Neutral Citation Number: [2020] EWHC 3527 (Ch)

Case No: CH-2020-000148

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS**
**OF ENGLAND AND WALES**
**APPEALS (Ch D)**

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

Date: 21/12/2020

**Before**:

**MR JUSTICE MORGAN**

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**Between:**

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|---|---|
| **SATFINANCE INVESTMENT LIMITED** | **Appellant** |
| **- and -** | |
| **ATHENA ART FINANCE CORP** | **Respondent** |

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**Charles Dougherty QC** and **Richard Edwards QC** (instructed by **Seladore Legal Ltd**) for the **Appellant**
**Philip Shepherd QC** (instructed by **Trowers & Hamlins LLP**) for the **Respondent**

Hearing date: 16 November 2020

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# Approved Judgment

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

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MR JUSTICE MORGAN

**Covid-19 Protocol: This judgment is to be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date for hand-down is deemed to be at 10.30 am on 21 December 2020.**

## MR JUSTICE MORGAN:

*Introduction*

1. This is an appeal against the order of Chief Master Marsh, made on 2 June 2020, to give effect to the judgment which he handed down on 26 May 2020. The application which was before the Chief Master was an application by the Fourth Defendant in these proceedings, Athena Art Finance Corp ("Athena"), to set aside an order made, *ex parte*, by Roth J on 1 November 2019, whereby the Claimant, Satfinance Investment Ltd ("SIL"), was granted permission to serve these proceedings on Athena, out of the jurisdiction. By his order of 2 June 2020, the Chief Master set aside the permission to serve out of the jurisdiction and, as a consequence, he also set aside other orders which had been made against Athena by Roth J on 1 November 2019 and which had been continued thereafter. The Chief Master refused to grant to SIL permission to appeal his order but permission to appeal was granted by Mann J on 22 August 2020.

2. The following is a brief summary of what is involved in these proceedings and in the present appeal. By its claim in these proceedings, SIL asserts legal and beneficial ownership of a valuable painting entitled 'Humidity' ("the painting") by the New York artist, Jean-Michel Basquiat. SIL says that it acquired its rights to the painting pursuant to an agreement made by it with the First and Second Defendants, Mr Philbrick and Inigo Philbrick Ltd ("IPL") respectively. SIL wishes to assert its rights to the painting against Athena who claims to be entitled to the painting under arrangements it made with the Third Defendant, Boxwood Green Ltd ("Boxwood"), a company registered in Jersey. Athena's claim is based on a transfer (or a purported transfer) of title in the painting by IPL to Boxwood and then the grant by Boxwood to Athena of a security interest in the painting.

3. On 30 October 2019, SIL issued the present proceedings against (1) Mr Philbrick, (2) IPL, (3) Boxwood and (4) Athena. SIL served Mr Philbrick and IPL within the jurisdiction on the basis that Mr Philbrick is resident in England and Wales and IPL is incorporated in England and Wales.

4. Upon issue of the proceedings, SIL applied for permission to serve the proceedings out of the jurisdiction on Athena and for interim relief to restrain dealings with the painting. SIL's applications were considered by Roth J on 1 November 2019 at an *ex parte* hearing. SIL had attempted to give informal notice of the hearing to Mr Philbrick and IPL but those parties did not participate in the hearing. The applications in relation to Athena were heard *ex parte*.

5. On 1 November 2019, Roth J granted permission to SIL to serve the proceedings out of the jurisdiction on Athena. He also granted interim relief restraining the Defendants from dealing with the painting. That interim relief was continued by me on 13 November 2019.

6. Roth J granted permission to SIL to serve Athena out of the jurisdiction on the ground, set out in CPR PD6B paragraph 3.1(3), to which I will refer as "the necessary or proper party gateway" or "gateway 3". The order was made on the basis that Mr Philbrick and IPL were anchor defendants, that as between SIL and the anchor defendants there was a real issue which it was reasonable for the English court to try

and that Athena was a necessary or proper party to SIL's claim against the anchor defendants. Further, the order was made on the basis that England was the proper forum for the claim.

7. On 10 December 2019, Athena applied for an order setting aside the order of 1 November 2019 permitting service on it out of the jurisdiction and for orders dismissing the claim against it and setting aside the interim relief as against it.

8. Athena's application was heard by the Chief Master on 17 March 2020. He handed down his reserved judgment on 26 May 2020 and, in consequence, he made the order, now under appeal, on 2 June 2020. The Chief Master held that, as at 1 November 2019, Mr Philbrick and IPL were not going to defend the claims against them and, in consequence, there was no real issue between SIL and Mr Philbrick and IPL which it was reasonable for the court to try, with the result that SIL had not established that the claim came within gateway 3. In those circumstances, the Chief Master did not have to consider whether England was the proper forum for the claim but he went on to hold that if gateway 3 had been established, he would not have concluded that England was the proper forum.

9. On this appeal, SIL submitted that the Chief Master was wrong about gateway 3 and about the proper forum for the claim. In addition, SIL relied on the fact that, on or about 19 May 2020, SIL joined, as a Fifth Defendant, Delahunty Ltd ("Delahunty"), a company incorporated in England and Wales. SIL said that Delahunty can now be regarded as an anchor defendant, that is, a defendant in relation to whom there is a real issue which it is reasonable for the court to try. SIL also said that Athena is a necessary or proper party in relation to SIL's claim against Delahunty and England is the proper forum for the claim. The Chief Master did not deal with the possibility of upholding the grant of permission to serve out of the jurisdiction by reference to the joinder of Delahunty but, on the appeal, I was asked by SIL to deal with the case on that basis, if that were necessary to uphold the grant of permission to serve Athena out of the jurisdiction.

*The parties*

10. I can take a more detailed description of the parties from the judgment of the Chief Master, to which I will add a reference to Delahunty.

11. SIL is incorporated in the BVI and managed from Montreux in Switzerland. Mr Boris Pesko is SIL's ultimate owner. His son, Aleksandar Pesko, is a UK citizen and lives in London. SIL owns real estate holdings in London and various art works and financial instruments. From now on, references to Mr Pesko are to Mr Aleksandar Pesko.

12. Mr Inigo Philbrick is a US citizen who had been resident in Florida and London. He is the sole director and sole shareholder of IPL. IPL was set up in April 2014 as a company incorporated in England and Wales with a registered office in London. It carried on business from an art gallery in Davies Street, London W1.

13. Boxwood is a company incorporated in Jersey. It is owned and controlled by Mr Philbrick and/or IPL. Until recently, Boxwood had nominee directors from a service provider in Jersey named Valla Limited. However, Valla has terminated its

arrangement with Mr Philbrick and IPL and Mr Philbrick is now the sole director of Boxwood.

14. Athena is a company incorporated in the state of Delaware in the United States and carries on business in New York, specialising in providing credit secured on works of art. Athena has no presence in England and Wales.

15. Delahunty is a company incorporated in England and Wales and carries on business as an art dealer under the name Delahunty Fine Art from premises in Bruton Street, London W1.

*The facts*

16. The Chief Master set out what he took to be the facts on which he should base his decision. As will appear later in this judgment, Athena applied to adduce further evidence on the appeal and that evidence included material as to the whereabouts of Mr Philbrick in the period leading up to 1 November 2019. At this stage in the judgment, I will refer to the facts as described by the Chief Master and I will refer to the further evidence separately later.

17. Mr Philbrick and Mr Pesko met in 2013 moving in the same social circle in London. Mr Pesko said he had developed an interest in modern art and had recognised that it could be a suitable alternative investment class for SIL. Over a period of time, Mr Philbrick, through IPL, introduced to Mr Pesko seven works of art that were purchased by them as 'partners' and sold at a profit.

18. In August 2016, Mr Pesko and Mr Philbrick agreed to purchase the painting jointly for $18.4 million and on 11 August 2016 they signed a document described as a 'Partnership Agreement'. (It is referred to in an invoice of the same date as a "Side Letter"). Under the Partnership Agreement:

    (1) SIL agreed to contribute US$12.2 million to the purchase of the Painting and IPL agreed to contribute US$6.2 million;

    (2) of SIL's US$12.2 million contribution, US$3 million was treated as a senior loan by SIL to IPL; the senior loan was secured against the painting and would be senior to IPL's US$6.2 million contribution;

    (3) SIL would hold "full title" to the painting;

    (4) subject to SIL's full title, SIL and IPL would hold jointly the painting and would share equally in any profit or loss;

    (5) IPL would retain possession of the painting and it would be kept at IPL's storage facilities in London or Zurich.

19. The Partnership Agreement does not specify a governing law. It was made in London and both Mr Philbrick and Mr Pesko were resident in London. The principal pointer to a legal system other than England is that the painting was in New York at the time the agreement was made and the lex situs would naturally govern the transfer of title and the manner in which the title was held.

20. Mr Pesko was given a copy of a Bill of Sale dated 10 August 2016 for the painting showing a purchase price of $18.4 million and IPL as the buyer of the painting from SKH Management Corp of 1875 Lexington Avenue New York 10035. Mr Pesko noticed that the signature on the Bill of Sale was not attributed to anyone and he could not locate SKH Management Corp at the given address. He was later given a copy of an amended version of the Bill of Sale with SKH's address amended to its registered office and stating it was signed by a director. It seems likely both documents are forgeries. SKH Management Corp is a grocery firm in Philadelphia and the address given for SKH in New York has no obvious connection with the sale of valuable works of art. The core element of SIL's case is that a dishonest representation about the purchase price of the painting was knowingly made by Mr Philbrick on behalf of himself and IPL and the representation was relied on by SIL.

