Neutral Citation Number: [2021] EWHC 1892 (Ch)

Case No: BL-2019-001262

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

7 Rolls Building
Fetter Lane,
London EC4A 1NL

Date: 7 July 2021

Before :

MR JUSTICE ZACAROLI

Between :

MOHAMED HASSAN EL HADDAD	**Claimant**
- and -	
(1) MS KHULOOD ABDULLA HASSAN AL ROSTAMANI	**Defendants**
(2) HASSAN ABDULLA AL ROSTAMANI	
(3) MARWAN ABDULLA AL ROSTAMANI	
(4) WAFA ABDULLA AL ROSTAMANI	
(5) BADREYA ABDUL RAHMAN MOHAMED AL ROSTAMANI	
(6) HASNA ABDULLA AL ROSTAMANI	
(7) NAJLA ABDULLA AL ROSTAMANI	
(8) HABIB MOHAMMED SHERIF ABDULLAH AL MULLA	
(9) SHEIKH MORAMMED BIN KHALIFA BIN SAEED AL MAKTOUM	
(10) THE DEVELOPER PROPERTIES LLC	

Andrew Ayres QC and Neil Baki (instructed by **Penningtons Manches Cooper LLP**) for the **Claimant**
Stephen Moriarty QC, Giles Robertson and Alexandra Whelan (instructed by **Allen & Overy LLP**) for the **first to seventh Defendants**
Justin Fenwick QC and Thomas Ogden (instructed by **Clyde & Co. LLP**) for the **Eighth Defendant**

Hearing dates: 24, 25, 26, 27 and 28 May 2021

APPROVED JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be NB 10.30 am on 7 July 2021.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

Introduction

1. The first to seventh defendants (the "AR Defendants"), challenge the jurisdiction of this court in respect of the claim brought against them by the claimant ("Dr Haddad"). The eighth defendant ("Dr Al Mulla") also challenges jurisdiction in respect of the claim against him but, in view of the fact that his application was made as recently as 2 March 2021, only certain of his challenges to jurisdiction (being essentially those that overlap with the grounds of challenge of the AR Defendants) were advanced at the hearing to which this judgment relates.

2. The AR Defendants are members of the Al Rostamani family, a well-known family owning a successful business group in the United Arab Emirates ("UAE"). Dr Haddad (a UK citizen) and the first defendant, Ms Khulood Abdulla Hassan Al Rostamani ("Ms Khulood") were in a personal relationship for some time prior to 2002. Dr Haddad contends that in 2002 they also became business partners, originally pursuant to an oral agreement in the autumn of 2002, and subsequently pursuant to a written agreement entitled "KMI Partnership Contract (London-Dubai)" (the "KMI-PC") made on 10 November 2003, although not signed until 14 February 2004 (the "Partnership").

3. Dr Al Mulla is a lawyer in the UAE. He was formerly the owner of the firm Habib Al Mulla & Co, and since 2013 has been the executive chairman and partner of Baker & McKenzie Habib Al Mulla in Dubai.

4. According to the Amended Particulars of Claim ("APOC"):

   (1) The business of the Partnership was "a combined offering of management consultancy, real estate, property development, marketing and advertising, investments, healthcare, automobile sales and hotel management, with the aim of becoming a world class property developer";

   (2) The Partnership originally carried on business under the name "UKQC", from premises in England, with the intention of starting in England but extending to Dubai and Saudi Arabia;

   (3) In or around April 2003, the Partnership decided to carry on business under the name "Knowledge Management International" or "KMI";

   (4) On or around 5 June 2003, at a meeting at the Gothic Temple in Derby, Dr Haddad and Ms Khulood agreed to carry on the business of the Partnership as equal partners, headquartered in England, offering management consultancy services in Dubai through its English office.

5. The KMI-PC provides, materially, as follows:

   (1) By clause 1.1, the parties "will continue their original partnership agreement which was made at the Gothic Temple in Derby…" the contract being made,

in part, to "align the "Gothic contract" better with the actual practice of doing business in the UAE".

(5) By clause 1.3, "Both parties will continue under "KMI" the First Party's business idea which first started under UKQC's objects to create an economic entity with a main purpose of being a world class premier property developer specialised in retail, hotels, commercial properties, residential properties and offices using its own interlinked departments/divisions to offer to itself and to others management consulting services, stock market trading, investments, general commercial trading, marketing & advertisements, healthcare, automobile sales & services and a Hotel management operator "The Group"";

(6) By clause 1.4, "Both parties will establish in Dubai companies/establishments to legally execute the activities of "The Group", since business activities in Dubai are limited to a single activity for every single company";

(7) Clause 1.5 provided as follows:

> "As some business activities in Dubai are limited to UAE nationals only, therefore if any companies or establishments are needed to legally execute the activities of "The Group" but cannot/didn't show the First Party [Dr Haddad] as a 50% shareholder as in the case of "KMI" Dubai, then the Second Party [Ms Khulood] will register the First Party's shares under the Second Party's name or under the name of one of her family members. In this case, the Second Party guarantees to the First Party from her own personal money the value of the First Party's shares in "KMI" Dubai and in the companies and establishments used to execute the activities of "The Group". In addition, the Second Party guarantees the value of the First Party's shares in the total of "The Group" and not only the value of the First Party's shares in a single activity or a single company or establishment";

(8) Clause 1.6 made similar, but reverse, provision in case any companies (without reference to any specific jurisdiction) are unable to show Ms Khulood as a 50% shareholder;

(9) By clause 3, "KMI" and any of the companies or establishments used to execute the activities of "The Group" must operate from one physical head office location;

(10) By clause 11, "the parties are 50% partners in all companies and establishments used to execute the activities of "The Group", whether already established as in the case of "UKQC", "KMI" UK and "KMI" Dubai or to be established in the future;

(11) By clause 12, the proper law of the KMI-PC was stated to be English law and the partners agreed that all disputes arising under or in connection with the KMI-PC were subject to the exclusive jurisdiction of the English courts;

(12) Clause 13 referred to the fact that "KM Properties" (meaning an entity that was at that time a sole establishment in Dubai and which was later incorporated as KM Properties LLC – "KMP Dubai") had been established on 10 February 2004 and would change its legal status to a limited liability company "by introducing a member of the second party's family as per Article 1.5 in order to give KM Properties the benefits of a Limited Liability Company, and the Articles of this contract apply to KM Properties."

6. The AR Defendants deny that any partnership agreement was made and dispute the authenticity of the KMI-PC. They accept, however (subject to arguments as to the validity of the alleged contracts), that these are not issues that can be determined at this stage. In other words, it is accepted that there is both a good arguable case and a serious issue to be tried that Dr Haddad and Ms Khulood executed the KMI-PC and made the oral partnership agreements that are alleged to have preceded it.

7. Dr Haddad also relies on certain written undertakings in support of his claim that shares in, and assets of, the companies through which the Partnership carried on business (particularly in Dubai) were held on trust for the Partnership. These consist of:

(1) An undertaking dated 12 August 2004, purportedly made by Ms Khulood on behalf of KMP Dubai (at a time when it was a sole establishment), declaring that all assets and properties registered or to be registered in its name were owned by the Partnership. It is governed by English law and has an exclusive jurisdiction clause in favour of the English courts. Although the defendants dispute its authenticity, it is accepted for the purposes of this application that there is a good arguable case that the undertaking was entered into.

(2) A series of undertakings dated 25 June 2006, by which various of the second to seventh defendants declared that the owner of properties registered in their name in Dubai was KMP Dubai.

(3) An undertaking dated 25 March 2007, purportedly made by Dr Haddad and Ms Khulood on behalf of KMP Dubai and KM Properties UK Limited ("KMP UK") and by Dr Haddad on behalf of KMP Properties International Real Estate, in which the companies declared that their activities, assets and properties registered or to be registered under their names were owned by the Partnership. The defendants also dispute the authenticity of this document but accept, for the purposes of this application, that there is a good arguable case that the undertaking was entered into.

(4) An undertaking dated 31 March 2007 made by Dr Haddad and Ms Khulood on behalf of KMP Dubai and by the second and third defendants on behalf of the second to seventh defendants (as heirs of the late Abdulla Hassan Al Rostamani), declaring that the heirs did not own any shares in, and had no rights to profits from, KMP Dubai.

8. The personal relationship between Dr Haddad and Ms Khulood ended in 2006 and the following year they firmly fell out. It is Dr Haddad's case that thereafter Ms Khulood, with the assistance of the other defendants, devised and executed a plan to misappropriate the Partnership assets in Dubai and in England. This included principally the disposal in 2013 of properties in Dubai referred to as the "Three Towers" for no consideration or at a gross undervalue, resulting in a loss to the Partnership of over £840 million, and the disposal of other real property assets in Dubai on various dates prior to 2016, all held through KMP Dubai, resulting in a loss of a further £517 million. Dr Al Mulla is said, despite being appointed to act as lawyer to the Partnership, to have been intimately involved with these wrongful transactions.

9. Claims are asserted in the APOC against Ms Khulood for breach of her fiduciary, contractual and statutory obligations in connection with the Partnership and, against all defendants, for damages for conspiracy to defraud Dr Haddad and for dishonest assistance in Ms Khulood's breaches of fiduciary duty and knowing receipt. A claim is also asserted against Ms Khulood and Dr Al Mulla in fraudulent misrepresentation. Dr Haddad seeks an order for the dissolution and winding-up of the Partnership and all necessary accounts and inquiries.

Procedural history

10. On 12 September 2018, a letter before action was sent from Dr Haddad's then solicitors, Cooke, Young and Keidan, to the defendants. After various requests for documents were made but refused, Allen & Overy, solicitors to the AR Defendants, wrote a substantive response to the letter before action on 11 December 2018.

11. On 4 July 2019, Dr Haddad filed the claim form and particulars of claim in these proceedings. On 11 July 2019 he issued the application for permission to serve the claim form outside the jurisdiction on all of the defendants. This was supported by his first witness statement dated 4 July 2019. On 24 July 2019 deputy Master Bartlett indicated that he was satisfied on the basis of the papers that there was a sufficient case to authorise service out as against Ms Khulood, but that he was not then convinced that there was a serious issue to be tried as against the other defendants. Dr Haddad then filed his second and third witness statements (respectively dated 7 August 2019 and 23 August 2019) and a without notice hearing of the application took place before deputy Master Bartlett on 28 August 2019.

