claim will fail at trial as to amount to substantial certainty". This sets a very low standard for new claims sought on amendment and one, therefore, quite easy to meet. In my view, on first appearances, the claims introduced by C's proposed amendments meet this standard: the Court could not, without assistance, have substantial certainty that the claims would fail at trial.

40. Such assistance has been offered by the Defendants. As such, while C has the overall burden in the application, in practical terms the Defendants are tasked with demonstrating, by penetrating below the surface of the amendments, that the claims advanced are in actual fact fanciful. If they successfully call into question, say, the plausibility of or basis for a claim, C will then have the burden of providing answers. In my view, this describes the way the parties have in fact approached the Amendment Application, and constitutes another reason why it is convenient to begin with the Defendants' objections to the proposed amendments and then move to C's responses to them.

Objection 1(i): the proposed amendments are not in concurrence with C's case as previously pleaded

41. The Defendants submit that C seeks to extensively reframe her claim by the proposed amendments and that her case in its most recent iteration is inconsistent with the PoC and C's sworn evidence in previous proceedings and in these proceedings. Most crucially, while in the PoC and previously otherwise C claimed "indirect" interests in the Assets, by means of her alleged ownership of their ultimate parent companies, in the APoC, C claims "direct" interests in them, by means of beneficial interests in the Assets themselves.

42. In respect of the case against it specifically, D3 Ltd submits that C's claim has changed significantly over time, with D3 Ltd having been moved incrementally towards the centre of the alleged wrongdoing. D3 Ltd is of course a DIFC establishment and it proffers that the claim against it is being developed in this way in attempts to sustain the Court's jurisdiction over the rest of the claim.

43. The classification of the proposed amendments—as clarifications of current pleadings, as C has characterises them, or as new or inconsistent pleadings, as the Defendants submit—is important as, as noted above, a proposed amendment seeking to raise a case which is inherently implausible or self-contradictory is liable for rejection. In asking the Court to reject the proposed amendments on the basis that they are inconsistent with C's current or prior claims, the Defendants have invited the Court to pay particular attention to the following events in the history of the dispute.

44. C initially pursued a claim in respect of the present dispute in the courts of Cyprus (the **"Cyprus Proceedings"**). D1, D2 and the Fourth to Ninth Defendants were identified as defendants in the Cyprus Proceedings. C did not pursue any claim against D3 Ltd. C sought and obtained a worldwide freezing order in the Cyprus Proceedings (the **"Cyprus Injunction"**). In the Endorsement of Claim, C alleged that D1 and/or D2 had "committed fraudulent and / or illegal acts in Cyprus against the Plaintiff and / or [D1 and D2] have conspired between them and / or with other persons in Cyprus and elsewhere…". In a affidavit supporting her case (the **"Cyprus Affidavit"**), C's business consultant stated that C's beneficial interests in the Assets arose by way of her beneficial interests in the shares of the two companies at the top of the Assets' corporate structures, that is, in D9 Ltd and RN Ltd.

45. In November 2019, C sought and obtained from the DIFC Courts a worldwide freezing order ancillary to the Cyprus Injunction (the **"First DIFC Proceedings"** and the **"First DIFC Injunction"**). C swore an affidavit in support of her application affirming, amongst other things, that the content of the Cyprus Affidavit was correct. This included confirmation that C's interest as "the ultimate beneficial owner" of both the Spanish Property and the Yacht was "held by me through the corporate structure". D3 Ltd was joined only as a notice party in this action.

46. On 31 March 2020, the Cyprus court dismissed C's claim for lack of jurisdiction. In addition, the Cyprus Court found that C had knowingly participated in arrangements that infringed money laundering laws.

47. Following the dismissal of the Cyprus Proceedings, on 13 April 2020, C issued a second claim in the DIFC, being the present claim (the **"Second DIFC Proceedings"**), this time asking the Court to hear and determine the dispute at large. D3 Ltd was for the first time named as a defendant.

48. C's claim against D3 Ltd was initially based on its alleged involvement in an ongoing unlawful means conspiracy with respect to the Spanish Property. C sought a quia timet injunction against D3 Ltd. C's claim form did not set out any claim against D3 Ltd with respect to the Yacht, nor was any claim for damages advanced against it.

49. C sought without notice and obtained a freezing order in substantially the same terms as the First DIFC Injunction on 22 April 2020 (the **"First DIFC Injunction"**). In her supporting affidavit, C again reiterated that her claim to be the ultimate beneficial owner of the Assets was by virtue of the corporate structures described in the Cyprus Affidavit.

50. During the without notice hearing, C's counsel confirmed that C was pursuing a claim against D3 Ltd for declaratory and injunctive relief with respect to the Spanish Property only. It was expressly stated that C did not allege that D3 Ltd owed or breached any contractual duties to her.

51. I was the judge who heard C's application. I asked counsel if D3 Ltd was "in agreement with [C]… to manage her assets in a certain way; is that your next argument, because we need to establish the link between [D3 Ltd] and [C]?". Counsel for C replied in this way:

> … it is not quite that far. What we say is that we had an agreement with [D1 and D2]. They were the people we dealt with. We had a contractual arrangement with them over the years. Our case is that [D3 Ltd] was the vehicle through which the first two respondents have acted or appeared to have acted in controlled matters.

52. Shortly after, I asked counsel for further confirmation in respect of D3 Ltd: "… But as a [legally] independent personality… it has no contract with you and there should be no direct duties; no contractual duties?", to which C's counsel replied in the affirmative, adding:

> … as against [D3 Ltd] we seek declarative remedies… in respect of their assistance in the wrongdoing… But in terms of the primary claim we do not identify it as a wrongdoer under those damages claims... But we will be seeking declarations or injunctions against it.

53. During a short adjournment of the hearing, C's case against D3 Ltd developed, as C's counsel explained to the Court when the hearing resumed:

> … in relation to this important question that you have been asking me to get to a conclusion on, I am in a position to confirm that we are content and the claimant, our client, will be making a case in conspiracy, an unlawful means conspiracy, under Article 35(a) of the Law of Damages and Article 36 of the Law of Obligation directly against [D3 Ltd].

54. On 27 May 2020, C filed and served the PoC. As outlined above, the PoC repeated C's then existing case on the nature of her alleged interests in the Assets. It included the claims against D3 Ltd intimated at the without notice hearing also.

55. On 23 July 2020, D3 Ltd filed an application for C's claim to be struck out and/or for immediate judgment against C, being the Immediate Judgment Application. D3 Ltd's application was made on the primary basis, as explained in the application notice, that "the… Claimant has no legal standing to pursue a claim against the… Third Defendant". While D3 Ltd did not go into great detail, in relation to another request made in the application notice, for the Second DIFC Injunction to be discharged, it was stated: "[C failed] to draw the Court's attention to the defence or potential defence arising from the fact that the Claimant had no right to complain in respect of losses suffered by a company in which she claims to have an indirect shareholding". D3 Ltd here referred to the rule of company law known as the Prudential rule or the rule against reflective loss which stipulates, in brief terms, that a shareholder cannot recover for loss sustained in that capacity consequential on the loss of the company of which he is a shareholder. The rule against reflective loss underpinned the Immediate Judgment Application also.

56. On 21 September 2020, C applied to amend her PoC and served a copy of a draft amended PoC on the Defendants.

57. On 5 October 2020, C served a further draft amended PoC, being the APoC. As shown above, in the APoC, C claims that her interests in the Assets arose not by virtue of her beneficial ownership of D9 Ltd and RN Ltd—or at least not by virtue of such alleged ownership only—but rather by virtue of the Trusts mentioned above, alternatively resulting trusts, alternatively by virtue of C's right to require D2 in the case of the Yacht and D4 in the case of the Spanish Property to follow her instructions as nominees and fiduciaries.

58. The Defendants aver that these proposed amendments are not in concurrence with C's case as previously pleaded and should be rejected for that reason.

59. C's insists that C had already claimed direct interests in the Assets in her PoC but that out of caution C has given extra detail in the APoC. It will be recalled that at [25] of the PoC, it is stated in respect of the Spanish Property that "The ultimate beneficial owner of the Spanish Property is and was at all material times [C]". (C's use of the term "ultimate beneficial owner" warranted clarification. Junior counsel for C explained in oral submissions that what was intended by the term ultimate beneficial owner was "the person ultimately entitled to exercise the beneficial ownership of the assets" i.e. ultimate beneficial owner in a broad sense rather than for the purposes of DIFC regulations, being "a natural person… who: (a) in relation to a company, owns or controls (directly or indirectly): (i) Shares or other Ownership Interests in the [company] of at least [25%]" (Regulation 3.1.1 of the DIFC Ultimate Beneficial Ownership Regulations).) Counsel for C says that this claim that C is and was at all material times the ultimate beneficial owner of the Spanish Property is a claim to direct ownership in the unamended case. There is a corresponding claim in respect of the Yacht at [29] of the PoC.

60. In respect of the case against D3 Ltd, senior counsel for C has justified the developments on the basis that "this is an evolving case" in which C is facing an "information deficit" but that "further matters came to light".

Discussion of objection 1(i)

61. Considered in isolation, the above citation from [25] of the PoC and its corresponding passage in [29] can, in my view, be said to be a claim to direct beneficial ownership of the Spanish Property and the Yacht, respectively. To this extent I agree with counsel for C. In context, however, these claims are in my judgment better characterised as only conclusions from the facts that C is and was the beneficial owner of the Spanish Property and the Yacht; conclusions which may or may not follow from the relevant facts and which may not necessarily therefore be claims to direct ownership in any complete sense.

62. If C had stated, for example, that the beneficial owner of the Spanish Property is and was at all material times C because C had decided she should be, C's conclusion that a beneficial interest in the Spanish Property arose in such circumstances would simply be the product of a misunderstanding of how a beneficial interest might arise: the supporting fact pleaded—C's decision that she should be the beneficial owner—could not possibly give rise to the beneficial interest claimed. If C then amended her statement to say that she was the beneficial owner of the property because, instead, she had paid for the Spanish Property and she did not intend the payment to be a gift or gratuitous transfer, in my judgment this would not be a clarification of the original claim and would be better described as a new claim inasmuch as the facts pleaded are entirely different and the only commonalities between the two statements are C's conclusions, one of which is misconceived, that she acquired a beneficial interest in the asset in question.

63. In my opinion, it is therefore necessary to look at C's claims to direct ownership of the Assests in their context, as D3 Ltd's senior counsel in particular has emphasised. As to this, and in relation to the Spanish Property, at [25] of the PoC also, C claims that her interest arose: "… *by virtue of* her beneficial ownership of the [D9 Ltd] Shares…" (emphasis added), that is, *indirectly*. In other words, in the PoC, the fact which C says supports the conclusion that she had a beneficial interest in the Spanish Property is her alleged ownership of the shares of the ultimate holding company whose ultimate subsidiary, D7 SL, owns the Spanish Property.

64. In my view, the way that C alleges that her interest in the Spanish Property arose in the APoC is unquestionably different. Along with a claim that her interest arose by virtue of her alleged beneficial ownership of D9 Ltd's shares, C's beneficial interest in the Spanish Property is said to have arisen by virtue of, amongst other things, an express trust and/or a resulting trust over the Spanish Property, that is, directly. This is not merely a clarification of the current case.

65. With that said, unlike in the illustration given above, in this case—and leaving to the side for the moment questions related to the merits of the pleadings under consideration—the facts which C relies on in the APoC in claiming a direct interest in the Spanish Property were already, in my view, very much present in the PoC.

66. It is important to highlight that it is C's case that the Trusts arose out of the Contracts—more will be said on this below—and so the facts alleged in support of the Contracts—already pleaded in the PoC—are essentially the same facts which might support the existence of the Trusts and indeed the resulting trusts. In the PoC, C stated:

> The Yacht and Spanish Property Contracts [(the "Contracts")]
>
> 13. In and around 2018 [C] instructed [D1] and [D2] to advise and assist in the purchase of the Spanish Property… through the DIFC "family office". The… Spanish Property [was] to be purchased from… a Russian businessman as part of an "asset swap"

14. Accordingly, [C] entered into [a contract] with [D1 and D2] as follows:…

b…. between April and October 2018 [C] agreed to pay commission fees in return for [D1 and D2's] advice as to the purchase and subsequent ownership structure of the Spanish Property through the DIFC "family office" (the **"Spanish Property Services"**). The Spanish Property Services also included authorising the necessary financial transactions on [C's] behalf and proposing and establishing entities, nominee directors and shareholders for the ownership structure of the Spanish Property (the **"Spanish Property Contract"**)….

The purchase and ownership structure of the Assets

21. [D1 and D2] advised [C] that the Assets should be held through a complex structure of companies, nominee directors and shareholders. [D1 and D2] advised that the purpose of such ownership structures was to maintain [C's] confidentiality and protect her assets from politically motivated attacks owing to her affiliation with [her husband].

22. In reliance on the aforementioned advice, [C] consented to the purchase and subsequent ownership structure of both the Yacht and the Spanish Property…

67. Notwithstanding that key information is missing from this passage, in my judgment facts which support a claim to direct beneficial interests in the Assets—whether in the form of express trusts or resulting trusts—are present in these paragraphs. While nothing is stated about how exactly a beneficial interest allegedly became vested in C, if what C does say is presumed to be true, the existence of some species of trust over the Assets in C's favour would not be farfetched. I think a claim to direct beneficial interests in the Assets is just below the surface of these pleadings. Indeed, in my view it is more curious that there were no such claims in the PoC than it is that C now seeks to advance them.

68. It is not unlikely that C failed to consider the rule against reflective loss and to apprehend, in turn, that, if the rule applied, she might need to establish ownership of the Assets by way of direct beneficial interests in them in addition to or instead of the indirect ownership claimed in the PoC to have a better or real prospect of success in these proceedings. Indeed, and nearly a year passed between the First DIFC Injunction being issued and the rule against reflective loss first being invoked in this dispute, it appears that the Defendants themselves failed to make the same apprehension.

69. C's claims and the Defendants' challenges thereto up until the rule against reflective loss was invoked appear to presuppose that, in principle, C could establish ownership of the Assets if she successfully established ownership of D9 Ltd in the case of the Spanish Property and RN Ltd in the case of the Yacht. This apparently being the case, I do not think that too much should be made of the fact that C did not fully develop her claim to having direct beneficial interests in the Assets in the way she has now seeks to in the APoC.

70. Moreover, comparing [25] in the PoC and [25] as amended in the APoC, in my view this is not a case where a claimant's claim has been fundamentally revised; it is a case where the claimant initially pursued by one route assets which were on any case acquired through complex transactions and which are, or were in the case of the Yacht, held in complex structures, before evidently deciding that another route had a better prospect of success. To make reference again to the illustration above, in my view C proposes the opposite type of amendments: the legal analysis has been rethought while the factual cases in the PoC and the APoC are, in my judgment, reconcilable. And I do not think inconsistencies in legal conclusions—particularly where the facts of the case unquestionably give rise to complex legal issues—should be treated with the same degree of caution as inconsistencies in factual cases. Contracts and trusts can come into existence without their parties being aware. The most important questions, in my view, are whether contracts or trusts in fact exist, the relevant requirements having been fulfilled, not whether it was known or not or known but not immediately argued and so on.

71. To turn to the question of how the claim against D3 Ltd has developed over time—from there being no claim against it in the Cyprus Proceedings; to being joined as a notice party in the First DIFC Proceedings; to initially being a relatively peripheral defendant in the Second DIFC Proceedings; to becoming very much at the centre of the dispute in the PoC; and to being identified, finally, as a party to the Contracts in the APoC—I think it can be said at once that this development warrants concern.

72. As noted above, senior counsel for C has explained the changes in the case against of D3 Ltd in the following way: "this is an evolving case in which we are facing this information deficit… more information has come to light". In my view, a without notice hearing is a most unlikely occasion on which more information might come to light, yet one of the most significant shifts in the case against D3 Ltd occurred on precisely such an occasion.

73. I heard two applications in the First DIFC Proceedings and therefore have some familiarity with them. D3 Ltd's inclusion in those proceedings as only a notice party was something that H.E. Deputy Chief Justice Omar Al Mheiri who heard the initial without notice application alighted on as the transcript of that hearing shows, in a manner not dissimilar to how I had done on the question of whether C alleged a contract with D3 Ltd in these, the Second DIFC Proceedings.

74. H.E. Deputy Chief Justice Al Mheiri asked counsel to confirm that C did not claim directly against D3 Ltd, to which he replied:

> [D3 Ltd] is a notice party. It is included, of course, because it appears to be centrally involved as a vehicle, but when we come to the actual definition of assets covered by the standard wording of the DIFC's (Inaudible) [presumably "freezing order" or "interim remedy" was said], the shares in [D3 Ltd] and the assets in [D3 Ltd], I think will be covered by the freezing order, the standard wording. We have not altered the standard wording but we have made [D3 Ltd] the notice party for the freezing order because it obviously ought to be made aware independently…

Counsel here referred to what became [6] and [7] of the First DIFC Injunction which provides—as far as I understand it is still in force, hence the present tense—as material:

> 6. [The freezing order against D1 and D2] applies to all [their] assets, whether or not they are in [their names]. For the purpose of this Order [D1 and D2's] assets include any asset (including without limitation any interest in and any assets of [D4] or [D3 Ltd]) which [they have] the power, directly or indirectly, to dispose of or deal with as if it were [their] own.
>
> 7. The prohibition referred to above includes the following assets in particular:…
>
> (2) the property and assets of [D1 and/or D2's] business known as [D3 Ltd]…

75. I am not aware that any explanation was given for D3 Ltd's inclusion in the First DIFC Proceedings as only a notice party, which is curious as, as C herself emphasises, a conspiracy does not require an express agreement between conspirers, a conspirer need not commit all of the relevant unlawful acts and a director can conspire with his company (see *Concept Oil Services Ltd v En-Gin Group LLP* [2013] EWHC 1897 (Comm) at [51] to [53]).

76. As C has averred in her response dated 27 August 2020 to D2's further information request made pursuant to Part 19 of the RDC dated 14 June 2020 (the **"First Part 19 Request"** and the **"Part 19 Response"**), C's knowledge of the Contracts—including question pertaining to when and where the Contracts were entered into and their terms and so on—is extremely thin: "the relevant records are in the possession and control of the First and/or Second Defendants" ([22] of the Part 19 Response in respect of the Yacht and [23] in respect of the Spanish Property); in oral submissions at the hearing of the Amendment Application, C's counsel described a "great deficit" of information that C suffers.

77. When all this is considered alongside the fact that D2 was a shareholder in and director of D3 Ltd until 14 July 2019 and 21 July July 2019, respectively, that is, right up until around the time crucial steps in the alleged conspiracy are said to have been taken; where, as is evident from [6] and to a greater extent [7] of the First DIFC Injunction, it was considered by C that D3 Ltd was D1 and D2's business; where it was C's case from the start of the First DIFC Proceedings that D3 Ltd was "centrally involved as a vehicle" of the alleged conspiracy; and where C believed that D3 Ltd was established to manage her assets and "was established with the sole purpose of misleading prospective clients" ([32] of the Cyprus Affidavit), when all of this is considered together, it begs the question, in my judgment, not so much of what information was missing that resulted in C not initially advancing the case against D3 Ltd that she now advances—including, most importantly for present considerations, identifying D3 Ltd as a party to the Contracts—but more so of what positive information C had or conclusions she had come to which resulted in her deciding that D3 Ltd was not in fact a wrongdoer or party to the Contracts, or at least that C would not make those claims, notwithstanding that making them would widen the net of defendants who might be found liable to her if nothing else. I will not speculate, but I will say that I do not think that C has properly explained the evolution of the case against D3 Ltd—C's pleadings appear to have evolved at a faster rate than the evidence.

78. But nor do I think that D3 Ltd's explanation is complete: C has been aware of D3 Ltd's jurisdictional significance from the outset of the First DIFC Proceedings and there appears to be no reason why, if C wanted to secure the Court's jurisdiction over this claim, she could not have placed D3 Ltd at the centre of the claim from the outset.

79. With these reservations stated, in my judgment, as with the C's case on her alleged interests in the Assets, the facts which support the newly introduced allegation against D3 Ltd were already more or less present in C's case before the APoC. The new allegation does not require additional facts: if D3 Ltd was party to the Contracts via D1 and/or D2, as a non-natural person it will

necessarily have been so by way of legal construct. As I stated above in relation to the direct interest amendments, I do not think that inconsistencies in legal conclusions should be treated with the same level of caution as factual inconsistencies, particularly where a case is complex.

80. While I do accept that the direct interest amendments and the D3 Ltd amendments have inconsistencies with C's current and previous cases, in my view these proposed amendments function to a greater extent to resolve inconsistencies and unanswered questions in the overall case. There is a sense that all the matters in dispute between the parties are present in the APoC, as C's senior counsel has stated. I think this overall effect of the proposed amendments would be a reason to allow, not reject, them.

Objection 1(ii): the proposed amendments are not properly pleaded

81. The Defendants' objections to the proposed amendments on the averred basis that they or some of them are not properly pleaded are less clear than the other objections. I understand that these objections stem from the pleadings in relation to the Contracts, which, apart from the allegation that D3 Ltd is party to the Contracts, were present already in the PoC and are not, therefore, sought on amendment. As mentioned above, however, the claims in respect of the Trusts is dependent upon the claim in respect of the Contracts, as C says that the Trusts arose out of the Contracts. In oral submissions, counsel for C described the relationship between the Contracts and the Trusts in this way:

> … arising from the agreement between the parties there was an express trust and that was created by the agreement between our client and the First and Third Defendants [presumably counsel said "to" rather than "and" but this word was incorrectly transcribed] that she would acquire the Assets as a beneficial owner. To the extent that the Court is satisfied that there was an agreement, we say, yes, then it follows there was also an express trust.

82. C claims that fiduciary duties were owed to her by D4 in respect of the Spanish Property and D2 in respect of the Yacht as her nominees and by D1, D2 and D3 Ltd in respect of the Assets generally as her agents. As with the Trusts claims, C's claims concerning fiduciary duties are wholly dependent upon the Contracts also.

83. I will determine objection 1(ii) to the Amendment Application on the assumption that the Defendants' position is that the Trusts and fiduciary duties claims are not properly pleaded inasmuch as they rely on the Contracts claims which are themselves not properly pleaded.