21. IPL produced an invoice addressed to SIL dated 11 August 2016 for US$12.2 million that referred to SIL acquiring a 66% share in the painting. Payment under the invoice was to be made to IPL at its account at HSBC Bank. The invoice contained a note:

> "Partnership detailed in side letter dated 11 August 2016. Full title to be transferred from Inigo Philbrick Limited to SatFinance upon receipt of above balance. Zero rated for VAT as artwork in USA at time of sale."

22. SIL paid the sum due under the invoice in two tranches. SIL took no steps to obtain any security for the payment it made or for its share of the painting.

23. The stated purpose of the Partnership Agreement was for the painting to be sold at a profit. Over a period lasting between August 2016 and October 2019 Mr Philbrick told Mr Pesko that he was making efforts to sell it. In early 2019 the painting was sent to an exhibition in Japan. At around the time of the hearing before Roth J on 1 November 2019, it was returned to New York where it remained in Athena's custody.

24. Mr Pesko says that, on about 10 October 2019, Mr Philbrick confessed to him that the painting had been used by Boxwood as collateral for a loan from Athena and Mr Philbrick provided Mr Pesko with a number of documents relating to that transaction. It also emerged that the painting had in fact been acquired by IPL from a customer of Phillips Auctioneers LLC for US$12.5 million. Mr Philbrick told Mr Pesko there had been additional consideration in the form of two paintings and payment of US$2 million but no evidence of the additional consideration has been produced by him.

25. During the week commencing 14 October 2019, Mr Pesko took steps to instruct Grossman LLP in New York and Signature Litigation in London on behalf of SIL. On 24 October 2019, Mr Pesko was told by Mr Delahunty, of Delahunty, that he had invested US$2.75 million to acquire a 12.5% interest in the painting. Delahunty was not joined as a party to the claim when it was issued but its interest was referred to in Mr Pesko's witness statement that was before Roth J on 1 November 2019.

26. I will now refer to the facts in relation to Athena as described by the Chief Master.

27. On 20 January 2017, IPL entered into a chattels mortgage with Athena that provided security for a facility agreement of the same date; the facility agreement itself was not in evidence. The chattels were four artworks that did not include the painting.

28. On 31 March 2017, Boxwood entered into a Loan and Security Agreement ("the LSA") with Athena. The LSA was subject to the law of New York "… including all matters of construction, validity and performance …" and the LSA provided for the parties to submit to the non-exclusive jurisdiction of the Supreme Court of the State of New York and of the District Court of the Southern District of New York. Under the LSA, Athena agreed to provide Boxwood with a revolving loan facility of up to US$10 million secured against the "Artwork Collateral Pieces". As at 31 March 2017, the five artworks did not include the painting. However, the LSA permitted works to be added and it is common ground that at a later stage the painting was added as collateral by an amendment to the LSA and that in 2018 the loan was increased by Athena to US$13.5 million.

29. Under the LSA:

    (1) Boxwood granted Athena a security interest in the collateral: clause 3.1;

    (2) the security interest is described as a continuing interest until all obligations are discharged: clause 3.3;

    (3) all artworks were to be stored at approved locations: clause 5.5;

    (4) Athena had a right to take possession of all items of collateral not already in its possession: clause 8.3.

30. A number of other associated security documents were executed at the same time as the LSA, including a personal guarantee by Mr Philbrick, a corporate guarantee by IPL, a Promissory Note between Boxwood and Athena and an Agreement of Subordination and Assignment between Boxwood, Mr Philbrick, IPL and Athena.

31. Valla has responded to a disclosure order made in Jersey and provided SIL with a considerable number of documents from its records as Boxwood's corporate services provider. Some shed light on how the purported transfer of title in the painting into Boxwood's name came about. It is relevant to note the following:

    (1) on 20 March 2017 a services agreement was made between Boxwood and IPL under which any artwork owned by Boxwood could be held by IPL to the order of Boxwood;
    (2) on 28 March 2017 Boxwood entered into a consultancy agreement with Mr Philbrick to advise Boxwood on the acquisition of artwork;
    (3) a services agreement was made between Boxwood and IPL (and amended on 30 March 2017) in relation to the purchase and financing of artwork;
    (4) the LSA and associated documents were entered into on 31 March 2017;
    (5) the painting (described as "the large Basquiat") was referred to in an email from Robert Newland of Arcor (he is an associate of Mr Philbrick) to Athena dated 3 April 2017 as the "final work for the $10m facility"; Athena was pressed by Mr Newland to complete its appraisal of the painting so that the drawdown of the US$10 million could take place; Mr Philbrick was copied with these emails;

    (6) on 7 April 2017, Mr Philbrick sent Mr Newland and Athena a transfer of title document between IPL and Boxwood that refers to an invoice dated 7 April

2017; the document states that "all right, title and interest" in the painting was transferred to Boxwood for "good and valuable consideration";

(7) the invoice which is dated 6 April 2017 is for US$12.5 million and is addressed to Boxwood; it records that the painting was in the USA at the date of the invoice;

(8) on 7 April 2017, Boxwood made a Draw Request for US$3.25 million and an email from Athena to, amongst others, Mr Philbrick on the same date says "we [Athena] have funded the $3.25 draw"; after deduction of Athena's expenses, US$3.245 million was received by Boxwood;

(9) on 10 April 2017, Boxwood paid US$3.235 million to IPL; this left the balance of US$9,265 million on the invoice from IPL to Boxwood outstanding as an informal loan between the two entities;

(10) on 17 April 2017, Athena gave notice that the painting had been added to the collateral under the LSA;

(11) Boxwood's records include a letter from Mr Philbrick to the directors of Boxwood ratifying the decision of the directors to purchase the painting for US$12.5 million from IPL; Mr Philbrick is described in the letter as the sole beneficial shareholder of Boxwood.

32. Boxwood's intermediate position between IPL and Athena may be significant in relation to the possibility of title being transferred by Boxwood to Athena. SIL contends that Boxwood was not a buyer in the ordinary course of business acting in good faith for the purposes of New York law.

*SIL's claim*

33. The following description of SIL's claim is taken from the Chief Master's judgment.

34. SIL's claim is based on the premise that the Partnership Agreement was made between SIL and IPL (not with Mr Philbrick personally). If the Partnership Agreement is looked at in isolation, there might be real doubt about whether IPL was a contracting party. IPL is not mentioned anywhere in the agreement which is stated to be made between SIL and Mr Philbrick. Further, Mr Pesko and Mr Philbrick signed it in their own names without attributing their signature to the relevant corporate entity.

35. On the face of the agreement, which is clearly informal in its drafting, it appears to be made between SIL and Mr Philbrick (not IPL); but the drafting is uneven. The agreement refers to "SatFinance" and "AP" (i.e. Mr Pesko) interchangeably but only refers to "IP" and not IPL. It states that:

(1) that Mr Pesko and Mr Philbrick intend jointly to purchase the Painting;

(2) that the sums SIL will pay and the loan by SIL are payable to Mr Philbrick;

(3) "… AP and IP agree …" followed by the arrangements as to ownership and title.

36. SIL's pleaded case about the identity of the parties to the Partnership Agreement is not crystal clear. No case is made about the identity of the parties on the proper construction of the agreement. However, the invoice from IPL to SIL which bears the same date as the agreement can be considered with the agreement. Counsel then appearing for SIL made the forensic point to the Chief Master that it was contrary to Athena's interests to assert that Mr Philbrick was the purchaser since its case depended upon IPL acquiring title to the painting. In any event, the Chief Master was satisfied there was a real prospect of SIL establishing that the parties to the agreement were SIL and IPL. If there was a point to be made about the way in which SIL's case is pleaded, the Chief Master considered that it was one that was easily cured or clarified.

37. The Chief Master summarised SIL's case as follows:

(1) "full title" to the painting had the effect of transferring legal title to the painting to SIL with the beneficial title to be shared between SIL and IPL equally, save that IPL's share was charged as security for the Senior Loan;

(2) IPL acted as SIL's agent and Mr Philbrick was responsible for its performance and therefore they both owed fiduciary duties to SIL (as set out in paragraph 13 of the particulars of claim);

(3) IPL in fact purchased the Painting for USD 12.5 million pursuant to a private buyer agreement dated 27 July 2016 and that accordingly SIL's contribution to the purchase price was not 66% as Mr Pesko believed but over 97%;

(4) IPL and Mr Philbrick made a representation about the purchase price that they knew to be false and SIL was induced to enter into the Partnership Agreement in reliance on it;

(5) IPL is precluded from claiming any equitable interest in the painting and any equitable interest that IPL would otherwise be able to assert is held on constructive trust for SIL;

(6) under New York Law a security interest, such as that purportedly granted by Boxwood to Athena in the painting, is enforceable only if the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party: Uniform Commercial Code 9-203(b)(2);

(7) Boxwood did not have any rights in the painting or any power to transfer rights in the painting to Athena;

(8) IPL had no rights it could transfer and, even if it did, such a transfer was expressly prohibited by the terms of the Partnership Agreement;

(9) Under New York law, IPL had limited power to transfer SIL's rights but only to a buyer in ordinary course of business: UCC 2-403(2); a buyer in ordinary course of business means a person that buys in good faith without the knowledge that the sale violates the rights of another person in the goods and does not include a person that acquires goods as security for a money debt: UCC 1-201(b)(9);

(10) SIL applies for declaratory relief concerning title to the painting and Athena's lack of interest or security, injunctions restraining dealing with the painting and delivery up and damages.