12. At that hearing, where Dr Haddad was without solicitors but represented by junior counsel on a direct access basis, the court granted permission to serve the claim form outside the jurisdiction in respect of the first to eighth defendants (the "Service-out Order"). The deputy Master was still not convinced that there

was sufficient to justify service out as against the ninth and tenth defendants. Dr Haddad then filed the APOC and a fourth witness statement (dated 30 September 2019), following which (on 7 October 2019) the court ordered service out as against the ninth and tenth defendants. There has been no confirmation that the ninth and tenth defendants have been served. They have played no part in the application.

13. The AR Defendants filed their application to set aside the Service-out Order on 28 July 2020. Dr Haddad served evidence in response on 16 December 2020. The hearing of the application had originally been listed for early March 2021. In light of the weight of evidence served by Dr Haddad, on 12 February 2021 the AR Defendants sought and obtained an extension of time for service of their reply evidence, which necessitated vacating the hearing date. Their evidence in reply was served on 12 March 2021.

14. In the meantime, on 2 March 2021 Dr Al Mulla had filed his own application to set aside the Service-out Order. As a result of hearings before Master Clark on 30 March 2021 and myself on 5 May 2021, Dr Al Mulla was permitted to participate in this hearing, but only in relation to certain issues where his own application to set aside the Service-out Order overlapped with the application of the AR Defendants.

The gateways relied upon

15. The gateways relied on at the hearing were greater in number than those identified in the application notice or before deputy Master Bartlett. No point is taken as to this by the defendants.

16. Dr Haddad relies on the following jurisdiction gateways as against Ms Khulood (by reference to the sub-paragraphs in paragraph 3.1 of Practice Direction 6B):

    (1) Paragraph (6)(a) and (c): a claim relating to a contract (the KMI-PC) that is governed by English law and/or relating to the prior oral partnership agreements which were made in England;

    (2) Paragraph (9): a claim in tort where damage was sustained within the jurisdiction;

    (3) Paragraphs (12) and (12A): a claim in respect of a trust created by a written instrument which is governed by English law and/or which confers jurisdiction on the courts of England and Wales;

    (4) Paragraph (15): a claim against Ms Khulood as constructive trustee, where the claim arises out of events occurring within the jurisdiction or relates to assets within the jurisdiction; and

    (5) Paragraph (4A): a claim is made against Ms Khulood in reliance on another gateway and a further claim is made against her which arises out of the same or closely connected facts.

17. Dr Haddad relies on the gateways in paragraph (9), (12), (12A), (15) and (4A) as against the second to seventh defendants, but also relies on paragraph (3) in that a claim is made against Ms Khulood (which gives rise to a real issue to be tried) and the second to seventh defendants are necessary or proper parties to that claim.

18. As against Dr Al Mulla, Dr Haddad relies (for the purposes of this hearing) on paragraphs (3), (4A), (9) and (15).

19. Since the existence of the Partnership underlies all of Dr Haddad's claims against the AR Defendants (and the claims relevant to this application against Dr Al Mulla), irrespective of the relevant gateway, it is common ground that it is essential, though not sufficient, for Dr Haddad to establish a good arguable case that the Partnership existed in order to establish jurisdiction against the AR Defendants and Dr Al Mulla.

The issues on this application

20. The AR Defendants seek to set aside the Service-out Order on three bases:

    (1) There is no good arguable case that the pleaded claims falls within any of the "gateways" for service-out in paragraph 3.1 of Practice Direction 6B;

    (2) In the alternative there is no serious issue to be tried in relation to any of the causes of action; and

    (3) Dr Haddad failed to disclose and/or misrepresented material matters to the Master on the without notice application for service-out.

21. Dr Al Mulla adopts the submissions of the AR Defendants insofar as they overlap with his own application to set aside the Service-out Order.

Applicable legal principles

22. The claimant must establish: (1) that in relation to a foreign defendant there is a serious issue to be tried; (2) that there is a good arguable case that the claim falls within one of the gateways in CPR 6BPD, para 3.1; and (3) that England and Wales is clearly or distinctly the appropriate forum for the trial of the dispute: see *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 (PC) ("*Altimo*"), at [71]. The defendants accept that England is the proper forum for the claim, if the claimant can establish (1) and (2).

23. Where the establishment of the gateway depends upon a question of fact, "good arguable case" requires the claimant to show that it has the better of the argument on the question (*Altimo* at [71]), but if jurisdiction depends on establishing a point of law, the court will normally decide it (*Altimo* at [81]).

24. In relation to the principal issue – whether the Partnership exists so as to establish the contract gateway under paragraphs 6(a) and (c) of CPR 6BPD 3.1 – the claimant is required to establish a good arguable case as to the existence of a contract.

25. Lord Sumption JSC in *Four Seasons Holdings Incorporated v Brownlie* [2017] UKSC 80, at [7], identified (obiter) the following as a "serviceable test" where jurisdiction depends upon an issue of fact:

> "What is meant is (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. I do not believe that anything is gained by the word "much", which suggests a superior standard of conviction that is both uncertain and unwarranted in this context."

26. The Supreme Court subsequently endorsed this approach in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34 at [9]. Mr Moriarty referred me to *Kaefer Aislaminetos v AMS Drilling Mexico* [2019] EWCA Civ 10, in which Green LJ (with whom Davis and Asplin LJJ agreed) elaborated on the application of the three-limbed test as follows (at [73] to [80]): (1) the first limb is to be understood as requiring an evidential basis that the claimant has the better of the argument; (2) the second limb is an instruction to use judicial common sense and pragmatism in seeking to overcome evidential difficulties and arrive at a conclusion if it "reliably" can; (3) the third limb addresses the situation where the court cannot reach a conclusion under the second limb, and "introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits."

27. Davis LJ (at [119]) said that whatever the niceties of language involved, "it is sufficiently clear that the ultimate test is one of good arguable case", which lies somewhere between proof on balance of probabilities and the mere raising of an issue.

The Contract Gateway

28. The defendants contend that Dr Haddad cannot establish a claim within the contract gateway because there is neither a good arguable case nor a serious issue to be tried that the KMI-PC (or a prior oral partnership agreement) existed. That is for two reasons: (1) the issue of whether there exists an overarching partnership between Dr Haddad and Ms Khulood has been determined against Dr Haddad in the courts of Dubai so as to give rise to an issue estoppel against him; and/or (2) the KMI-PC and/or the alleged Partnership is void on the basis of illegality under the law of the UAE.

Issue estoppel

29. Mr Ayres accepted that the burden lay on Dr Haddad to establish that he had the better of the argument in showing that he was not barred by issue estoppel from contending that there was a partnership between him and Ms Khulood.

30. The applicable principles are not in dispute:

(1) An issue estoppel arises where the issue sought to be litigated has been finally determined in earlier proceedings by a court of competent jurisdiction, provided that the proceedings are between the same parties (or their privies) and the determination of the issue in the earlier proceedings was essential to the ultimate decision: see for example, *Arnold v National Westminster Bank plc* [1991] 2 AC 93 (HL), per Lord Keith of Kinkel at 105D to 106A;

(2) The principle extends to foreign judgments. For the decision of a foreign court to give rise to an issue estoppel, three matters must be satisfied, per Lord Brandon of Oakbrook in *The Sennar (No.2)* [1985] 1 WLR 490, at p.499A-C:

> "The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent Jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action."

(3) It does not matter that in the earlier proceedings the court applied a different law to determine the issue from the law which would be applied by the English court in the later proceedings: Spencer Bower and Handley, *Res Judicata* (5th ed., 2019) at [8.28], citing among other cases, *First Laser Ltd v Fujian Enterprises (Holdings) Company Ltd* [2012] HKCFAR 569, per Lord Collins of Maplesbury at [48];

(4) Nor does it matter if the foreign decision was wrong, even "manifestly wrong": *Adams v Cape Industries* [1990] Ch 433 (CA), at p.569E-F (although the decision will not be followed if it is contrary to natural justice: see below at [55] to [58]);

(5) The parties must have been acting in the same capacity in each of the proceedings: *Lemas v Williams* [2013] EWCA Civ 1433, per Arden LJ at [43].

31. Mr Ayres referred me to the need for caution where a claim of issue estoppel is based on a foreign judgment: *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.2)* [1967] 1 AC 853, per Lord Reid at pp.918C to 919B. The need for caution arises in particular from this court's lack of familiarity with the procedure of the

foreign court, so that it may not be easy to see what was essential to the decision, as opposed to obiter. In this case, there is the added difficulty that the translation of the relevant decisions is not of the best quality (although the defendants do not dispute the accuracy of the translations, which have been prepared by the claimant).

32. The defendants rely principally upon a decision of the Dubai Court of Cassation (the final court of appeal) dated 5 January 2020 in case number 508/2019 ("Decision 508"). This was an appeal from a decision of the court of appeal (case number 1010/2013) which was in turn an appeal from a decision of the court of first instance (case number 120/2009). The claim was filed by Dr Haddad against 17 defendants, including all of the AR Defendants. He sought the appointment of an accountant to each of the Dubai incorporated companies which are claimed (in these proceedings) to be partnership assets so as to audit them and determine the profits due to him. He contended that, although the registered shareholders of the various companies were, in some cases, Ms Khulood and members of the Al Rostamani family and, in other cases, Ms Khulood as to 51% and Dr Haddad as to 49%, in reality he and Ms Khulood were equal shareholders in all of the companies. He contended that the memorandum of association of KMP Dubai was a sham contract, entered into so as to get around the restriction on foreign ownership of more than 49% of the shares in a Dubai company. The court of first instance rejected Dr Haddad's claim (in a decision dated 28 May 2013) and that decision was upheld by the court of appeal and by the Court of Cassation in Decision 508.

