Neutral Citation Number: [2023] EWHC 307 (Ch)

Claim Number: BL-2022-000913

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

Re: HARRINGTON & CHARLES TRADING COMPANY LIMITED (IN LIQUIDATION)
Re: BRAMHALL & LONSDALE LIMITED (IN LIQUIDATION)
Re: HOLDWAVE TRADING LIMITED (IN LIQUIDATION)
Re: OC305234 LLP (IN LIQUIDATION)
Re: OCEANROAD GLOBAL SERVICES LIMITED (IN LIQUIDATION)
Re: CONNECOR (UK) LIMITED (IN LIQUIDATION)

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

14th February 2023

Before :

MR JUSTICE EDWIN JOHNSON

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Between :

(1) HARRINGTON & CHARLES TRADING COMPANY LIMITED (in liquidation) **(2) BRAMHALL & LONSDALE LIMITED (in liquidation)** **(3) HOLDWAVE TRADING LIMITED (in liquidation)** **(4) OC305234 LLP (in liquidation)** **(5) OCEANROAD GLOBAL SERVICES LIMITED (in liquidation)** **(6) CONNECOR (UK) LIMITED (in liquidation)** **(7) COLIN DISS** **(As Liquidator of the First to Sixth Claimants)** **(8) NICHOLAS STEWART WOOD** **(As Liquidator of the First to Sixth Claimants)**	**Claimants**

and

(1) JATIN RAJNIKANT MEHTA **(2) SONIA MEHTA** **(3) VISHAL JATIN MEHTA** **(4) SURAJ JATIN MEHTA** **(5) HAYTHAM SALMAN ALI ABU OBIDAH**	**Defendants**

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Ewan McQuater KC, Ian Wilson KC and Philip Hinks (instructed by Hogan Lovells International LLP) for the Claimants
Thomas Grant KC and Emily McKechnie (instructed by Withers LLP) for the First, Second, and Fourth Defendants
Justin Higgo KC and Paul Adams (instructed by Howard Kennedy LLP) for the Third Defendant

Hearing dates: 6th and 7th December 2022
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JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10.00am on Tuesday, 14th February 2023 by circulation to the parties and their representatives by email and by release to The National Archives.

Mr Justice Edwin Johnson:

The structure of this judgment

1. The structure of this judgment is as follows:

Introduction

2. This is the hearing of various applications (**"the Jurisdiction Applications"**), pursuant to CPR Part 11, seeking an order that the court decline to exercise jurisdiction over, or otherwise stay the claims made in this action and in related proceedings under the Insolvency Act 1986. The various applications are made by the First to Fourth Defendants in this action. The case of the First to Fourth Defendants is that India is plainly the more appropriate jurisdiction than England for the resolution of this dispute, with the consequence that the court should decline jurisdiction over, or stay both this action and the related insolvency proceedings pursuant to the provisions of CPR Part 11.

3. The hearing of the Jurisdiction Applications, which occupied two days, followed a three day hearing in this action in October of last year (**"the October Hearing"**). In the October Hearing I heard rival applications seeking, respectively, either to continue or discharge a worldwide freezing order (**"the WFO"**) which I made, together with certain ancillary orders, against the First to Fourth Defendants. The WFO was made, on the application of the Claimants, at a without notice hearing on 27th May 2022 (**"the May Hearing"**).

4. The applications of the First to Fourth Defendants to discharge the WFO were only some of a number of applications which have been made by these parties, including the Jurisdiction Applications. By an order made on 22nd July 2022 His Honour Judge Hodge KC gave directions which hived off the Jurisdiction Applications to this hearing. It was not possible to hear all the remaining applications at the October Hearing, which was confined to the respective applications to continue or discharge the WFO. The remaining applications comprised applications by the First to Fourth Defendants seeking orders striking out the claims against them in this action and the related insolvency proceedings. The hearing of these remaining applications could not be fitted into this hearing. There are therefore some remaining applications, namely the strike out applications, which, subject to my decision on the jurisdiction question, remain to be heard.