*Gateway 3 – the legal principles*

38. SIL was granted, by Roth J, permission to serve Athena out of the jurisdiction on the ground set out at CPR PD6B 3.1(3), to which I have referred as the necessary or proper party gateway, or gateway 3. This gateway is in these terms:

> "3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where – […]
>
> (3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.*"*

39. In *Lungowe v Vedanta Resources Plc* [2019] UKSC 20, [2019] 2 WLR 1051, Lord Briggs at [20] summarised the elements the court must consider, in relation to gateway 3, in the following way:

> "… the claimant must demonstrate as follows:
>
> i) that the claims against the anchor defendant involve a real issue to be tried;
>
> ii) if so, that it is reasonable for the court to try that issue;
>
> iii) that the foreign defendant is a necessary or proper party to the claims against the anchor defendant;
>
> iv) that the claims against the foreign defendant have a real prospect of success;
>
> v) that, either, England is the proper place in which to bring the combined claims or that there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place, or the convenient or natural forum."

40. In his judgment, the Chief Master set out the following summary of the principles, relating to gateway 3, taken from the judgment of Andrews J, as she then was, in *Gunn v Diaz* [2017] 2 All ER (Comm) 129, at [86]:

> "i) The "necessary or proper party" gateway is anomalous, in that, by contrast with the other heads of jurisdiction, it is not founded upon any territorial

connection between the claim, the subject-matter of the relevant action, and the jurisdiction of the English courts: *AK Investment* at [73];[1]

ii) The prospect of proceedings having to take place in more than one jurisdiction will never be enough, in and of itself, to justify the joinder of a foreign defendant: *AK Investment*, per Lord Collins at [73], adopting the well-known dictum of Lloyd LJ in *Golden Ocean Assurance Ltd v Martin* [1990] 2 Lloyd's Rep 215 at 222:

> "... caution must always be exercised in bringing foreign defendants within our jurisdiction under Order 11 r 1(1)(c). It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction."

iii) The claimant must show that a claim is made against a defendant on whom the claim form has been or will be served (otherwise than in reliance on the "necessary or proper party" gateway). Service on that anchor defendant may be within the jurisdiction; outside the jurisdiction without permission if permission is unnecessary; or outside the jurisdiction with permission, if permission is required: *Alliance Bank JSC v Aquanta Corporation and others* [2012] EWCA Civ 1588 [2013] 1 All ER (Comm) 819, at [79].

iv) The mere fact that defendant A is sued only for the purpose of bringing in B as a defendant is not fatal to the application for permission to serve B out of the jurisdiction, but it is a factor in the exercise of the court's discretion: *AK Investment* at [76] – [79], reiterated and applied in *Nilon Ltd and another v Royal Westminster Investments SA and others* [2015] UKPC 2, [2015] 3 All ER 372.

v) The court must first ask itself, viewed in isolation, (a) whether there is a real issue to be tried between the claimant and the anchor defendant on the merits, (i.e. one with a real, rather than fanciful, prospect of success) and (b), if so, whether it is reasonable for the English court to try that claim: *Erste Group Bank AG v JSC "VMZ Red October"* [2015] EWCA Civ 379 [2015] 1 CLC 706.

vi) The question whether it is reasonable for the English court to try the claim between the claimant and the anchor defendant is an objective one: it is not the same question as whether it was reasonable for the claimant to start proceedings against that defendant within the jurisdiction: *Erste Group Bank* at [48].

vii) If the anchor defendant has failed to acknowledge service or is not defending the claim, there is highly unlikely to be a real issue to be tried which it is reasonable for the court to try: a fortiori if the claimant has entered default judgment or summary judgment already, see *Erste Group Bank* at [78] and [136];

[1] *AK Investment CJSC v Krygyz Mobil Tel* [2011] UKPC 7

viii) It is only if both limbs of PD 3.3(1)(a) are satisfied that the court should go on to consider, under sub-paragraph (b) whether there is a good arguable case that B is "a necessary or proper party" to the claim between the claimant and A: *Erste Group Bank* at [38].

ix) The question whether B is a "proper party" to the claim against A is answered by asking: "supposing both parties had been within the jurisdiction, would they both have been proper parties to the action?" *AK Investment* at [87], (applying *Massey v Heynes & Co* (1888) 21 QBD 330); *Nilon Ltd* especially at [15]. B will be a proper party if the claims against A and B involve one investigation or there is a sufficient "common thread" between them."

41. It is clearly established that, on an application to set aside the grant of permission to serve out of the jurisdiction, the court decides the issues arising by reference to the position at the time that the permission was originally granted and not by reference to the position at the time the application to set aside is heard. In *Erste Group Bank AG v JSC 'VMZ Red October'* [2015] 1 CLC 706 at [44] Gloster LJ in giving the judgment of the court said:

> "The parties did not dispute the proposition that an application to set aside permission to serve out of the jurisdiction falls to be determined by reference to the position at the time permission is granted, not by reference to circumstances at the time the application to set aside is heard: see per Hoffmann J (as he then was) in *ISC Technologies v Guerin* [1992] 2 Ll Rep 430 at 434-435."

42. Gloster LJ then cited a number of authorities which applied this proposition. The proposition applies to all aspects of an application for permission to serve out of the jurisdiction, not just forum conveniens. In *Erste Group Bank*, Gloster LJ went on to say at [45] that:

> "… permission which was rightly granted will not be discharged simply because circumstances have changed, although, as Hoffmann J observed in *ISC Technologies*, subsequent events may throw light upon considerations which were relevant at that time."

43. In a typical case, the grant of permission to serve out of the jurisdiction will have been granted at an *ex parte* hearing on the basis of the evidence adduced by the claimant alone but when the court considers an application to set aside the original grant of permission, the matter will be considered at an *inter partes* hearing on the basis of evidence adduced by all relevant parties. Nonetheless, the further evidence must be directed at the situation at the date when permission was originally granted: see *Mohammed v Bank of Kuwait* [1994] 1 WLR 1483 at 1492 per Evans LJ and *Microsoft Mobile OY v Sony Europe* [2018] 1 All ER (Comm) 419 at [93] per Marcus Smith J. In the present case, the relevant date is 1 November 2019, when permission to serve out was granted by Roth J.

44. The questions as to whether there is real issue between the claimant and the anchor defendant and whether that issue is one which it is reasonable for the court to try have been considered in a number of cases to which it is relevant to refer. Clearly, there will not be a real issue between the claimant and the anchor defendant if the claim

against the anchor defendant is bound to fail: the claim must give rise to a serious issue to be tried: see *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at [80]-[85]. But gateway 3 requires something more than a viable claim against an anchor defendant.

45. In *ISC Technologies v Guerin* [1992] 2 Lloyd's Rep 430, Hoffmann J held that there were real issues between the claimant and some of the anchor defendants (Mr Radcliffe and TAI) when, at the relevant time, the action against those two defendants "appeared to be still alive" even though, subsequently, TAI did not give notice of intention to defend and it was doubtful whether Mr Radcliffe was worth pursuing to trial on his own: see the findings at 433 and 434.

46. In *Erste Group Bank AG v JSC 'VMZ Red October'*, it was said that the question was whether it was reasonable for the English court to "try the issue", whether in summary judgment proceedings or otherwise: see at [48]. In the same case, at [78], the court held that there was no real issue between the claimant and the anchor defendants which it was reasonable for the English court to try for a combination of reasons, which included the facts that: (i) at the date of the grant of the original permission to serve out, the contractual claims against the anchor defendants were not being contested by the anchor defendants; (ii) the claimant was pursuing the anchor defendants in Russian insolvency proceedings; (iii) and although the claimant was also claiming damages for conspiracy, the conspiracy claim duplicated the contractual claims and it was difficult to see any utility in the court trying the conspiracy claim.

47. In *Gunn v Diaz*, it was held that there was "no particular advantage" for the claimants to be gained from the English court trying a claim against an anchor defendant and, accordingly, gateway 3 was not established: see at [99]-[100].

48. In *Microsoft Mobile OY v Sony Europe*, there was no real claim for the court to try because the claim was the subject of a compulsory reference to arbitration.

49. There was an issue in this case as to whether, as at 1 November 2019, the anchor defendants had any intention of defending the claim against them. Athena said that the correct finding was that, as at 1 November 2019, the anchor defendants had no such intention and, as a result, there was at that date no real issue between SIL and the anchor defendants which it was reasonable for the court to try. SIL did not accept that that was the correct finding and made further submissions as to the application of gateway 3, even if that had been the correct finding.