84. The particulars in relation to the Contracts on which the Trusts and fiduciary duties depend are pleaded at [14] to [19] of the PoC and APoC. The pleadings in the APoC that concern the Spanish Property are as follows:

> 14. Accordingly, [C] entered into two separate contracts with [D3 Ltd], [D1] and [D2] as follows:…
>
> b. Similarly, between April and October 2108 [C] agreed to pay commission fees in return for [D1's] and [D2's] advice as to the purchase and subsequent ownership structure of the Spanish Property through [D3 Ltd] the DIFC "family office" (the **"Spanish Property Services"**). The Spanish Property Services also included authorising the necessary financial transactions on [C's] behalf and proposing, and establishing and then managing and controlling entities, nominee directors and shareholders for the ownership structure of the Spanish Property (the **"Spanish Property Contract"**).
>
> 15. As the aforementioned services were to be administered by [D1] and [D2] through [D3 Ltd], the DIFC "family office" the implied proper law of both the Yacht Contract and the Spanish Property Contract was (and is) DIFC Law. Alternatively, the proper law of both the Yacht Contract and Spanish Property Contract was DIFC Law as it was (and is) the system of law with which the contracts have the closest and most real connection…
>
> *The Terms of the Spanish Property Contract*
>
> 18. The following were express and/or implied terms of the Spanish Property Contract:
>
> a. [D3 Ltd], [D1] and [D2] (whether jointly or severally) would not take any steps in relation to the Spanish Property which were contrary to, or outside of [C's] express instructions without first obtaining [C's] consent;
>
> b. [D3 Ltd], [D1] and [D2] (whether jointly or severally) would respond to [C's] instructions as to the Spanish Property within a reasonable time; and
>
> c. [D3 Ltd], [D1] and [D2] (whether jointly or severally) would carry out the Spanish Property Services honestly and in good faith, acting in the interests of [C].
>
> 19. The aforesaid implied terms arose from:

a. The nature and purpose of the contract; and/or

b. Good faith and fair dealing; and/or

c. Because they represented the obvious, but unexpressed intentions of the parties;

and/or

d. Reasonableness.

85. [21] and [22] of the APoC are also relevant:

The purchase and ownership structure of the Assets

21. [D1] and [D2] advised [C] that the Assets should be held through a complex structure of companies, nominee directors and shareholders. [D1] and [D2] advised that the purpose of such ownership structures was to maintain [C's] confidentiality and protect her assets from politically motivated attacks owing to her affiliation with [her husband].

22. In reliance on the aforementioned advice, and believing [D1] and [D2] to be acting as part of the well-known [KAILOS (in part, al least because of [D1] and [D2's] use of [D3 Ltd], then known as [UA DIFC]) [C] consented to the purchase and subsequent ownership/holding structure of both the Yacht and the Spanish Property in the manner set out…

86. I think written submissions made on behalf of D2—in support of the Part 19 Applications but brought into the Amendment Application by reference in D2's counsel's skeleton argument—sum up the Defendants' objections to the Contracts pleadings and so to C's proposed amended case insofar as it is dependent on them:

> As the relevant contracts were oral [as initially intimated by C's counsel but not later confirmed]: (a) the Claimant should have no difficulty in stating that fact (and should have pleaded it); (b) the Claimant must be in a position to know, given she claims to have been the contracting party, when, where and between whom the contract was made (and should have pleaded it); and (c) the Claimant must be in a position to say what the express terms of the contract were…
>
> The inescapable inference is either that no such oral contracts were made or, if they were, the Claimant does not want to provide the required particulars because to do so would reveal that this Court has no jurisdiction over [D2] in relation to the contractual claims, contrary to the specific pleading at paragraph [76] of the [APoC]…

I will add to this a point made in D2's skeleton argument in relation to the Jurisdiction Applications: "Nor do the Amended Particulars of Claim state, in relation to any alleged trust relationship(s), the identity of the alleged trustee or the trust property".

87. C says that she has given as much detail as she presently is able to.

Discussion of objection 1(ii)

88. As descriptions of events which C says occurred, the Contracts pleadings—and so C's case on the Trusts and fiduciary duties—are in my view incomplete. When oral agreements are pleaded—and I proceed on the basis that the Contracts were oral, as intimated earlier in these proceedings by C's counsel—RDC r. 17.41 is engaged:

> **17.41**
>
> Where a party relies on an oral agreement, the statement of case should set out the contractual words used and state by whom, to whom, when and where they were spoken.

Given the allegations made in this case, RDC r. 17.43 is also relevant:

> **17.43**
>
> A party must specifically set out the following matters in his statement of case where he wishes to rely on them in support of his case:
>
> (1) full and specific details of any allegation of fraud, dishonesty, malice or illegality;
>
> (2) details of any misrepresentation;
>
> (3) details of all breaches of trust;
>
> (4) notice or knowledge of a fact;…

89. In my view, it is correct that [14] to [19] and [21] to [22] of the APoC fall short of the standards set out in RDC rr. 17.41 and 17.43. And it seems unlikely to me that so little of alleged agreements and trusts that concerned such valuable assets would be recalled, including the contractual words used in the Contracts and therefore the terms of the Trusts and fiduciary duties created and so on, and precisely who stated what, when and where.

90. But unlikelihood is not impossibility. C submits that she has given as much detail as she can at this stage. On my reading of RDC r. 17.41, this rule does not provide for a strict obligation: "the statement of case *should* set out the contractual words used and state by whom, to whom, when and where they were spoken". And while RDC r. 17.43 does, in my view, provide for a strict obligation—"a party *must…*"—I think the extent of that obligation must be relative to the knowledge of the obligated party. RDC r. 17.43(1), for example, requires a party to specifically set out "full and specific details of any allegation of fraud, dishonesty, malice or illegality". Interpreted strictly, few allegations of fraud and dishonesty would survive strike-out applications, which cannot be right. In my judgment, RDC r. 17.43(1) requires full and specific details of the allegation, which is to say that a claimant should explain his claim with as much detail as possible.

91. If it is true that there were contracts between C and D1, D2 and D3 Ltd and that there is some explanation for why C is unable to properly particularise them at this stage and therefore the Trusts, I think it would be unjust if C be denied the opportunity to avail herself of any rights she has under those contracts and any beneficial interests that may have arisen from them on the basis that she was unable to fully particularise those agreements at the start of the proceedings.

92. In *Devani v Wells* [2019] UKSC 4, the UK Supreme Court relevantly stated at [17] and [18]:

> 17 The question whether there was a binding contract between Mr Devani and Mr Wells required a consideration of what was communicated between them by their words and their conduct and whether, objectively assessed, that led to the conclusion that they intended to create a legally binding relationship and that they had agreed all the terms that the law requires as essential for that purpose. Lord Clarke of Stone-cum-Ebony JSC explained the relevant principles in this way in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH Co KG (UK Production)* [2010] 1 WLR 753, para 45:
>
> > The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.
>
> 18 *It may be the case that the words and conduct relied upon are so vague and lacking in specificity that the court is unable to identify the terms on which the parties have reached agreement or to attribute to the parties any contractual intention. But the courts are reluctant to find an agreement is too vague or uncertain to be enforced where it is found that the parties had the intention of being contractually bound and have acted on their agreement. As Lord Wright said in G Scammell and Nephew Ltd v H C and J G Ouston* [1941] AC 251, 268:
>
> > *The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention, looking at substance and not mere form. It will not be deterred by mere difficulties of interpretation*. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found. (emphases added)

93. On the question of the purpose of pleadings, the English Court of Appeal stated in *Boake Allen Ltd v Revenue and Customs Commissioners* [2006] EWCA Civ 25 as follows:

> 131. While it is good sense not to be pernickety about pleadings, the basic requirement that material facts should be pleaded is there for a good reason - *so that the other side can respond to the pleaded case by way of admission or denial of facts, thereby defining the issues for decision for the benefit of the parties and the court*. Proper pleading of the material facts is

essential for the orderly progress of the case and for its sound determination. The definition of the issues has an impact on such important matters as disclosure of relevant documents and the relevant oral evidence to be adduced at trial… (emphasis added)

94. Applying these principles, if C and D1, D2 and D3 have entered into agreements, intended to create legal relations, and have then acted on those agreements, as C claims, I do not think that the vagueness of those agreements alone should prevent a claim being advanced under them. Doing justice between the parties will require giving effect to the parties' intentions and allowing substance to prevail over form. I think it would be unjust and disproportionate to disallow the amendments that depend on the Contracts on the basis that they are not fully particularised, or even to allow them on condition that they are fully particularised in circumstances where C would, on her case, inevitably fail to meet such a condition.

95. While acknowledging the deficiencies in C's pleadings, I think she has given enough detail for the Defendants to be able to respond by way of admissions or denials. While the facts of the case and in particular those relating to the underlying transactions and corporate structures are complex, in my view the essence of C's claim is relatively simple and boils down, in the APoC, to assertions that the Contracts exist, that the Trusts arose from the Contracts and that C owns the Assets. As for the Defendants, in my view their defences as intimated in their arguments and evidence in both the First and the Second DIFC Proceedings are even simpler and will apparently be categorical and wholesale denial of C's claim, substantiated by all the evidence that C has been criticised for not herself having.

96. In other words, I do not think that the proposed amendments which depend on the Contracts should be rejected on account of deficient particularisation. So long as C has supplied all the information that she has—a question that only she can answer for the time being at least—and certainly where the most important aspects of her claims have been articulated, in my view her pleadings are at this stage sufficiently particularised.

Objection 1(iii): the proposed amendments are not supported by the evidence and contemporaneous documents

97. The Defendants have asked the Court to reject those of the proposed amendments which concern C's alleged direct interests in the Assets on the bases that they contradict key documentation relating to the Assets and the transactions by which they were acquired and are otherwise unsupported by evidence.

98. In relation to the Spanish Property, the transaction consisted of the shares in D7 SL being purchased from a Dutch company (**"TH bv"**) and a Gibraltar company (**"EH Ltd"**)—both of which C believes the Russian Businessman to be the ultimate beneficial owner of—by D5 Ltd and a Gibraltar company, which C claims she was the ultimate beneficial owner of, and TH bv in turn purchasing the shares in the Moldovan Assets.

99. The transfer deeds in respect of the transfer of the shares in each of the Moldovan Assets from D5 Ltd to TH bv each contain a declaration, at Clause 8, that the shares in the assets were free from any encumbrances.

100. Furthermore, the share purchase agreements for the sale of the shares of two of the three Moldovan companies that make up the Moldovan Assets (the remaining company was owned by an unnamed special purpose vehicle in Gibraltar) from D5 Ltd to TH bv provide: at Clause 2.1, that the shares in the company would be sold by D5 Ltd free from all encumbrances; at Clause 1 of Schedule 2, covenants by D5 Ltd that it had full title to transfer the shares, that it would do so free of all encumbrances and that the shares represented D5 Ltd's entire legal and beneficial shareholding in the company; and at Clause 3.2 of Schedule 2, covenants that D5 Ltd was the sole legal registered holder and beneficial owner of the shares.

101. The Defendants submit that these transaction documents confirm that, immediately prior to the share swap, C held no legal or beneficial interest in the shares of the Moldovan Assets. They invite the Court to reject the proposed amendments on the basis that, contrary to C's claim, she did not provide any consideration for the asset swap and therefore could not have acquired any interests in the Assets.

102. (The transaction in relation to the Yacht is different and more complex. For the purposes of the Amendment Application, however, I do not think that it needs to be outlined. As with the Spanish Property, the relevant transfer deed and share purchase agreement both purport that the company transferring an asset held the asset free from any encumbrances, had full title to transfer, that the shares in the asset represented the relevant company's entire legal and beneficial holding and that the company was the sole legal registered holder and beneficial owner of the shares.)

103. In response to these arguments, C relevantly relies on the following passages from authorities.

104. At [38] of *Equitable Life Assurance Society v Ernst & Young* [2003] EWCA Civ 1114, the English Court of Appeal stated:

> The overriding concern is the interests of justice. So far as facts are concerned, the simpler the case is the easier it is likely for a court to be able to take a view that the basis of a claim is fanciful or contradicted by all the documentary material on which it is founded. More complex cases are unlikely to be capable of being resolved in that way. *There is a danger of injustice in seeking to try such cases summarily on the documents and thus without disclosure and oral evidence tested by cross–examination. It should not be done unless the court can be confident that all the relevant facts had already been satisfactorily investigated.* The power of summary disposal is not intended for cases where there are issues which need to be investigated at trial. (emphasis added)

And so, the court may decline to decide an issue at the interim stage consistently with the documents where disclosure and oral evidence might change the court's view of a case.

105. As to the lack of evidence supporting the proposed amendments, in the English case of *Dadourian Group v Simms* [2009] EWCA Civ 169, the Court of Appeal held at [89]:

> We reject Mr Cakebread's categorisation of the trial judge's finding that Helga knew that Jack had falsely represented that he was only an intermediary as mere supposition, conjecture and unjustified assumption. Mr Cakebread appeared to be equating proper inferences with conjecture and assumption. *At times he came close to suggesting that fraud can only be established where there is direct evidence. If that were the case, few allegations of fraud would ever come to trial. Fraudsters rarely sit down and reduce their dishonest agreement to writing. Frauds are commonly proved on the basis of inviting the fact-finder to draw proper inferences from the primary facts.* That is exactly what the judge did here. (emphasis added)

Discussion of objection 1(iii)

106. I think this objection can be dealt with more quickly than the previous ones. The Defendants' reliance on the transfer deeds and the share purchase agreements by which the Assets were acquired is, in my judgment, misplaced in circumstances where, on C's case, presumed to be correct for present purposes, C and D1 and D2, through D3 Ltd, purposely set out to conceal C's interests in the Assets in order to protect them from politically motivated attacks. In other words, on C's case, any content in the transfer deeds and the share purchase agreements inconsistent with her claims can be explained as elements of a strategy intended to conceal her interests. I do not know whether such steps would be legal under the relevant laws or, if illegal, what consequences should follow, but I am satisfied for the purposes of the Amendment Application that the documents in question should not be relied on as necessarily describing the states of affairs they purported to. Indeed, at least some witness evidence filed in support of D2's and D4's respective cases in the Cyprus Proceedings and cited below in my discussion of the Part 19 Applications appears to diverge from the content of these documents also.

107. As to the lack of direct evidence supporting the Amendment Application, C's case is that D1 and D2 were her advisers and that she is to a significant extent dependent on them in these proceedings for ascertaining and supporting important aspects of her claim as D1 and D2 possess and control important records relating to the Contracts and the alleged asset swap. If C's case is presumed to be true, I do not think that the usual requirements in relation to supporting evidence should be applied. In my judgment, as things stand, if this case goes to trial, C's claim is one that may find the bulk of its evidential support through disclosure and witnesses and so on. I do not think that the lack of evidence in C's possession now should impede her claim from progressing, including by way of the proposed amendments.

108. In conclusion, notwithstanding the documentary evidence contradicting C's case and the lack of direct evidence presently supporting it, I am satisfied that C's proposed amendments should not be denied on either basis.

Objection 2: the proposed amendments are not maintainable in law

109. The Defendants contend that C's proposed amendments in relation to the Trusts are bad in law. One objection concerns the governing law of the Trusts: in respect of both of the Assets, the Defendants say that no trust could have arisen as laws which do not recognise trusts would govern the arrangements (the **"Governing Law Objection"**). Another objection is that no resulting trusts could have arisen in respect of either the Spanish Property or the Yacht as C advanced no consideration for their acquisition, on her own case (the **"Resulting Trust Objection"**).

The Governing Law Objection

110. C's case is that the governing law of the Trusts is DIFC law but accepts that there is no express agreement on this question. On C's case, therefore, it would be necessary for the Trusts' governing laws to be determined by applying the relevant rules.

111. The Defendants have highlighted that there are conflicting approaches in the common law as to whether questions related to trusts are governed by the law where the property is situated or the law of the country with the closet connection to the arrangement: Dicey, Morris & Collins, the Conflict of Laws, para 29-081. Under English law, the issue is governed by the law with the closest connection: *Martin v Secretary of State for Work and Pensions* [2009] EWCA Civ 1289 at [29] to [30].

112. In relation to the Spanish Property, the Defendants submit that the relevant transaction was the sale of shares in D7 SL, a Spanish company which owns real property in Spain, and that, therefore, on either of the above approaches, Spanish law is engaged. The Defendants submit that no trust could therefore have arisen as trusts are not recognised as a matter of Spanish law. The same arguments are made, *mutatis mutandis*, in relation to the Yacht.

113. Junior counsel for C argued in oral submissions in response to this objection that DIFC Law No. 4 of 2018 (the **"Trust Law"**) provides its own regime for determining the governing law of trusts, Article 11, and that it is this regime that must be applied.

114. Article 11 of the Trust Law provides, as material, as follows:

> Governing law
>
> (1) The meaning and effect of the terms of a trust are:
>
> (a) determined by the law of the jurisdiction expressed by the terms of the trust as the governing law; failing which
>
> (b) to be implied from the terms of the trust; or failing which
>
> (c) to be determined by the law with which the trust at the time it was created had the closest connection.
>
> (2) The references in Article 11(1)(a) and (b) to "failing which" include references to cases:
>
> (a) where no law is expressed or implied under Article 11(1)(a) or
>
> (b); and(b) where a law is so expressed or implied, but that law does not provide for trusts or the category of trusts concerned.
>
> (3) In ascertaining, for the purpose of Article 11(1)(c), the law with which a trust had the closest connection, reference shall be made in particular to:
>
> (a) the place of administration of the trust designated by the settlor;
>
> (b) the situs of the assets of the trust;
>
> (c) the place of residence or business of the trustee; and
>
> (d) the objects of the trust and the places where they are to be fulfilled…

115. Counsel for C proposed that the governing law of the Trusts would be determined under Article 11(1)(b) or (c) of the Trust Law, that is, it would be implied from the terms of the Trusts, failing which determined by the law with which the Trusts at the time they were created had the closest connection, with DIFC law being that law in both cases, which needless to say recognises trusts. Counsel argued that DIFC law would be implied from the terms of the Trusts on the bases that the Assets' corporate structures were set up and managed through D3 Ltd and that it had the closest connection with the Trusts at the time they were created in any event as the place of administration of the Trusts was the DIFC.

The Governing Law Objection discussion

116. The Defendants have argued that none of laws connected to the Assets and the alleged arrangements—implicitly, other than that of the DIFC, insofar as it has any connection—recognise trusts. This point strikes me as weighing in favour of C's primary case on this question, namely that the governing law of the Trusts is DIFC law. On my reading of Article 11 of the Trust Law, it does not appear that a trust might fail under DIFC law on the basis that the law implied from its terms does not provide for trusts. Article 11(2)(b) provides, as material, that "The [reference] in Article 11(1)…(b) to "failing which" [includes reference] to cases… where a law is… implied [under Article 11(1)(b)], *but that law does not provide for trusts or the category of trusts concerned*". (emphasis added) And if DIFC law is not to be implied from the terms of the Trusts, arguably it would be the law with the closest

connection to the Trusts at the time they were created: if no law other than the law of the DIFC with any connection to the Assets and the arrangements provides for trusts, arguably DIFC law would necessarily have the closest connection to the Trusts inasmuch as no other law would have any connection whatsoever.

117. In my view, at the very least C has a real prospect of successfully establishing the existence of the Trusts so far as the issue of governing law is concerned, notwithstanding that the laws where the Assets are situated and/or those with the closest connection to the arrangements do not recognise trusts, inasmuch as DIFC law would apparently and accordingly govern those arrangements.

The Resulting Trust Objection

118. The two sets of circumstances in which resulting trusts arise under English law were explained by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669:

> (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer… (B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest… Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention. (page 708)

119. In the APoC, C claims that she is the beneficiary of resulting trusts over the Assets of the kind that arises in circumstance (A) of Lord Browne-Wilkinson's explanation.

120. D3 Ltd, with whom the other Defendants are in agreement, submits that the facts relied on by C do not support an intention which might justify the imposition of a resulting trust. D3 Ltd argues that C's sole assertion in this regard is that she provided the entire consideration for the acquisition of the Assets, while, D3 Ltd says, she did not, even on her own case.

121. The legal owner of the Spanish Property is D7 SL. That has never changed and indeed is uncontroversial. D7 SL legally owned the Spanish Property before the swap and retains ownership thereof until the present day. The same is true of EY Ltd in respect of the Yacht. Absent anything to the contrary, legal title carries with it the beneficial interest in a property (see *NRC Holding Ltd v Danilitskiy* [2017] EWHC 1431 (Ch) at [38]).

122. As to the valuable consideration supplied for the acquisition, provided in exchange for the shares in D7 SL, this was the shares in the Moldovan Assets. D3 Ltd says that those are shareholdings which were owned by D5 Ltd, not by C. It follows, D3 Ltd submits, that the valuable consideration for the transaction was provided by D5 Ltd, not C.

123. As set out above, the transaction documents purport that, as at the date of the share transfers, the shares in the Moldovan Assets were held by D5 Ltd free from any encumbrances. D5 Ltd was expressly stated to be the beneficial owner of the shares being swapped. D3 Ltd says that that evidence is fatal to C's contention that a trust arose from the swap and that even if some trust could have arisen, it would have been over the shares in D7 SL, not over any property D7 SL itself owned as only shares in those companies were acquired. The same would apply in the case of the Yacht.

124. Counsel for C took a cautious approach in responding to these submissions, focusing on the transaction as a whole rather than attempting to identify where beneficial ownership was originally vested and how it became vested in C. In summary, counsel contended that the essence of C's claim is that the ownership of the Assets was transferred because of value that C possessed and advanced and that the transfers were intended to be for her own benefit, with all of this being sufficient to establish that C has a good arguable case that she is the beneficiary of resulting trusts over the Assets.

125. Both D3 Ltd and C have relied on the case of *Prest v Petrodel Resources Limited* [2013] UKSC 34 in support of their cases. At [52] of that judgment, Lord Sumption stated:

> Whether assets legally vested in a company are beneficially owned by its controller is a highly fact-specific issue. It is not possible to give general guidance going beyond the ordinary principles and presumptions of equity, especially those relating to gifts and resulting trusts. But I venture to suggest, however tentatively, that in the case of the matrimonial home, the facts

> are quite likely to justify the inference that the property was held on trust for a spouse who owned and controlled the company. In many, perhaps most cases, the occupation of the company's property as the matrimonial home of its controller will not be easily justified in the company's interest, especially if it is gratuitous. The intention will normally be that the spouse in control of the company intends to retain a degree of control over the matrimonial home which is not consistent with the company's beneficial ownership. Of course, structures can be devised which give a different impression, and some of them will be entirely genuine. But where, say, the terms of acquisition and occupation of the matrimonial home are arranged between the husband in his personal capacity and the husband in his capacity as the sole effective agent of the company (or someone else acting at his direction), judges exercising family jurisdiction are entitled to be sceptical about whether the terms of occupation are really what they are said to be, or are simply a sham to conceal the reality of the husband's beneficial ownership.