5. I handed down my judgment on the applications which were heard at the October Hearing on 22nd November 2022 (**"the November Judgment"**). For the reasons set out in the November Judgment I dismissed the application of the First to Fourth Defendants for the discharge of the WFO and allowed the application of the Claimants for the WFO to be continued to trial.

6. At this hearing the Claimants were represented by Ewan McQuater KC, Ian Wilson KC and Philip Hinks. The First, Second and Fourth Defendants were represented by Thomas Grant KC and Emily McKechnie. The Third Defendant was represented by Justin Higgo KC and Paul Adams. I am, as at the October Hearing, grateful to counsel for their helpful written and oral submissions and for their co-operation in ensuring that the oral arguments were heard within the two day time estimate. In particular, I was assisted by the sensible decision of Mr Higgo not to traverse the same ground as Mr Grant, who opened the Jurisdiction Applications, but rather to adopt Mr Grant's submissions and to add specific

submissions of his own, which Mr Grant in turn adopted. This avoided unnecessary duplication in the submissions.

The November Judgment

7. I have already explained the background to this dispute at some length in the November Judgment. The November Judgment is however very lengthy, and it is not my intention that the reader of this judgment should have to plough through the November Judgment in order to understand this judgment. For this reason I will repeat some of the background set out in the November Judgment, sufficient to set the scene for this judgment, while taking the opportunity to add matters of particular relevance to the Jurisdiction Applications.

8. I will also, at various points in this judgment, make reference to particular sections of the November Judgment where more detailed analysis of particular matters can be found. I will identify particular paragraphs in the November Judgment as [NJ/1], and so on. I will also, as a general rule, establish the same definitions in this judgment as in the November Judgment. Finally, and as in the November Judgment, italics have been added to quotations in this judgment.

The parties

9. This is a case of alleged fraud. The Claimants' case is that each of the First to Fourth Defendants were complicit in a US $1 billion fraud whereby the proceeds of bullion advanced to two companies were misappropriated, laundered and concealed through multiple layers of corporate entities, with the vast majority of the proceeds said to have ended up in entities owned and/or controlled by the First to Fourth Defendants.

10. The First to Sixth Claimants are said to have been used as vehicles in the alleged fraud, as one layer of the corporate entities through which the proceeds of the alleged fraud are said to have passed. It is convenient to refer to the First to Sixth Claimants, collectively, as **"the Claimant Companies"**, subject to the point that the Fourth Claimant is an LLP. All of the Claimant Companies are registered in this jurisdiction. The Claimant Companies were formerly within something described as the Transactional Services Unit of a group of companies known as the Amicorp Group, which provided company administration and other services (**"the Amicorp Group"**).

11. The Third and Fifth Claimants were placed into members' voluntary liquidation (**"MVL"**) on 26th October 2020. Each MVL was converted into a creditors' voluntary liquidation (**"CVL"**) in February 2021, with the Seventh and Eighth Claimants taking up appointment as joint liquidators. This followed the entry of default judgment against the Third and Fifth Claimants by an order of Butcher J dated 16th January 2021. The default judgment was entered in favour of the claimants in an action in the Commercial Court (Claim No. CL-2020-000503), who were described as Standard Chartered Bank and Standard Chartered Bank India, in respect of claims arising out of the alleged involvement of the Third and Fifth Claimants in the alleged fraud.

12. It is relevant to note at this point that, as a matter of the law of England and Wales, Standard Chartered Bank and Standard Chartered Bank India are the same legal personality. I understand however that Standard Chartered Bank India is

registered as a foreign company under the (Indian) Companies Act 2013, with the consequence that Standard Chartered Bank India has or may have some kind of separate legal personality for the purposes of Indian law. I will use the expression **"SCB"** to refer to Standard Chartered Bank, and **"SCB India"** to refer to Standard Chartered Bank India. In doing so, it should be kept in mind that, for the purposes of the law of England and Wales, SCB and SCB India are the same legal personality. It should also be kept in mind, as a point relevant to the Jurisdiction Applications, that SCB India is, regardless of its correct legal personality, a branch of SCB which trades in India. In this sense it seems to me correct to describe SCB India as an Indian bank.