50. SIL submitted that I would be assisted by the decisions of Coulson J and of the Court of Appeal in *Lungowe v Vedanta Resources plc*, reported at [2016] BCC 774 and [2018] 1 WLR 3575, respectively. Those courts did consider a submission based on *Erste Group Bank* as to whether there was a real issue between the Claimant and the anchor defendant which it was reasonable for the English court to try. However, in that case it was not said that the anchor defendant was not going to defend the claim. Accordingly, I do not see those decisions as offering any assistance in the present case where Athena's case is that Mr Philbrick and IPL were not going to defend the claim with the result that SIL could not establish gateway 3.

51. This issue as to the intentions of the anchor defendants as at 1 November 2019 gave rise to discussion as to the test to be applied to the relevant evidence for the purpose

of determining that issue. As this issue arises in relation to the application of gateway 3, the court ought to apply the usual approach to a question of that kind. In the past, the court asked whether the claimant had the better of the argument in relation to the relevant question. However, recent cases have elaborated the test and have offered guidance as to the approach where there are difficulties, on the evidence, in making a confident assessment on the relevant question. This guidance is contained in two decisions of the Supreme Court, namely, *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 and *Goldman Sachs International v Novo Banco SA* [2018] 1 WLR 3683, and both these cases have been considered by the Court of Appeal in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV* [2019] 1 WLR 3514 at [72]-[80]. The relevant guidance can be taken from *Goldman Sachs* at [9] and is in these terms:

> "For the purpose of determining an issue about jurisdiction, the traditional test has been whether the claimant had "the better of the argument" on the facts going to jurisdiction. In *Brownlie v Four Seasons Holdings Inc [2018] 1 WLR 192*, para 7, this court reformulated the effect of that test as follows:
>
> "(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it."
>
> It is common ground that the test must be satisfied on the evidence relating to the position as at the date when the proceedings were commenced."

52. In this case, the court is required to consider the evidence which relates to the position at 1 November 2019 and to ask: on that evidence, was there a real issue between the claimant and the anchor defendants which it would be reasonable for the court to try? As part of that assessment, the court will consider what the evidence shows as to the likelihood, assessed at that date, that the anchor defendants would be active defendants.

53. Prima facie, the court should have regard to all of the evidence adduced as to the likelihood, as at 1 November 2019, that the anchor defendants would be active defendants. The evidence could, in principle, include evidence that was not adduced at the hearing at which permission was granted but which was adduced at the hearing of the application to set aside the permission. It ought not to matter that that evidence could not have been obtained at the relevant time if it had been obtained before the hearing of the application to set aside the permission.

54. It is important to stress that evidence which relates to a later period of time and which shows that the anchor defendants were not at the later time active defendants does not

necessarily throw any light on the position at the relevant time. A defendant can change his intentions as to defending a claim between the relevant time and a later time. Conversely, later behaviour might indicate that a defendant did not, at any time, intend to be an active defendant. It all depends on the evidence.

55. Having regard to the above statements of principle, when the Chief Master considered the application to set aside the grant of permission at the hearing on 17 March 2020, he was entitled to take into account all the evidence adduced at the hearing in so far as it threw light on the intentions of the anchor defendants at 1 November 2019.

*Gateway 3 – the Chief Master's decision*

56. In this section of my judgment, references to paragraph numbers are to the paragraphs of the judgment of the Chief Master.

57. Certain matters were not in dispute before the Chief Master. Those matters were:

    i) Mr Philbrick and IPL were the suggested anchor defendants;

    ii) if the anchor defendants were going to participate in the litigation as active defendants:

        a) there would be a real issue to be tried between SIL and the anchor defendants;

        b) it would be reasonable for the court to try the issues between SIL and the anchor defendants; and

        c) Athena would be a necessary or proper party to the claims against the anchor defendants;

    iii) the claims against Athena had a real prospect of success.

58. Thus, the questions which arose in relation to gateway 3 were:

    i) as at 1 November 2019, were the anchor defendants going to be active defendants in the litigation?

    ii) if it were held that, at the relevant time, the anchor defendants were not going to be active defendants in the litigation, did it follow that SIL could not rely on gateway 3?

59. At [36], the Chief Master recorded Athena's submission that, as at 1 November 2019, Mr Philbrick and IPL had no intention of participating in these proceedings with the result that that there was, at that time, no real issue between SIL and them which it would be reasonable for the court to try. Between [42] and [57] of his judgment, the Chief Master considered that submission. He made the following findings:

    i) prior to 1 November 2019, Mr Philbrick had been involved in fraudulent activity in connection with the painting and other artistic works: see at [48] and [54](1);

ii) as at 1 November 2019, Mr Philbrick's activities had either come to light or were about to come to light and he knew that his fraudulent conduct would be revealed: see at [48] and [54](2);

iii) Mr Philbrick did not respond to notice of the hearing on 1 November 2019: see at 54(3);

iv) there was doubt about whether Mr Philbrick was in London on 1 November 2019: see at [46] and [54](4);

v) IPL's gallery in London was found to be closed on 4 November 2019: see at [49];

vi) as at 1 November 2019, Mr Philbrick had either disappeared or was about to do so within a matter of days: see at [54](5).

60. At [55], the Chief Master reached this conclusion:

> "SIL has to show that it had at 1 November 2019 a good arguable case that there was a real issue to be tried that it was reasonable to try; or, put another way, that it had the better of the argument on those points. It seems to me that had the position, as it is now understood, been known on 1 November 2019 SIL would not have been able to discharge the burden placed upon it. The order giving permission to serve out of the jurisdiction was made on the assumption that there was a real issue to be tried as against Mr Philbrick and IPL. The need for there to be a real issue to be tried is central to this gateway and is a prerequisite to considering whether the foreign defendants are necessary and proper parties. If there is to be no trial of issues concerning the anchor defendant, and it is clear the claim will go by default, the claimant is unable to pass through the gateway."

61. At [56], the Chief Master commented that the facts of this case were unusual because it was possible to have regard to subsequent events to interpret the position, as at 1 November 2019, with reasonable certainty.

62. At [57], the Chief Master held that the fact that SIL was seeking a declaration made no difference because that would not result in a trial of the claim in this jurisdiction.

*The further evidence*

63. On this appeal, Athena has applied to adduce further evidence which was not considered by the Chief Master at the hearing on 17 March 2020. Athena says that some of this further evidence throws light on the intentions of the anchor defendants as at 1 November 2019. In particular, it is said that the further evidence relates to the movements of Mr Philbrick before 1 November 2019 which shows that he (and therefore also IPL) did not intend at that date to defend a claim against them by SIL, such as the claim which has been brought.

64. The further evidence adduced by Athena shows that Mr Philbrick was in the United States in October 2019 and that, on 21 October 2019, he travelled to Australia and from there to the Pacific island of Vanuatu. Mr Philbrick travelled to Vanuatu with his girlfriend or fiancée. He remained in Vanuatu until the middle of June 2020 when he left Vanuatu against his will. Although the United States does not have an extradition treaty with Vanuatu some steps or other were taken in June 2020 whereby Mr Philbrick was taken into the custody of the United States' authorities which removed him to Guam and from there to New York. In July 2020, he was indicted in New York on various counts of fraud in the period from 2016 to 2019. These counts included matters relating to the painting in this case. The court in New York refused bail to Mr Philbrick on the ground that he was a flight risk. That assessment was based in part on the fact that he had left the United States in October 2019 to travel to Vanuatu. The New York court considered that Mr Philbrick's reasons for going to Vanuatu were to avoid the civil proceedings which had been brought, or which were likely to be brought, against him. The attorney acting for Mr Philbrick at the bail hearing did not appear to resist the suggestion that Mr Philbrick had fled to Vanuatu to avoid the civil proceedings; indeed, the attorney appeared to argue that Mr Philbrick had gone to Vanuatu to avoid the civil proceedings as distinct from avoiding possible criminal proceedings which might be brought against him.

65. In relation to the application to adduce this further evidence on appeal, relating to Mr Philbrick's movements before 1 November 2019, I will apply the usual approach to such an application. The court has a power, pursuant to CPR 52.21(2)(b), to receive further evidence on appeal. The court will decide whether to exercise such a power in accordance with the overriding objective. To assist the court with its decision it will ask: (i) could the further evidence have been obtained by the use of reasonable diligence in order to be used at the hearing before the Chief Master; (ii) is the further evidence such that it would probably have an important influence on the outcome of the application, though it need not be decisive; and (iii) is the further evidence apparently credible, though it need not be incontrovertible.

66. I will admit the further evidence referred to above. This evidence could not have been obtained with reasonable diligence prior to the hearing before the Chief Master. The essential facts as to Mr Philbrick's movements before 1 November 2019 are not in dispute. As to whether the evidence will have an important influence on the outcome of this appeal remains to be considered but I will admit the evidence so that I can consider the arguments as to its relevance taken together with the other evidence and submissions as to whether, as at 1 November 2019, Mr Philbrick and IPL intended to be active defendants in these proceedings.

*Gateway 3 – the submissions*

67. SIL contended that the Chief Master's conclusion, in paragraph [55] of his judgment, was wrong and should be reversed. SIL emphasised that the facts as to gateway 3 must be assessed as at 1 November 2019. Unlike some of the other cases which have been cited, such as *Erste Group Bank*, the relevant date in this case, for the purposes of gateway 3, was right at the beginning of the proceedings. By that date, there had not really been any time in which Mr Philbrick or IPL could be expected to indicate whether they intended to defend these proceedings.