126. D3 Ltd emphasises the difference between the instant case and the type that frequently arises in the matrimonial context, in which the court is more willing to justify an inference of a trust, for example in respect of a matrimonial home. D3 Ltd avers that there is no basis for the “scepticism” that may be applied by family courts in England. D3 Ltd argues that in the matrimonial context, the husband—and it is usually the husband—is often being obstructive and so the court can draw adverse inferences from that, something, D3 Ltd says, that is particularly important when somebody is denying that they have a beneficial interest. It is a completely different circumstance where a party is saying that he has a beneficial interest and he will have to prove it.

127. C, on the other hand, places particular reliance on Lord Sumption’s statement that whether assets legally vested in a company are beneficially owned by its controller “is a highly fact-specific issue” and submits that the Court is not in a position to come to a conclusion at this early stage of the proceedings, before disclosure and the filing of evidence, that C has no real prospect of successfully establishing that she is the beneficiary of resulting trusts over the Assets.

128. C also relies on the English High Court’s findings in *NRC Holding Ltd v Danilitskiy* [2017] EWHC 1431 (Ch), and in particular the facts in that case which the Court held supported the presumption of a resulting trust, especially those at [39(1) to (3)]:

> 39. There are, in my view, a number of facts which together support the presumption of a resulting trust in the present case. I emphasise, in particular, the following:
>
> (1) Opal Stem had only recently been incorporated and was incorporated for the purposes of holding title to the Property. It appears to have had no other assets, no operations and no bank account.
>
> (2) The acquisition of the Property was arranged by and occurred on the instructions of Mr Danilitskiy.
>
> (3) Mr Danilitskiy paid the purchase price of the Property out of his own resources. There is no evidence that the monies were advanced by Mr Danilitskiy to Opal Stem by way of loan or capital subscription.
>
> (4) Whilst the Property may not, it appears, ever have been the main matrimonial home, it was purchased as a home for the family for them to use whilst they were staying in London.
>
> (5) There is no evidence that any rent was in fact paid by Mr Danilitskiy for use of the Property and no evidence that the terms on which he was permitted to use it were otherwise than, in practice, gratuitous.

The Resulting Trusts Objection discussion

129. In the case of *Cobussen v Akbar* [2020] EWHC 2805 (QB), after citing [52] of the Prest judgment, cited above, Mr Justice Edis commented at [45]:

> That was specifically said [i.e. [55] of *Prest*] in the matrimonial context, *but contains a statement of principle, which is that the issue before me will be resolved by a careful analysis of the facts*, which I have attempted above. I am asked to make declarations that Mr. Akbar is the ultimate beneficial owner of Legacy, and/or that the legal title to the Property is held by Legacy on a resulting or as nominee for Mr. Akbar… (emphasis added)

130. I adopt the view of Justice Edis that Lord Sumption’s statement, though made within the matrimonial context, is a statement of broader application. I see no reason why the question whether assets legally vested in a company are beneficially owned by that company or another should be approached one way in the matrimonial context and another way in different contexts. In both cases, the objective is the same: the court sets out to determine the identity of the beneficial owner of disputed property.

131. Moreover, I do not think the fact that a spouse denies beneficial ownership or, in a different context, that an individual *claims* beneficial ownership should have a bearing on the question of whether such claimants have sufficient proof for their claims: in both cases, most fundamentally, there is a claim that an asset is beneficially owned inconsistently to how it is legally owned and a denial of that claim, with the court asked to determine the correct position.

132. In my view, the parallels between the facts in the instant case and those which may be present in matrimonial proceedings—for example, a spouse who is responsible for family finances being obstructive in relation to the finances—are more significant than their differences are. C says that D1 and D2 were her trusted financial advisors and that, through D3 Ltd, they managed her assets, including the Assets, and are in control of the information concerning the relationships between the Defendants and how the Defendants dealt with the Assets. Such financial advisors, in my view, have an important similarity to obstructive spouses.

133. I think it was appropriate for C to focus on the alleged transactions broadly rather than attempting to take detailed positions at this stage of the proceedings. Whether C is or could be, on her case, a beneficiary of a resulting trust over the Assets is a question that should be determined, in my judgment, through fact-sensitive analysis. For example, and drawing on C's submissions and the authorities on which she relies, before making any determination, the Court might want to know the purposes and operations of the various companies in the corporate structures before the asset swap; the identity of the person or persons on whose instructions the acquisitions were arranged and because of whom they occurred; to whom the resources with which the Assets were acquired in fact belonged; the intention the person or persons when advancing the resources; the past practice of the parties in respect of other assets; how the beneficial interests in the Assets were held before the asset swap took place; and, if those interests were held in a manner inconsistent with the relevant transaction documentation, the precise journey, so to speak, that the Assets' beneficial interests took through the asset swap.

134. With all of these questions as yet unanswered, I do not think that it can be said that C's chances of establishing resulting trusts in her favour are hopeless. I think she at least has a real prospect of successfully establishing that the Assets are held on trust for her under resulting trusts. Yet, too many facts are unknown, while, and to conclude as Justice Edis' concluded in Cobussen, "In the end, the issue is one of fact" ([50]).

Conclusion

135. For the reasons given above, I find that none of the objections made by the Defendants justify rejecting C's proposed amendments. The proposed amendments are not inherently implausible, in my judgment, notwithstanding the transaction documents which contradict them, inconsistencies between them and C's earlier case and the absence of evidence supporting them. Nor do I think it should be fatal to C's case, in a case like this, that some of the proposed amendments are supported by pleadings which are not fully pleaded. In my view, C has a real prospect of success for each of the proposed amendments. And the Defendants are yet to file defences to C's claim, which would have justified a more lenient approach in any event if leniency was required. It follows that the Amendment Application must be allowed, and C is accordingly given permission to rely on the APoC.

Costs

136. In accordance with the usual practice in applications to amend statements of case, C is ordered to pay the costs of the Defendants in the application, on the standard basis, to be assessed by a registrar if not agreed.

The Immediate Judgment Application

137. The Immediate Judgment Application was made on the basis of D3 Ltd's contention that C had no real prospect of succeeding on her claim as advanced in the PoC. In summary, D3 Ltd argued that, on C's case, the proper claimants were in fact the companies which own and owned the Spanish Property and the Yacht, D7 SL and EY Ltd, not C in her capacity as shareholder of the Assets' ultimate holding companies, D9 Ltd and RN Ltd. D3 Ltd argued that C had no standing to bring the claims advanced in the PoC and suffered no loss which the law would recognise.

138. As stated above, the Immediate Judgment Application is premised on the rule against reflective loss, a rule of company law which stipulates that, when a company suffers loss, its shareholder does not, in his capacity as a shareholder, suffer any loss which the law recognises as separate and distinct from the loss of the company. Such a shareholder cannot, in his capacity as a shareholder, personally recover damages or other remedies for the company's loss, in the form of a diminution in share value or in distributions.

139. It is not D3 Ltd's case that the principal way that C puts her case in the APoC, her claim that she has direct beneficial interests in the Assets, engages the rule against reflective loss. But in the APoC, C continues to claim interests in the Assets by way of shareholdings, albeit that this has become her secondary case (the **"Secondary Case"**). It will be recalled that C states at [25] of the APoC, in respect of the Spanish Property, as follows:

> The ultimate beneficial owner of the Spanish Property is and was at all material times [C], holding the controlling and/or beneficial interest in the same by virtue of an express, alternatively implied express trust alternatively resulting trust of the Spanish Property and/or the corporate holding/ownership structure established for her benefit *and/or the shares of each of the companies in the corporate holding structure…* (emphasis added)

A materially identical claim is made in respect of the Yacht at [29] of the APoC. It will be noted that, in the Secondary Case, C's claim to interests in the Assets via shareholdings has in fact been expanded: C now claims in the alternative that she has interests in the Assets by virtue of her beneficial ownership of the shares of all the companies in both corporate structures i.e. the shares of D7 SL, D5 Ltd, D8 Ltd, D9 Ltd, EY Ltd, QH Ltd and RN Ltd. The Immediate Judgment Application will be determined against the Secondary Case.

140. As a final introductory remark, while this is an immediate judgment application, with the Court therefore ultimately concerned with the question whether the respondent has a real prospect of succeeding on its case or an issue at trial, for reasons that will become clear in the ensuing discussion, each of the issues which fall to be determined in the Immediate Judgment Application turn on short points of law and in each case the possible outcomes are binary. As such, the question in this application is, in my view, whether C can or cannot succeed on the Secondary Case at trial, not whether she has a real as opposed to fanciful—and so on—prospect of doing so. It follows that there is no need to set out the law and principles which ordinarily apply in immediate judgment applications.

The Rule Against Reflective Loss

141. The rule against reflective loss follows from principles of company law. Companies have separate legal personality from their shareholders (*Salomon v A Salomon & Co Ltd* [1897] AC 22). As a result, the proper claimant in an action in respect of a wrong done to a company is, prima facie, the company (*Foss v Harbottle* (1843) 2 Hare 461).

142. In *Prudential Assurance v Newman Industries* [1982] Ch. 204, directors of a company were alleged to have made fraudulent misrepresentations to its shareholders in order to induce them into approving the purchase of assets at an overvalue. The Court of Appeal said at p. 222 to 223:

> It is also correct that if directors convene a meeting on the basis of a fraudulent circular, a shareholder will have a right of action to recover any loss which he has been personally caused in consequence of the fraudulent circular; this might include the expense of attending the meeting. But what he cannot do is to recover damages merely because the company in which he is interested has suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution in dividend, because such a "loss" is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only "loss" is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3 per cent shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely unencumbered property. The deceit practised upon the plaintiff does not affect the shares; it merely enables the defendant to rob the company. A simple illustration will prove the logic of this approach. Suppose that the sole asset of a company is a cash box containing £100,000. The company has an issued share capital of 100 shares, of which 99 are held by the plaintiff. The plaintiff holds the key of the cash box. The defendant by a fraudulent misrepresentation persuades the plaintiff to part with the key. The defendant then robs the company of all its money. The effect of the fraud and the subsequent robbery, assuming that the defendant successfully flees with his plunder, is (i) to denude the company of all its assets; and (ii) to reduce the sale value of the plaintiff's shares from a figure approaching £100,000 to nil. There are two wrongs, the deceit practised on the plaintiff and the robbery of the company. But the deceit on the plaintiff causes the plaintiff no loss which is separate and distinct from the loss to the company. The deceit was merely a step in the robbery. The plaintiff obviously cannot recover personally some £100,000 damages in addition to the £100,000 damages recoverable by the company.

The decision in *Prudential* thus established the rule against reflective loss.

143. Until recently, the leading authority on the rule was *Johnson v Gore Wood & Co* [2002] 2 AC 1. *Johnson* gave support, principally through the speech of Lord Bingham, to the decision in *Prudential* but also gave rise, principally through the speech of Lord Millet, to an expansion of the rule in subsequent case law. The cause of this expansion is described by Lord Reed in *Marex Financial Limited v Sevilleja* [2020] 3 WLR 255, a UK Supreme Court decision in which the rule against reflective loss was reviewed and clarified and about which more will be said below:

> 49. … Lord Millett began by discussing the relationship between the company's assets and the value of its shares. A share, he said at p 62, "represents a proportionate part of the company's net assets, and if these are depleted the diminution in its assets will be reflected in the diminution in the value of the shares". But a share is not a proportionate part of the company's net assets: see Macaura. The idea that a diminution in the value of a company's net assets will be reflected in the value of the shares is therefore not an axiomatic truth… The rule in Prudential is not premised on any necessary relationship between a company's assets and the value of its shares (or its distributions).
>
> 50. Approaching the matter on the basis which he had described, Lord Millett observed at p 62 that the problem which arose, where the company suffered loss caused by the breach of a duty owed to it, and a shareholder claimed to have suffered a consequent diminution in the value of his shareholding or in distributions, caused by the breach of a duty owed to it by the same wrongdoer, was the risk of double recovery, on the one hand, or a risk to the company's creditors through the depletion of its assets, on the other:
>
> "If the shareholder is allowed to recover in respect of such loss, then either there will be double recovery at the expense of the defendant or the shareholder will recover at the expense of the company and its creditors and other shareholders. Neither course can be permitted … Justice to the defendant requires the exclusion of one claim or the other; protection of the interests of the company's creditors requires that it is the company which is allowed to recover to the exclusion of the shareholder."…
>
> 67. … Johnson has been followed by a multitude of cases in which litigants, usually relying on the speech of Lord Millett, have sought either to establish exceptions to the general principles laid down by Lord Bingham, or to establish that the rule against the recovery of reflective loss extends more widely than Johnson had determined.

144. Earlier in his judgment, Lord Reed gave examples of how the rule against reflective loss had been expanded since Johnson:

> 12. The decision in Johnson has been interpreted in later cases as establishing a principle, generally referred to as the "reflective loss" principle, whose legal basis and scope are controversial. This supposed principle has been applied to claims brought by a claimant in the capacity of a creditor of a company, where he also held shares in it, and the company had a concurrent claim. In the present case, the Court of Appeal held that the principle applied to a claim brought by an ordinary creditor of a company (who was not a shareholder), where the company had a concurrent claim.
>
> 13. In the present appeal, the court is invited to clarify, and if necessary depart from, the approach adopted in Johnson, and to overrule some later authorities…

145. The majority of the Supreme Court confirmed that the rule against reflective loss as established in *Prudential* remains good law. A shareholder is still precluded from pursing an action in his personal capacity for any loss which is not separate and distinct from loss suffered by the company. But the reasoning in *Johnson* which diverges from *Prudential* and the developments which this reasoning generated have been departed from.

146. The following passages from *Marex* are relied upon by either D3 Ltd or C or both of them in the Immediate Judgment Application and together present well the rule against reflective loss as redefined in *Marex* and as pertinent to this case:

> 9. … the decision in *Prudential* established a rule of company law, applying specifically to companies and their shareholders in the particular circumstances described, and having no wider ambit…
>
> 39. … *Prudential* decided that a diminution in the value of a shareholding or in distributions to shareholders, which is merely the result of a loss suffered by the company in consequence of a wrong done to it by the defendant, is not in the eyes of the law damage which is separate and distinct from the damage suffered by the company, and is therefore not recoverable. Where there is no recoverable loss, it follows that the shareholder cannot bring a claim, whether or not the company's cause of action is pursued. The decision had no application to losses suffered by a shareholder which were distinct from the company's loss or to situations where the company had no cause of action…

51. … the unique position in which a shareholder stands in relation to his company, reflected in the rule in *Foss v Harbottle*, is a critical part of the explanation [of the rule against reflective loss]. In addition… there are pragmatic advantages in adopting a clear rule…

79. … it is necessary to distinguish between (1) cases where claims are brought by a shareholder in respect of loss which he has suffered in that capacity, in the form of a diminution in share value or in distributions, which is the consequence of loss sustained by the company, in respect of which the company has a cause of action against the same wrongdoer, and (2) cases where claims are brought, whether by a shareholder or by anyone else, in respect of loss which does not fall within that description, but where the company has a right of action in respect of substantially the same loss.

80. In cases of the first kind, the shareholder cannot bring proceedings in respect of the company's loss, since he has no legal or equitable interest in the company's assets: *Macaura* and *Short v Treasury Comrs*. It is only the company which has a cause of action in respect of its loss: *Foss v Harbottle*. However, depending on the circumstances, it is possible that the company's loss may result (or, at least, may be claimed to result) in a fall in the value of its shares. Its shareholders may therefore claim to have suffered a loss as a consequence of the company's loss. Depending on the circumstances, the company's recovery of its loss may have the effect of restoring the value of the shares. In such circumstances, the only remedy which the law requires to provide, in order to achieve its remedial objectives of compensating both the company and its shareholders, is an award of damages to the company.

81. There may, however, be circumstances where the company's right of action is not sufficient to ensure that the value of the shares is fully replenished. One example is where the market's valuation of the shares is not a simple reflection of the company's net assets… Another is where the company fails to pursue a right of action which, in the opinion of a shareholder, ought to have been pursued, or compromises its claim for an amount which, in the opinion of a shareholder, is less than its full value. But the effect of the rule in *Foss v Harbottle* is that the shareholder has entrusted the management of the company's right of action to its decision-making organs, including, ultimately, the majority of members voting in general meeting. If such a decision is taken otherwise than in the proper exercise of the relevant powers, then the law provides the shareholder with a number of remedies, including a derivative action, and equitable relief from unfairly prejudicial conduct…

83. The critical point is that the shareholder has not suffered a loss which is regarded by the law as being separate and distinct from the company's loss, and therefore has no claim to recover it. As a shareholder (and unlike a creditor or an employee), he does, however, have a variety of other rights which may be relevant in a context of this kind, including the right to bring a derivative claim to enforce the company's rights if the relevant conditions are met, and the right to seek relief in respect of unfairly prejudicial conduct of the company's affairs.

84. The position is different in cases of the second kind. One can take as an example cases where claims are brought in respect of loss suffered in the capacity of a creditor of the company. The arguments which arise in the case of a shareholder have no application. There is no analogous relationship between a creditor and the company. There is no correlation between the value of the company's assets or profits and the "value" of the creditor's debt, analogous to the relationship on which a shareholder bases his claim for a fall in share value. The inverted commas around the word "value", when applied to a debt, reflect the fact that it is a different kind of entity from a share.

A Preliminary Remark

147. I should state as a preliminary remark that, having revisited the arguments and reconsidered the issues in the Immediate Judgment Application, it is not clear to me how the rule against reflective loss is supposed to be engaged in a case as a matter of law. As I understand it, the parties' arguments focus on: (i) the scope of the rule as redefined in *Marex*; (ii) whether the rule should be adopted in the DIFC as a matter of principle; and, if it should be and is, (iii) whether it operates to bar C's claims in the Secondary Case (the **"Three Issues"**). I am not sure that anything has been said on the question of how the rule against reflective loss is brought into play in a case. Is the rule a rule of procedural law applied by the court in all appropriate cases; a rule of policy applied in all cases; or is it instead a rule of substantive law, and if so, is the rule's applicability determined by the law of the place of the cause of action or instead the law of the place of the injured company's incorporation?

148. It makes most sense to me that the applicability of rule against reflective loss will be determined with reference to the law of the place of incorporation of the injured company. I take this view because, on my reading of *Marex*, the rationale for the rule appears to be most fundamentally grounded, not in policy considerations or "company law" as a broad category which groups together the various company laws of the world, but rather more specifically in a company law which, properly understood,

renders loss suffered by a company which it governs as being neither separate nor distinct from loss consequentially suffered by its shareholder in that capacity. In my view, this is implicit in Lord Reed's lead judgment in *Marex*—though important policy considerations or "pragmatic advantages" to the rule are acknowledged (see for example [38])—and it is relatively explicit in Lord Hodge's, wherein he highlights "*the central role of company law* in the Court of Appeal's judgment in the Prudential case which is the *fons et origo of the principle*" and ascribes the problems and uncertainties which emerged in the law after that case when the rule against reflective loss broke "from *its moorings in company law*" ([95]). (emphases added) In my view, Lord Hodge must be referring an actual body of governing regulations rather than a category which includes the divergent company laws of, say, England, the DIFC, Spain, the Seychelles and Lebanon.

149. In my judgment, this court has previously approached reflective loss in a manner consistent with this view. In *Nest Investments Holding Lebanon S.A.L. and Ors v Deloitte & Touche (M.E.) and Anr* CFI-027-2016 (31 October 2017), Justice Roger Giles held that the question whether shareholders of a Lebanese company were entitled to bring claims for loss said to be suffered by them in their capacity as shareholders was to be determined with reference Lebanese law (see: [57] to [68]). Nor can it be said that the rule against reflective loss was overlooked in that case: Justice Giles invited supplementary submissions on the rule as adopted in common law jurisdictions and made recourse to them when considering the position under Lebanese law (see: [64] to [68]). Indeed, Justice Giles appears to have positively declined applying the rule against reflective loss in that case (see: [68]). Whilst his reasons for doing so are not expressly provided in his judgment, it seems clear to me that the learned judge held that the shareholders' entitlement or otherwise to bring claims for reflective loss should be decided with reference to the company law which governed the injured company, in that case Lebanese company law.

150. The rule against reflective loss follows chiefly from the rule in *Foss v Harbottle* (1843) 2 Hare 461 that companies have separate legal personality from their shareholders, a rule present in DIFC company law in the form of Article 9 of DIFC Law No. 5 of 2018, being the DIFC Companies Law:

> **Legal personality**
>
> A Company incorporated pursuant to Article 8(1) [i.e. a company incorporated under the DIFC Companies Law] shall have a separate legal personality from that of its Shareholders. The liabilities of a Company, whether arising in contract, tort or otherwise, are the Company's liabilities and not the personal liabilities of any Shareholder or Officer of the Company, except where otherwise provided in this Law.

As the first sentence of Article 9 makes clear, this provision only applies to DIFC-incorporated companies and so, in my judgment, it should not be a basis itself for applying the rule against reflective loss to non-DIFC-incorporated companies, such as D7 SL and EY Ltd and indeed all of the companies of both of the corporate structures whose ultimate subsidiaries hold the Assets. While it is to be expected that most or all company laws will have their own versions of the Foss v Harbottle rule, and indeed versions of the other rules from which the rule against reflective loss follows, discussed below, if a company law has an equivalent but different rule to the rule against reflective loss specifically (for example, a narrower or wider formulation of the rule) or a contrary rule (for example, no bar on shareholders claiming in that capacity), it is not clear to me why the rule against reflective loss should nevertheless be imposed in a case on the mere basis that the law of the place of the cause of action does not recognise a shareholder's loss as being separate and distinct from the loss of the company.

151. With that remark made, the parties have given thorough consideration to the rule against reflective loss and indeed D3 Ltd has referred to the above-referenced passages from Justice Giles' judgment in Nest Investments (2017) in its skeleton argument. So, it is safe to proceed, I think, on the presumption that C has considered any arguments against the application of the rule against reflective loss in this case arising from substantive law. As such, I will determine the Immediate Judgment Application in accordance with the arguments presented by D3 Ltd and C which, in my view, presuppose that unless I decide that the rule against reflective loss as redefined in *Marex* should not be adopted by the Court for any of the reasons proffered by C, the rule is brought into play.

The Three Issues

Should the rule against reflective loss as restated in Marex be applied in this case?