13. The four remaining Claimant Companies were all dissolved, following MVLs, in 2019 or 2020. These four Claimant Companies were all restored to the register by orders of Judge Hodge KC made on 1st June 2021. The four remaining Claimant Companies were restored to MVLs, which were subsequently converted to CVLs on 11th August 2021. The application for restoration was made by SCB and SCB India. Judge Hodge KC delivered a fully reasoned judgment on the application for restoration, which is reported as *SCB v Registrar of Companies* [2021] EWHC 1566 (Ch). The Seventh and Eighth Claimants are also now liquidators of these four Claimant Companies. It is therefore convenient to refer to the Seventh and Eighth Claimants as **"the Liquidators"**. The Liquidators are licensed insolvency practitioners and partners (strictly members) in Grant Thornton UK LLP, the firm of accountants.

14. The Claimant Companies are said to have comprised the bulk of the second layer (**"Layer 2"**) companies through which the proceeds of the alleged fraud were passed. The only other Layer 2 company was Carte & Hurt Tools Ltd (**"Carte"**), an Irish registered company which was also dissolved but cannot now be restored to the register because time has expired for doing so under Irish law.

15. The First to Fourth Defendants are all members of the Mehta family. The First and Second Defendants are husband and wife. The Third and Fourth Defendants are their sons. The Fifth Defendant, Mr Obidah, is said to be a close business associate of the First Defendant. Each of the five Defendants is alleged to have been involved in the orchestration of the alleged fraud. It is convenient to continue to refer to the First, Second, and Fourth Defendants, collectively, as **"the Three Defendants"**.

16. The precise whereabouts of the Fifth Defendant, Mr Obidah, is not currently known, although he is believed to be residing in the United Arab Emirates (**"the UAE"**). By an order made on 2nd August 2022 Master Kaye gave the Claimants permission to serve the claim form and other documents in this action and the related insolvency proceedings out of the jurisdiction, by the methods specified in the Master's order. Service was effected in accordance with this order on 11th August 2022, and took effect as deemed valid service on 16th August 2022 pursuant to paragraph 3 of the Master's order. One of the methods of service prescribed was the sending of the relevant documents to Nawal Salem Saeed, Advocates and Legal Consultants, at their office in the UAE. By an email sent to the Claimants' solicitors on 24th August 2022 Nawal Salem acknowledged receipt of the documents and stated that the documents had been forwarded to their client,

who was identified as the Fifth Defendant. This was followed by a letter from Nawal Salem to the Claimants' solicitors dated 22nd September 2022, which set out a reply to the proceedings. The letter commenced with a formal denial of the claims against the Fifth Defendant, and then set out various grounds on which the claims were contested. The first of these grounds was jurisdiction. Nawal Salem addressed this topic at some length in their letter, and concluded with the contention that the jurisdiction to hear the disputes in this case was limited to the courts of the UAE.

17. It is therefore clear that the Fifth Defendant is aware of this action and the related insolvency proceedings. Nawal Salem have not however come on to the court record either in this action or in the insolvency proceedings. On 14th October 2022 Master Kaye notified the parties, by an emailed message, that Nawal Salem had filed numerous documents on the CE file as advocates for the Fifth Defendant, but with a confidential marking. The Master's message went on to explain that this was not an appropriate way to proceed, and that Nawal Salem had not explained the basis on which they were authorised to conduct litigation in this jurisdiction and were not on the court record.

18. The Fifth Defendant has not made any formal response to the action or the insolvency proceedings. In particular the Fifth Defendant has not, either within the prescribed time limit or at all, made any formal challenge to the jurisdiction of this court to hear this action and the insolvency applications. The Fifth Defendant has, at least to date, taken no other active part in these proceedings, either in this action or in the insolvency applications.