33. The Court of Cassation concluded that Dr Haddad's claim to 50% of each of the companies had already been decided against him in a previous decision of the Court of Cassation, which gave rise to the equivalent in English law of an issue estoppel. That earlier decision, dated 1 November 2018 in case number 548/2017 ("Decision 548"), was made in conjoined appeals in which KMP Dubai claimed against Dr Haddad in unjust enrichment by reason of his refusal to hand back to KMP Dubai two villas registered in his name but beneficially owned by KMP Dubai. Dr Haddad responded to that claim by asserting that he was "in reality" a 50% shareholder in the KM Group (including KMP Dubai) and that he was entitled to the two villas because they had been paid for out of his share of profits. The Court of Cassation rejected Dr Haddad's claim on the basis that he had not sufficiently evidenced his claim.

34. Mr Ayres, for Dr Haddad, made three core submissions. First, that neither Decision 508 nor Decision 548 gave rise to an issue estoppel because the issue was not the same as that which arises in these proceedings, and because the capacity of the parties was different. Second, Dr Haddad can point to three other decisions in Dubai which indicated that there was an overarching partnership between him and Ms Khulood, so that it cannot be said that the matter of his partnership entitlement has been fully and finally determined against him by the Dubai courts. Third, the decisions relied on by the defendants were arrived at in breach of natural justice.

The same issue/capacity of parties

35. Mr Ayres' first contention under this head was that whereas the issue in Decisions 508 and 548 was whether Dr Haddad could show that he was a "real" or "reality" shareholder in KMP Dubai, notwithstanding that he was not listed on the memorandum of association, the issue in these proceedings is what should happen with respect to the overarching partnership between Dr Haddad and Ms Khulood governed by the KMI-PC. Thus, for example, it is only in these proceedings that an order is sought to dissolve the Partnership, and the Dubai courts have not adjudicated on matters such as the identity of the Partnership assets, the form of the account between the parties and what the final balance on the account should be.

36. I reject that submission, which focuses (wrongly, in my judgment) on the different relief sought in Dubai and in England. It is true that no question of dissolving the Partnership arose in the Dubai proceedings. The question of dissolution is only relevant, however, if Dr Haddad can establish the existence of the Partnership in the first place, and it is *that* issue – i.e. whether there was a Partnership at all – which the defendants contend was determined in Dubai. In the end, I understood Mr Ayres to accept this, as he acknowledged that if the Dubai court had ever decided that Dr Haddad and Ms Khulood did not have a 50/50 overarching partnership, in proceedings to which Dr Haddad and Ms Khulood were parties in their capacity of partners, that would give rise to an issue estoppel (leaving out of account his other arguments).

37. Mr Ayres' second contention was that the Dubai courts have not in fact determined that there was no such overarching partnership. He contended that the Court of Cassation in Decisions 508 and 548 merely determined a narrower issue, namely that Dr Haddad could not establish a 50% legal interest in the shares in KMP Dubai. It is not enough that Dr Haddad's case in Dubai (that he had such an interest in the shares in KMP Dubai) is *consistent* with his case in these proceedings: it is necessary to show that the issues are *the same* in both jurisdictions.

38. I accept that it is essential to show that the issue determined in Decision 508 is the same as that which arises in these proceedings but, for the reasons which follow, I consider that it is indeed the same.

39. First, Dr Haddad's case in Decision 508 was not merely that he had a 50% legal ownership in the shares of KMP Dubai. Rather, he claimed to have a 50% interest in all of the companies in the KM Group in Dubai. Similarly, although the only defendant in Decision 548 was KMP Dubai, it was Dr Haddad's case in those proceedings that he and Ms Khulood were joint owners in all of the relevant companies and sole proprietorships in Dubai.

40. Second, the foundation of Dr Haddad's case in Dubai that he was a 50% shareholder in the relevant entities, was an overarching agreement for partnership between him and Ms Khulood under which he was entitled to a half interest in all the companies and sole proprietorships in Dubai. This is evident, for example, from his contention that the constitutional documents of the companies were sham documents in that they did not represent the true

agreement between him and Ms Khulood, and from the following passage in Decision 548 (itself quoted in full in Decision 508):

> "…on 22-1-2009 he [Dr Haddad] filed a complaint against [Ms Khulood] – the director of [KMP Dubai] – stating that he has been a shareholder with her since 2003 in a group of companies and sole proprietorships with a percentage of 50%, including [KMP Dubai], and that she prevented him from entering the company and misappropriated the partnership contracts signed by both of them…"

41. Third, the suggestion that the issue at stake in Decision 508 was a narrow company law one as to his legal status as shareholder is inconsistent with Dr Haddad's claim in that case that he should be declared a 50% owner of all of the entities and that they should all be liquidated. It is common ground between the parties that if a Dubai court concluded that the register of members falsely identified a majority of Dubai resident shareholders when, in reality, a foreign individual owned 50% or more of the shares, the immediate consequence would be the dissolution of the company, with the assets being distributed in accordance with the *true* position. In this case, if Dr Haddad's claim had succeeded, that would have resulted in the assets of KMP Dubai and the other Dubai companies being distributed equally between him and Ms Khulood. This is indeed what the first instance decision (120/2009) records Dr Haddad's "final requests" as including: the dissolution of KMP Dubai and other Dubai companies with the assets being divided equally between him and Ms Khulood.

42. It is also relevant to note that, although the Partnership is said to have included a number of other companies (including some incorporated in England, India and Saudi Arabia), by the date of the first instance decision in 120/2009 all but one of the remaining companies in the alleged Partnership were those incorporated in Dubai which were the subject of Dr Haddad's claims in cases 548/2017 and 508/2019. The one exception was a company incorporated in Saudi Arabia, but even that is described by Dr Haddad as a "branch" of KMP Dubai (its shares being registered, as to 51%, in the name of Dr Haddad and, as to 49%, in the name of KMP Dubai). Thus the Dubai proceedings concerned substantially the same alleged Partnership assets as would be in issue in these proceedings.

43. Fourth, the defendants' uncontradicted evidence is that the materials relied on by Dr Haddad to establish in the Dubai courts the agreement giving him an entitlement to 50% of the shares in the KM Group are substantially the same as the materials which Dr Haddad relies on in these proceedings. The first instance decision (120/2009) refers to text messages, letters and electronic documents which Dr Haddad submitted in order to prove his equal share in all companies and sole proprietorships. The Court of Cassation in Decision 508 similarly referred to data, accounting documents and emails which had been examined by the appointed expert in the case (it being the practice in Dubai for the court to appoint an expert to examine the facts). It concluded that some of this evidence "might be interpreted" as demonstrating that Dr Haddad was "a reality shareholder in the KM Group" and some of it "might be interpreted that [Dr Haddad] is not a reality shareholder in these companies".

44. One important document that was *not* considered in Decisions 508 and 548 (and the decisions in the lower courts in each case) was the KMI-PC. It is Dr Haddad's case that this document had been kept in a safe by Ms Khulood and misappropriated by her. This allegation had been put to Ms Khulood in an interview (conducted in the context of potential criminal proceedings) in April 2009. It would appear that Dr Haddad had made the same allegation in case 548/2017, since the passage I have quoted above from Decision 548 refers to Dr Haddad's claim that Ms Khulood had "misappropriated the partnership contracts signed by both of them".

45. In fact, Dr Haddad did at one time seek to have the KMI-PC deployed in case 508/2019. The document had been deployed in proceedings in Dubai brought by a Ms Issa against (among others) Dr Haddad and Ms Khulood. On 3 September 2018, Dr Haddad petitioned the court of appeal in case 1010/2013 (the appeal from which led to Decision 508) to join the Issa case file so that the documents in that case would be available to the court of appeal. His application indicated that he wished the proceedings to be joined so that documents "…which prove that the first agreement on the partnership between [Dr Haddad and Ms Khulood] was in Britain before it moved to Dubai" and that "the partnership contracts signed by and between [Dr Haddad and Ms Khulood] were in the possession of [Ms Khulood]…" However, Dr Haddad withdrew his application to join the Issa case file on 28 January 2019. This followed soon after Allen & Overy had pointed out, in their letter of 11 December 2018 responding to the letter before action from Cooke, Young and Keidan, that the KMI-PC was "currently before the courts of Dubai for their adjudication".

46. Although it is true, as Mr Ayres pointed out, that Dr Haddad's claim in Dubai was to a 50% interest in each of the companies, whereas his claim in these proceedings is to a 50% interest in all the assets of the Partnership, which includes the shares in the same companies *and* the beneficial interest in the assets of the companies, that does not detract from the facts that (1) in both jurisdictions the essential question is whether the partnership agreement – upon which the alleged entitlement depends – exists at all, and (2) the question was answered against Dr Haddad in Dubai.

47. As to capacity, Mr Ayres submitted that Dr Haddad's claim, in the Dubai proceedings, was limited to seeking recognition as a shareholder, and he was not acting in the capacity of a partner under an English law governed partnership. He submitted that at no stage did Dr Haddad ever initiate or respond to proceedings in Dubai as a "partner" in the sense of being a partner pursuant to the Partnership Act 1890. That, however, is not a relevant difference in capacity for the purposes of issue estoppel. A difference in capacity exists where a person brings one claim in their own right and another claim in right of someone else, for example as a personal representative of another: see *Lemas v Williams* [2013] EWCA Civ 1433, per Arden LJ at [43]. In this case Dr Haddad claims in his own right both in Dubai and in these proceedings. In both jurisdictions, his claim is that he is entitled to a 50% share in the relevant assets as a result of the agreement made by him, in his personal capacity, with Ms Khulood. The fact that the Partnership Act 1890 was not relied on by Dr Haddad in Dubai is irrelevant, because - as I have noted above - an issue estoppel is

created where the issue (whether there was a partnership agreement at all) is the same notwithstanding that the law governing that issue might be different in the two jurisdictions.

48. It is common ground that for a foreign judgment to create an issue estoppel, it is necessary for that judgment to create an issue estoppel according to the foreign law, as well as according to English law. The expert evidence adduced by the AR Defendants consists of two reports from Mr Ali Al Aidarous ("Mr Aidarous"). He stated that, whereas cause of action estoppel requires a "triple identity" test (identity of subject matter, parties and cause of action), this is relaxed in the case of issue estoppel, so that a res judicata will be created even if the causes of action are different "…provided the decision in both cases depended upon a common underlying issue and the parties are common (whether actual or considered commonality…)". The latter covers parties who are "considered as a party, on a de facto basis".