68. SIL also said that what Athena was asking the court to consider were the subjective intentions of Mr Philbrick at 1 November 2019 but the court should not do that. The court should confine itself to what was objectively known (or knowable) at 1 November 2019 as to whether Mr Philbrick (and in addition IPL) were likely to defend the proceedings. SIL submitted that if there was no reliable evidence at the outset as to whether the anchor defendants would be likely to defend the claim, then the court should not hold that gateway 3 was not established and should not put off the decision to "wait and see" what might happen thereafter. Instead, the right course would be to hold that, in the absence of cogent evidence to the contrary, the application for permission to serve out should be dealt with on the basis that the claim would be defended.

69. SIL further submitted that this might be a case where the nature of the issue and the material available at the interlocutory stage was such that no reliable assessment could be made and so the court should ask whether there was a plausible, albeit contested, evidential basis for holding that, as at 1 November 2019, the proceedings would be defended by the anchor defendants.

70. As to the evidence in this case, SIL submitted:

    i) the fact that Mr Philbrick and IPL were involved in fraudulent activity did not mean that they would not defend themselves; there are many cases of fraudsters who defend the allegations of fraud made against them;

    ii) the fact that Mr Philbrick failed to respond when given informal notice of the proceedings showed nothing;

    iii) the court does not know precisely why Mr Philbrick went to Vanuatu; his attorney in the New York court proceedings appeared to accept that Mr Philbrick was on the run from the civil proceedings but the point that the attorney was trying to make was a different point, namely, that he was not on the run from criminal proceedings;

    iv) even if it were held that Mr Philbrick had gone on the run before 1 November 2019, there are many examples of fraudsters on the run who defend the allegations of fraud against them;

    v) in any case, Mr Philbrick was still in communication with Mr Pesko in October 2019; on 21 October 2019, Mr Philbrick asked Phillips to confirm the purchase of the painting by him (or IPL); SIL also referred to an email from Mr Philbrick on 24 October 2019;

    vi) Mr Philbrick had a child living with its mother in London and, as at 1 November 2019, it should be considered to be unlikely that Mr Philbrick would not return to London.

71. SIL also referred to the position of IPL, as distinct from that of Mr Philbrick. IPL had creditors, including Athena. If a creditor (such as Athena) obtained a winding up order against IPL, then whether IPL would defend the proceedings brought by SIL would be for the liquidator to decide.

72. SIL then addressed a point made by the Chief Master that litigating in this jurisdiction in order to obtain a default judgment did not involve the English court "trying" the claim for the purposes of the reference in Gateway 3 to a claim which it was "reasonable to try". First of all, SIL submitted that even if Mr Philbrick and IPL did not seek to defend the proceedings, it was not inevitable, as at 1 November 2019, that SIL would confine itself to seeking a default judgment. It was said that SIL might pursue the matter to a full trial on the merits or might seek a summary judgment, both of which involved a trial: see *Football Dataco Ltd v Smoot Enterprises* [2011] 1 WLR 1978 at [16]. Further, there might need to be an assessment of damages or equitable compensation payable by Mr Philbrick or IPL.

73. SIL developed its submission as to whether there would be a trial with particular reference to its claim for a declaration as to its title to the painting. SIL's interest in the painting was derived from IPL, or Mr Philbrick. SIL had brought these proceedings to establish its title to the painting against all persons claiming an interest in it. Even if Mr Philbrick and IPL did not defend the proceedings, SIL still needed to establish its title. SIL would therefore have to persuade the court to make the declaration which it sought. The court would not make a declaration simply because Mr Philbrick and IPL had not defended the claim. SIL referred to authority in this respect and, in particular, the note in *Civil Procedure* at paragraph 40.20.3 stating that a declaration was a judicial act which ought not to be made on default of pleading but only if the court was satisfied by evidence.

74. Athena relied on the findings made by the Chief Master, to which I have earlier referred. Athena further said that the Chief Master's conclusion that Mr Philbrick had either disappeared, or was about to do so, has been shown to be sound by the later evidence that Mr Philbrick travelled to Australia (on route to Vanuatu) on 21 October 2019.

75. Athena also relied on the evidence given by Mr Pesko in his witness statement of 29 October 2019 to the effect that Mr Philbrick was being evasive prior to the end of September 2019 and that, on 10 October 2019, he confessed to Mr Pesko what he had done in relation to the painting. Mr Philbrick told Mr Pesko at that point that the painting had been pledged to Athena by Boxwood and Mr Philbrick sent Mr Pesko a number of documents including the LSA between Boxwood and Athena. Athena also relied on the evidence of other creditors, or victims, of Mr Philbrick closing in on him in October 2019 with their claims against him.

76. Athena also submitted that Mr Philbrick's disappearance prior to 1 November 2019 should be seen in the context that he and Mr Pesko had been business partners and friends for some years but yet, at that point, Mr Philbrick stopped communicating with Mr Pesko.

77. Athena also relied on the fact that SIL have applied, on 26 February 2020, for a default judgment against Mr Philbrick and IPL. Athena also said that although Mr Philbrick has been in New York since June or July 2020, neither he nor IPL had played any part in these proceedings or in any of the proceedings brought against them in the United States.

78. Athena adopted the conclusion of the Chief Master that the fact that SIL claimed a declaration as to its title to the painting did not create a real issue which it was reasonable for the court to try.

*Gateway 3 - discussion and conclusions*

79. The issue in this case as to the application of gateway 3 arises in circumstances which are different from the circumstances of earlier cases and, in particular, the circumstances in *Erste Group Bank*. In the present case, the relevant date is 1 November 2019. That date was right at the beginning of the proceedings. The fraud had just been discovered and the proceedings were brought virtually immediately, because SIL wished to have the benefit of an injunction in relation to the painting. By 1 November 2019, Mr Philbrick and IPL had not been formally served with the proceedings and the time for filing an acknowledgment of service had not begun to run and had certainly not expired. But yet the court is asked to decide, by reference to the evidence which relates to the situation at 1 November 2019, whether at that date it was likely that Mr Philbrick and/or IPL would defend the proceedings.

80. There is a second difficulty in deciding this issue in this case. I am making my decision over a year after 1 November 2019. A lot has happened in the interval. It is now clear that Mr Philbrick and IPL do not intend to defend these proceedings. The court can take account of events subsequent to 1 November 2019 but only insofar as they throw light on the question whether it was likely at 1 November 2019 that Mr Philbrick and IPL would defend the proceedings. It can certainly be argued that the later events suggest that they never did intend to defend the proceedings. Conversely, it is possible that Mr Philbrick had not come to any final conclusion about that by the very early stage of 1 November 2019, although he did make up his mind later.

81. A third difficulty arises from the fact that the dispute between the parties as to gateway 3 is said to depend upon the subjective intentions of Mr Philbrick. Mr Philbrick did not say anything before 1 November 2019 as to what was in his mind in this respect. Therefore, his state of mind has to be inferred from his conduct. Athena relies heavily on the fact that Mr Philbrick went to Vanuatu. There is no direct evidence as to why he chose Vanuatu. I was told that the United States did not have an extradition treaty with Vanuatu (although that did not avail Mr Philbrick in the event). If that was the reason that he chose Vanuatu, then that would suggest that he was on the run from criminal proceedings or both criminal and civil proceedings.

82. SIL submitted that it cannot be inferred that fraudsters will not defend proceedings brought against them and, in particular, that fraudsters on the run will not defend such proceedings. However, the evidence in this case strongly supports the inference that Mr Philbrick chose Vanuatu, a remote island in the Pacific in order to hide himself there and with no intention of defending any proceedings against him.

83. SIL submitted that I should not take Mr Philbrick's flight to Vanuatu as admissible or relevant because that fact was not known or knowable as at 12 November 2019. SIL referred to the approach of Hoffmann J in *ISC Technologies v Guerin* [1992] 2 Lloyd's Rep 430 at 433 where he referred to how matters "appeared" at the relevant time. SIL submitted that the court should consider how matters appeared at 1 November 2019 without regard to what emerged much later in July 2020 as a result of the criminal proceedings in New York. I do not regard Hoffmann J as laying down a

legal principle to that effect; instead, he was describing the facts in that case. I consider that I should take account of the evidence which is now before me as to what the real facts were on 1 November 2019 and should not exclude that evidence because those facts were not known or knowable on that date.

84. I have given full weight to the difficulties of making a decision as to the intentions of Mr Philbrick (and IPL) on 1 November 2019. Nonetheless, on the material before me, the conclusion I would reach is that it is clear that Mr Philbrick went to Vanuatu at the end of October 2019 in an attempt to flee from the legal process which had been, or would be, issued against him, including civil proceedings and including these proceedings.

85. SIL submitted that, as regards IPL, a creditor might have sought to wind up that company, in which case the decision as to whether these proceedings should be defended by IPL would be the decision of the liquidator and not that of Mr Philbrick. Of course, it was conceivable, as at 1 November 2019, that IPL might be wound up and a liquidator might decide to defend these proceedings but there was nothing specific as at 1 November 2019 to cause me to give particular weight or emphasis to that possibility.