152. While there are numerous and, in my judgment, complex reasons in favour of both applying the rule against reflective loss as restated in *Marex* and not applying it or applying a narrower version of it—the latter reasons being presented, most notably, by the minority in *Marex* and the New Zealand Court of Appeal in Christensen v Scott [1996] 1 NZLR 273, cited with approval by the

minority in *Marex*, which ruled that where a shareholder "has personal rights and these rights are invaded, the rule in *Foss v Harbottle is irrelevant*" (p 280)—without detailed argument from the parties on why the Court should prefer one version of the rule over another or dispense with the rule altogether, in my judgment it becomes the more simple question of whether English or New Zealand authority should be followed.

153. As senior counsel for D3 Ltd argued, English jurisprudence is persuasive authority in the DIFC. Article 8(2) of DIFC Law No. 3 of 2004, being the Law on the Application of Civil and Commercial Laws in the DIFC, for example, requires the application of English law in certain circumstances. The DIFC does not share the same close nexus with New Zealand law, which is, moreover, an outlier in the common law world so far as the rule against reflective loss is concerned. For these reasons, I think it is appropriate to follow *Marex* in this case.

What is the scope of the rule against reflective loss as redefined in Marex?

154. D3 Ltd argues that two core principles can be distilled from *Marex*. First, that whether the rule will apply in a case is determined by reference to the loss that is being claimed: the question is whether the loss is recognisable, as a matter of law, as one which is properly separate and distinct from the loss suffered by the company (the **"Separate Loss Principle"**). If the loss is in reality a claim for a fall in the value of a shareholding or distributions, it would not be recognised in law as separate and distinct from the company's loss; if the loss "does not fall within that description", then the rule will not apply.

155. The second principle follows from the first. D3 Ltd says that the identity of the claiming party is not the determining factor in deciding whether or not the rule applies. The central consideration is whether the loss claimed is recognised, not the identity of the claimant, and the rule will therefore apply to claims by any party for loss which is not separate and distinct from the losses of the company (the **"Interest Principle"**). The rule will apply, then, not only where a claimant's interest in an asset is through his interest in the company which owns the asset, but also where the interest is in another company higher up in the corporate structure, notwithstanding that in the latter case the claimant is not a shareholder of the injured company itself. And the rule can apply to cases involving trustees or beneficiaries of a trust, D3 Ltd submits, provided that the loss claimed still falls within the description set out in Prudential i.e. it is a loss which is not separate or distinct from the loss of the company.

156. C approaches the rule against reflective loss as redefined in *Marex* differently. Her counsel submits that, for the rule to apply, a claimant must have suffered his loss, first, in his capacity as a shareholder (the **"Capacity Requirement"**) and, second, merely as a result of actionable loss suffered by the company (the **"Actionable Loss Requirement"**). The Actionable Loss Requirement has not been disputed by D3 Ltd, though the parties disagree on its scope and application. I will deal with this issue in a separate section below.

157. As to the Capacity Requirement, C submits that, where the shares in an injured company are held on trust and a claimant claims for losses or potential losses incurred in his capacity as a beneficiary to the said trust or claims for an account of profits, the Capacity Requirement is not satisfied as such losses or potential losses would not have been incurred in the shareholder capacity. C says that this is consistent with the underlying rationale of the reflective loss principle. It is the "unique position of the shareholder" which provides a critical justification for the rule. C relies on the following passages from Prudential, cited with approval in *Marex*:

> The shareholder does not suffer any personal loss. His only 'loss' is through the company, in the diminution in the value of the net assets of the company… The plaintiff's shares are merely *a right of participation in the company on the terms of the articles of association…* (p 223)
>
> When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company *by the exercise of his voting rights in general meeting…* (p 224) (emphases added)

158. C avers that the instant case is a "paradigm example" of how the position of a beneficiary of shares held on trust materially differs to the unique position of an actual shareholder: C has no direct right of participation in D9 Ltd and EY Ltd on the terms of their articles of association and has no voting rights at their general meetings. If C had these rights, counsel submits, the issue of reflective loss would never have been raised: she would have exercised such rights so as to join the relevant companies as claimants to the action. And the above applies a *fortiori*, C contends, where a claimant seeks an account of profits as this not loss

suffered “in the form of a diminution of share value or in distributions” or equitable damages for breaches of fiduciary duties owed personally to the claimant as such claims are not for loss suffered in the capacity of a shareholder, but rather as a beneficiary of the duties.

159. In my judgment, two issues fall to be decided under this first heading: first, whether the rule against reflective loss applies to a claimant whose interest is not in an injured company, but rather in a company higher up in a corporate structure (the **“Shareholder Degree Issue”**) and, second, whether the rule applies to a claimant whose interest in an injured company is a beneficial interest (the **“Beneficial Interest Issue”**).

The Shareholder Degree Issue

160. In the English High Court decision *Broadcasting Investment Group Limited & Ors v Smith* [2020] EWHC 2501, Andrew Simmonds QC, sitting as a Deputy Judge of the High Court, determined that the rule against reflective loss did not apply to second- or third-degree shareholders i.e. a “shareholder of a shareholder” or a “shareholder of a shareholder of a shareholder”, and so on. He provided his reasoning at [64]:

> (1) The judgments of the majority of the Supreme Court in *Marex* make it clear that the rule only bars claims by shareholders in the loss-suffering company: see per Lord Reed at [89].
>
> (2) The descriptions of the rule in the judgments of Lord Reed and Lord Hodge (“highly specific exception…having no wider ambit” at [9]; “the unique position in which a shareholder stands in relation to his company” at [51]; “that is the full extent of the “principle” of reflective loss” at [100]) are antipathetic to any incremental extension of the rule to non-shareholders, whatever policy justifications may be advanced for such an extension.
>
> (3) The fact is that a second degree, or third degree, shareholder (as I have described them) is not, in fact or in law, a shareholder in the relevant company. To blur that distinction is to ignore the separate legal personality of the companies which form the intervening links in the chain between the claimant and the loss-suffering company. Whilst in certain limited circumstances it is permissible for a court to “pierce the corporate veil”, as explained by the Supreme Court in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, none of those circumstances apply to Mr Burgess’s claim (see also the analysis of the Court of Appeal in *IBM UK Holdings Ltd v Dalgleish* [2018] PLR 1 at [364]-[369]).
>
> (4) Both Lord Reed and Lord Hodge explain that the rule derives from the legal relationship between a shareholder and his company. That relationship gives rise to both advantages and disadvantages for the shareholder. One of the disadvantages is (per Lord Reed at [35]) that
>
> > “When a shareholder invests in a company, he therefore entrusts the company – ultimately, a majority of the members voting in a general meeting – with the right to decide how his investment is to be protected”
>
> or, as the Court of Appeal put it in Prudential at 224B:
>
> > “When a shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company…”.
>
> More generally, at [100], Lord Hodge refers to the rule as
>
> > “…a rule of company law arising from the nature of the shareholder's investment and participation in a limited company and excludes a shareholder's claim made in its capacity as a shareholder”.
>
> Quintessentially, it seems to me, the rule in Prudential is something which the shareholder contracts into when he acquires his shares in (what proves to be) the loss-suffering company. But, none of this reasoning can apply to a second degree or third degree shareholder who does not acquire shares in the relevant company and therefore never contracts into the rule so far as it affects recovery of losses by that company.

161. C relies on *Broadcasting Investment*. D3 Ltd submits that it was wrongly decided. I agree with D3 Ltd and respectfully disagree with Mr Simmonds’ reasoning for the following reasons. If a company, Company A, is set up for the purposes of holding an asset and that asset is misappropriated by a third party, Wrongdoer, resulting in a diminution of the value of the shares of Company A, the rule against reflective loss would bar Company A’s shareholder from pursuing a claim against Wrongdoer because the shareholder’s loss is not separate and distinct from Company A’s loss. Suppose now that Company A’s shares are owned by another company, Company B, and precisely the same diminution in the value of Company B’s shareholding occurs as

a consequence of the misappropriation of Company A's asset. In my judgment, the rule against reflective loss should also prevent Company B's shareholders from pursing a claim since their loss is not separate and distinct, not from Company A's loss, but from Company B's loss. To say that Company B's shareholders' loss is separate and distinct from Company A's loss on the basis that Company B's shareholders are not Company A's shareholder is correct but, in my view, creates a direct link between Company B's shareholders and Company A's asset which does not exist.

162. The loss that Company B's shareholders suffer on account of the asset being misappropriated is still mediated by the shareholder-company relationship. Company B's shareholders' loss is via a depreciation in the value of its shares in Company B whose loss is via a depreciation in the value of its shares in Company A; Company B's shareholders do not suffer their loss unmediated by a shareholder-company relationship and suffer their loss, in my view, in their capacity as shareholders. In my judgment, Company B's shareholders therefore, like Company B, cannot circumvent the shareholder-company dynamic as their losses occur precisely by means of it and it is only in Company A's loss in the illustration that the shareholder-company relationship and so, in my judgment, the rule against reflective loss, does not intervene.

The Beneficial Interest Issue

163. In *Shaker v Al-Bedrawi & Ors* [2003] EWCA Civ 1452, an individual claimed a proportion of a company's shares which he alleged were held on trust for him by the company's sole director. A claim was brought against that director by the beneficiary for alleged breaches of fiduciary and other duties. The Court of Appeal held that, in principle, the rule against reflective loss applied to claims by a beneficiary against a trustee for breach of fiduciary duty:

> 81. … We agree with Mr. Lyndon-Stanford that if the claim by Mr. Shaker for an account is in substance a claim to monies to which ANA Inc. has a claim against Mr. Bedrawi, then consistently with the reasoning in Johnson the Prudential principle would bar Mr. Shaker's claim for what in effect reflects part of the loss suffered by ANA Inc., and it matters not that the causes of action of Mr. Shaker and ANA Inc. are different. Nor does it matter that ANA Inc. has not yet brought proceedings against Mr. Bedrawi: the Prudential principle still bars a claim reflective of the company's loss (see the *Johnson* case at p. 35 per Lord Bingham and at p. 66 per Lord Millett)…

164. This reasoning was approved and followed in *Gardner v Parker* [2004] 2 BCLC 554 (per Neuberger LJ at [43] to [46]). Although aspects of Gardner were criticised in *Marex*, the principle derived from Shaker was not challenged in the appeal and the Supreme Court did not address the question whether the rule against reflective loss applied where wrongdoing took the form of a breach of fiduciary duty. C submits that Shaker should be treated with extreme caution. D3 Ltd submits that it remains a valid statement of the law as it relates to the application of the rule to claims by beneficiaries with an interest in the shareholding of a company.

165. Again, I agree with D3 Ltd. I think that unless the rule against reflective loss applies to claimants whose interest in an injured company is a beneficial interest, the rule would be easily circumvented and probably incapable of upholding any principle of company law. To use another illustration, if a company, Company X, is set up to hold an asset and that asset is misappropriated, as we have seen, the rule against reflective loss would prevent Company X's shareholder, Y, from claiming for the diminution of the value of the shares of Company X. The rule should also, in my judgment, cause an identical result for Z, the beneficiary of the shares in Company X, held on trust for him by Y. Z's interest in the misappropriated asset is not, in my judgment, made more direct by virtue of Z not being a shareholder per se. To the contrary, I think Z's interest in the misappropriated asset and his loss is in fact twice mediated: through Z and Y's beneficiary-trustee relationship in the first instance and through Y and Company X's shareholder-company relationship in the second, with the rule against reflective loss applying to the latter relationship and rendering any loss suffered by Z's as being neither separate nor distinct from Company X's loss at its source.

166. I do not think this interpretation of *Marex* is odds with those aspects of the judgment which emphasise the identity of the shareholder, like Lord Reed's statement at [79] that the rule applies in "cases where claims are brought by a shareholder in respect of loss which he has suffered *in the capacity*": a claimant with a beneficial interest in shares in an injured company can, in my judgment, and should be considered a shareholder. While such a "beneficiary-shareholder" will not have a direct right of participation in the company on its terms of association and voting rights, those rights will still exist for the underlying shares, and in many cases will be exercised on behalf or for the benefit of the beneficiary-shareholder.

167. This last point highlights another difficulty that I have with C's narrower interpretation of the rule against reflective loss. On C's interpretation, a beneficiary-shareholder may, as a "shareholder", exercise his influence over the fortunes of the company by, say, instructing his nominee to vote in certain ways in general meetings, while simultaneously, as a beneficiary, being able to

evade the worst of the company's fortunes by recovering damages or other relief through personal actions for injuries inflicted on the company, inasmuch as, on this interpretation, the rule against reflective loss would not apply to him. If the law was so, there would be every incentive to insert beneficiary-trustee relationships into every shareholder-company relationship and the rule against reflective loss would surely only rarely uphold the principles of company law it was designed to.

Conclusion on the Shareholder Degree Issue and the Beneficial Interest Issue

168. In conclusion, I do not think that it should matter whether a claimant is a first-, second- or third-degree shareholder or whether his name appears in the injured company's register of members or his shares are held on trust. I adopt D3 Ltd's positions on both the Shareholder Degree Issue and the Beneficial Interest Issue.

Does the rule against reflective loss operate to bar C's claims in the Secondary Case?

169. I would articulate the criteria for the rule against reflective loss in the following way. Where a claimant: (i) is a shareholder, whether properly so called or a beneficiary-shareholder; (ii) claims for loss which is consequential on the company's loss, taking the form of a diminution in share value or in distributions; and (iii) the company has a cause of action against the same wrongdoer, the rule against reflective loss applies and operates to bar the claimant from pursuing a personal action in respect of that loss.

(i) Does C claim in a shareholder capacity?

170. C concedes that, in the Secondary Case, she claims as a beneficial owner of the shares in each of the companies in the corporate structures holding the Assets i.e. as a beneficiary-shareholder in D7 SL, D5 Ltd, D8 Ltd, D9 Ltd, EY Ltd, QH Ltd and RN Ltd. Consistently with my findings above, C does, therefore, claim in a shareholder capacity.

(ii) Are C's losses consequential on D7 SL's and EY Ltd's losses, taking the form of a diminution in the share value of D7 SL, D5 Ltd, D8 Ltd, D9 Ltd, EY Ltd, QH Ltd and RN Ltd?

171. This criterion of the rule against reflective loss can be addressed shortly also. At [31] of *Marex*, Lord Reed stated:

> The starting point is the nature of a share, and the attributes which render it valuable. A share is not a proportionate part of a company's assets: *Short v Treasury Comrs*. Nor does it confer on the shareholder any legal or equitable interest in the company's assets: *Macaura v Northern Assurance Co Ltd*. As the court stated in Prudential, a share is a right of participation in the company on the terms of the articles of association.

172. Applying these principles, in her capacity as beneficiary-shareholder in each of D7 SL, D5 Ltd, D8 Ltd, D9 Ltd, EY Ltd, QH Ltd and RN Ltd, C does not have any legal or equitable interests in the relevant companies' assets. As such, any loss suffered by C as shareholder in any of these companies must necessarily be a consequence of loss sustained to the relevant company that itself has an interest in the relevant asset, if there is any loss at all: in my judgment, any loss presupposes loss sustained by the company. Only D7 SL and EY Ltd, themselves, as separate legal entities, can say that their losses do not occur in the form of diminutions in the value of shares. C, along with D5 Ltd, D8 Ltd, D9 Ltd, QH Ltd and RN Ltd, in my judgment, would merely suffer losses consequential on D7 SL's and EY Ltd's losses.

(iii) Do D7 SL and EY Ltd have causes of action against the same wrongdoers?

173. Notwithstanding C's contention that Shaker should be treated with caution, she relies on the Court's statement at [83] of that judgment, which she submits survived the ruling in Marex, that it would not be right to bar a claimant's action "unless the defendants can establish not merely that the company has a claim to recover a loss reflected by the profit, *but that such claim is available on the facts*". (emphasis added)

174. I respectfully disagree with C. In my opinion this additional requirement places [83] of Shaker into the category of post-*Johnson* rules, dismissed by Lord Reed at [68] to [71] of *Marex*, that established exceptions to the general principles laid down by Lord Bingham in Johnson:

> 69. In *Giles v Rhind* [2003] Ch 618 the Court of Appeal decided that [a shareholder could recover for loss which flowed from the company's loss as the company had a cause of action but failed to pursue it]. The claimant was a former company director who was also a shareholder in the company. He brought proceedings against a defendant who had conducted a business in competition with that of the company, in breach of contractual obligations owed to both the claimant and the company. The company's action for damages had been discontinued due to its inability to find security for costs, as a result of impecuniosity caused by the defendant's wrongdoing. The terms on which the action was discontinued precluded the company from bringing any further proceedings in relation to its claim. The claimant sought to recover for a variety of losses,

including the loss of the value of his shares. The Court of Appeal allowed the claim to proceed to trial. It considered that it would be unjust to allow a wrongdoer to defeat a claim by shareholders on the basis that the claim was trumped by a right of action held by the company which his own wrongful conduct had prevented the company from pursuing. It concluded that the "reflective loss" principle, in so far as it was relevant, did not apply in those circumstances.

70. One can sympathise with the Court of Appeal's sense of the unattractiveness of the defendant's position, but the fact that a wrongdoer has unmeritoriously avoided his liability in damages to A is not a reason for requiring him to pay damages to B. The basis of the decisions in Prudential and Johnson is that a shareholder, whose shares have fallen in value as the consequence of loss suffered by the company for the recovery of which it has a cause of action, has not suffered a recoverable loss. That conclusion does not depend on whether the company is financially able to bring proceedings or not. *If the shareholder has not suffered a recoverable loss, he has no claim for damages, regardless of whether, or why, the company may have failed to pursue its own cause of action.*

71. The same criticism applies to the later decision in *Perry v Day* [2004] EWHC 3372 (Ch); [2005] 2 BCLC 405, where the court followed *Giles v Rhind* in a situation where the wrongdoer had abused his powers as a director of the company so as to prevent it from bringing a claim under which it could have recovered its loss. The solution which company law provides, in a situation of that kind, is the derivative action.

175. As can be seen from these summaries, even where a wrongdoer's own wrongful conduct prevents the injured company from pursuing an action, where such an action has become impossible and notwithstanding the unattractiveness of the position of such a wrongdoer, the rule against reflective loss, as redefined in *Marex*, stipulates that the shareholder has simply not suffered a recoverable loss—that is, he has not suffered any loss at all, in the eyes of the law—and therefore "has no claim for damages, regardless of whether, or why, the company may have failed to pursue its own cause of action". As such, I do not think that the additional requirement from Shaker that defendants must demonstrate that an injured company has a claim to recover loss available on the facts has survived *Marex*. The ruling in *Marex*, in my judgment, renders the shareholder a stranger to the injured company's loss, in the eyes of the law, *in that capacity*.

176. The question is, then, whether D7 SL and EY Ltd have causes of action against the Defendants. In written submissions, C has relevantly stated that "it is far from clear that any company has suffered actionable loss: it is the Defendants' case that the Yacht was 'properly sold', so it is well possible that the only wrong effected is the denial of [C's] beneficial interests". In my view, however, it is C's factual case that is assumed to be correct in this application. As to this, in other written submissions, in connection with the Beneficiary Issue, C has stated that, had she direct participation and voting rights in "the relevant companies" i.e. D7 SL and EY Ltd "She would have exercised such rights so as to join the relevant companies as claimants to the action". This statement appears to me to be consistent with an acknowledgment on C's part that D7 SL and EY Ltd have causes of action against the same wrongdoers. On what other basis should they be claimants in an action against the Defendants?

177. C's junior counsel developed this line of argument in oral submissions at the Hearing. Commenting on D2's above-mentioned contention that the Yacht was properly sold, counsel stated:

> That does not allow a cause of action to arise on behalf of the company because, on the Second Defendant's case, it has simply been sold. The wrong that has been done by that sale is to [C] because her beneficial interest in [the Yacht] has been denied and it has been sold without her authority. That has nothing to do with the company. So the company has no cause of action on the basis of the sale.
>
> The next stage at which there might be a cause of action is where those funds are perhaps taken out of the company, but we do not know: we do not know if the funds are in the company; we do not know if they have been taken out. But even if they have been taken out it does not necessarily mean that the company has a cause of action, because they could be taken out by reason perhaps of a loan. They could have made a director's loan. They could have paid them by way of remuneration. They could have granted dividends to people. So there are a multitude of ways by which [C] can have suffered a loss but the companies have not.

178. Counsel then relied on [61] of *Shaker* where the Court "addresses this very argument":

> Further, as Mr. Steinfeld submitted, it is possible that there are two other ways in which at least part of the $6 million might have been lawfully extracted from ANA Inc., that is to say as a repayment of a debt and as remuneration. That possibility cannot be dismissed as fanciful.

179. The first observation I will make is that, unlike EY Ltd, the company being discussed in the above passage from *Shaker*, ANA Inc., was an operating company, specifically a television and radio broadcaster. While D7 SL appears to be an operating company, being the registered operator of the Spanish Property, the other companies in the corporate structures do not appear to engage in any business. Indeed, in the APoC, C claims that the corporate structures were established for the purpose of holding the Assets only (see, for example: the APoC at [14], [21] and [22]). Indeed, in answering in the affirmative my question whether the corporate structures had no business other than holding the Assets, C's counsel stated that this had not been disputed. Nor did counsel for any of the Defendants thereafter state otherwise. Indeed, D2's counsel went some way in oral submissions to demonstrate with documentary evidence that this was the case for the Yacht. As such, it is not clear in what circumstances exactly the proceeds of the sale of the Yacht might be lawfully extracted from EY Ltd or the Spanish Property/D7 SL lawfully sold or their proceeds extracted.

180. More importantly, however, if D7 SL and/or EY Ltd have not suffered loss, while I agree with C that application of the rule against reflective loss would thereby be precluded, in my view this is not because one part of the criteria of the rule will not have been made out, but rather more fundamentally because there would be no loss at all—a fortiori shareholder loss. It follows, in my judgment, that if C seeks to recover for losses in the Secondary Case then, by application of the rule against reflective loss, those losses are D7 SL's and EY Ltd's losses and their shareholders do not acquire rights of action in respect of the same, while if D7 SL and EY Ltd have not sustained losses then there is no basis for any action at all.

181. As to C's counsel's statement that the only established wrong is that done to C as beneficial owner of the Yacht—the same would apply to the Spanish Property of course—on account of her beneficial interest being denied and the Yacht having been sold without her authority, in my judgment this speaks to her primary case in the APoC, not the Secondary Case, but insofar as it is relevant to the Secondary Case, in my view it is against it.

Conclusion

182. For the reasons given above, the Immediate Judgment Application must be granted. Following my decision in the Amendment Application and having reviewed C's claims in the APoC, however, it seems to me that my decision in this application is, as things stand, of only very limited impact on C's right to pursue actions in respect of the losses that she claims have been or might be suffered by her. Most or nearly all of those claims, in my judgment, have been "transferred" to her primary case in the APoC in which she claims, not as a shareholder, but as the beneficial owner of the Assets.