49. The evidence adduced by Dr Haddad consists of two reports from Dr Arar Khrais ("Dr Khrais"). In his report addressing the question of res judicata, he referred only to cause of action estoppel. He provided no response at all to Mr Aidarous' evidence as to issue estoppel.

50. Mr Ayres did not press an argument at the hearing that Decisions 508 and 548 could not give rise to an issue estoppel under Dubai law (otherwise than for the same reason – the absence of the same issue – which he contended precluded issue estoppel under English law, and which I have dealt with above). In particular, he did not press an argument raised in Dr Khrais' evidence to the effect that Decision 548 could not give rise to an issue estoppel under Dubai law in the context of Decision 508 because the parties were different. I consider he was right not to do so. That is, first, because of the absence of any evidence to contradict Mr Aidarous' opinion as to issue estoppel (as opposed to cause of action estoppel) under Dubai law and, second, because Decision 508 is itself a decision of the final appeal court in Dubai on the application of issue estoppel in a case where the parties included all the parties to these proceedings. In other words, Decision 508 itself creates an issue estoppel upon the question of whether Decision 548 creates, under Dubai law, an issue estoppel. As I have already noted, even if Decision 508 is wrong as a matter of Dubai law, it is still capable of giving rise to an issue estoppel in these proceedings.

51. Accordingly, having reviewed in detail Decisions 508 and 548 and the first instance decision 120/2009, and notwithstanding the caution to be exercised in seeking to interpret decisions of foreign courts, I am satisfied that the defendants have the better of the argument that the issue which lies at the heart of these proceedings – whether there is an overarching partnership between Dr Haddad and Ms Khulood – is the same issue that was determined against Dr Haddad in Decision 508.

Three decisions relied on by Dr Haddad

52. Mr Ayers' second core submission was that in three further decisions, a court in Dubai has concluded that Dr Haddad *was* a partner with Ms Khulood. I can deal with this shortly, since Mr Ayres made it clear that he was not relying upon

any of these decisions as giving rise to a res judicata or issue estoppel. Given that acceptance, it is not necessary to consider in any detail why those other decisions do not give rise to an issue estoppel, beyond saying that I accept Mr Moriarty's submission that in each of the three decisions the court's conclusion as to the existence of the partnership was not essential to the ultimate decision (and, in one instance, the ultimate decision was an acquittal in a criminal case which cannot give rise to a res judicata under English law).

53. Instead Mr Ayres relied on the three cases in support of a submission that the court cannot be completely satisfied that the question of the existence of the Partnership has been fully and finally determined, conclusively, on the merits against Dr Haddad. (He also relies on them in relation to the argument based on breach of natural justice, which I deal with below).

54. I do not accept this second core submission. Aside from arguments based on breach of natural justice, it is not contended, by reference to Decisions 548 or 508 themselves, that they are neither final nor conclusive judgments on the merits against Dr Haddad. I do not see how, in those circumstances, it can be said that Decisions 548 or 508 may nevertheless not be final or conclusive judgments on the merits because of the existence of other decisions reaching a different conclusion which are *not* said to give rise to an issue estoppel. Issue estoppel is not established by reference to "the UAE courts", "looked at as a whole", as Mr Ayres put it in argument, but by reference to a specific final and conclusive decision or decisions of a particular court where there was sufficient identity of parties and issue.

Breach of natural justice

55. In Mr Ayres' skeleton (itself based on the expert evidence of Dr Khrais), more than 50 separate instances of alleged breaches of natural justice, in relation to five different decisions of the Dubai courts, are identified. At the hearing, however, only two instances were pursued, both of which relate to Decision 508.

56. First, it is contended that it was a breach of natural justice for the Court of Cassation in Decision 508 to ignore the three decisions of the courts of Dubai that Dr Haddad points to as deciding (albeit without creating any issue estoppel) that there was a partnership. Second, the Court of Cassation is criticised in Decision 508 for having failed to state its reasons for concluding that Decision 548 gave rise to an issue estoppel notwithstanding the lack of identity of parties.

57. The essential question is whether the proceedings in the foreign court offend against our view of substantial justice: *Pemberton v Hughes* [1899] 1 Ch 781, cited with approval by the Court of Appeal in *Adams v Cape Industries Plc* [1990] Ch 433, at 566G. It is not limited to due notice and the opportunity to put a case, but it is not enough to show that the foreign court was wrong. That is made clear in the following passage from the judgment of the Court of Appeal in *Adams* (above) at p.569E-G:

> "It is well established that a defendant, shown to have been subject to the jurisdiction of a foreign court, cannot seek to persuade our court to examine the correctness of the judgment whether on the facts, or as to the application by the foreign court of its own law or, when relevant, of the law of this country. A foreign judgment is not impeachable merely because it is "manifestly wrong:" *Godard v. Gray*, L.R. 6 Q.B. 139; *Castrique v. Imrie* (1870) L.R. 4 H.L. 414 and *Robinson v. Fenner* [1913] 3 K.B. 835, 842. In any such case it could be said that there has been a breach of natural justice, but it is not a type of breach which our courts will consider relevant. In effect, their attitude is that the only way in which the defendant can seek to correct an error of substance made by the foreign court is by using such means for correction of error as may be provided under the foreign system."

58. Neither of the matters of which Dr Haddad complains reaches, in my view, the threshold of offending our views of substantive justice. As to the first complaint, it is not suggested that Dr Haddad was prevented from putting forward his argument, or from relying on the relevant judgments to support his claim that there was a partnership. I do not think it can be said to be a breach of natural justice for the Court of Cassation to have reached a decision based upon the evidence cited to it and an issue estoppel created by a previous decision, rather than by reference to decisions of other courts *which it is not contended gave rise themselves to an issue estoppel*. As to the second complaint, the position in Dubai (as appears from Decision 508 itself) is the same in England, namely that a court is not obliged to respond independently to every argument raised by the parties. The complaint amounts, in essence, to one that the Court of Cassation was wrong to conclude that Decision 548 gave rise to an issue estoppel (indeed, the point was advanced in Mr Ayres' skeleton as "the Court erroneously used Decision 548…"). As noted above, even if (which I do not accept) Decision 508 was "manifestly wrong", that would not constitute a breach of natural justice.

Conclusion as to issue estoppel

59. For the above reasons, I am satisfied that the defendants have the better of the argument on the question whether Dr Haddad's claim is barred by issue estoppel. For that reason Dr Haddad has failed to establish a claim falling within the contract gateway in paragraph 3.1(6)(a) or (c) of Practice Direction 6B. Indeed, I would go further and conclude that the reasons set out above lead also to the conclusion that there is no serious issue to be tried as to whether Dr Haddad can refute the contention that his claim based on the alleged Partnership is barred by issue estoppel.

60. This conclusion means that it is unnecessary to consider the alternative argument, that the contract gateway cannot be established because the KMI-PC was entered into for an illegal purpose. I deal with it nevertheless, since the point was fully argued.

Illegality

61. The defendants contend that the KMI-PC is a contract to violate UAE law, because it is a contract whose sole, or at least predominant, purpose is to undertake business, including a property development business in Dubai through entities incorporated in Dubai that are owned equally by Dr Haddad and Ms Khulood. They rely in particular on the following provisions of the KMI-PC:

    (1) Its purpose was stated as being (among other things) a "world class premier property developer" (§1.3);

    (2) Both parties would establish in Dubai companies/establishments to legally execute the activities of the "Group" (§1.4);

    (3) The express recognition that it was unlawful for a non-UAE national to own more than 49% of shares in a UAE company, and the attempt to get around this by Dr Haddad's shares in any UAE company being registered in Ms Khulood's name, in clause 1.5; and

    (4) The fact that any companies or establishments used to execute the activities of the "Group" must operate from one physical head office location (clause 3), which was in Dubai;

62. They rely in addition on the purported undertaking by KMP Dubai dated 12 August 2004, that all of its assets and properties were owned by the Partnership.

63. This is said to be contrary to the law of the UAE in two respects.

64. First, it contravenes restrictions on foreigners owning land in Dubai. Article 4 of Dubai Law No.7/2006 (the "Land Registration Law") states that:

> "The right to own Real Property in the Emirate shall be restricted to UAE and GCC nationals and to companies owned in full by them and to public joint stock companies. Subject to the Ruler 's approval and in specific areas in the Emirate as determined by him, non-national persons may be granted the following rights:
>
> A. The right to freehold ownership without time restrictions; or
>
> B. Usufruct right or leasehold right over a Real Property for a period not exceeding 99 years."

65. Pursuant to Article 3 of Regulation No.3/2006 (the relevant bylaw under the Land Registration Law), foreigners are permitted, as from 7 June 2006, to acquire ownership rights over real property in certain designated areas. The defendants accept that there is at least a good arguable case that the property acquired in Dubai (on Dr Haddad's case for the Partnership) was in such designated areas, so that the alleged Partnership's ownership of real property in Dubai has been legal since 7 June 2006.

66. Mr Aidarous (the defendants' expert in UAE law) stated that, prior to enactment of the Land Registration Law, the "position … was the same. The Land Registration Law codified prior established practice". In other words, his evidence was that prior to 7 June 2006 foreign nationals could not own land in the UAE, and that it was only after that date that certain areas within the UAE were designated in which foreign nationals could own land.

67. Dr Khrais' response to this evidence was (at paragraph 141 of his first report) that "the non-UAE National can own personally or through a company a UAE real estate located at the Free and freehold Zones since 2004 up till now". He went on at paragraphs 142 and 143, however, to refer to the Land Registration Law as permitting non-UAE nationals to acquire "usufruct rights" in designated areas from 7 June 2006, and to conclude that "it was not prohibited for Dr Haddad to own a company with a property development activity at around 2006", as per the Land Registration Law.