86. In the light of the above considerations, I now need to consider the guidance given in *Brownlie* and *Goldman Sachs* as to the test to be applied when determining whether a claimant has established a gateway which is relied on. The first limb of that guidance is that it is for the claimant to provide a plausible evidential basis for the application of Gateway 3. In many cases where proceedings are brought against a defendant within the jurisdiction, where it would obviously be in the defendant's interests to defend the proceedings and where nothing else is known about the defendant's intentions, then it would normally be appropriate to infer that the defendant was likely to defend the proceedings.

87. The second limb of the guidance applies where there is an issue of fact about the application of the gateway or there is reason to doubt whether it applies. In this case there is an issue of fact about the application of the gateway and there is reason to doubt whether it applies. The issue of fact and the doubt arise from the fact that Mr Philbrick's flight to Vanuatu suggests that he, and IPL, did not intend to defend these proceedings. In such a case, the second limb of the guidance suggests that the court should take a view of the matter on the evidence, if it can reliably do so. The issue in this case relates to the state of mind of Mr Philbrick and IPL at a very early stage in the proceedings. The material available does not include any statements by Mr Philbrick and no objective matters in the form of an acknowledgment of service stating no intention to defend or the expiry of a time limit for an acknowledgment of service or a defence. On the other hand, there is really only one piece of evidence which bears on the question of intention and that is the fact of his flight to Vanuatu. I do not think that I can give much weight to the fact that Mr Philbrick had a child in London when he fled with his girlfriend or fiancée to Vanuatu to avoid the proceedings which had been or would be brought against him. In these circumstances, my conclusion would be that, on the balance of probabilities and by reference to the single piece of evidence to which I have referred, it was more probable than not that Mr Philbrick (and therefore IPL also) were not intending to defend these proceedings. Although the flight to Vanuatu is a single piece of evidence it is strong evidence to that effect.

88. The next question is whether I can reliably come to that decision or whether this case comes within the third limb of the guidance which applies where no reliable assessment can be made. If the third limb applies then I ought not to make an unreliable assessment but I should instead hold that gateway 3 has been established if there is a plausible, albeit contested, evidential basis for it.

89. I have concluded that I can make a reliable finding on the material in this case. My finding is that, as at 1 November 2019, Mr Philbrick had fled to Vanuatu in order to escape from claims such as the present claim and this evidence is sufficiently strong to show that he (and IPL) did not intend to defend such claims.

90. However, that is not necessarily the end of SIL's case in relation to Gateway 3. I now need to consider the point made by SIL in reliance on its claim for a declaration as to its title to the painting. It is important to consider how the claim to a declaration would be dealt with on the correct hypothesis. If the court were considering the claim to a declaration, at a time when Athena was a party who was resisting that declaration and Mr Philbrick and IPL were not defending the claim in any way, then because the declaration would potentially affect the position of Athena, it is likely that the court would not grant such a declaration without considering what Athena had to say on that subject, even as regards the relationship between SIL on the one hand and Mr Philbrick and IPL on the other. However, that is not the hypothesis which I need to consider. Instead I should consider what would be likely to happen if Mr Philbrick and IPL were the only defendants to the claim and they had not defended the claim.

91. In the event of Mr Philbrick and IPL being the only defendants to the claim, but yet not defending the claim, the court would not make a declaration as to SIL's title to the painting merely on the ground that the defendants had not presented any defence. The court would apply its conventional approach which is that a declaration of the court is a judicial act and should only be granted if supported by evidence and argument and where the court is persuaded that a declaration would be useful and appropriate. In this case, the evidence relied upon would be the documents entered into by SIL, Mr Philbrick and IPL, evidence of payment by SIL and Mr Philbrick's admission as to the price he, or IPL, had initially paid for the painting. Adducing that evidence would be a relatively simple matter. However, that evidence would give rise to an issue as to whether SIL's beneficial interest in the painting was 50% or 2/3 or 100%. SIL's interest must be at least 50% but SIL does not limit its claim to that percentage and is claiming to have a more extensive beneficial interest. It has not been said by Athena that there is no real issue to be determined, as between SIL and IPL, as to the extent of SIL's beneficial interest. I consider that there would need to be a hearing in relation to SIL's claim to a declaration at which the court heard submissions as to the extent of SIL's beneficial interest. Although SIL would also have to persuade the court that a declaration as to title would be useful and appropriate, I would not expect that matter would involve any real difficulty.

92. In these circumstances, in the context of gateway 3, there would be a real issue between SIL and Mr Philbrick and IPL which it would be reasonable for the court to determine. Does that satisfy gateway 3 which refers to an issue which it is "reasonable to try"? The authorities on gateway 3 show that obtaining a default judgment, pursuant to an administrative process, does not involve the court "trying" the claim but obtaining a summary judgment does. I do not think that what is, and is not, "a trial" in other contexts will necessarily determine what is "a trial" for the purposes of

gateway 3. On balance, having regard to the purposes of gateway 3, I hold that the type of process and determination potentially involved in SIL obtaining a declaration as to title in this case, on the assumption that the only defendants are Mr Philbrick and IPL, would bring the claim within gateway 3.

93. I therefore hold, on that limited ground, that SIL has established that the case is within gateway 3. However, the type of court process which would be needed to determine SIL's claim for declarations against Mr Philbrick and IPL, if they were the only defendants, will be relevant to the question which I next have to consider as to the appropriate forum in this case.

94. If I had not accepted SIL's submission as to the relevance of the fact that its claims against Mr Philbrick and IPL included a claim to a declaration of title, which it was reasonable for the English court to try, I doubt if I would have held that SIL would establish gateway 3 by choosing not to obtain a default judgment but instead opting for a trial on the merits and/or an assessment of damages or equitable compensation. As to its possible choice of a trial on the merits over a default judgment, SIL did not identify any legitimate interest that would be better served by taking that course in this case. As to the claim for damages or equitable compensation, a claimant can specify the sum of money which it claims and obtain a default judgment for the specified sum; the sum claimed need not be a liquidated sum: see CPR 12.4(1)(a).

*The proper forum – the legal principles*

95. The court has to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. The burden is on SIL to persuade the court that England is clearly the appropriate forum. For these propositions, see *Altimo Holdings v Krygyz Mobil Tel* [2012] 1 WLR 1804 at [88].

96. It has been said that where the claimant can establish the necessary or proper party gateway, the factors which make the foreign defendant a necessary or proper party will also weigh heavily when considering the question of forum: see *Société Commerciale de Réassurance v Eras International Ltd (The Eras Eil Actions)* [1992] I Lloyd's Rep 570 at 591 cited in *Lungowe v Vedanta Resources plc* [2019] 2 WLR 1051 at [69].

97. The desire to avoid multiplicity of proceedings and the risk of irreconcilable decisions can be a significant factor: see *E D & F Man Capital Markets Ltd v Straits (Singapore) PTE Ltd* [2019] EWCA Civ 2073 at [43]; but in some cases it is not a trump card, particularly where it can be avoided by bringing all claims in the foreign jurisdiction: see *Lungowe v Vedanta Resources plc* [2019] 2 WLR 1051 at [82].

98. It is generally preferable, other things being equal, that a case should be tried in the country whose law applies. This factor is of particular force if issues of law (as distinct from issues of fact) are likely to be important and if there is evidence of relevant differences in the legal principles applicable to such issues in contention as the appropriate forum: see *VTB Capital plc v Nutritek International Corpn* [2013] 2 AC 337 at [43].

99. In this case, the relevant date for forming a judgment as to the proper forum is 1 November 2019. The court can have regard to events after 1 November 2019 insofar

as they throw light on the judgment to be made by reference to the situation at 1 November 2019.

100. There are many factors potentially relevant when the court makes the evaluative judgment needed to identify the proper forum for the claim to be tried. It has been said many times that an appeal court should be slow to interfere with an evaluative judgment of this kind. However, an appeal court may reverse the decision of the lower court on conventional grounds such as where the lower court has taken into account immaterial considerations or has failed to take into account material considerations or has reached a conclusion which no reasonable court could have reached.

*The Chief Master's decision as to forum*

101. The Chief Master held that SIL did not establish gateway 3 so that it was not necessary for him to consider the question of forum. However, at [58]-[59] he made the following observations on that question, as follows:

> "58. Having concluded that SIL has failed to establish a good arguable case concerning paragraph 3.1(3) it is strictly unnecessary for me to deal with forum conveniens. I observe briefly that there are strong connections with New York:
>
> (1) The subject matter of this claim is a Painting that is held in New York and it has only been held in London for a short period since it was acquired in 2016. At the time of the hearing before Roth J it was assumed the Painting was in Japan.
>
> (2) Boxwood entered into an agreement with Athena that provides for non-exclusive New York jurisdiction and for New York law to be applied.
>
> (3) Athena is based in New York and any witnesses that it needs to call to give evidence reside in the USA.
>
> (4) The issues of New York law have involved marked differences of view between the experts employed by the parties and although they could be resolved by an English court based upon expert evidence it is preferable they are dealt with in New York.
>
> (5) The need for a unitary judgment from an English court does not provide a trump card.
>
> 59. Had it been necessary to do so, on the assumption that SIL was able to satisfy the requirements of paragraph 3.1(3), and having regard to the position of all the parties to the claim, I would not have concluded that England was obviously the most appropriate jurisdiction."