183. In such circumstances, it seems appropriate to me to make a declaration rather than one of the orders which would usually conclude a successful immediate judgment application i.e. those set out in RDC r. 24.11: C is barred from claiming for any losses which were or might be suffered by her in her capacity as a shareholder of any of the companies in the corporate structures whose ultimate subsidiaries hold the Assets.

Costs

184. It also seems appropriate to order costs in the case.

The Jurisdiction Applications

Introduction

185. D2, D4 and D5 Ltd contest the Court's jurisdiction to try the claims against them. There is considerable overlap between the jurisdiction applications of D2 on the one hand and D4 and D5 on the other. In order to avoid prolixity, in the Jurisdiction Applications references to the "Defendants" are references to D2, D4 and D5 Ltd unless it is clear that all the Defendants are being referred to and D2, D4 and D5 Ltd will be distinguished from each other only where it is necessary to do so.

186. Apart from challenging the jurisdiction of the Court, D5 Ltd also disputes that service was effected upon it on 15 May 2020, contrary to C's certificate of service upon D5 Ltd filed on 20 May 2020 (the **"D5 Ltd CoS"**), or indeed at all. In oral submissions at the Hearing, D5 Ltd's counsel intimated that, if the Court is against the Defendants on the question of jurisdiction, D5 Ltd is content to accept that it became "properly before the Court from the date Defendant Five filed an acknowledgment of service, which is in July this year". I will deal with this issue last below.

C's Case on the Court's Jurisdiction

187. I will briefly outline C's case relevant to the question of jurisdiction before discussing the Defendants' challenges to it.

188. The jurisdiction of the Court of First Instance is set out in Article 5(A)(1) of the Judicial Authority Law (**"JAL"**). C relies on Article 5(A)(1)(a), (b), (c) and (e) in particular as bases for the DIFC Court's jurisdiction to try her claim, which provide as follows:

> **Article 5**
>
> **Jurisdiction**
>
> **(A) The Court of First Instance:**
>
> (1) The Court of First Instance shall have exclusive jurisdiction to hear and determine:
>
> (a) Civil or commercial claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party;
>
> (b) Civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalised or performed within DIFC or will be performed or is supposed to be performed within DIFC pursuant to express or implied terms stipulated in the contract;
>
> (c) Civil or commercial claims and actions arising out of or relating to any incident or transaction which has been wholly or partly performed within DIFC and is related to DIFC activities;…
>
> (e) Any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations.

189. On C's case, the Contracts were concluded with a DIFC entity, D3 Ltd, with Article 5(A)(1)(a) thereby engaged. It should be noted that D3 Ltd accepts that the Court has jurisdiction to try any claims against it. (It should be noted also that the consequence, if any, of such jurisdiction on the other Defendants was not fully argued by the parties. Senior counsel for D2 submitted in oral submissions that there would be no consequence on the Defendants if the Court had jurisdiction under Article 5(A)(1)(a) to hear claims against D3 Ltd: "it applies only against the Third Defendant unless [D3 Ltd] is used as an anchor for joining the remaining Defendants". While I do not agree with the proposition implicit in this argument, C's counsel did not argue otherwise.)

190. Moreover, it was intended that the Contracts be wholly or partly performed from the DIFC, engaging Article 5(A)(1)(b). Indeed, the Contracts were entered into, C submits, because D1 and D2 had advised C that her assets should be protected and managed through the DIFC.

191. And the appointments of D4 and D5 Ltd were made by D1 and/or D2 acting through D3 Ltd or from somewhere else in the Index Tower in the DIFC. Further, C avers that the Contracts made provision for services to be performed from the DIFC, and the frauds, she says, were masterminded and/or executed from the DIFC, in particular from an office in Index Tower. These aspects of C's claim, C submits, engage Article 5(A)(1)(c).

192. In addition, while the only defendant incorporated in or residents of the DIFC is D3 Ltd, the other Defendants are necessary and proper parties to the claims against D3 Ltd and it is "desirable" that the claims against all the Defendants be heard together, engaging Article 5(A)(1)(e) in combination with RDC r. 20.7(1)—"The Court may order a person to be added as a new party if: (1) it is desirable to add the new party so that the Court can resolve all the matters in dispute in the proceedings…"—in accordance with the ruling in *Nest Investments Holding Lebanon S.A.L. and Ors v Deloitte & Touche (M.E.) and Anr* CA-011-2018 (13 March 2019), about which more will be said below (the **"RDC r. 20.7(1) Argument"**).

193. Finally, as already noted, it is C's case that the Trusts are DIFC trusts, such that the Court has jurisdiction in relation to them pursuant to Article 5(A)(1)(e) of the JAL read with Article 19(a) of the Trust Law:

> **19. Jurisdiction of the Court**
>
> The [DIFC] Court has jurisdiction where:
>
> (a) the trust is a DIFC trust…

(the **"Trust Law Argument"**).

<u>The Defendants' cases on the Court's Jurisdiction</u>

194. The Defendants dispute that the Cout has jurisdiction under any of the JAL gateways. They argue also that, even if the Court takes the view that it has jurisdiction to hear the present claim, there are "clearly and undeniably" other forums more convenient to adjudicate the dispute (the **"Forum Non Conveniens Argument"**). I will discuss each of these contentions in the order I have

mentioned them, and I will not repeat C's arguments though where necessary I will elaborate on them.

Article 5(A)(1)(b)

195. The Defendants submit that C simply asserts the existence of two contracts and identifies only terms said to be implied by DIFC Law No. 6 of 2004 (the **"Contract Law"**). The APoC assert that the Contracts arose by specific agreement but do not, the Defendants say, identify any particulars relating to their making, their terms or the allegedly agreed commission.

196. For example, C's pleading "literally asserts no express terms: at best the terms are said to be 'express and/or implied'". Furthermore, if there are no express terms of the Contacts, there cannot have been, the Defendants aver, any implied terms, those necessarily arising out of, and needing to be considered in the light of, the express terms. The Defendants maintain that C's contractual claims are therefore "fundamentally and fatally flawed" and as pleaded cannot give rise to jurisdiction.

197. And to the extent any conclusion is to be drawn from the subjects of the Contracts, the Defendants submit, they relate to matters wholly outside the DIFC: the management and control of assets, be they company shares or the underlying assets of those companies, wholly outside the DIFC.

Article 5(A)(1)(b) discussion

198. My findings in the Amendment Application naturally impact the Jurisdiction Applications. While I am sympathetic to the Defendants' objections and their position that any express terms of the Contracts should be within C's knowledge, it is not impossible that C has as little information as she has provided and, consistently with my decision in the Amendment Application, I will not dismiss C's claim on account of the deficiencies in her pleadings. It follows that for the purposes of the Jurisdiction Applications, the Contracts must be presumed to exist.

199. The questions which must be addressed, therefore, are: first, do the primary facts pertaining the Contracts engage Article 5(A)(1)(b) of the JAL and, if they do, over how much of C's claim does the Court's jurisdiction under this provision extend?

200. In *Al Khorafi v Bank Sarasin-Alpen* (ME) Ltd [2011] DIFC CA 003 (5 January 2012) at [60], the Court of Appeal stated:

> The Purpose of Article 5(A)(1)(b) is to bring within the exclusive jurisdiction of the DIFC Courts claims arising out of or relating to a contract or to the negotiation for a contract where the connecting factor is that the contract or intended contract had been wholly entered into or partly entered into in the sense of negotiated or had been wholly or partly agreed upon or wholly or partly performed by conduct or an event which had taken place in the DIFC. *The essence of the provision is that the court is given jurisdiction where there has been relevant activity with regard to the contract or related to it within the DIFC*. (emphasis added)

201. In the APoC, C pleads as follows:

> 14.… [C] entered into two separate contracts with [D3 Ltd], [D1] and [D2] as follows:
>
> a. In or around April 2018 [C] agreed to pay commission fees in return for [D1's] and [D2's] advice and assistance (*through [D3 Ltd] the DIFC "family"*) as to the purchase and subsequent ownership/holding structure of the Yacht (the **"Yacht Services"**). The Yacht Services included authorising the necessary financial transactions on [C's] behalf and proposing, establishing and then managing and controlling entitles, nominee directors and shareholders for the ownership/holding structure of the same (the **"Yacht Contract"**).
>
> b. Similarly, between April and October 2018 [C] agreed to pay commission fees in return for [D1's] and [D2's] advice as to the purchase and subsequent ownership/holding structure of the Spanish Property *through [D3 Ltd] the DIFC "family office"* (the **"Spanish Property Services"**). The Spanish Property Services also included authorising the necessary financial transactions on [C's] behalf and proposing, establishing and then managing and controlling entitles, nominee directors and shareholders for the ownership/holding structure of the Spanish Property (the **"Spanish Property Contract"**).
>
> 15…. the aforementioned services were to be administered by [D1] and [D2] *through [D3 Ltd], the DIFC "family office"…* (emphases added)

202. In my view, these pleadings clearly engage Article 5(A)(1)(b) of the JAL. At the very least, the Contracts were supposed to be performed within the DIFC pursuant to express or implied terms stipulated in the Contracts. There is clearly a "relevant activity", as it was put in *Al Khorafi*, which engages the jurisdiction of this Court.

203. *Al Khorafi* addressed the second question also, at [82]. The Court of Appeal stated that it was necessary: "…to show that there is a claim for a remedy by or against a party which falls within one of the four identified categories [in Article 5(A)(1)(a)]". (emphasis added) While the Court here ruled on Article 5(A)(1)(a), not Article 5(A)(1)(b), the Defendants appear to take the position that the ruling in Al Khorafi was intended to apply to each of the Article 5(A)(1) jurisdictional gateways which begin with the words "claims and actions", that is, Article 5(A)(1)(a), (b), (c) and (e), and I agree with them.

204. The causes of action C alleges are as follows:

i. breach of contract as against D1, D2 and D3 Ltd;

ii. breach of fiduciary duty against D1, D2 and D3 Ltd, and against D4 in respect of the Spanish Property;

iii. breach of trust against D1, D2 and D3 Ltd, and against D4 in respect of the Spanish Property;

iv. conversion in respect of the Yacht against D1 and D2;

v. deceit against D1, D2 and D3 Ltd, and against D4 in respect of the Spanish Property;

vi. harm by unlawful means against D1, D2 and D3 Ltd;

vii. unlawful means conspiracy against D1, D2 and D3 Ltd and against D4, D5 Ltd and D6 in respect of the Spanish Property; and

viii. knowing receipt against D1, D2 and D3 Ltd in respect of the proceeds of the sale of the Yacht.

205. Arising from these allegations, C claims the following remedies:

i. as against D1 and/or D2 and/or D3 Ltd and/or D4, damages for breach of contract;

ii. as against D1 and/or D2 and/or D3 Ltd and/or D4, damages for breach of fiduciary duties;

iii. as against D1 and/or D2 and/or D3 Ltd and/or D4, damages for breach of trust;

iv. as against D1 and/or D2 and/or D3 Ltd and/or D4, an order to compel the performance of trustees' duties;

v. as against D1 and/or D2 and/or D3 Ltd and/or D4, an order to redress breaches of trust;

vi. as against D1 and/or D2 and/or D3 Ltd and/or D4, accounts of profits/benefits;

vii. as against D1 and/or D2 and/or D3 Ltd and/or D4, damages for deceit and/or fraudulent misrepresentation;

viii. as against D1 and/or D2 and/or D3 Ltd and/or D4, exemplary damages;

ix. as against D1 and/or D2 damages and/or restitutionary damages for conversion/wrongful interference with property;

x. as against D1 and/or D2 and/or D3 Ltd, damages for harm by unlawful means and/or unlawful means conspiracy;

xi. as against D1 and/or D2 and/or D3 Ltd, a duty to account as constructive trustee on the grounds of knowing receipt and/or dishonest assistance;

xii. as against D1, D2, D3 Ltd, D4, D5 Ltd and D6, a permanent injunction;

xiii. and interest and costs.

206. As noted several times above, on C's case, the Trusts and fiduciary duties are said to have arisen from the Contracts. With this in mind and applying the ruling at [82] of *Al Khorafi*, in my view it is clear from the above-listed claims to remedies that C has a good arguable case that the Court has jurisdiction to hear and determine each of her claims against the Defendants pursuant to Article 5(A)(1)(b) of the JAL: each claim either arises out of or instead relates to contracts, being the Contracts, at least supposed to be performed within the DIFC pursuant to express and/or implied terms stipulated in the contracts.

207. I think the Court has jurisdiction on a broader basis under this same gateway also. This basis was not argued by the parties or otherwise put to them but it arises from Article 5(A)(1)(b) itself—and indeed the other gateways that begin with "claims and actions"—a provision which has received considerable attention from the parties and which the Court has been asked to interpret and apply. I do not think that there is risk, therefore, that I might be going "off on a frolic" by doing just that.

208. In *Al Khorafi*, the Court of Appeal stated at [58] that: "In construing Article 5(A) it is necessary to keep very clearly in mind that the ultimate and dominant text is in Arabic [(the **"Arabic JAL"**)] and that this court is using a translation to arrive at the true meaning and intent of that Arabic text…".

209. In a footnote to the English translation of Dubai Law No. 16 of 2011, the law by which the original Judicial Authority Law, Dubai Law No. 12 of 2004 (the **"First JAL"**), was amended (the **"JAL Amendment"**), the translator of the JAL Amendment, the Government of Dubai Legal Affairs Department, included the following caution:

> Every effort has been made to produce an accurate and complete English version of this legislation. However, *for the purpose of its interpretation and application, reference must be made to the original Arabic text. In case of conflict the Arabic text shall prevail.* (emphasis added)

210. The Arabic text which corresponds to "Civil or commercial claims and actions arising out of or relating to a contract or promised contract…" in Article 5(A)(1)(b) of the English translation of the JAL reads, in transliteration: *"Al talabāt wa al daʿāwā al madaniyya aw al tijāriyya al nāshiʾa ʿan aw al mutaʿalliqa biʿaqd aw biwaʿad bil taʿāqud…"*. A literal translation of this passage would read as follows: "Civil and commercial applications and claims (in the broad sense of "cases" rather than the narrow sense of "claims for remedies") arising from or related to a contract or a promise to contract…".

211. In the English translation of Article 5(A)(1)(b), the term I have translated as "applications", *"al talabāt"*, is translated as "claims". In my view, if the legislator had intended to refer to "claims" here, the only term other than *"al daʿāwā"* that he could have used was *"al mutālabāt"* which literally means "claims" and is a term of art for claims for remedies rather than *"al talabāt"*, which literally means "requests" but which denotes "applications for orders" in the context of litigation. The Courts' Small Claims Tribunal, for example, is called *Lajna al Mutālabāt al Saghīra* in Arabic, not *Lajna al Talabāt al Saghīra*, which would translate to "The Small Applications Tribunal".

212. I take no issue with the translator's rendering of the term *"al daʿāwā"* which literally means "claims" and in legal practice is used to denote "claims"/"actions" in the broad sense of "cases". The term "action" appears to have been given a narrow interpretation in the caselaw, however, as in *Al Khorafi* at [82], cited above i.e. "claims for remedies".

213. Interestingly, the English translation of the First JAL provides a more accurate translation of both *"talabāt"*—or more precisely the singular form of the word, *"talab"*, which appears in Article 5(A)(1)(d)—and *"daʿāwā"*, rendering them "application" and "cases", respectively.

214. Returning to Article 5(A)(1)(b) of the JAL, with reference to the Arabic authoritative text, in my judgment the scope of Article 5(A)(1)(b) encompasses applications (tālabāt) and cases *(al daʿāwā)* which arise from *(al nāshiʾa ʿan)* or relate to *(al mutaʿalliqa bi)* the types of contracts described in the provision. Whatever the meanings of "arise from" and "relate to", in my judgment it is applications and cases i.e. *proceedings* that must arise from or relate to the contracts in question, not claims in the narrow sense of claims for remedies. As such, on the broadest interpretation, if a case relates to an Article 5(A)(1)(b)-type contract, in my judgment Article 5(A)(1)(b) will be engaged and the Court will have jurisdiction to hear and determine that case. I do not think that the language of Article 5(A)(1)(b) supports the proposition that the Court's jurisdiction under that gateway is limited to hearing and determining *claims for remedies* relating to or arising from Article 5(A)(1)(b) contract contracts. Whether the DIFC Court is the court most suited to hearing a case—say, one with only a spurious relationship to a contract just about within the ambit of Article 5(A)(1)(b)—is a separate question. I am concerned with the periphery of the Court's mandate under this provision.

215. I note briefly that the jurisdiction of the DIFC Court as set out in Article 19(1)(a), (b) and (c) of DIFC Law No. 10 of 2004 (the **"Court Law"**) is consistent, as material, with my translation of the Arabic JAL. Each of these gateways begins with the words "[the Court has jurisdiction to hear] civil or commercial cases and disputes" and is therefore an accurate translation, in my judgment, of the corresponding provisions in the First JAL. Indeed, Article 19(1) of the Court Law is a carbon copy also of the First JAL's official English translation. While the Court Law was superseded by the JAL Amendment with the result that anything in the former legislation inconsistent with something in the latter was impliedly repealed, it is not the English translation of the JAL but rather the Arabic version which affects the Court Law. The word presently under consideration, *"al daʿāwā"* (cases), is in fact common to the relevant provisions of the First JAL, the translation of which the Court Law incorporated into DIFC domestic law, and the current JAL, which replaces anything inconsistent in the Court Law. In my judgment, while it is true, therefore, that the Arabic text of the JAL is the current authority for the DIFC Court's jurisdiction and Article 19(1) of the Court Law has been substantially superseded, one function which it can be said Article 19(1) of the Court Law still plays is to provide the only DIFC domestic law rendition of the Arabic word *"al daʿāwā"*: "cases".

216. In *Nest Investments Holding Lebanon S.A.L. & Ors v Deloitte & Touche (M.E.) and Anr* (12 February 2018), Justice Robert Giles stated at [96]: "Jurisdiction [under Article 5(A)(1) of the JAL] is prescribed in terms of claims and actions… having particular characteristics. It is jurisdiction by kinds of claims and actions, not by persons or territories". While *Nest Investments* (2018) was overturned on appeal, Justice Giles' statement at [96] was approved (see *Nest Investments* (2019) at [38]) and remains an accurate description of the Court's jurisdiction under Article 5(A)(1). I would only say, with reference to the Arabic version of the JAL, that Article 5(A)(1) prescribes jurisdiction in terms of the kinds of circumstances which applications and cases arise from or are connected to.

217. Returning to the instant matter, in my view, applying the Arabic text of Article 5(A)(1)(b), C has a good arguable case that the Court has jurisdiction over the case at large, without the need for the Court to differentiate between the separate claims to remedies: the case clearly arises out of or relates to contracts supposed to be performed in the DIFC, being the Contracts, and so Article 5(A)(1)(b) is engaged.

Article 5(A)(1)(c)

218. Given my conclusions in respect of the Article 5(A)(1)(b) jurisdictional gateway, I do not think it is necessary to consider the parties' arguments in respect of the Article 5(A)(1)(c) gateway. On the one hand, this averred basis of jurisdiction strikes me as being rather speculative in the context of this case and to some degree inconsistent with C's "deficit of information" in relation to the conspiracy. Article 5(A)(1)(c) is concerned, after all, with incidents and transactions which in fact occurred or were performed *within the DIFC*. On the other hand, to the extent that C's arguments are taken at face value—that D1 and D2 did in fact manage the Assets through D3 Ltd and from a DIFC address—jurisdiction under Article 5(A)(1)(c) will not add anything to the jurisdiction which I found under Article 5(A)(1)(b) of the JAL.

The RDC r. 20.7(1) Argument

219. Although the conclusions I have reached above entail jurisdiction extensive enough to encompass all of the Defendants, with the result that there is no need to determine the RDC r. 20.7(1) Argument, out of deference to the Defendants' arguments, in order to highlight a recent relevant decision of the Court and to make an observation which follows from this recent decision together with my interpretation of the Arabic version of Article 5(A)(1), I make the following remarks. To recap: first, the Defendants dispute that RDC r. 20.7 can be a basis for jurisdiction in the circumstances of this case as the Defendants are already parties to the proceedings. Even if the addition of a party might cure any lack of jurisdiction, the Court would need to exercise its powers under RDC r. 20.7 and jurisdiction will not exist until it has done so.

220. RDC r. 20.7 provides as follows:

> The Court may order a person to be added as a new party if:
>
> (1) it is desirable to add the new party so that the Court can resolve all the matters in dispute in the proceedings; or
>
> (2) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the Court can resolve that issue.

221. In *Nest Investments* (2019), a decision on which C relies, the Court held at [59] that RDC r. 20.7 is a DIFC regulation capable of conferring upon the Court jurisdiction for the purposes of the Article 5(A)(1)(e) gateway. The Court was concerned in that case with the jurisdictional basis for adding a new party to proceedings, in circumstances, moreover, where the Court regarded that it did not have jurisdiction over the proposed new party under any of the Article 5(A)(1)(a) to (d) gateways. The Court was not concerned with the question whether it had jurisdiction over an existing party.

222. At [59], the Court stated: "… we consider that the Court does have jurisdiction because RDC 20.7 is a DIFC Regulation which confers jurisdiction upon the court which it can exercise as a matter of discretion, if the criteria set out in the Rule are met". Strictly speaking, therefore, under *Nest Investments* (2019) the RDC r. 20.7 jurisdiction is contingent upon, amongst other things, it being "desirable to add the new party…" (emphasis added), a criterion common to RDC r. 20.7(1) and (2). Where the addition of a new party is not sought, in my judgment the criteria of RDC r. 20.7(1) and (2) cannot be met and, accordingly, on a strict interpretation of the ruling in *Nest Investments* (2019), RDC r. 20.7 will not in those circumstances be a source of jurisdiction.