68. On the basis of this evidence I am satisfied that the defendants have the better of the argument that land ownership by non-UAE nationals prior to 7 June 2006 was unlawful. The natural inference from paragraphs 142 and 143 of Dr Khrais' report is that Dr Haddad *was* prohibited from doing so *prior to* 7 June 2006. While that is inconsistent with his statement in paragraph 141 (referring to the period from "2004 up till now"), Dr Khrais neither acknowledges or explains that inconsistency, nor points to anything which contradicts Mr Aidarous' evidence as to the position before 7 June 2006.

69. Mr Ayres contends, however, that Mr Aidarous' evidence establishes only that any pre-2006 restriction on non-UAE nationals owning land was based on it being contrary to public policy, not that it was unlawful. Accordingly, he submitted (in reliance on an obiter passage in the judgment of Phillips J in *Lemenda Ltd v African Middle East Co* [1988] QB 448 at p.456A-C) that the fact that performance of a contract would contravene the public policy of a foreign state (but not the provisions of its law) does not in itself constitute a bar to the enforcement of the contract.

70. In agreement with the submissions of Mr Moriarty, I do not think it is open to Mr Ayres to take this point. It was open to Dr Khrais to challenge (in his first report) Mr Aidarous' evidence that "the position … was the same" prior to the enactment of the Land Registration Law, but he did not do so. Although he sought to do so in a third expert report produced shortly before the hearing, I excluded that evidence on the grounds that it was produced far too late and in breach of an order of mine dated 5 May 2021 limiting the scope of any further evidence filed on behalf of the claimant.

71. The second ground of illegality is that the KMI-PC is said to contravene restrictions on foreigners participating in companies in Dubai. Under the 1984 Companies Law (in force in the period 2004 to 2009), it is a requirement to have UAE shareholders with at least a 51% stake in a company. By Article 323 of the 1984 Companies Law, any company that violates the provisions "concerning the established position of the U.A.E. nationals in the company share capital…" shall be liable to a fine.

72. Mr Aidarous refers to the fact that it was a common practice for non-UAE nationals to set up limited liability companies in Dubai, that were totally owned by non-UAE nationals, using the services of a "sleeping partner" who would own 51% of the shares in the company. If such an arrangement were proved before a court, however, the court would "nullify such a company". As I have already noted, it is common ground that, although the company would be nullified, the surplus assets of the company would be distributed to the shareholders in accordance with their true arrangement.

73. Dr Khrais' response was to refer to authorities which established that it is not considered unlawful in the UAE "if there is an agreement between a UAE national and a non-UAE national to assign 50% of the shares or more to a non-UAE national."

74. Again, I consider that the defendants have the better of the argument on this issue. Article 230 of the Company Law (cited by both experts) is clear in relation to assignments. It provides that an assignment of shares is valid only from the date of entry of the same in the company's register and the register of Commerce and, importantly, that: "In all cases, the assignment may not cause decrease of the national partner's share in the capital to a rate below 51% of the total number of shares…".

75. I am fortified in this conclusion by two further matters. First, Dr Haddad himself asserted at paragraph 44 of his first witness statement that "The Dubai Courts would also nullify the KMI Partnership Contract as it is unlawful as per the UAE law". In his fifth witness statement, Dr Haddad sought to explain this passage by saying: "The correct position is that the UAE Court will enforce the real contract (KMI Partnership Contract) but it will declare its lack of jurisdiction because the contract includes an [agreement as to] English Courts jurisdiction and English law which is a valid and lawful agreement between parties and does not violate the UAE public policy, as [Dr Khrais] explains at Report 1 at para DD".

76. The passage referred to from Dr Khrais' first report merely confirmed, however, that where there was a "true contract" as to ownership of a company which had been concealed by "an apparent contract", the court would nevertheless distribute the company's assets in accordance with the true contract. That is consistent with Mr Aidarous' evidence that the *consequence* of an unlawful holding by a foreign national of more than 49% of the shares in a Dubai company is that the company is dissolved, but that the assets are nevertheless distributed in accordance with the true contract. Dr Khrais did not dispute that it was in the first place unlawful for a foreign national to own more than 49% of the company.

77. Second, not only was it Dr Haddad's case (as recorded in Decision 508) that the reason Ms Khulood was shown as holding more than 50% of the shares in KMP Dubai and other companies was because it was unlawful for foreigners to own more than 49%, but the court of first instance in the same case (120/2009) expressly noted that Dr Haddad had chosen to go against the laws of the UAE in relation to shareholder percentages of non-citizens in companies.

78. Mr Ayres contended, however, that even if the business of the Partnership at the time of the KMI-PC was unlawful under UAE law because it involved investment in real estate in the UAE and Dr Haddad owning more than 49% of KMP Dubai and other Dubai entities, that did not prevent the contract gateway from being satisfied. A number of reasons for this were advanced in his skeleton, but I need to address only the following two principal reasons:

    (1) The contract gateway was satisfied by the fact (which the defendants do not dispute for the purposes of this application) that there is a good arguable case that the KMI-PC (which is by its terms governed by English law) was entered into by Ms Khulood. The fact (if it was established) that the KMI-PC was entered into for the sole or predominant purpose of breaching UAE law might constitute a defence to the claim, but was not relevant to the satisfaction of the gateway;

    (2) In any event, neither the sole nor predominant (if that is the test) purpose of the Partnership was to breach UAE law.

The relevance of illegality to the contract gateway

79. The defendants' contention that illegality precludes Dr Haddad from satisfying the contract gateway is premised on the following: the KMI-PC was entered into with the intention of breaching UAE law; as such it is void (and not merely voidable); a void contract is no contract at all such that Dr Haddad's claim cannot be said to be "in respect of a contract where the contract … is governed by English law". Accordingly, although (for the purposes of this application) the defendants accept that there is a good arguable case that an *agreement* in the terms of the KMI-PC was reached, they contend that it is not a *contract* for the purposes of the gateway in paragraph 3.1(6) of Practice Direction 6B.

80. It is important to identify the precise legal basis underpinning the defendants' claim that the KMI-PC is void and, in particular, what is *not* relied on. The defendants' case is not based on the common law doctrine of illegality, because that is concerned (in the case of a contract governed by English law) solely with contracts that are illegal as a matter of English law. Nor is the defendants' case put on the basis that the *performance* of the KMI-PC contravened UAE law (which would have rendered it unenforceable: see *Ralli Bros v Compania Naviera Sotay Aznar* [1920] 2 KB 287). Instead the defendants' case is put on the basis that – as a matter of public policy – the English court will not enforce a contract the very purpose and intention of which was to breach a foreign law.

81. The principle is stated as follows in Dicey, Morris & Collins, The Conflict of Laws, 15th ed., para 32-191: "An English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of that country notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally" (quoting Sankey LJ in *Foster v Driscoll* [1929] 1 KB 470, at p.521).

82. In *Foster v Driscoll*, the majority of the Court of Appeal concluded that the parties had set out as co-adventurers to conduct an illegal adventure, namely supplying whisky to the United States of America in violation of its laws. The object of the parties was held to be to obtain a large profit from the illicit sale of the whisky. It was not seriously disputed (as Lawrence LJ noted at p.510) that if that was the real nature of the adventure then it would be an illegal partnership. He said: "…I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even although the parties have not succeeded in carrying out their enterprise, and no such criminal offence has in fact been committed…"

83. At p.514, Lawrence LJ addressed the contention (derived from a passage in the 4th edition of Dicey's Conflict of Laws) that an English contract will only be held invalid on account of illegality if it "actually necessitates the performance in a foreign and friendly country of some act which is illegal by the law of such country". He concluded that, in view of the main object of the partnership (as noted above) it was not saved from illegality merely because the partners may have contemplated not being able themselves to import the whisky into the United States, and may have considered the possibility of having to deliver the whisky to the illicit buyers elsewhere "consistently with their being able to obtain the high price ruling on the illicit market in which they intended to sell the whisky."

84. Sankey LJ agreed, concluding (at p.520) that "all the parties concerned were engaged in an adventure which had for its express purpose the violation of the law of the United States." He also agreed that the principle that a contract which might be performed in two ways (one legal, one illegal) cannot be said to be an illegal contract was "excluded by the facts of the case". He expressed the principle (at p.521) in the terms quoted by Dicey (above).

85. In the context of the common law principle of illegality, the Supreme Court in *Patel v Mirza* [2016] UKSC 42; [2017] AC 467, jettisoned the former rule, that a party to an illegal agreement cannot enforce a claim against the other party to the agreement if he has to rely on his own illegal conduct in order to establish the claim. The new test is encapsulated in the following passage from the judgment of Lord Toulson at [101]:

> "So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy."

86. The defendants rightly point out that *Patel v Mirza* does not directly apply to a case where the relevant illegality is the breach of a foreign country's laws. Nevertheless, it has recently been held that a similar balancing exercise is appropriate in determining whether public policy requires the English court wholly to refuse to enforce a contract entered into with the intention of breaching a foreign law: see *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm). In that case, Cockerill J rejected the application of *Patel v Mirza* to a case involving a contract alleged to have been entered into with the purpose of breaching UAE law. At [331] she rejected that argument because it involved conflating two different iterations of public policy: the public policy underpinning the law relating to domestic illegality is *ex turpi causa* and consistency, whereas the public policy underpinning the principles in *Ralli* and *Foster v Driscoll* is international comity. She continued, at [332], however:

> "Having said that I do not consider that this involves (as Mr Robins suggested) a perverse dichotomy with a flexible rule in one context and a rigid and inflexible rule in another. *Patel v Mirza* does provide a guide in this sense. Surely it is right in both cases that a balancing exercise has to be performed, though the elements in the balancing exercise will at least in part be different because the public policy which underpins the question in the foreign illegality cases is different to that which affects *Patel v Mirza* type cases. One does not go to the questions at which Lord Toulson arrived via a consideration of the caselaw and academic thinking on domestic illegality. One does not specifically invoke proportionality, because that assumes an understanding of the questions of weight and gravity which may not be available in respect of a foreign court's or foreign judicature's priorities. But where the clear answer is not given by either of the main principles, one balances the relevant factors discernible from the case law in the light of the underpinning principle. It is thus that one gets to the factors which Lord Collins set out in *Ryder*. These are the kind of factors which are relevant to the particular public policy."