*The proceedings in New York*

102. Before dealing with the parties' submissions as to forum, it is convenient to refer to events which took place after the Chief Master gave his judgment on 26 May 2020. Athena lost no time in bringing proceedings in New York in order to seek to establish its rights in relation to the painting. On the same day as the Chief Master made his order (2 June 2020), Athena brought proceedings *in rem* in New York, asserting its title to the painting. In due course, SIL and Delahunty participated in those proceedings. There is an issue as to whether SIL has submitted to the jurisdiction of the New York courts (as Athena contends) or has reserved its position in that respect (as SIL contends). The New York court has not made any decision on the merits of the dispute but, as I understand it, the parties are awaiting the outcome of this appeal before taking further steps in the New York proceedings.

*The proper forum - submissions*

103. SIL made the following submissions:

i) because the question of forum was to be considered as at 1 November 2019, the litigation in New York commenced after the Chief Master gave his judgment was entirely irrelevant to that question;

ii) in a case like the present, where Athena is a necessary or proper party within gateway 3, that fact should weigh heavily in favour of England as the proper forum; proceedings here, which included all the relevant claimants to an interest in the painting, would avoid multiplicity of proceedings and the risk of inconsistent judgments;

iii) SIL's claims were based on a contract made in England, governed by English law, with IPL, an English company;

iv) as at 1 November 2019, there was a potential issue between the parties and Delahunty, and English company, and the position of Delahunty was referred to in the evidence before Roth J;

v) as at 1 November 2019, there were no proceedings about the painting elsewhere in the world;

vi) at the date of the agreement between SIL and IPL, and as at 1 November 2019, Mr Pesko was resident in London; Mr Philbrick had been resident in London until he went to Vanuatu;

vii) the above factors all pointed to England as the appropriate forum;

viii) the factors relied on by the Chief Master did not outweigh the factors which pointed to England;

ix) it is accepted that the fact that the painting was in New York at the date of the agreement between SIL and IPL meant that issues as to the title to the painting are governed by New York law; however, the location of the painting at any time is not otherwise relevant and the location of the painting varied from time to time;

x) the location of parties and witnesses are factors which point to England as the proper forum; England is the home jurisdiction for Mr Philbrick and IPL and also, in reality, for SIL and Boxwood given the identity of those controlling those entities; the only party with a New York connection is Athena and it is registered in Delaware;

xi) the Chief Master referred only to Athena's witnesses but the main factual witness will be Mr Pesko; SIL suggested that Athena would not have relevant witnesses and that there might be further witnesses resident in England, for example, connected with Delahunty;

xii) as to the governing law, some issues would be governed by New York law and some governed by English law;

xiii) English law would govern the meaning and effect of the agreement between SIL and IPL and the duties owed by Mr Philbrick and IPL; there might be an issue as to attribution of Mr Philbrick's knowledge to Boxwood and, although that would be governed by Jersey law, it was likely that Jersey law was the same as English law in that respect; the agreement between Delahunty and IPL would also be governed by English law;

xiv) it was accepted that Athena would advance arguments based on New York law as to the effect of the agreement between Boxwood and Athena but in that respect the legal principles would be intelligible to an English court and what would matter would be the application of those principles to the facts and not issues of law as such.

104. Athena made the following submissions:

i) as at 1 November 2019, it was objectively clear that Mr Philbrick and IPL would not participate in these proceedings;

ii) at that date, Delahunty was not a party to the proceedings;

iii) New York is an appropriate forum which can resolve all of the issues arising, fully and fairly;

iv) Athena's place of business is New York where the transactions with Mr Philbrick and Boxwood took place; Athena has no presence in England; an English judgment against Athena would have to be enforced by an action in New York;

v) New York law governs the contract between Boxwood and Athena, the questions of title to the painting as between SIL and IPL and as between Delahunty and IPL;

vi) the contract between Boxwood and Athena provides for non-exclusive New York jurisdiction;

vii) the relevant New York law is different from English law and the New York court is the appropriate forum for resolving issues of New York law;

viii) the painting was in New York on 1 November 2019;

ix) Athena has already obtained a money judgment in New York against Mr Philbrick, IPL and Boxwood;

x) Mr Philbrick is now being prosecuted in New York (although this was not the position at 1 November 2019);

xi) SIL is a BVI company, managed from Switzerland;

xii) SIL retained lawyers in New York in October 2019 in connection with the dispute about the painting and would have no difficulty in litigating all relevant issues in New York.

*The proper forum – discussion and conclusion*

105. For the purpose of deciding on the proper forum for this dispute, I must consider how matters stood at 1 November 2019 when Roth J granted permission to SIL to serve Athena out of the jurisdiction. I will also consider this issue on the basis of my earlier findings as to the likelihood (assessed as at 1 November 2019) that Mr Philbrick and IPL would not defend these proceedings and on the narrow basis on which I have held that SIL has brought the case within gateway 3.

106. I referred earlier to the proceedings brought by Athena in New York. These proceedings were brought well after 1 November 2019. There is an issue as to whether SIL has submitted to the jurisdiction of the New York courts in relation to those proceedings. As the proceedings were brought after 1 November 2019, that issue does not need to be resolved for the purposes of deciding this appeal. I will refer to that issue later in this judgment when I consider what to do in relation to the fresh application made by SIL on the basis that Delahunty is now an anchor defendant.

107. At least in one respect, SIL submitted that I should approach my assessment on a realistic basis as to what was likely to be involved and not give undue weight to theoretical possibilities. SIL made that submission in relation to Athena's argument that if SIL obtained a judgment in London against Athena, SIL would still have to apply in New York in order to enforce that judgment. SIL's retort was to say that an application to enforce would not in practice be needed because it was unlikely that Athena would fail to comply with a judgment against it. I accept the general proposition that I should assess matters in a realistic way but, as I see it, that submission cuts both ways in this case.

108. I consider that I should focus on the assessment which ought to have been made, on 1 November 2019, as to the nature of the dispute which a court would have to determine in proceedings brought either in London or in New York.

109. The conduct of the litigation between SIL and the anchor defendants, Mr Philbrick and IPL, would depend on the nature of any defence put forward by them. In accordance with my earlier findings, it was much more probable than not that, as at 1 November 2019, Mr Philbrick and IPL would not defend the proceedings, whether in London or New York. If the proceedings were in London, SIL would be entitled to a default judgment in relation to the remedies which it sought against them, except for

the claim to a declaration. As regards the claim to a declaration, the principal issue would be as to the extent of SIL's beneficial interest in the painting. It is accepted that issues as to the title to the painting were governed by New York law although issues as to the construction of documents and the fiduciary obligations owed by Mr Philbrick (and IPL) would be governed by English law. If the proceedings were in London, and SIL applied for a declaration where there was no opposition raised by Mr Philbrick or IPL, it might not be necessary for there to be any evidence on that question apart from the relevant documents, but if it had been necessary for Mr Pesko to prepare a witness statement, in circumstances where Athena would probably be permitted to test SIL's case against IPL, then Mr Pesko might well be cross-examined by Athena, but not by Mr Philbrick or IPL. SIL did not make any submissions as to whether it would be more difficult for it to obtain a declaration against Mr Philbrick and IPL in New York in circumstances where neither of them was participating in the New York proceedings.

110. SIL's claim against Athena would be governed by New York law. The parties disagreed as to whether the relevant New York law would be complicated or straightforward and as to how familiar the legal principles would be to a judge in London. Further, there was no agreement as to whether the claim would give rise to issues of law as distinct from the application of settled legal principles to the facts. As at 1 November 2019, I consider that the right assessment would be that, in view of the fact that the claim was governed by New York law, it would be more suitable for the claim to be tried in New York rather than in London. It is also likely that it would be necessary for Athena to call witnesses based in New York.

111. In terms of what would be involved in the court dealing with the matter, the dispute between SIL and Athena would be much more significant than the issues between SIL and Mr Philbrick and IPL. It would seem that the "anchor" of having Mr Philbrick and IPL as defendants is significantly undersized to be effective to moor the substantial dispute between SIL and Athena in this jurisdiction.

112. As to the parties, SIL, Boxwood and Athena are not registered in this jurisdiction. IPL is but it was unlikely to defend the claim. Mr Pesko is resident in England. Before he went to Vanuatu, Mr Philbrick was resident in both London and Miami.

113. Delahunty was not a party to the proceedings as at 1 November 2019 and indeed it was not joined as a defendant until 19 May 2020.

114. The proceedings in New York could deal with all of the issues arising between all parties. However, SIL submitted that if IPL did not submit to the jurisdiction in New York then a judgment adverse to IPL in New York could not be enforced against IPL in England, if IPL said that the judgment was not binding on it. SIL therefore submitted that it would be necessary for it to obtain judgment against IPL in London. As to that, it is not likely that SIL would need to enforce a New York judgment against IPL in London if the substantive relief sought was a declaration as to SIL's rights against IPL and SIL had established its rights against Athena. Further, if IPL did not participate in the New York proceedings, it was less likely to challenge in London a judgment obtained in New York. SIL then submitted that a liquidator of IPL might wish to resist enforcement of a judgment obtained against IPL in New York. However, it is not obvious that a liquidator of IPL, faced with an adverse judgment obtained in New York, after a full trial at which Athena had put forward its arguments

as to the rights which SIL had obtained from IPL in relation to the painting, would wish to incur the expense of arguing such matters a second time in London.