223. In a recent decision of the Court handed down in a private case on 3 November 2021 (**"CFI-041-2021"**), Justice Wayne Martin considered the question whether RDC r. 20.7 is capable of conferring jurisdiction upon the Court in relation to existing parties. At [132] he stated:

The existence of jurisdiction identified through this process of reasoning was confirmed by the decision of the Court of Appeal in *Nest Investment Holdings Lebanon SAL & Ors v Deloitte & Touche (ME) & Fardi*. The principle was enunciated in that case in which there was an application for the joinder of a party before the Court, and the written submissions of the Defendants in this case included an argument to the effect that such an application was an essential prerequisite to the existence of the jurisdiction. However, during the course of oral argument, that component of the Defendants' submissions was expressly abandoned by Senior Counsel for the Defendants. So, *it is accepted that the Court has jurisdiction in relation to claims against parties who would have been liable to have been joined pursuant to RDC r.20.7, notwithstanding that those parties may already have been joined to the proceedings.* (emphasis added)

224. The reasons for this apparent development of the ruling in *Nest Investments* (2019) are not provided in CFI-041-2021. Different routes to Justice Martin's conclusion can be conceived, however. For example, the Court might, where required, make an order pursuant to RDC r. 4.2(14) "for the purpose of managing the case and furthering the overriding objective"—for example, "saving expenses" (RDC r. 1.6(2)) and/or "ensuring that [the case] is dealt with expeditiously" (RDC r. 1.6(4)—declaring jurisdiction in relation to a party who, but for the fact the he is already party to proceedings, would have been liable to be joined pursuant to RDC r. 20.7, thereby saving the expense and delay of an application under RDC r. 20.7. A similar order could perhaps be made under Article 20(1) of the Court Law which provides that "The Court of First Instance has the power, in matters over which it has jurisdiction to make any orders, including interlocutory orders, and to issue or direct the issue of any writs it considers appropriate". It is arguable that Article 20(2) of the same legislation provides a further alternative route: "The Court of First Instance has jurisdiction to waive any procedural requirements if the Court of First Instance is satisfied that the applicant is unable to meet the procedural requirements". If a defendant is already joined to proceedings, strictly speaking a claimant would be unable to meet the requirement under RDC r. 20.7 that it be "desirable to *add the new party…*". In such circumstances, and where it is desirable that the concerned party be party to proceedings, arguably it would be appropriate for the Court to waive this requirement.

225. Before concluding this discussion, I should add that on my reading of the Arabic text of Article 5(A)(1)(a), (b) and (c), jurisdiction will exist in respect of parties who would be within the ambit of RDC r. 20.7 but are outside of the ambit of the English translation of Article 5(A)(1)(a), (b) and (c), without the need for RDC r. 20.7 read with Article 5(A)(1)(e) to be the source of that jurisdiction. Unless it is said—and I do not think it can be—that, for the purposes of Article 5(A)(1)(a), (b) and (c), "applications" and "cases" must be confined to individual claims to remedies—which would deprive the terms of their meaning—"Civil and commercial *applications* and cases…" is capable of embracing claims to remedies which would not, if pursued separately, pass through any of the JAL's jurisdictional gateways and therefore matters and issues which arise from those extra-JAL claims to remedies and the persons required to be party to the proceedings so that the Court can resolve the matters and issues in dispute.

The Trust Law Argument

226. The Defendants contend that DIFC trusts are required to be made by an instrument in writing. They rely on Article 33 of DIFC Law No. 4 of 2018 (the **"Trust Law"**) which concerns the creation of trusts. Article 33 of the Trust Law provides as follows:

(1) A trust may be created by:

(a) transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;

(b) the transfer of property from one (1) trust to another;

(c) declaration by the owner of identifiable property that thereupon the owner will hold the property as trustee; or

(d) exercise of a power of appointment in favour of a trustee.

(2) *A trust shall come into existence by an instrument in writing including a will or codicil.* (emphasis added)

D2, D4 and D5 Ltd say that Article 33(2) provides for a mandatory requirement: without a written instrument, there can be no DIFC trust.

227. C argues that none of the scenarios set out in Article 33(1)(a) to (d) of the Trust Law—for example, the "transfer of property to another person as a trustee during the settlor's lifetime…" (Article 33(1)(a))—require writing and that, properly understood, Article 33(1) concerns DIFC trusts that may be created without writing while Article 33(2) concerns trusts created in writing.

228. C further argues that even if unwritten trusts cannot be created pursuant to Article 33 of the Trust Law, pursuant to Article 10(1), they are available under the common law and in equity:

> **Common law and principles of equity**
>
> (1) The common law of trusts and principles of equity supplement this Law, except to the extent modified by this Law or any other DIFC law or by the Court.

C submits that there is a distinction in the Trust Law between DIFC trusts on the one hand and non-DIFC trusts on the other, and that Article 33 of the Trust Law, even if requiring DIFC trusts to be in writing, will not effect the validity of non-written trusts available in the common law of trusts and in accordance with the principles of equity, including resulting and constructive trusts.

229. If the proposition that DIFC trusts are required to be made by an instrument in writing is correct, it would follow that the Trusts, insofar as they are apparently unwritten trusts—the existence of any written trust instruments has not been alleged by C, still less evidenced—cannot be DIFC trusts. The Defendants have not argued that resulting and constructive trusts are not available under DIFC law as a consequence of Article 33 of the Trust Law. I will focus on the requirements for DIFC trusts.

230. Junior counsel for C argued in oral submissions that, if Article 33(2) of the Trust Law provides for a mandatory requirement for the creation of DIFC trusts, one would have expected the language of Article 33 to be slightly different. For example, rather than providing that a "trust may be created by [(a), (b), (c) or (d)]", Article 33(1) might have provided that a "trust may be created for [(a), (b), (c) or (d)]". Moreover, rather than providing that a "trust *shall* come into existence by an instrument in writing…," one would have expected slightly stronger words in Article 33(2), for example that a "trust *may only* come into existence by an instrument in writing…". I think these are persuasive arguments.

231. As noted above, in oral submissions C's counsel argued that none of the scenarios in Article 33(1)(a) to (d) of the Trust Law require writing. Article 33(1)(a), however, provides, amongst other things, that "A trust may be created by: transfer of property to another person as trustee… *by will…*", while DIFC wills are required to be in writing. While detracting somewhat from arguments made on behalf of C, this point also gives support to C's case, in my judgment. If Article 33(2) provides for a requirement that applies to all DIFC trusts, then it is curious that the above-cited part of Article 33(1)(a) sets out the criteria for a valid trust without the need for Article 33(2): Article 33(1)(a) may be paraphrased as providing, as material to this point, that "a trust may be created by the transfer of property to another person as trustee by a will in writing" which renders redundant a "trust shall come into existence by an instrument in writing including a will…" from Article 33(2).

232. Moreover, if Article 33(2) provides for a requirement for the creation of trusts, the following provision, Article 34, headed "Requirements for creation [of trusts]," strikes me as a better place for it to have been included in the Trust Law.

233. These observations of course do not answer the questions why Article 33(2) was legislated at all and why this provision was separated by paragraph from the methods by which trusts may be created under Article 33(1)(a) to (d). As I said to C's counsel at the Hearing, according to C's construction of Article 33(2), it is unclear why the provision was not included as Article 33(1)(e) rather than Article 33(2).

234. I do not feel that I am in a position to come to a conclusion on whether a DIFC trust is created only where Article 33(1) and (2) are satisfied—as the Defendants submit—or is instead created where either Article 33(1) or (2) is satisfied—as argued by C—subject to the other requirements under the Trust Law. I do think, however, that at the very least, C has a real prospect of successfully establishing that DIFC trusts do not need to be created by a written instrument under DIFC law.

The Forum Non Conveniens Argument

235. As noted above, the Defendants argue that there are "clearly and undeniably" other forums more convenient to adjudicate the present dispute. For example, senior counsel for D4 and D5 Ltd contends that the courts having jurisdiction to try disputes about the ownership of the Spanish Property and the question whether D4 holds the shares in D9 Ltd on trust for C are the courts where the Spanish Property, as immovable property, is situated, the Spanish courts, and the place of incorporation of D9 Ltd, the courts of the Seychelles.

236. In my judgment, however, as a consequence of the Amendment Application and the Immediate Judgment Application, these arguments are more pertinent to C's Secondary Case and have become, in turn, more secondary in these proceedings; secondary to questions concerning the Contracts and the Trusts—both of which C claims are governed by DIFC law—including

their existence and, if existing, their terms and rights and obligations arising from them. Counsel for D4 and D5 Ltd, I think it can be inferred, appears to acknowledge this this. For example, in written submissions he states:

> … in the absence of any properly pleaded contract between the parties (either for the offer of services or for nominee services), we respectfully submit that the matter shall be decided by applying well established principles of conflict of laws in relation to the ownership of an immovable property and the ownership of shares of a company…

and

> … in our view, in the event the Third Defendant's application for immediate judgment succeeds… then this will play a decisive role in relation to the whole action of the Claimant in respect of the rest of the defendants as well. (emphasis added)

237. The Immediate Judgment Application has been granted, but because of my decision in the Amendment Application, C has been permitted to make amendments to her claim which retain D3 Ltd in the picture and which advance a case that there are trusts in existence governed by DIFC law, notwithstanding the deficiencies in the pleadings relating to the Contracts from which the Trusts are said to arise.

238. In the English case of *Deschamps v Miller* [1908] 1 Ch. 856 at pp. 863 and 864, the court relevantly stated:

> In my opinion the general rule is that the Court will not adjudicate on questions relating to the title to or the right to the possession of immovable property out of the jurisdiction. There are, no doubt, exceptions to the rule, but, without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend on the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a Court of Equity in this country, would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property. Thus, in cases of trusts, specific performance of contracts, foreclosure, or redemption of mortgages, or in the case of land obtained by the defendant by fraud, or other such unconscionable conduct as I have referred to, the Court may very well assume jurisdiction. But where there is no contract, no fiduciary relationship, and no fraud or other unconscionable conduct giving rise to a personal obligation between the parties, and the whole question is whether or not according to the law of the locus the claim of title set up by one party, whether a legal or equitable claim in the sense of those words as used in English law, would be preferred to the claim of another party, I do not think the Court ought to entertain jurisdiction to decide the matter.

239. Moreover, while the Spanish and Seychelles courts would certainly be appropriate forums to try disputes about the ownership of the Spanish Property and the shares in D9 Ltd, respectively, likewise it could be said that the courts of Gibraltar would be an appropriate forum to try disputes about the ownership of the Yacht, legally owned by a Gibraltar-registered company, EY Ltd, and the shares in RN Ltd, another Gibraltar-registered company. But in circumstances where, on C's case, much or perhaps nearly all of the evidence which might be given in separate claims in respect of the ownership of the Spanish Property, of D9 Ltd, of EY Ltd and of RN Ltd would be relevant and admissible in the other three claims, and relevant and admissible, moreover, in C's claims under the Contracts and the Trusts in this Court, in my judgment it would be contrary to the interests of justice for that evidence to be given more than once, for the core of each of the claims to be heard more than once and for the risk of inconsistent findings and judgments to be increased presumably several times over.

240. I think the question becomes: what would be the most appropriate forum to try all of the claims? On the face of it, and particularly because of C's claims regarding the Contracts and the Trusts, all of which can be said to underly and unite the entirety of the dispute, in my judgment the answer to that question would be: the DIFC Court.

<u>Service Upon D5 Ltd</u>

D5 Ltd's arguments

241. D5 Ltd disputes that service was properly affected upon it on 15 May 2020, as C purported in the D5 Ltd CoS, or any time thereafter. D5 Ltd submits that it "did not receive proper knowledge of the DIFC Order dd 21/04/2020, nor of the judicial documents that were allegedly served upon the Fifth Defendant":

> It is the position of the Fifth Defendant that it became aware of the alleged service upon it through the DIFC Proceedings and not through the prescribed method of service that is provided for in the Civil Procedure Rules of Cyprus, governing the matter of service… It is the position of the Fifth Defendant that it became aware of the service upon it, when it received a letter dated

09/07/2020 by the lawyers representing the Claimant, whereby they argued that the Fourth and Fifth Defendants were in breach of the DIFC Order dd 21/04/2020.

242. D5 Ltd states that it first became aware of the D5 Ltd CoS when its lawyers reviewed the case file ahead of a directions hearing before the Deputy Registrar of the Court (as she then was) on 14 July 2020. D5 Ltd's lawyers then disputed whether service had been properly effected at that hearing.

243. On 21 July 2020, C's lawyers forwarded to D5 Ltd's lawyers an affidavit of service dated 19 May 2020. According to the affidavit of service, the person on whom service was said to have been effected was an Kaleho. D5 Ltd's counsel has explained, and it has not been denied, there is no one at the relevant address who has this name.

244. D5 Ltd's primary position is that no one at its lawyers' firm recalls receiving the relevant bundle. But even if the bundle was left at the firm's address, D5 Ltd submits that the service would have been defective in any event.

245. RDC r. 9.53 provides that "… it is the responsibly of the party serving process to ensure he complies with the rules regarding service of the place where he is seeking to effect service". RDC r. 9.54 provides that "Where a claim form is to be served out of the DIFC or Dubai, it may be served by any method permitted by the law of the place in which it is to be served". D5 Ltd was to be served in Cyprus. It follows, D5 Ltd submits, that C had an obligation to ensure that service upon D5 Ltd was effected in accordance with the rules applicable in Cyprus.

246. Counsel for D5 Ltd, who it should be stated is an experienced lawyer practising in Cyprus, submits that Rule 7 of Order 5 of the Cyprus Civil Procedure Rules (the **"CCPR"**), which governs service upon legal entities, in conjunction with section 372 of the Cyprus Companies Law, Chapter 113, apply in this case. This has not been challenged by C.

247. D5 Ltd's counsel submits that Rule 7 of Order 5 of the CCPR provides that, unless there is a specific law governing service of any writ of summons or other process upon a legal entity, service of an office copy of a writ of summons or other process on the president or other head officer, or on the treasurer or secretary of such body, or delivery of such copy at the office of such body, shall be deemed good service.

248. Section 372 of the Cyprus Companies Law, Chapter 113, provides specifically for the manner service shall be effected upon legal entities. D5 Ltd's counsel submits that this provision therefore supersedes those of Rule 7 of Order 5 of the CCPR. It provides that a "document may be served on a company by leaving it at or sending it by post to the registered office of the company".

249. The abovementioned provisions have been interpreted by the Supreme Court of Cyprus. According to the Supreme Court, it is not sufficient to serve judicial documents upon a legal entity merely by leaving them at the registered office of the company; the judicial documents must be left to a responsible person as a person's fundamental right to be heard pursuant to Article 30(3)(b) of the Constitution of Cyprus is engaged.

250. Moreover, the official languages of the Republic of Cyprus are Greek and Turkish pursuant to section 3(1) of the Constitution of the Republic of Cyprus and section 2 of the Law on the Official Languages of the Republic of Cyprus. The documents served by C, however, were in English and Arabic. No Greek or Turkish translations of the documents were included. D5 Ltd contends that this is a separate reason why the documents were not served in accordance with the rules applicable in Cyprus and in the DIFC under the RDC, and in particular RDC rr. 9.59 to 9.62 which concern translations of claim forms. Most importantly perhaps, RDC r. 9.60 provides that, where a claim form is to be served outside of Dubai, it must be served accompanied with a translation thereof and:

> 9.60
>
> The translation must be:
>
> (1) in the official language of the place in which it is to be served; or
>
> (2) if there is more than one official language of that place, in any official language which is appropriate to the place where the claim form is to be served.

251. In oral submissions at the Hearing, D5 Ltd's counsel made the following further submissions:

The allegation is that the documents were left in my building—my firm's building—owned entirely by our firm—so there is no possibility that another company took this—and to a person named as "Kaleho", "Kaleho" or "Kaleho". We are not clear from the handwriting. The translation says "Kaleho". I assured my learned friend [C's counsel] that there is nobody in this building called "Kaleho". We have not employed anybody ever named "Kaleho".

There is a mistake somewhere. I am more than happy, in the event that your court rejects all the applications, to consider Defendant 5 as properly before the Court from the date Defendant 5 filed an acknowledgement of service, which is in July this year. We do not want to be difficult with our learned friends. We are happy, if your court rejects these jurisdictional objections and says that it has jurisdiction, to accept… the date we acknowledge service [as being the] date on which Defendant 5 has been probably notified of the fact of these proceedings. We will not raise a question of service after that date.

But we will not accept that Defendant 5 has been served at any time prior to that acknowledgement of service. We are being practical, but on a matter of principle we will not accept service earlier than that date…

C's arguments

252. In written submissions, C responded to these arguments as follows.

253. First, C avers that there was proper service in accordance with the requirements as set out by D5 Ltd's counsel. The Claimant relies on the D5 Ltd CoS and submits that there is no reason for the Court to go behind it.

254. Second, C contends that it is clear that the relevant documents have in any event been received and understood by D5 Ltd, and that they have been with it for some time. To the extent that there is any doubt over whether D5 Ltd has been properly served, C invites the Court to make an order dispensing with further service, or for alternative service, by way of email on D5 Ltd's counsel.

255. In oral submissions at the Hearing, C's senior counsel made the following further submissions:

I have noted of course very carefully what Mr Pavlou has said and I suppose in one way the issue of service comes before you now as something which you might think is no longer contested or important, because he has indicate that from the acknowledgement of service on 13 July he is prepared to regard service as effective from then. But our certificate of service [states] that service had been effect on 20 May.

It is not just an academic discussion because the Court may be aware from other material before the Court, including correspondence between the parties… that efforts were made by [D5 Ltd] over the period of that interval of time to remove the director of [D7 SL] from his position, and that led to a standoff and a threat indeed by my client to bring contempt proceedings against the Fourth and Fifth Defendants for interfering with the ownership structures of the Spanish property.

It is not an academic discussion. What happened between May and July is important, and there is no real dispute in this case that the correct address has been identified. It has not been said that the documents were not left there. It simply said that nobody by that name was there… It is quite clear of course that service has been effected for some time. [The Court has] a certificate of service backed up by an affidavit of service from Cyprus… [What] has been stated by Mr Pavlou is really only… that there is nobody at that address by that name. It in fact is his address and quite clearly the documents were left there…

D5 Ltd's reply

256. D5 Ltd's counsel's reply to C's counsel included the following submissions:

Changing a director is not interfering with the ownership structure, which is prohibited [under the Second DIFC Injunction]. It did not happen, in any event, and so it is completely theoretical. We would be able to argue the point if the other side decides to raise it, however hopeless that allegation is…

… Our firm is established in 1963 and we will not ever be assisting in any way anybody to be in contempt… But it was not served. [D5 Ltd] was not aware at the relevant time of that order.

I have pointed out to my learned colleague, much to his desire to ignore it, that a bundle of documents of the size of the documents of this case could not have been overlooked. No such bundle was delivered in our firm.

… I am aware clearly of the [two] people who were sitting in the reception on that day… It could not be anybody else. We were in the middle of COVID measures. Most of the firm was not in the office. The two receptionists are the two ladies. And we have not seen this bundle of documents at any point. I am not able to say to the court what happened because I do not

know. I am happy to accept that they have somehow achieved service by the time we acknowledge service. But I will not accept that they managed to do it the way they are claiming because it did not happen. It did not happen according to Cyprus law.

Discussion

257. I do not think that the Court has been given enough information to make a determination on the date on which D5 Ltd was served. D5 Ltd is content to accept that C "somehow achieved service" on the date that D5 Ltd filed its acknowledgment of service, being 13 July 2020. While acknowledging the virtue of D5 Ltd offering to waive any right it may have to object to non- or defective service, I am not convinced that the date on which it filed its acknowledgment of service is the best date for that purpose.

258. Rules about service of documents are there to ensure that parties have notice of claims, applications and orders and so on made against them or which concern them. I think the date on which a party becomes aware of a relevant document has more affinity with a date of service, actual or deemed, than does the date on which a party acknowledges service, something not required to be done immediately.

259. To make a more general point before concluding my discussion of the Jurisdiction Applications, in my judgment D5 Ltd was bound by the terms of the Second DIFC Injunction as soon as it had notice of it. As material, the Second DIFC Injunction provided as follows:

PENAL NOTICE

IF YOU (1) [D1] OR (2) [D2] OR (3) [D3 Ltd] OR (4) [D4] OR (5) [D5 Ltd] DISOBEY THIS ORDER YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED…

7. Please note:…

(2) this Order is effective against any Respondent on whom it is served *or who is given notice of it…*

PROHIBITORY INJUNCTION

16. *Until the Return Date or further order of the Court, the Respondents must not deal with, or cause any dealings to be had with or cause or effect in any way any change in relation to the corporate structure of ownership of [the Spanish Property].* For the avoidance of doubt, this Order prohibits the Respondents from instructing or causing any other individual to effect any change in ownership or structure of ownership of any company or individual involved in the holding of the Spanish Property or from dealing with it in any way or selling or diminishing the value of the holding structure of the Spanish Property…

Persons outside the DIFC…

26. The terms of this Order will affect the following persons in a country or state outside the jurisdiction of this Court:

(1) *the Respondent or his officer or agent* appointed by power of attorney…

NOTIFICATION AND SERVICE…

29. Each of the Fifth Respondent and the First to Fourth Notice Parties *may be immediately notified of the making of this Order by email, in person or by courier…* (emphases added)

260. Pursuant to [29] of the Second DIFC Injunction, C was permitted to notify D5 Ltd of the order by email, in person or by courier. In my judgment, it was upon D5 Ltd's notice of the Second DIFC Injunction, not valid service of it, that it became obligated to obey it.

Conclusion

261. For the reasons given above, the Jurisdiction Applications are dismissed.

Costs

262. D2, D4 and D5 Ltd shall pay C her costs of the Jurisdiction Applications on the standard basis and to be assessed by a registrar if not agreed.

The Part 19 Applications

263. By the Part 19 Applications, D2 and D4 seek orders requiring C to provide "adequate responses" to separate requests for further information made under Part 19 of the RDC (the **"Part 19 Requests"**). The contents of the Part 19 Requests, as D4 notes, are similar. And as with other applications heard at the Hearing, there is significant overlap between the positions of the participating defendants. Accordingly, I will only distinguish between D2 and D4 in the Part 19 Applications where there is need to and references to the "Defendants" are references to D2 and D4 only.

264. In addition to the Part 19 Requests, D2 asks the Court to direct that C provides, pursuant to RDC r. 28.5, documents which she has expressly referred to in statements of case but which, D2 says, she has refused to provide at this stage of the proceedings (the **"Part 28 Request"**).

The Part 19 Requests

265. Part 19 of the RDC is based on Part 18 of the CPR and its accompanying practice direction. RDC rr. 19.1, 19.5 and 19.6 are the most important rules in the Part 19 Applications and provide as follows:

> **19.1**
>
> The Court may at any time order a party to:
>
> (1) clarify any matter which is in dispute in the proceedings; or
>
> (2) give additional information in relation to any such matter;
>
> whether or not the matter is contained or referred to in a statement of case.
>
> **19.5**
>
> Before making an application to the Court for an order under Rule 19.1, the party seeking clarification or information should first serve on the party from whom it is sought a written request for that clarification or information ("a Request"), stating a date by which the response to the Request should be served. The date must allow the party providing clarification or further information a reasonable time to respond.
>
> **19.6**
>
> A Request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or to understand the case he has to meet.