87. The reference to *Ryder* was to a decision of the Final Court of Appeal of Hong Kong, *Ryder Industries Limited v Chan Shui Woo* (2015) 18 HKCFAR 544, [2016] 1 HKC 323, involving a contract in connection with the manufacture of mobile phones performed in such a way as to infringe a Chinese regulatory provision on the outsourcing of bonded materials. At [57] of his judgment, Lord Collins noted that, while there may be cases in which a sufficiently serious breach of foreign law, reflecting important policies of the foreign state, may be such that it would be contrary to public policy to enforce a contract, "there is no basis in authority or principle for holding that every breach of foreign law would come into this category".

88. I respectfully adopt Cockerill J's analysis. Lord Toulson's comment in *Patel v Mirza*, justifying a more flexible approach in the context of domestic illegality, that "we are, after all, in the area of public policy" holds good in the case of foreign illegality. It is just that the public policies are different.

89. The defendants also contend that *Patel v Mirza* can have no application to an illegal partnership, because it is mandatorily dissolved by statute: see section 34 of the Partnership Act 1890. That, however, begs the question as to what consequences flow from dissolution and, in particular, whether any account ought nevertheless be taken as between the parties as to the distribution of the dissolved partnership's property between them.

90. Adopting that more flexible approach, I consider it to be far from clear that, even if the Partnership was entered into with the sole purpose of contravening restrictions under UAE law on foreign nationals owning more than 49% of the shares in Dubai incorporated companies or owning an interest in real estate in Dubai, this court is precluded from taking an account as between the partners and distributing the property of the Partnership according to that account. Of particular importance in this regard is the fact (as acknowledged by Mr Aidarous) that the consequence in the UAE of the breach of the restriction on ownership by a foreign national of more than 49% of shares in a Dubai company is that the assets of the company are nevertheless distributed to the shareholders according to their true agreement. So far as the ownership of real estate is concerned, it is also an important consideration that (for the purpose of this application at least) it is accepted that it has been lawful for Dr Haddad to own the relevant property in Dubai since 7 June 2006.

91. Put another way, I consider that Dr Haddad has (at least) the better of the argument that even if the KMI-PC was entered into with the sole intention of breaching UAE restrictions on foreign ownership of shares or real property, it is nevertheless a contract giving rise to certain legal consequences under English law. Under the flexible approach which I consider the more recent authorities mandate, a finding of such illegality no longer leads inevitably to the contract being void for all purposes. Accordingly, in circumstances where it is accepted for the purpose of this application that the KMI-PC was, as a matter of fact, entered into, I conclude that Dr Haddad has the better of the argument in contending that his claim is one "in respect of" a contract governed by English law.

92. In light of this conclusion, I need not consider the alternative argument advanced by Mr Ayres that, even if the necessary consequence of a finding that the KMI-PC was entered into with the intention of breaching UAE law is that it is void, the claim is nevertheless one that is "in respect of" a contract. I see some force in the proposition that sufficient nexus is established with this jurisdiction for the purposes of the contract gateway by the fact (assumed for the purposes of this application) that Ms Khulood entered into an agreement which by its terms were governed by English law. Since, however, I received limited submissions on this point, which could have wider implications, and it is unnecessary to reach a decision, I do not express a view on it.

93. This also makes it unnecessary to decide whether, (1) for the *Foster v Driscoll* principle to be engaged, it is necessary to show that (as Dr Haddad contended) the sole, or (as the AR Defendants contended) just a predominant, purpose of the agreement was to breach foreign law, or (2) the KMI-PC was entered into for such sole or predominant purpose. Under the more flexible approach that I consider applies today, the extent to which the partnership is infected with a

purpose to breach foreign law is part of the balancing exercise to be applied. If it had been necessary to do so, however, I would have concluded that, whether the test is sole, or predominant, purpose, Dr Haddad has the better of the argument that it was neither the sole or predominant purpose of the Partnership to breach UAE law, for the following reasons:

(1) The starting point is the pleaded case, which includes the following allegations: the Partnership was originally governed by an oral agreement which envisaged the business originally being in England but extending to Dubai and Saudi Arabia; and in June 2003 it was agreed that the Partnership would be headquartered in England and would offer management consultancy services in Dubai through its English office;

(2) The KMI-PC itself indicated that the parties would continue the existing business and that its business would include "interlinked departments/divisions to offer to itself and others management consulting services, stock market trading, investments, general commercial trading, marketing & advertisements, healthcare, automobile sales & services and a Hotel management operator…";

(3) Mr Ayres provided me with a list of references to the fifth witness statement of Dr Haddad which demonstrated the breadth of the business undertaken by the Partnership. This was supported to some extent by the list of companies said to have been incorporated under the umbrella of the Partnership, the names of which revealed the areas of business conducted by them, including "Every Hour Newspapers & Magazines Distributors"; "Knowledge Automobiles and Trucks"; "KM Hospitality and Leisure"; "KMAM Advertising"; and "Black Eagle Contracting". Moreover the list included companies incorporated in England, India and Saudi Arabia;

(4) Many of the companies were dissolved long ago and it may well be the case that for many years the only business conducted by any of the companies within the umbrella of the alleged Partnership has been real estate carried out predominantly in Dubai. Nevertheless, as Mr Moriarty submitted, what matters for the purpose of determining whether the Partnership was entered into for an illegal purpose is the intentions at the date of the KMI-PC;

(5) There is no evidence from the defendants themselves to contradict what Dr Haddad said about the business of the Partnership. On the basis of the limited evidence to which I was referred, I consider that Dr Haddad has a good arguable case that, at the time the KMI-PC was entered into, there was sufficient non-UAE business envisaged to mean that neither its sole nor predominant purpose was to breach UAE law.

The other gateways

94. My conclusion that there is no good arguable case (or even a serious issue to be tried) as to the existence of the Partnership is sufficient to determine the application of the AR Defendants (and the application of Dr Al Mulla insofar as it is in play on this application) against Dr Haddad, since, as I have noted above, unless Dr Haddad can establish a good arguable case as to the existence

of the Partnership, then there is no sufficient basis to establish a claim under any of the other gateways relied on.

95. I will therefore set out my conclusions and reasoning in relation to the other gateways more briefly.

The tort gateway

96. The tort claim pleaded in the APOC is a claim in conspiracy between all defendants culminating in the dishonest misappropriation and sale of Partnership property and monies. Dr Haddad contends that this claim is within paragraph 3.1(9)(a) of Practice Direction 6B on the basis that damage was sustained in the jurisdiction.

97. It is sufficient if some significant damage was suffered in England, even if the tort was committed abroad and damage was also suffered elsewhere: see, for example, *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, at p.437C.

98. Mr Ayres contended that damage was sustained in England in two ways. First, and principally, because Dr Haddad's ability to recover amounts due to him on the taking of the account upon dissolution of the Partnership will be impaired by reason of the misappropriation of Partnership assets. It is contended that such damage occurred in England because the proper place for Ms Khulood to account to her partner is in England.

99. The first difficulty with this argument is that no such loss has yet been sustained, and will not be sustained unless and until (1) the account has been taken in England, (2) that account results in a balance due to Dr Haddad, and (3) Ms Khulood fails to comply with the order the court makes on the account. That in turn depends upon this court accepting jurisdiction (because unless it does so, the place of accounting would not be England). Mr Ayres submitted that it is an "assumption of perfection" which I ought not to make that Ms Khulood would comply with any order made against her on taking the account. I disagree and, in any event, that does not answer the problem of timing and circularity that unless and until this court assumes jurisdiction in respect of the Partnership claim, the relevant loss in England will not occur.

100. More substantively, as Mr Moriarty contended, this argument confuses the place where the damage was sustained with the place where the financial consequences were felt of damage sustained elsewhere. That distinction is borne out by *Bastone & Firminger Ltd v Nasima Enterprises (Nigeria) Ltd* [1996] CLC 1902. In that case, the claimant was an exporter of chemical products to a purchaser in Nigeria. Payment was pursuant to bills of exchange payable in London. The claimant claimed, among other things, in conversion arising from the release of the goods to the purchaser in Nigeria before payment was made. It contended that damage had been suffered in England because it resided in England and kept its accounts here, that the bills of exchange should have been remitted to London and applied here in reduction of the claimant's overdraft facilities and but for the mishandling of the goods and documents, the documents would have been returned to London, whereupon the claimant would

have been free to deal with them and the goods, so as to realise their value in London. Rix J rejected that argument. He accepted the defendants' argument that the damage was sustained in Nigeria, where the goods were allegedly lost without the bills being first accepted or paid for, and that the failure to remit proceeds or return the documents was only consequential on the prior alleged failures to maintain the goods in warehouse until proper acceptance or payment of the bills. It was not enough, he concluded, that the financial consequences of the damage were felt in England.

101. The alleged impairment in respect of the account falls, in my judgment, on the same side of the line as the loss in *Bastone*. It represents the financial consequences to one of the partners of damage suffered by the Partnership in the UAE as a result of the alleged tortious conduct of the defendants.

102. Mr Ayres pointed to the obiter views of the majority of the Supreme Court in *Brownlie v Four Seasons Holding Inc* (above), followed by the majority of the Court of Appeal in the subsequent decision in the same proceedings: *FS Cairo (Nile Plaza) LLC v Brownlie* [2020] EWCA Civ 996. In the former case, Lady Hale JSC cast doubt on the utility of the distinction between direct and indirect damage. In the latter case, McCombe LJ said, at [53] said:

> "To my mind the distinction between "direct" and "indirect" damage is virtually meaningless in the present context when one is asking the proper question whether a claimant has suffered "significant damage" in the jurisdiction. Even in cases of economic loss, moreover, I can see no reason why the suffering of "significant damage" in this country might not amount to a proper "connecting factor" between this country and a foreign defendant, even if other such damage is suffered elsewhere, justifying the assumption of jurisdiction in a proper case. There is no need to import the legalistic niceties inherent in the concepts of direct and indirect damage. Such jurisdiction may not necessarily be exclusive. It may be that other "significant damage" is inflicted in the defendant's country also and the rules of that country may give its courts jurisdiction also. It is then a question of balance for the court to decide whether this country's jurisdiction should be asserted in the face of a parallel jurisdiction of the courts of the country abroad."