115. In any case, if I dismiss the appeal and Athena ceases to be a party to these proceedings, then it will be for SIL to decide whether to apply for a declaration as against Mr Philbrick and IPL in London. That ought not to be a burdensome matter. That would not prevent the more substantial dispute between SIL and Athena being determined in New York. Insofar as SIL says that two sets of proceedings might produce inconsistent judgments, it must still be remembered that the court should be cautious about bringing Athena to this jurisdiction to deal with SIL's claim here on the ground that the alternative to doing so is that there will be two actions in two jurisdictions: see *Golden Ocean Assurance Ltd v Martin, The Goldean Mariner* [1990] 2 Lloyd's Rep 215 at 222 and *Altimo Holdings v Kyrgyz Mobil Tel* [2012] 1 WLR 1804 at [73].

116. I do not consider the precise whereabouts of the painting on 1 November 2019 carries very much weight for the purposes of the current assessment.

117. The arguments in favour of New York as the appropriate forum are appreciably stronger than the arguments in favour of London. Although the Chief Master did not need to give a formal ruling on the question of forum, he did consider it and he expressed his conclusion in favour of New York as the proper forum. Even though that was not a formal ruling, I consider that it deserves to be given proper weight. Further, it accords with my own view as expressed above. I conclude that SIL has not established the England is clearly the appropriate forum for its claim.

*The fresh application*

118. I have now held that SIL has established gateway 3 but has failed to establish that England is clearly the appropriate forum for its claim. These conclusions were reached by reference to the situation at 1 November 2019. These conclusions ought to mean that I should dismiss the appeal. However, SIL submits that I should allow it to take a new point on appeal namely that, on 19 May 2020, Delahunty was joined as a defendant and from that date SIL's claim against Delahunty involved a real issue which it was reasonable for the English court to try and thereby SIL could establish gateway 3.

119. It seems likely that SIL sought to rely on this new point in case I agreed with the Chief Master that SIL had not established gateway 3, on the basis of Mr Philbrick and IPL being anchor defendants. As it has turned out, I have held that SIL has established gateway 3 but on a narrower basis than SIL contended for. However, I will assume that SIL might still wish to rely on its new point in case the assessment as to the proper forum might be different when the proceedings include SIL's claim against Delahunty.

120. SIL has not issued a fresh application notice seeking permission to serve Athena out of the jurisdiction on this new basis. Instead, it has included such an application in its appellant's notice dated 22 June 2020. SIL submitted that this is a convenient course which the court should permit as there would be "no purpose" in requiring it to issue a fresh application. In support of this submission, SIL referred to *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495.

121. IN *NML Capital*, an *ex parte* application for permission to serve out was made on the basis that there were two reasons why the foreign defendant, the Republic of Argentina, did not have state immunity. Permission was granted on that application. The Republic of Argentina applied to set aside the grant of permission and, on the hearing of its application, the claimant accepted that the original two reasons were not sound but wished to put forward a further reason for the same conclusion. The judge hearing the application permitted the claimant to put forward that argument which he then upheld. The Supreme Court agreed with his judgment. In that case, the claimant was not relying on a different cause of action from that originally relied on nor on any new facts which were not in evidence on the original application for permission to serve out. To require the claimant to bring a fresh application for permission to serve out was considered to be a waste of time and money. I have had regard to the wider discussion in relation to a claimant being allowed to rely subsequently on an additional gateway at [65]-[78] per Lord Phillips and at [131]-[137] per Lord Collins.

122. I was also referred to *Alliance Bank v Aquanta Corp* [2013] All ER (Comm) 819 where the claimant had obtained permission to serve out by relying on gateway 6. The Court of Appeal, at [75], held that it was appropriate to allow the claimant to rely in addition on gateway 3, when resisting an application by the foreign defendant to set aside the grant of permission. However, the Court of Appeal explained that reliance on gateway 3 did not involve any new facts which were not already before the court.

123. Those two cases are different from the present case. In *NML Capital,* the new point was taken at the hearing of the application to set aside the grant of permission to serve out. The claimant was able to show that at the date of the grant of permission and on the evidence before the court on that date it had been right to grant permission with the result that the application to set aside that grant should fail. In *Alliance Bank*, the position would have been similar if the new gateway had been established.

124. In the present case, the new point depends on the joinder of Delahunty on 19 May 2020. SIL cannot attempt to justify the grant of permission on 1 November 2019 by reference to that fact. The court cannot hold that the grant of permission on 1 November 2019 was right on the basis of an event which only occurred on 19 May 2020.

125. *Gunn v Diaz* [2017] 2 All ER (Comm) 129 did raise a point similar to the point I am now considering. In that case, the claimant had obtained permission to serve out in reliance on gateway 9. On the application by the sixth defendant to set aside the grant of permission as against it, the claimant accepted that it could not rely on gateway 9 but sought to rely instead on gateway 3 on the ground that it had served another defendant, which had submitted to the jurisdiction, and against which there was a real issue which it was reasonable for the court to try and that the sixth defendant was a necessary or party within gateway 3. The claimant could not establish gateway 3 at the date on which permission was originally granted. The judge (Andrews J) was prepared to assume, without deciding the point, that the claimant could resist the application to set aside the permission by relying on a gateway which was not available to the claimant at the date of the original grant of permission but which had become available subsequently: see at [79]. However, the judge went on to conclude that the claimant could not establish gateway 3 at any time. In the event, therefore, the judge left open the question whether a claimant could resist an application to set aside

the grant of permission to serve out by relying on a gateway not originally relied upon and which depended on events which occurred after the original grant of permission.

126. There is a difference between permitting SIL to make a fresh application for permission to serve out based on the joinder of Delahunty on 19 May 2020 and holding that Roth J was right, on 1 November 2019, to grant permission to serve out. This new point is being raised in the context of an appeal against the decision of the Chief Master who set aside the grant of permission which had been made on 1 November 2019. It seems to me to be clear that the grant of permission on 1 November 2019 cannot be upheld by reference to the event which occurred on 19 May 2020. Accordingly, it is not a criticism of the Chief Master's decision that he set aside the permission of 1 November 2019 and did not uphold it by reference to the event which occurred on 19 May 2020.

127. SIL's application based on the joinder of Delahunty is a fresh application for permission to serve Athena out of the jurisidiction. The relevant date for considering that application cannot be 1 November 2019. As to whether the relevant date ought to be the date of the appellant's notice (22 June 2020) or the date of the hearing of the fresh application, there does not appear to be any dispute. SIL accepted that the relevant date would be the date of the hearing of the application.

128. As a matter of form, it was irregular to make a fresh application for permission to serve out in the appellant's notice in this case. The result of the fresh application cannot affect the result of the appeal as the appeal must be dismissed in any event.

129. The question now is, what is to happen to the fresh application? Athena did not object to the fact that it had been made irregularly in the appellant's notice. The application was not fully considered at the hearing of the appeal for various reasons. One reason was that an order had been made to expedite the appeal and the parties had told the court that the time estimate for the appeal was one day. After the order for expedition, the parties started to put in further evidence. Some of that evidence related to the proceedings in New York which had been issued on 2 June 2020. That evidence was considerably greater in length than the material which was before the Chief Master. That evidence was not relevant to the appeal but might be relevant to the fresh application based on the joinder of Delahunty. In addition, Athena did adduce further evidence as to Mr Philbrick's movements prior to 1 November 2019 and that was relevant to the appeal. The parties did not revise the time estimate of one day which was inadequate to deal with the fresh application based on the joinder of Delahunty.

130. The result is that the fresh application will need to be dealt with if SIL still wishes to pursue it. The fresh application will involve the court in considering gateway 3 and forum at a different date and on different evidence. As I understand it, Athena does not put forward any specific points as to gateway 3 as now relied upon. However, Athena does contend that London is still not the appropriate forum, even with Delahunty as a defendant. Athena wishes to rely on what has happened in the New York proceedings and wishes to argue that SIL and Delahunty have submitted to the jurisdiction of the New York courts. This is denied by SIL. Apparently, both SIL and Athena wish to adduce evidence, which would be expert evidence as to New York law, on the disputed question of submission to the jurisdiction. In any event, SIL contends that the existence of the New York proceedings is not decisive as to the question of forum although it accepts that it is a relevant factor.

131. Having considered the fresh application to this extent, I can now state what ought to happen in this case. I will dismiss the appeal. On or after the handing down of this judgment, I will give directions as to the fresh application for permission to serve out, if SIL indicates that it intends to pursue that application. My provisional view, in advance of hearing the parties on directions, is that the directions should provide for: (1) the issue by SIL of a proforma application for permission and the payment of the requisite fee; (2) the evidence in this case to stand as the evidence on that application; (3) compliance with CPR part 35 in relation to expert evidence; and (4) directions as to the hearing of the application.

*The result*

132. The result is that I will dismiss the appeal and I will give directions as to the fresh application if I am asked to do so.