266. I will not recount each of the Part 19 requests, each of C's responses to them and each objection that the Defendants make against C's responses to the requests. As senior counsel for D2 noted at the Hearing, "there has been a common approach to answering all of them and you either will agree with that general approach to answering them or you will agree with our contentions".

The Defendants' arguments

267. The Defendants contends that, in breach of the rules governing the drafting and content of pleadings, C's pleadings are defective and incomplete and she has failed to adequately particularise her allegations so as to allow the Defendants to properly plead their defences. Senior counsel for D4 submits that:

> … the Particulars of Claim filed by the Claimant is subject to strike out, as the facts invoked by her are not sufficient so as to prove her claims and even if those facts are proved, they are not sufficient so as to disclose an actionable right of the Claimant against the Defendants, as those are mere unfounded allegations.
>
> Material facts and substantial details of her allegations are not included [in C's pleadings] and as a result not only has she failed to substantiate the Court's jurisdiction (as the relevant facts are not included therein), but she has also failed to properly plead and substantiate the causes of action that she promotes. Therefore, we respectfully submit that such information/particulars are necessary for the Fourth Defendant so as to plead his case and defend the Present Claim.

268. Counsel for D4 states that, while in the APoC C claims that D4 "is believed to be [D1 and D2's] employee or business partner" ([1(e)(i)]), that D4 assisted D1 and D2 with perpetrating the fraud against C ([3]) and that D4 holds the shares in D9 Ltd on trust for C ([24(e)]), C does not go on to give:

any tangible or any adequate or any specific details or facts or information that somehow show the truth of the Claimant's allegations. The Claimant does not provide any information at all other than general, unfounded and vague allegations… One of the information requested with the Fourth Defendant's Part 19 Request is whether the Claimants [sic] asserts that a trust exists under DIFC law and, if yes, to provide us with a copy of the alleged trust instrument. It is repeated and highlighted that the Fourth Defendant disputes and denies the existence of such a trust or the existence of any relationship with the Claimant.

269. In written submissions, D2 placed particular emphasis on the words "reasonably necessary" in RDC r. 19.6 and derived from them the following proposition: any information required to be given by a party under the RDC must be information which is reasonably necessary for a party to plead. In oral submissions, senior counsel for D2 put it a different way:

> … in our respectful submission, this is not a matter of discretion. It becomes a matter of discretion if one asks for information outside the stated case because the Court does not want to see its process abused by attempts to obtain unreasonable disclosure…
>
> If the rules require that a pleading contains certain things, [however,] then we would say that requirement operates as a matter of right. It operates as a matter of right… because the Court rules are premised on the basis that people will comply with them.

I did not ask counsel whether this different formulation elaborated on D2's proposition in written submissions or whether they form a separate proposition. My understanding is that D2 offers a second, broader argument to the effect that, if the RDC requires a party to supply information and that information has not been supplied, this would be a sufficient basis for an order under RDC r. 19.1 compelling that party to do so.

270. In submissions, D2's senior counsel gave as an example her twenty-second Part 19 request (**"Request 22"**) and C's response to it:

> **Paragraphs 14 and 14(a)**
>
> **Of** The whole paragraphs
>
> **Request**
>
> 22. In relation to each of the "separate contracts" constituting the alleged "Yacht Contract" alleged to have been entered into between [C] and [D1], and [C] and [D2], respectively:
>
> 22.1. When was the alleged contract entered into?
>
> 22.2. Between which natural persons was the alleged contract made?
>
> 22.3. Where was the alleged contract concluded?
>
> 22.4. Was the alleged contract entered into orally, or in writing?
>
> 22.5. If the alleged contract was oral or partly oral, please (i) identify whether the alleged contract was concluded by telephone or in person; (ii) provide the words used, or gist of them, pursuant to rule 17.4 of the Rules; (iii) identify where each of the counterparties was situated at the time the contract was concluded.
>
> 22.6. If the alleged contract was in writing or partly in writing, please produce copies of the relevant documents.
>
> 22.7. Please identify each and every one of the express terms of alleged contracts including (without limitation):
>
> 22.7.1 Full particulars of the alleged Yacht Services and each of them.
>
> 22.7.2 Full particulars of the commission fees [C] agreed to pay including the timing of such payments.
>
> 22.7.3 Please identify each and every one of the implied terms of the alleged contracts.
>
> . Identify each of the counterparties situated. If the alleged contract was in writing or partly in writing, produce copies, and provide details of the alleged express terms."
>
> **Reply**

22. This request is outside the scope of Part 19 in that it is not confined to matters which are reasonably necessary and proportionate to enable the Second Defendant to prepare her own case or understand the case which she has to meet. The Claimant's pleaded case is clear. Without prejudice to the generality of the foregoing and in any event, the relevant records are within the possession and control of the First and/or Second Defendants, and for the reasons already stated, not available to the Claimant. The best particulars that the Claimant can give in respect of this request, at this stage and pending disclosure, are at paragraphs 14, 14(a), 16 and 17 of the Particulars of Claim. The contracts were in the same course of dealings that the parties had undertaken throughout their working relationship since 2011. The Claimant through her associates sought the assistance of the First and Second Defendants, acting through the Third Defendant and working with [X] of [Y Ltd].

271. Commenting on C's reply to Request 22, counsel for D2 states that, if the Contracts were oral, as C's lawyers have previously stated, RDC r. 17.41 is engaged which requires the statement of case to set out the contractual words used and identify by whom, to whom, when and where they were spoken. In breach of this rule, D2 submits, C has not pleaded, and has "refused" to provide clarification in relation to, the required information; C merely asserts, D2 says, that the "relevant records" in relation to the Contracts are "within the possession and control of the First and/or Second Defendants and are not available to the Claimant": "However, it is wholly unclear what the alleged records relevant to the formation and terms of the alleged contracts are said to comprise of, or what their relevance is". Moreover, D2 highlights that in her reply, C also refers to a course of dealings which, if relied upon as a source of the Contracts, is required to be particularised in accordance with RDC r. 17.42 but is not.

272. D2 submits that C should be required to provide the information "which is necessary for D2 to understand C's case". D2 says that C's approach to pleading her case is defective because she has pleaded causes of action without sufficiently, or in some cases at all, pleading the necessary primary facts from which, the pleaded legal conclusions arise. Not only does this mean the pleadings are not in compliance with the RDC, D2 says, but it makes them demurrable also.

C's arguments

273. C says that there is no substance to the Part 19 Requests. It is abundantly clear, C submits, that her pleaded case meets the requirements of the RDC generally, and particularly when regard is had to the fraud and wrongdoing she alleges. Moreover, C contends that the Part 19 Requests fail to meet the "strict requirements of reasonable necessity and proportionality" under RDC r. 19.6.

Discussion

274. I agree with C. With respect, I think the Part 19 Requests are misconceived.

275. Part 19 of the RDC, as RDC r. 19.1 makes clear, is concerned with the provision by parties of information clarifying matters in dispute in proceedings. While RDC r. 19.1, if considered in isolation, appears to be capable of a very broad application, in my view it cannot be read separately from RDC r. 19.6, a rule which significantly narrows it.

276. Pursuant to RDC r. 19.1, the Court may order a party to clarify a matter in dispute or give additional information about such a matter. Before a party applies to the Court for an order under RDC r. 19.1, however, pursuant to RDC r. 19.5, that party "should first serve on the party from whom it is sought a written request for that clarification or information". Clearly the "clarification" and "information" mentioned in RDC r. 19.5 correspond to the clarification and information mentioned in RDC r. 19.1(1) and (2), respectively; the word "that" in RDC r. 19.5 shows, on my reading, that the clarification or information sought from the party is the clarification or information that might be sought subsequently pursuant to RDC r. 19.1.

277. Pursuant to RDC r. 19.6, a request under RDC r. 19.5 "should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or to understand the case he has to meet". While the use of the word "should" in RDC r. 19.6 apparently leaves some gap for requests that fall outside of this description—though presumably not a very large gap due to the words "strictly confined" which follow it—the rule clearly limits the type of requests that might be made under RDC r. 16.5 and orders, in turn, that might be made later under RDC r. 16.1: if the subject matter of an order under RDC r. 16.1 must be the subject matter of a request under RDC r. 16.5 which should be made in accordance with RDC r. 16.6, then it would follow, in my judgment, that an order under RDC r. 16.1 will generally be made only where the requirements of RDC r. 16.6 have been met.

278. What does RDC r. 16.6 require? This question was considered by Justice Roger Giles in *Georgia Corporation v Gavino Supplies* [2016] DIFC ARB 005 (11 October 2016):

53. … Part 19 of the Rules is materially the same as Pt 18 of the CPR and its accompanying Practice Direction. Part 18 of the CPR was intended to replace the two separate regimes for further and better particulars and interrogatories, and "to impose a more restrictive and disciplined regime than the previous rules" (Halsbury's Laws of England, 5th ed, vol 32, p457). In the present case the Defendant's request is in the nature of interrogatories, but under the tighter regime.

54. Interrogatories could be administered in order to obtain admissions. But they were not ordered routinely, and it had to be shown that they were necessary for disposing justly of the case or saving costs. In *National Grid Electricity Transmission Plc v ABB Ltd* [2012] EWHC 869 (Ch) (*"National Grid"*) at [73] the Court cited from the judgment of Lord Woolf MR in *Hall v Sevalco Ltd* [1996] PIQR 344 –

"Necessity is a stringent test. It cannot be necessary to obtain information or admissions which are or are likely to be contained in pleadings, medical reports, discoverable documents or witness statements unless, exceptionally, a clear litigious purpose will be served by obtaining such information or admissions on affidavit."

55. In *National Grid* this was regarded (at [74]) as applicable, mutatis mutandis, to a request for information under Pt 18. The Practice Direction, *and RDC 19.6 taken from it, call for a no less stringent approach: necessity and proportionality are required, both with strictness.*

56. Relevantly to the present case, the matters requested must be "to enable the first party to prepare his own case". The word "prepare" is important. No doubt it can extend to obtaining an admission to be used in the party's case, but it indicates a process which can also be satisfied by calling evidence of the matter the subject of the desired admission. *Necessity and proportionality must take account of other sources and ability to provide other evidence, and of the prospect of the desired admission being made.* (emphases added)

279. Most pertinently for the present case, RDC r. 16.9 requires that requests made under RDC r. 16.5 be strictly confined to matters which are reasonably necessary—necessity being a *stringent* test—and proportionate to enable the requesting party to prepare his case or to understand the case he has to meet, which requires taking into account other possible sources of the information sought and the prospects of the requesting party in fact receiving the information from the requested party.

280. It would follow from these conclusions, in my judgment, that both of D2's propositions must be rejected. I think it is not necessarily critical for the purposes of RDC r. 16.6 and so RDC rr. 16.5 and 16.1 that certain information may be required by the RDC; the information should be *required by the requesting party*, to enable him to prepare his own case or understand the case he has to meet. Where a party's pleadings are not compliant with the RDC, for example where a party relies on an oral agreement but, in breach of RDC r. 17.41, he does not set out in his statement of case the contractual words used and by whom, to whom, when and where they were spoken, this may be a basis for striking out the relevant pleadings. While the Defendants, and D4 in particular, have made clear reference to the need to prepare their cases and to understand the case they have to meet as bases for the Part 19 Requests, with respect, I think most of their submissions would have been more at home in applications for orders under RDC r. 4.16(3). The Defendants' disproportionate reliance on authorities relevant to courts' powers to strike out deficient pleadings, in my view, betrays this.

281. And while the Defendants have made reference to preparing their cases and understanding C's case, neither party has explained how any particular clarification or further information sought is reasonably necessary for the Defendants to complete these exercises. Instead, deficiencies in C's pleading have been recounted and it is said that those deficiencies should be remedied to enable the Defendants to prepare their own cases and/or understand the case they have to meet. In my judgment, it is not possible for the Court to determine whether a particular request meets the "stringent test" of RDC r. 16.9 unless these points are fully addressed and substantiated.

282. More importantly, I think the absence of explanations as to why a clarification or any further information is required by the Defendants to enable them to prepare their cases and/or understand the case they have to meet is in fact consistent with their cases as discernible from their witness evidence and submissions to this point: in brief C's case is "false", "fabricated" and ultimately itself "fraudulent". All this can be seen in, for example, affidavits dated 18 November 2019 sworn by D2's lawyer (the **"D2 Affidavit"**) and D4's lawyer (the **"D4 Affidavit"**), both in response to the Cyprus Affidavit sworn in support of C's case in the Cyprus Proceedings.

283. For example, in the D2 Affidavit it is stated, amongst other things:

4. I am aware of the facts of the present case to which I refer below, from information provided to me by [D2], personally and through her records, as well as from my official records as her legal advisor…

11. *I would like to clarify from the outset that the allegations made in the [Cyprus Affidavit] are either false, incomplete or are being stated in such a way as to confuse and mislead the Court. Additionally, a lot of relevant facts have not been disclosed sufficiently or at all…*

21. … *[D2] has never acted in a nominee/trustee capacity in relation to [C] or to anyone else…*

26. … *The allegations made [in the subsection of the Cyprus Affidavit concerning the Yacht] are ludicrous… the Yacht belonged to [D2] and she had bought it using her own assets and monies.* [D2] has also paid from her own money all expenses relation to the Yacht… Burgess (the largest yacht operated in the world) was managing the Yacht and can confirm the same. Burgess also conducted an extensive due diligence before accepting [D2] as a client. If she would not have been credible to own such a Yacht, and to have her own funds to pay for the ongoing operational expenses of the Yacht, Burgess would have never accepted [D2] as a client…

29. I would now like to explain the corporate structure through which [D2] owned the Yacht.

30. On 18/7/18 [QH Ltd]…, a company that [D2] owns, bought all the shares of…

44. The balance of convenience clearly lies in favour of the Respondents since [D2] is the real owner of the Yacth (which she has subsequently sold) but also [D4] is the real owner of the Spanish Property. The status quo will definitely not be maintained if a third party such as [C], with no supporting documentation as to her real ownership of the assets, is able to freeze such assets and prevent their real owners who are the people indicated as the UBOs on all the relevant documents, from handling their assets as they think fit…

48. … *this fabricated story about third unknown parties holding assets for [C] whilst the said parties are the registered UBOs while [C] cannot produce any evidence or documents to support her allegations, indicates that there is no serious case to be heard in the present case or a good probability that [C] will be successful…* (emphases added)

284. And in the D4 Affidavit it is stated, amongst other things:

5. … I have prepared this affidavit with the facts and information provided to me by [D4], personally and through his records, as well as from my official records as his legal advisor…

7. … *I would like to point out from the outset that the evidence provided by the Applicants via the [Affidavit for C] is greatly misleading and inaccurate, fails to convey the full picture of the matters in dispute and is depicted in such a selective was so as to serve only the Applicants' purpose…*

9. *[D4] is the Director and Ultimate Beneficial Owner of [D8 Ltd], [D9 Ltd], and through them, [D7 SL] and [D5 Ltd].*

10. *[D4] has never met [C or her husband] and does not know them either personally or through any representatives. He has never worked with them and/or conducted any business with them with respect to the subject of the present action…*

11. *[D4] has confirmed and proved to me to my satisfaction that he is the ultimate beneficial owner of [D9 Ltd], [D8 Ltd], [D5 Ltd] and [D7 SL] and through [D7 SL], [the Spanish Property]…*

14. *The contents of [the Affidavit for C] are denied as being false and incorrect…*

16. … The fraudulent scheme and conspiracy being spoken about has in fact been concocted by [C] and her husband… to illegally and wrongfully misappropriate and steal assets not belonging to them like the Spanish Property…

35. … *it is preposterous that [C] is claiming to be the 'true' ultimate beneficial owner without showing any documentary proof of the same. This lack of documentary proof is attributable to the fact that it does not exist and [C] is falsely stating that she is the owner of the Spanish Property… I have the entire documentary evidence showing that [D4] is the real owner of the Spanish Property…* (emphases added)

285. On the Defendants' case, then, C's case us "false", "ludicrous" and "preposterous". On the other hand, the Defendants are the registered ultimate beneficial owners of the Assets. In the case of D4, he possesses documentary evidence which proves that he owns the Spanish Property. It is to be inferred from D2's criticisms of C's evidence that she possesses documents proving her ultimate entitlement to the proceeds of the Yacht. Both can obtain further evidence to support their cases; for example, from Burgess in the case of D2. In such circumstances, it is of no surprise that the Defendants have not made clear why any particular

request for information is necessary to enable them to prepare their own cases or to understand the case they have to meet: presumably, on their cases, C can offer them very little, or perhaps nothing, in the way of useful, much less necessary, information for their defences.

286. While in most cases a party's ability to prepare his case will be contingent to a significant extent upon him having an understanding of his opponents case, as I see it the more diametrically opposed cases are—for example where one side's case must necessarily be fabricated and it is each side's case that the other's is so—the more likely it will be that a party is able to prepare his case without the case of his adversary being entirely clear or exhaustively informative. If it is A's case that B's case is completely fictitious, a request for information about one aspect of the fiction can, in my view, be characterised as an invitation for further tales, the utility of which strikes me as being highly questionable.

287. Returning to the example request given by D2, Request 22, if D2 was party to the Contracts then D2 should have no difficulty recollecting the information the subject of the Part 19 Requests, including for D4's benefit such that D2 would be an alternative source of the information for D4; while if she was not and if C's case is fictitious, a more detailed account of C's fiction cannot, in my judgment, be necessary.

288. I will add one final observation before concluding this discussion. As has been pointed out by D4's senior counsel, whereas in the Cyprus Affidavit it was stated at [23] that "To the best of my knowledge, in most cases (including the one concerning the Spanish Property), the identity of [C], being the ultimate beneficial owner, was not revealed to nominees appointed on [C's] behalf by [D1 and D2]", in the APoC it is claimed at [64 b] that "[D4], prior to and upon accepting the position as nominee director and shareholder of D9 Ltd on [C's] behalf, represented to [C] that he was suitable for such a position…". As D4's counsel has said, these statements appear to contradictorily suggest that, on C's case, C has not met D4 and that she has met him, respectively. While I do not think that this apparent contradiction has been explained by C, much less resolved, I do not think that it justifies granting the Part 19 Applications in particular or part of them—for example so that D4 can prepare his case or understand the case he has to meet—for the reasons explained above.

The RDC r. 28.5 Request

289. As mentioned above, D2 requests an order requiring C to produce documents which have been referred to in the PoC and in the Part 19 Response, pursuant to RDC r. 28.5, cited below. There are 24 categories of documents. There is no need to outline each of the categories of documents requested by D2. As with the Part 19 Requests, entitlement or otherwise to the order sought will come down to the construction of the relevant RDC rules.

290. The RDC r. 28.5 Request is framed as an exercise of D2's "absolute right" under the rule to inspect documents mentioned in C's statement of case: "We just simply say there is really no debate about this. It simply should be provided". Counsel further proposed that when a "statement of case is delivered, which refers to a document, there is an immediate entitlement to inspect that is not dependent on case management or the discretion of the court".

291. C maintains that no request for the production of these documents under Part 28 of the RDC has been made and that it is not true that C has expressly refused to provide them. In C's submission, it would not be productive or fair, and would be contrary to the scheme of Part 28 and a waste of this Court's time and resources, for the Court to adjudicate upon the production of the documents in the absence of a Part 28 request and response. With the benefit of a duly made request and a duly considered response, the Court will know whether documents are likely to exist and what obstacles or objections, if any, are raised in respect of their production.

292. C contends that the correct time for document production, including in respect of electronic documents, will be following the determination of the Jurisdiction Applications and the Immediate Judgment Application and that if early production is required, in advance of the delivery of defences, this may be applied for.

Discussion

293. The first question is whether the Part 19 Response falls within the ambit of RDC r. 28.5, which provides as follows:

> A party may inspect a document mentioned in:
>
> (1) a statement of case;
>
> (2) a witness statement;
>
> (3) a witness summary; or

(4) an affidavit.

A statement of case is defined in the RDC as:

(1) A claim form, particulars of claim where these are not included in a claim form, defence, additional claim notice, or reply to defence; and

(2) Any formal written further information given in relation to a statement of case, whether given voluntarily or by court order.

The Part 19 Response, therefore, falls within the ambit of this definition, being written further information given in relation to a case, and therefore captured by RDC r. 28.5(1) specifically.

294. As to the RDC r. 28.5 Request itself, I do not think that RDC r. 28.5 confers on parties an "absolute" right to inspect documents referred to in relevant submissions by another party. In my view, RDC r. 28.5 provides for a general right which is qualified by RDC rr. 28.26 and 28.28, both cited below, which concern objecting to requests to produce.

295. Commenting on CPR r. 31.14(1), a rule identical to RDC r. 28.5, the White Book relevantly explains at [31.14.1]:

Right to inspect

… The right to inspect here arises simply by virtue of the document having been mentioned in one of the documents in r.31.14(1), irrespective of whether or not a List of Documents has been served, and irrespective of whether pleadings are closed. See the RSC authority of *Quilter v Heatly* (1883) 23 Ch. D. 42, CA. The same result would probably be reached under r.31.14. Under the RSC, once a party established that a document was mentioned in a pleading etc., the onus then fell to the other party to show good cause why they should not produce it: see *Quilter v Heatly* (ibid.) at 51. Again, the same should apply under the CPR. The same general rights to withhold inspection (see 31.3 and 31.19) apply under this provision, *Expandable Ltd v Rubin* [2008] EWCA Civ 59; [2008] 1 W.L.R. 1099, CA.

While the right under CPR r.31.14 to inspection of a document referred to in a witness statement appears to be unqualified, the court still has inherent jurisdiction to restrict inspection of a document referred to in a witness statement by preventing disclosure, on the ground that it is not necessary for the fair disposal of the action: *Danisco A/S v Novozymes A/S* [2012] EWHC 389 (Pat); [2012] F.S.R. 22.

296. [31.14.8] of the White Book discusses the limits on ordering inspection of documents and "proportionality", a consideration which arises due to CPR r. 31.3(2). CPR r. 31.3(2) does not have an exact counterpart rule in the RDC but the White Book's commentary at [31.14.8] is nevertheless insightful and so I cite it here, just below. First, CPR r. 31.3(2) provides as follows:

Where a party considers that it would be disproportionate to the issues in the case to permit inspection of documents within a category or class of document disclosed under rule 31.6(b) –

(a) he is not required to permit inspection of documents within that category or class; but

(b) he must state in his disclosure statement that inspection of those documents will not be permitted on the grounds that to do so would be disproportionate.