103. The facts in the *Brownlie* cases, which concerned the extent to which personal injuries suffered in an accident abroad gave rise to damages (including pain and suffering and loss of amenity) both abroad and in England where the claimant resided, were far removed from the present case. I do not read either the obiter views of the majority of the Supreme Court or the decision of the Court of Appeal as undermining the conclusion or reasoning in *Bastone*.

104. Mr Ayres also referred me to the decision of the Court of Appeal in *Eurasia Sports Ltd v Aguad* [2018] EWCA Civ 1742. In that case, however, the Court of Appeal expressly endorsed the distinction between damage and consequential financial loss (see Floyd LJ at [22]). Mr Ayres relies on the decision for the conclusion of Floyd LJ at [32] that "If the damage is

characterised as the impact of the failure of the defendants to meet their monetary obligations by providing security, then it seems to me that it is clear that that damage is felt in the place where the money was to be received, which was Malta". That conclusion echoes what was said by Christopher Clarke J in *Dolphin Maritime & Aviation Services v Sveriges Anfartygs Assurans Forening* [2009] EWHC 716 (Comm), at [60]:

> "I do not ignore the danger of conflating the place where the damage occurred with the place where the loss was suffered. There is, however, a difference between a case in which the claimant complains that he has lost his money or goods … and a case in which the claimant complains that he has not received a sum which he should have received. In the former case the harm may be regarded as occurring in the place where the goods were lost … or the place from or to which the monies were paid… although the loss may be said to have been suffered in the claimant's domicile. In the latter case the harm lies in the non receipt of the money at the place where it ought to have been received, and the damage to him is likely to have occurred in the place where he should have received it. That place may well be the place of his domicile and, therefore, also the place where he has suffered loss. An analogy may be drawn with the non delivery of cargo at the destination port…".

105. I do not think, however, that this helps Mr Ayres. In *Dolphin*, the tort consisted of inducing a breach of a contractual obligation to pay money, where the money was due to be paid in London. In this case, on the other hand, the tort consists of a conspiracy to defraud by misappropriation of assets in the UAE. Aside from the separate point made in relation to KMP UK (which I deal with below), it is not contended that the tortious conduct consisted of defaulting on payments which were due to be made to an account in England.

106. The second basis for contending that damage was suffered in this jurisdiction is that one element of the tortious conduct consisted of a failure to pass revenue that was due to KMP UK, an English entity said to be owned by the Partnership. The pleaded allegation (at paragraph 28.1) of APOC is that Ms Khulood "dishonestly concealed all of KMP UK's accounting records and financial transactions", amounting to at least AED 49,676,386. The evidence in support consists of an assertion to the same effect in Dr Haddad's fifth witness statement, together with the assertion that he and Ms Khulood had agreed these transactions should be allocated to KMP UK, because the UK business arm of the Partnership had been responsible for introducing the relevant buyers. The only documentary evidence provided in support is a one page schedule which contains a list of customers and the price payable by them for unidentified purposes save the name of the property (identified as the relevant "Tower") in the UAE to which the payment related. The payments are all denominated in AED. The relevant customers are not identified as buyers from KMP UK: it is merely suggested that the transactions should be "allocated" to KMP UK because KMP UK introduced the relevant customer. There is no allegation (and no evidence) that any of the payments were due to be made to an account in

England. In these circumstances, I consider that the defendants have the better of the argument that the failure to allocate these transactions to KMP UK does not give rise to any damage suffered within this jurisdiction.

107. The defendants also contend that there is no serious issue to be tried because any loss suffered by Dr Haddad as a result of the alleged tortious actions of the defendants is wholly reflective of the loss suffered by KMP Dubai and as such cannot be claimed by Dr Haddad as a shareholder. I can deal with this shortly because it is Dr Haddad's case that the assets of KMP Dubai which are alleged to have been misappropriated were held on trust for the Partnership, pursuant to a written undertaking dated 25 March 2007. If that is correct (and it is accepted for the purposes of this application that there is a good arguable case that the undertaking was executed), the misappropriation was of assets that did not belong beneficially to the company and so did not cause any loss to the company. There is therefore no room for the application of the reflective loss principle.

108. Given the above conclusion, I do not find it necessary to address an alternative objection, that there is no serious issue to be tried that the second to seventh defendants had sufficient intention, as a matter of UAE law, to misappropriate Dr Haddad's property. For the same reason, it is unnecessary to consider an application made after the end of the hearing by Dr Haddad for permission to adduce further evidence, in the form of a power of attorney given by the AR Defendants to the director of KMP Dubai to sell land belonging to KMP Dubai.

The Trust gateway

109. Dr Haddad relies (as against Ms Khulood) on the undertaking dated 12 August 2004 purportedly executed by Ms Khulood on behalf of KMP Dubai in which KMP Dubai declared and undertook that its activities, and all the assets and properties registered or to be registered under its name were owned by the Partnership. That declaration is stated to be governed by English law and subject to the jurisdiction of the English courts.

110. Mr Ayres submitted that because KMP Dubai was a "sole establishment" at the time of the declaration, the undertaking is to be construed as one made by Ms Khulood in her personal capacity. Mr Moriarty objected that it is not open to Dr Haddad to take this point because the only pleaded case is that the undertaking was made by KMP Dubai, defined as the corporate entity. Mr Ayres' submission depends upon it being established as a matter of Dubai law that a sole establishment has no separate personality in law to that of its "owner". There is no evidence on this issue. As Mr Moriarty pointed out, since the pleaded claim relates only to KMP Dubai, the corporate entity, there was no need for the defendants to adduce any evidence of their own on the point. I agree that for these reasons it is not open to Dr Haddad to contend that because KMP Dubai was a sole establishment at the date of the undertaking of 12 August 2004 the undertaking is to be construed as one given by Ms Khulood over assets owned personally by her.

111. More substantively, I do not see how – even if the undertaking of 12 August 2004 imposed any obligations on Ms Khulood personally – those obligations can have survived the subsequent incorporation of KMP Dubai and declaration given by KMP Dubai on 25 March 2007. Dr Haddad's case that Ms Khulood is a trustee of the relevant assets depends upon her having a legal interest in the assets held in the name of KMP Dubai. It is impossible to see how that can be the case once KMP Dubai was incorporated as a separate legal personality. That is reinforced by the fact that in the undertaking of 25 March 2007, KMP Dubai (by now an incorporated company) declared and undertook that all of its assets and properties registered or to be registered in its name were owned by the Partnership.

112. As against the second to seventh defendants, Dr Haddad relies on the undertaking dated 31 March 2007 which stated, among other things: "we the under signed, declare and undertake that the legal heirs of the late Mr Abdulla Hassan Al Rostamani, do not own any shares in KM Properties LLC…" The undersigned consisted of Dr Haddad and Ms Khulood (signing "for KM Properties") and the second and third defendants (signing as "Representative(s) of the Heirs of the late Mr Abdulla Hassan Al Rostamani"). The undertaking went on to state that "we acknowledge that we are the only responsible party for all liabilities associated with the company … We declare that we will never subject the heirs to any claim by any shareholder of the company or other parties." The heirs also acknowledged that they had no right to claim any profits from KMP Dubai.

113. There is no express declaration of trust in this document by the second to seventh defendants in favour of the Partnership or Dr Haddad. The defendants contend that, even if it did constitute such a declaration of trust, there is no good arguable case that it is governed by English law.

114. Mr Ayres relies on the Hague Convention on the law applicable to trusts (incorporated in English law by the Recognition of Trusts Act 1987). Article 6 provides that a trust shall be governed by the law chosen by the settlor, which may be implied from the terms of the trust instrument interpreted in the light of the circumstances of the case.

115. Mr Ayres submitted that a choice of English law should be implied into the undertaking of 31 March 2007 for two reasons. First, because it is closely related to the undertaking of 25 March 2007 which has an express English choice of law provision and, second, because clause 12 of the KMI-PC states that non-contractual obligations arising in connection with it are to be governed by English law.

116. In my judgment, Dr Haddad has failed to establish that he has the better of the argument on either of these points. The second to seventh defendants are not parties to the KMI-PC (which was entered into some three years earlier). In agreement with Mr Moriarty, therefore, I find that the terms of the KMI-PC are irrelevant to the construction of the 31 March 2007 undertaking. Similarly, they were not parties to the undertaking of 25 March 2007. The mere fact that the two undertakings are only a week apart is insufficient to lead to the implication of a choice of law provision in the later document, particularly given the

differences between the documents as to parties and subject matter. Indeed, if there was otherwise a connection to be made between the two documents, the fact that the parties chose to include a choice of law provision in the first document, but not in the second, points against implying such a provision in the undertaking of 31 March 2007.

117. Although Mr Ayres indicated that Dr Haddad's case was based alternatively on Article 7 (a trust is governed by the law with which it is most closely connected), he did not advance any submissions in support of that alternative case. In any event, I do not see how a declaration by the registered holders (all of whom are UAE nationals) of shares in a UAE company (and its Saudi Arabian subsidiary), that they did not own those shares could be said to be closely connected with England.

Constructive trust gateway

118. Dr Haddad relies on this gateway in respect of the claim against the second to eighth defendants in unconscionable receipt and dishonest assistance. Under paragraph 3.1(15) of Practice Direction 6B, service out of a claim in constructive trust may be granted where the claim arises out of acts committed or events occurring within the jurisdiction. In his skeleton argument, Mr Ayres pointed to a number of matters which he said established a powerful connection with England. At the hearing, however, acknowledging that connection with the jurisdiction is not the relevant test under this gateway, he relied solely on the contention that KMP UK did *not* receive commission revenue of some £10 million to which it was entitled in respect of the transactions that should have been allocated to it: see paragraph 106 above. As I have noted there, the pleaded case and evidence in support go no further than an allegation that certain transactions, where it is said that KMP UK introduced the customer, should have been "allocated" to KMP UK. The £10 million figure referred to is the sterling equivalent of the total of AED 49,676,386 said to be payable by the relevant customers for unidentified purposes relating to properties in Dubai. It is neither pleaded as, nor said in the evidence to be, commission payable to KMP UK. For the reasons I have set out above in connection with the tort gateway, I do not think that Dr Haddad has demonstrated a good arguable case that any part of the alleged sum was due to be paid in this jurisdiction. In any event, in agreement with Mr Moriarty, I do not think that the failure to pay amounts to a UK entity constitutes "events occurring within this jurisdiction".

119. Accordingly, I conclude that Dr Haddad has failed to establish a good arguable case under this gateway.

Claims against the same defendant and/or necessary and proper parties

120. In view of my conclusions above, I need not address these two remaining gateways, which depend on establishing a claim against Ms Khulood under one or more of the gateways addressed above.

Non-disclosure

121. It is common ground that an applicant for an order for service out of the jurisdiction must not only refrain from actively misleading the court but must be "full and frank". Practice Form 6F warns, at paragraph 6, that the "the application, being without notice, should also bring to the attention of the court any matter which, if the other party were represented, that party would wish the court to be aware of."

122. The applicable principles were not in dispute. Mr Moriarty referred me to the following summary provided by Christopher Clarke J in *Millhouse Ltd v Sibir Energy plc* [2008] EWHC 2614 (Ch), at [102]:

> "(1) If the court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.
>
> (2) Notwithstanding that general rule, the court has jurisdiction to continue or re-grant the order.
>
> (3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.
>
> (4) The court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.
>
> (5) The court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.
>
> (6) The court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.
>
> (7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.
>
> (8) The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence.

> (9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances."

123. That summary was taken from an earlier decision (*Arena Corpn Ltd v Schroeder* [2003] EWHC 1089 (Ch) at [213]) which was concerned with non-disclosure on an application for a freezing order. Not all of the points summarised apply outside the freezing or search order context. Christopher Clarke J described the summary as a "helpful review … subject to the overriding principle, reflected in proposition (9), that the question of whether, in the absence of full and fair disclosure, an order should be set aside and, if so, whether it should be renewed either in the same or in an altered form, is pre-eminently a matter for the court's discretion, to which … the facts (if they be such) that the non-disclosure was innocent, and that an injunction or other order could properly have been granted if the relevant facts had been disclosed, are relevant."

124. At [104], Christopher Clarke J stressed that the court's ability to set aside an order, or to refuse to renew it, is the sanction by which the obligation of full and frank disclosure is enforced and others are deterred from breaking it. At [106], while noting that much depends on the facts, he said that the more serious or culpable the non-disclosure, the more likely the court is to set its order aside and not renew it. Where there has been a deliberate misrepresentation or non-disclosure, then it has been said that exceptional circumstances would be required for the court not to discharge the order: *Congentra AG v Sixteen Thirteen Marine SA (The Nicholas M)* [2008] 2 Lloyds Rep 602 (QBD), per Flaux J at [62].

125. Mr Ayres relied on a passage in the judgment of Toulson J in *MRG (Japan) Limited v Engelhard Metals Japan Ltd* [2003] EWHC 3418 (Comm), at [43], in which he said that even if he had found wrongful non-disclosure he would not have set the order aside as that would have disproportionate (and could have been addressed by some form of costs sanction). I note that his comment was in the context of "the absence of any intention on the part of MRG to mislead the court".

126. Even where there is no deliberate breach of duty, a factor which might persuade the court to set aside an order is where the defendant obtained an illegitimate advantage (for example avoiding the expiry of a limitation period) as a result of the order: see *Easy Group Ltd v Empresa Aérea De Servicios Y Facilitatión Logistica Integral S.A.* [2020] EWHC 40 (Ch), per Nugee J at [117] to 120].

127. The defendants accept that if I were to set aside the Service-out Order it would be open to Dr Haddad to re-apply. They contend, however, that given the further passage of time they would now have additional limitation defences available to them if Dr Haddad was required to start again.

128. Although the defendants contend that Dr Haddad failed in this respect in numerous ways, Mr Moriarty pressed only one matter in oral argument. That was, he said, so big that in itself it was sufficient to justify setting aside the Service-out Order. It relates to the defence of issue estoppel. The facts are as follows:

(1) On 11 December 2018, Allen & Overy responded on behalf of the defendants to the letter before action from Cooke, Young & Keidan. Under the heading "res judicata", the letter stated that the issue on which Dr Haddad's claim in these proceedings rests – the existence of a partnership between him and Ms Khulood – had been determined against him by the courts in Dubai, including by the Court of Cassation in Decision 548 and by the court of first instance (in case 120/2009) which was then being pursued to the court of appeal and which ultimately led to Decision 508. The letter went on to explain that the doctrine of res judicata existed to prevent abuse of process and harassment of defendants, and acts to prevent a party from bringing before the courts a matter which has already been litigated and decided by a court or tribunal.

(2) On the application to serve out of the jurisdiction, Dr Haddad exhibited the letter from Cooke, Young & Keidan, but omitted to exhibit or make any reference to Allen & Overy's response;

(3) In his witness statement in support of that application, Dr Haddad referred to there having been "extensive litigation" between him and Ms Khulood in the UAE, but said that "it is not related to the present claim". He provided a table summarising that litigation, but even though that table referred to Decision 548 and to other decisions which had dismissed his claim to an agreement with Ms Khulood entitling him to a 50% share in all the companies in Dubai, nowhere is that conclusion of the Dubai courts clearly stated. On the other hand the table did state (wrongly) that the first instance judge in case 1/2009 had stated that the AR Defendants had admitted to the court that Dr Haddad was a partner with Ms Khulood in KMP Dubai;

(4) He went on in that witness statement to state that "there is no overlap between the proceedings which have taken place in the UAE and the present claim" and that "Dubai Case No 120/2009 … does not overlap with the present claim";

(5) In the same witness statement he said that he had not submitted the KMI-PC in any pending proceedings in Dubai;

(6) In his fifth witness statement, Dr Haddad said that he apologised for the oversight in not providing the court with Allen & Overy's pre-action correspondence, but said that the matters raised in that correspondence were fully aired at the hearing.

129. There is no doubt that the failure to refer to the Allen & Overy letter was a breach of the obligation to be full and frank. Mr Ayres candidly admitted as much, and accepted that I can take it that, although he did not have solicitors acting for him at the time, Dr Haddad was aware of the obligation to provide full and frank disclosure. He was represented by direct access counsel (against whom no criticism is levelled) at the hearing before the deputy Master. Mr Ayres contended, however, that I should accept both Dr Haddad's apology and his description of his non-disclosure as an "oversight". He submitted that since the omission of the Allen & Overy letter would have been immediately obvious

to the defendants, it would have made no sense to withhold it, which suggests that its non-disclosure was not deliberate.

130. I am unable to accept this. The failure to be full and frank is not limited to the non-disclosure of the Allen & Overy letter, but extends to the failure to make any reference to the fact that the defendants intended to argue that Dr Haddad's claim was barred by issue estoppel and to the misleading nature of his description of the relationship between the Dubai litigation and these proceedings. The fact that the defendants would rely on issue estoppel was clearly stated in Allen & Overy's letter. Although it is fair to say that the possibility of a defence of issue estoppel was inherent in the fact that there had been extensive litigation between the same parties in Dubai, that litigation was described – both in Dr Haddad's witness statement and in the attached schedule – in a way which negated that possibility.

131. That is particularly demonstrated by Dr Haddad's repeated statement of there being "no overlap" between the proceedings. The suggestion (in his fifth witness statement) that the matters raised by Allen & Overy's correspondence were "fully aired" at the hearing is not borne out by the notes of the hearing. On the contrary, the matters raised by Allen & Overy were closed off in a manner which would preclude debate by the bald assertion of there being "no overlap". In the knowledge that the defendants would indeed contend – in reliance on at least a final decision of the Court of Cassation in Decision 548 – that there was an issue estoppel as to the existence of the Partnership, I consider that this bald assertion is more than mere non-disclosure and amounts to a positive misrepresentation of the position. Given my findings on the question of issue estoppel it was plainly wrong.

132. The assertion that the failure to disclose the Allen & Overy correspondence was an oversight is unsupported by any explanation as to how this occurred: for example, had Dr Haddad simply forgotten about the letter, or had he mistakenly believed that it was exhibited? In the absence of any such explanation, and given the importance of the correspondence to the issues in play, I cannot accept that it was a mere oversight. Nor do I accept, notwithstanding it is true that its non-disclosure would be immediately apparent to the defendants, that this demonstrates that it must have been an accidental omission. The misleading description of the issues in the Dubai proceedings indicates a positive desire on Dr Haddad's part to avoid engaging with the possibility that they gave rise to an issue estoppel.

133. This is compounded by Dr Haddad's statement that he had not submitted the KMI-PC in proceedings in Dubai. As I have noted above (see paragraph 45), that was untrue, because he *had* applied to join the file of another case (in which the KMI-PC had been disclosed) for the express purpose of ensuring that documents (plural) relating to the Partnership were before the court (including those that demonstrated it had originally been in England and that the written partnership agreement had been in Ms Khulood's possession). His withdrawal of that application some months later, for which he has offered no adequate explanation, does not detract from the fact that he had sought to admit the KMI-PC in the Dubai proceedings.

134. For these reasons, had it been necessary to do so, I would have found that not only was Dr Haddad in breach of the obligation to provide full and frank disclosure on his application for service out, but that the evidence was positively misleading and that these failings were the result of deliberate conduct as opposed to accidental omission. In accordance with the principles set out at [122] to [126] above, I would have set aside the Service Out Order, leaving it to Dr Haddad to make a further application for service out. Meaning no disrespect to Mr Fenwick, who presented an additional ground of breach of the obligation to provide full and frank disclosure, given that the ground relied on by Mr Moriarty is sufficient, and this point does not arise for decision given my earlier conclusions, I do not propose to lengthen this judgment by addressing it.

Conclusion

135. For the above reasons, I conclude that the Service-out Order should be set aside as against the first to seventh defendants. I will hear further from the claimant and the eighth defendant as to the implications of this judgment for the eighth defendant's application, to the extent that is not agreed.