The commentary at [31.14.8] of the White Book states:

In *National Crime Agency v Abacha* [2016] EWCA Civ 760; [2016] C.P. Rep. 43, Gross LJ held at [30] that:

"... the right to inspect under CPR r.31.14 is not, however, unqualified; it is instead subject to CPR rules based limits, which may be invoked by the party resisting inspection — the burden resting on that party to justify displacing the general rule. Thus, 'proportionality' is part of the overriding objective CPR r.1.1(2)(c) and, in an appropriate case, it would be open to a party to oppose inspection on the ground that it would be 'disproportionate to the issues in the case': CPR r.31(3)(2). In determining any such issue of proportionality, a Court would very likely have regard to whether inspection of the documents was necessary for the fair disposal of the application or action."

In that case the court refused an application for inspection of a document referred to in a witness statement, that document being a request for mutual legal assistance made by the UK National Crime Agency to the US Department of Justice. The request was a confidential state-to-state communication, and inspection of it was not necessary for the fair disposal of the action.

297. While CPR r. 31.3(2), again, does not have an exact counterpart in the RDC, pursuant to RDC r. 28.26 a party may object to a request to produce for any of the reasons set out in RDC r. 28.28, which provides:

> The Court may, at the request of a party or on its own initiative, exclude from production any document for any of the following reasons:
>
> (1) lack of sufficient relevance or materiality;
>
> (2) legal impediment or privilege under the legal or ethical rules determined by the Court to be applicable;
>
> (3) unreasonable burden to produce the requested evidence;
>
> (4) loss or destruction of the document that has been reasonably shown to have occurred;
>
> (5) grounds of commercial or technical confidentiality that the Court determines to be compelling;
>
> (6) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Court determines to be compelling; or
>
> (7) considerations of procedural economy, proportionality, fairness or equality of the parties that the Court determines to be compelling.

298. I reject D2's proposition that RDC r. 28.5 confers on parties an "absolute right" to inspect documents mentioned a statement of case. I adopt the approach explained in the White Book. In my judgment, where a document is mentioned in a statement of case, a party is entitled to inspect that document unless the requested party can show good reason to refuse producing it. As such, I think the requesting party's right is a qualified right. If there is any absolute right in the context of RDC r. 28.5, in my view it is the requested party's right to object to a request. Only where a request is not objected to or where none of the bases for objecting set out in RDC r. 28.28 are established does the requesting party acquire an absolute right to inspection.

Conclusion

299. For the reasons given above, the Part 19 Applications are dismissed.

Costs

300. D2 and D4 shall pay C her costs of the applications on the standard basis, to be assessed by a registrar if not agreed.

The Compliance Application

301. By the Compliance Application, C sought the following declaration and orders:

> i. a declaration that D1, D2 and D3 Ltd have been bound since the notification of the Second DIFC Injunction made against them;
>
> ii. an order that D1, D2 and D3 Ltd shall comply with the Information Orders in the Second DIFC Injunction;
>
> iii. save for an application to vary these orders and declaration, orders that all and any application filed by or on behalf of D1, D2 and D3 Ltd shall be stayed and shall not be proceeded with pending compliance with the Information Orders; and
>
> iv. costs.

302. During an adjournment of the Hearing, however, C and D3 Ltd came to an agreement part of which was that C would not pursue the Compliance Application as against D3 Ltd on this occasion. As such, the Compliance Application as determined below affects D1, who has not responded to the application, and D2 only.

303. The Compliance Application turns on the construction of [4] the Second DIFC Injunction.

The Second DIFC Injunction

304. The Information Orders in the Second DIFC Injunction provide as follows:

> 13. Unless paragraph 14 applies, the First to Third Respondents must each, within five working days of service of this Order and to the best of his ability, inform the Applicant's legal representatives of all his assets: (a) in the DIFC; and (b) in the UAE exceeding USD 30,000 in value whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions.

14. If the provision of any of this information is likely to incriminate the Respondent, he may be entitled to refuse to provide it but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render the Respondent liable to be imprisoned, fined or have his assets seized.

15. Within 10 working days after being served with this Order, the Respondent must swear and serve on the Applicant's legal representatives an affidavit setting out the above information.

305. It is uncontroversial that the Information Orders have not been complied with. The parties' disagreement (at the time of the Hearing) was on the question whether the requirement to comply with the Information Orders had arisen. This disagreement stems from the parties' divergent constructions of [4] of the Second DIFC Orders which provides as follows:

> This Order and these proceedings shall be subject to the final determination of the Joint Judicial Committee (the "JJC") in Claim No. 11 of 2019 in relation to the jurisdiction of the DIFC Courts to hear and determine claim CFI-074-2019.

306. The background to [4] is that, in response to the First DIFC Proceedings and having subsequently issued proceedings against C in the onshore Dubai Courts, D2 filed a reference with the Joint Judicial Committee (the **"JJC"** and the **"JJC Claim"**). An order of H.E. the Deputy Chief Justice Omar Al Mheiri dated 4 February 2020 continuing the First DIFC Injunction (the **"Continuing Order"**) provided at [6] that "These proceedings are stayed until the outcome of [D2's] application to the Joint Judicial Committee and further order of the Court, but the Freezing Order, as hereby continued, remains effective during this period and until further order of the Court".

307. D2's position, as can be discerned from a letter D2's lawyers sent to C's lawyers shortly after the Second DIFC Injunction was served on 23 April 2020, is that the ordinary and natural meaning of "subject to" in [4] of the Second DIFC Injunction is that the order would not come into effect before the determination of the JJC Claim by the JJC. D2 argued in correspondence that [4] applied a stay to "both the [Second DIFC Injunction] itself and [the Second DIFC Proceedings] more generally with the result that it currently does not require any action on the part of our client". The letter further stated "we have been instructed to make a further reference to the Joint Judicial Committee in relation to CFI-032-2020".

308. By letter dated 27 April 2020, C's legal representatives responded, noting the position being taken and reserving C's right to oppose any further application to the JJC. As D2's counsel has pointed out, C's lawyers did not expressly object at that stage to D2's construction of [4].

309. In submissions in this application, however, C has argued, amongst other things, that [4] says nothing about a stay:

> As a matter of construction, the paragraph contemplates that the JJC's final determination will have been made when the paragraph takes effect. Further, when read together with the immediate mandatory provisions of the Order including the specific and mandatory time limits for complying with the Information Order, it is clear that immediate compliance with the Order was required.
>
> [In C's] respectful submission, the plain and obvious intention of paragraph 4 is that once the JJC's final determination becomes available, the DIFC Court will consider and apply the JJC's reasoning, as appropriate, to the present proceedings. This is consistent with the engagement of the Court at the interim hearing, whereby as a matter of practicality the Court was concerned, in granting the worldwide freezing order and the information order, to ensure that due account would be taken of the JJC's final determination.
>
> It is axiomatic that, in the absence of a separate JJC application, the JJC's final determination could not have any impact on the present case unless and until the JJC ruling is taken into account and its reasoning applied as appropriate by this Court.

Discussion

310. I am the author of [4] of the Second DIFC Injunction and therefore have the advantage of being able to state with certainty what its intended effect was. The First DIFC Proceedings and the Second DIFC Proceedings are substantially identical so far as their underlying dispute is concerned. As such, if D2 or any other of the Defendants made an application to the JJC in respect of the Second DIFC Proceedings, as had been done by D2 in respect of the First DIFC Proceedings, one would expect the JJC to come to the same conclusions on the second occasion as it had done on the first and accordingly make the same orders, or at least that the JJC's conclusions in the in the JJC Claim would be highly instructive in respect of any further claims made. The intended purpose of [4] was to ensure that the JJC's decision in respect of the First DIFC Proceedings would apply to the Second

DIFC Proceedings, so that the parties would not lose any benefits arising from the JJC's final determination nor evade its decision, the JJC procedure would not be abused, and all parties would save time and costs. In other words, D2's construction of [4] is not consistent with the intention behind that provision.

311. Is D2's construction of [4] nevertheless permissible as a matter of language? With respect to D2, I do not think it is, for three main reasons. Firstly, the effect of [4] of the Second DIFC Order, whatever its intended purpose, is clearly contingent upon some future event, namely the coming into existence of the final determination of the JJC. Secondly, the Second DIFC Injunction otherwise is clearly worded to take effect immediately. Thirdly, the issuing of an immediately-stayed order nevertheless required to be served would be a rather strange outcome of an urgent without notice application. When these three reasons are combined, it is clear to me that an interpretation to the effect that the Second DIFC Injunction in its entirety was stayed by operation of [4] of it is optimistic to say the least. I will expand on a few points briefly.

312. There are two components of [4] that point to some future event: the modal verb "shall" and the words "the final determination of the [JJC]" inasmuch as such a determination did not exist on the date of the Second DIFC Injunction. [13] and [15] of the order, on the other hand, are concerned with the immediate period following issue of the order and provide as follows:

> 13. Unless paragraph 14 applies, the First to Third Respondents must each, *within five working days of service of this Order* and to the best of his ability, inform the Applicant's legal representatives of all his assets: (a) in the DIFC; and (b) in the UAE exceeding USD 30,000 in value whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets. The Respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions…
>
> 15. *Within 10 working days after being served with this Order*, the Respondent must swear and serve on the Applicant's legal representatives an affidavit setting out the above information. (emphases added)

313. D2's construction of [4] of the Second DIFC Injunction requires that the order contains internal inconsistencies. By [5] of Schedule B to the Second DIFC Order, C undertook to serve the Second DIFC Order on the Defendants "as soon as practicable" and, as shown above, pursuant to [13] of the order, the Defendants were required to supply information to C's lawyers concerning their assets within five working days of being served and, pursuant to [15], to swear and serve affidavits including the same information within 10 working days. Needless to say, [13] and [15] of the Second DIFC Injunction were not ordered on the basis of any knowledge or estimation that the JJC Claim referred to at [4] would be concluded—and concluded against D2, thereby giving jurisdiction to the DIFC Court rather than the Dubai Court—before the obligations in [13] and [15] arose. D2 did not approach the Court to ask for a clarification of the meaning and intention of the Second DIFC Injunction, in circumstances where her construction of [4] necessarily rendered aspects of it unclear.

314. Moreover, it is not clear when D2 formulated her construction of [4] of the Second DIFC Injunction. As senior counsel for C has pointed out, D2's representatives' intimation in the letter dated 23 April 2020 that a further application would be made to the JJC concerning the Second DIFC Proceedings is inconsistent with D2's current position that the Second DIFC Proceedings were stayed by [4], which would render it unnecessary to bring a separate application to the JJC. And if there was any need to make another application to the JJC, presumably this would be because D2 regarded the Second DIFC Proceedings and the Second DIFC Injunction were not stayed and not without effect, respectively, consistently with C's current position. No explanation has been given for the apparent change of interpretation of [4] of the Second DIFC Injunction.

315. The Information Orders have been in effect since they were made, and the Defendants have been bound since notification of the Second DIFC Injunction to comply with the Information Orders. In such circumstances, it is appropriate that the Defendants be ordered to comply with the Information Orders.

316. As to C's request for orders staying applications made by the Defendants pending compliance with the Information Orders, save for any applications to vary any orders made as a consequence of this application, I respectfully decline this request, which would apparently extend to any applications to appeal the orders made in this decision. If the Defendants are in breach of the Information Orders, C may, if so advised, issue committal proceedings against them. Where such a proceeding is available to C and has not been utilised, I think orders preventing the Defendants from, ultimately, being heard by the Court until compliance with the Information Orders would be disproportionate.

Conclusion

317. For the reasons given above, the Compliance Application is granted, though not in its entirety. It is declared that the Information Orders in the Second DIFC Injunction have been in effect since they were made and the Defendants subject to them have been bound since notification of the Second DIFC Injunction to comply with the Information Orders. D1 and D2 are ordered to comply with the Information Orders.

Costs

318. D1 and D2 shall pay C her costs of the application on the standard basis, to be assessed by registrar if not agreed.

The Variation Application

319. By the Variation Application, D2 seeks orders varying the Information Orders so as to extend time for compliance until 14 days from the date of the varied order (the **"Extension Request"**) and to permit the disclosure to be made to the Court alone until it is finally determined that the Court has jurisdiction (the **"Custody Request"**).

D2's arguments

320. The Extension Request is explained in the Fourth Witness Statement of Tyne Hugo dated 20 September 2020 (**"TH4"**):

> 15. As to the request for an extension of time, the Second Defendant draws the attention of the Court to the fact that she has acted in good faith and on legal advice [with regards to her construction of the meaning and effect of [4] of the Second DIFC Order], which is similar to the advice which has been given to the other Defendants who are legally represented in these proceedings. An extension of time will enable her to attend to the provision of the information without any threat of contempt proceedings by the Claimant.
>
> 16. As to the time for compliance, the Claimant's draft Order is impossible on any view to comply with and a reasonable time for compliance should be allowed bearing in mind that amongst the information required is the valuation of all assets held by the Second Defendant to determine whether or not they are required to be disclosed and, if so, what their respective values are. To the extent they include land, the determination of accurate land valuations in Dubai is necessarily problematic at the moment, and to the extent they include shares in unlisted companies such as [QH Ltd] a proper accounting analysis will be necessary.

321. As to the Custody Request, D2 submits that unless the Court is the custodian of the information sought, she will be placed in a position where her interests could be permanently damaged by the release of confidential information to persons who, "in the separate opinions of the Moldovan, Russian and United States Governments and the European Parliament have been involved in corrupt and dishonest acts and who on their own evidence have behaved unlawfully and dishonestly". The persons D2 refers to are C and her husband. In TH4, it is stated:

> 18. … the Second Defendant is concerned that the information which has been sought will be used improperly. She has already given sworn evidence in the previous proceedings of the threats which have been made against her and which have been the subject of formal complaints to the police lodged on her instructions by her lawyers…
>
> 20. The Second Defendant is so concerned about the harm which the Claimant and/or her husband might procure to befall her that she has taken steps to augment her security, including by way of installing bullet proof glass in her home at significant cost.
>
> 21. In addition to these matters –
>
> a. As disclosed in the Claimant's Affidavit of 22 April in these proceedings, the Claimant and her husband were [earlier in] 2020 publicly designated by the United States Department of State as having been involved in significant corruption…;
>
> b. As disclosed in Exhibit 7 to [the Affidavit for D2] in the Cyprus proceedings…, the Claimant and her husband are alleged to have engaged in money laundering in a report prepared by the National Bank of [an Eastern European country] by a leading international forensic account firm…;
>
> c. As disclosed in Exhibits 10 and 11 to [the Affidavit for D2] and confirmed by the Claimant's Affidavit in these proceedings…, the Claimant's husband has made deliberately false statements to the Parliament of [an Eastern European country]… in relation to his assets and his relationship with the Claimant;

d. As disclosed in Exhibit 1 to [the Affidavit for D2]… and paragraph 103 of the Applicant's Affidavit of 12 April 2020 in these proceedings, the Claimant has deliberately made false statements to the immigration authorities in the United Arab Emirates in relation to her relationship with her husband;

e. Despite the Claimant's denial of knowledge of the requirements of international anti-money laundering laws…, as disclosed in Exhibit 8 to [the Affidavit for D2] the Claimant's husband has been found by Courts in England and Scotland to have engaged in asset concealment;

f. Notwithstanding the concluding words of paragraph 99 of the Claimant's Affidavit of 12 April 2020 in these proceedings,… the Claimant… has been aware of the illegality of the arrangements she claims to have made but has given no evidence to the Court of having "taken immediate steps to tell (her) advisors to fix the problem and pay any fines due"; and

g. Despite each of the matters referred to in paragraphs (a) to (e) above being the subject of evidence and submissions before this Court in proceedings CFI-074-2019, the Claimant has not responded to that evidence before this Court beyond bare assertion… that the State Department designation referred to in paragraph (a) was incorrect and is the subject of challenge in the United States.

322. D2 submits that, until it is has been finally determined that the Court has jurisdiction to determine the claim, C will have the protection of continuing updates to the information already provided. In TH4 it is stated:

25. Each of these matters [in [24] of TH4, cited in the previous paragraph] is highly relevant to the Second Defendant's application disputing jurisdiction, and, in the event that jurisdiction is found to exist, the prospects of success of the Claimant's claim and hence the appropriateness of the Freezing Order: it is the Second Defendant's position that given inter alia the… deficiencies in the Particulars of Claim, which do not comply with Rules 17.36 to 17.47 in numerous respects, the Claimant's claims have no realistic prospect of succeeding.

323. Moreover, D2 says that the return date hearing of the application which resulted in the Second DIFC Injunction is likely to be scheduled in the near future and at which time D2 will, for the first time in the Second DIFC Proceedings, have the opportunity to argue that even if the Court has jurisdiction, the Second DIFC Injunction and so too the Information Orders should not have been made.

324. D2 also avers that C seeks the information for purposes other than monitoring compliance with the Second DIFC Injunction "and is accordingly… an abuse of the process of the Court". D2 here refers to the following from C's witness statement dated 31 August 2021: "I also wish to reiterate how my efforts in these proceedings to date to find out about [D3 Ltd] have been frustrated by the refusal of the Defendants to provide information pursuant to the interim orders in these and the previous proceedings".

325. These matters, coupled with "the weakness of and inconsistencies in the case advanced by the Claimant", make it appropriate, D2 contends, for C to not be provided with the information at this point in time.

C's arguments

326. C submits that the US Department of State's designation is not a finding nor based upon any charge of wrongdoing; it is a measure with immigration consequences only, made on the basis of "bare and politically motivated allegations against her husband alone". The designation is being challenged in the US and in all the circumstances, C contends, it is "unsafe and incapable of tainting [C's] case against these Defendants with any criminality". C argues that, in any event, the allegations of criminality do not amount to a good reason for the concerned Defendants failing to comply with the Information Orders.

327. C submits that the requirement for injuncted parties to provide information about their assets is an important component of freezing orders:

it is essential for its integrity and effectiveness, and in the present case, by reason of the denial by the Defendants that they are bound by the Freezing Order, there is a heightened risk and corresponding enhanced imperative that it should be complied with.

C says that the effect of non-compliance for her would be to jeopardise the freezing order that has been made for her protection.

328. As regards the Custody Request, C highlights that the sealed envelope suggestion has twice been rejected by this court in the First DIFC Proceedings, by myself in an urgent variation application and by H.E. Deputy Chief Justice Al Mheiri at the return date hearing. C says the suggestion "is contrary to the principle of open justice and to the effect and purpose of information orders

granted in support of freezing orders". C reminds the Court of her undertaking that information provided can only be used in these proceedings.

329. C argues that the suggestion that the information be concealed from C is calculated to frustrate the monitoring of compliance with the Second DIFC Injunction and to prevent the scrutiny by C of D2's assets, and so undermine and potentially destroy the effectiveness of the freezing order: "In cases of complex corporate and nominee holding structures and the movement of assets and funds between them, as potentially here, the assistance of the applicant and its advisors is essential to the effective enforcement of the freezing order".

Discussion

330. Disclosure orders play a crucial role in the implementation and policing of freezing orders. An order under RDC r. 25.1(7) is designed to enable a claimant to discover assets which are or may be the subject of an application for a freezing order and/or those assets' whereabouts. D2's submissions in the Compliance Application have given rise to doubts in the mind of C as to whether D2 has complied with the Second DIFC Injunction. In my view, and while noting D2's reassurance that her assets have not been dissipated, one can sympathise with these doubts.

331. To deal with the Extension Request first, this request is supported by D2's construction of [4] of the Second DIFC Injunction and the difficulty D2 will have with complying with the time limit sought by C. I do not think that D2's strained construction of [4] of the Second DIFC Injunction provides any support to the Extension Request for the reasons given in the Compliance Application. It follows from this, in my judgment, that an extension of time to comply with the Information Orders is not appropriate.

332. As to the Custody Request, D2's proposal that information be supplied to the Court in a sealed envelope, I do not think that information supplied in this way would be of much utility. It is evident from the terms of RDC r. 25.1(7) that the rule is intended to provide support to freezing orders whether already in effect or before being made. In these proceedings, there is an extant freezing order. In my judgment, both C and the Court are entitled, in the absence of a good reason, to information required to know whether the order is being complied with.

333. Moreover, D2 asks that the Court retains custody of the information sought only until it is finally determined that the Court has jurisdiction to hear and determine the claim. Having determined that the Court does so have jurisdiction in this matter, the foundation of the Custody Request falls away. More importantly, however, I am not convinced that it was a solid foundation in the first place.

334. If D2's allegations against and concerning C and her husband are presumed correct, whether or not the Court finds a good arguable case as to jurisdiction—a relatively low standard to meet—seems to me to be an arbitrary condition upon which a party might withhold from or disclose to persons confidential information who may be involved in corrupt and dishonest acts and capable of permanently damaging the first party's interests. While the handing over of sensitive information will have been in vein if the Court later finds it had no jurisdiction in the first place, the justified frustration and disappointment that would come from that seems to me to be superficial compared to any actual risks which presumably will be the same whether the Court finds that it does have jurisdiction or does not if the information is supplied: in both circumstances, sensitive information is placed into the hands of people capable of causing harm.

335. Moreover, D2 has not outlined how her interests might be harmed nor why C and her husband should be expected to cause such harm. While the allegations and concerns are of a serious nature, insofar as they concern C and her husband generally they include corruption and money laundering but not, say, the misappropriation of individuals' assets (though it is acknowledged that, on D2's case, C is wrongfully attempting to deprive D2/a company she is the UBO of the proceeds of Yacht in these proceedings), while insofar as they concern D2, they relate to her personal safety. If D2 believed that giving C custody of information relating to her assets would put her wellbeing or life in jeopardy or greater jeopardy, I would have expected her to give the Court a thorough and clear explanation of this. And inasmuch as D2's fears about C and her husband and about her own safety and the nature of the information required to be provided to C under the Second DIFC Injunction do not, based on the submissions made to the Court, seem connected to each other in any significant way, while, on D2's case, C may not be an ideal candidate for being in custody of sensitive information about her, and with C's undertakings not to use any information obtained outside of these proceedings in mind, I do not see a sufficient basis for modifying the standard Information rders in the Second DIFC Injunction.

<u>Conclusion</u>

336. For the reasons given above, I do not think that D2 has demonstrated that the Information Orders should be varied. Accordingly, the Variation Application is dismissed.

Costs

337. D2 shall pay C her costs of the application on the standard basis, to be assessed by a registrar if not agreed.