19. In his written and oral submissions Mr Grant referred to the First to Fourth Defendants, collectively, as *"the active Defendants"*. I myself used this expression in the hearing, but I do not adopt this expression in this judgment because the role of the Fifth Defendant in this action became the subject of dispute between the parties, for reasons to which I shall come. In the November Judgment I referred to the First to Fourth Defendants as the Respondents. In the case of the Jurisdiction Applications however, the First to Fourth Defendants are the Applicants. For the purposes of this judgment, I will therefore adopt the neutral expression **"the Applicants"** to refer collectively to the First to Fourth Defendants.

20. The Applicants all reside in this jurisdiction and were served with the proceedings, both in this action and in the related Insolvency Act proceedings, as of right in this jurisdiction.

<u>The Alleged Fraud</u>

21. As I noted in the November Judgment, the factual background to the claims in this action is set out in considerable detail in the voluminous evidence filed for the May Hearing and the October Hearing. There remain substantial conflicts of fact which have emerged between the parties. In addition to this, it also remains the case that the investigations of the Liquidators into the alleged fraud are not yet complete. As I have explained above, the following summary of the factual background, taken from the November Judgment, is sufficient to set the scene for the matters which I have to consider in this judgment.

22. In or around 2008 a company known as Winsome, initially called Su-raj Diamonds & Jewellery Ltd and later called Winsome Diamonds and Jewellery Ltd (**"Winsome"**), entered into an arrangement described as a Precious Metals Facility (or Facilities) with a bank or banks, pursuant to which the bank or banks provided bullion, which I understand to have been gold (or principally gold), to Winsome, by way of loan/credit facility. I have seen the agreement comprising this Precious Metals Facility entered into between Winsome (then Su-raj Diamonds & Jewellery Limited) and SCB, which is dated 8th August 2008. It appears to be the case that other Precious Metals Facilities were entered into between Winsome and other banks. I understand that drawdown notes were issued, as and when Winsome drew down bullion under these facilities. Payments then fell to be made pursuant to the terms of these drawdown notes. A similar facility or facilities arrangement was entered into between a bank or banks and another company, in the same group as Winsome, known as Forever Precious (**"Forever Precious"**). I believe that the terms of drawdown were that payment fell due after 270 days for each drawdown. It may therefore be more accurate to refer to these facilities as commodities sales on 270 days credit.

23. I understand that there were eight banks in total which provided these Precious Metal Facilities (**"PMFs"**), as they were called. As I have mentioned, one of these banks was SCB. I will refer to the banks who provided the PMFs as **"the Bullion Banks"**.

24. In 2009 a consortium of banks, led by SCB India, entered into a joint working capital consortium agreement with Winsome, pursuant to which the members of the consortium issued standby letters of credit (**"SBLCs"**) for Winsome, as security for the advances of bullion drawn down by Winsome pursuant to the PMFs. I understand that there was an equivalent arrangement between a consortium of banks led by the Punjab National Bank and Forever Precious. I will refer to what I understand to have been the two consortia of banks as **"the Consortium Banks"**. It is important, for reasons to which I shall come, to maintain a distinction between the Bullion Banks and the Consortium Banks notwithstanding that, in the case of SCB at least, SCB was a Bullion Bank and a Consortium Bank (at least by reference to its legal personality under English law). The First Defendant acted as guarantor of the obligations of Winsome and (I assume) Forever Precious to the Consortium Banks.

25. In his oral submissions Mr Grant spent some time dealing with the terms of the joint working capital consortium agreement between Winsome and the relevant Consortium Banks, which was dated 23rd October 2009, and was the subject of two supplemental agreements dated, respectively, 15th December 2010 and 25th January 2012. I will refer to this joint working capital consortium agreement (including the supplemental agreements thereto), and to what I assume to have been the equivalent agreement or agreements between Forever Precious and the relevant Consortium Banks as **"the JWCC Agreements"**. It is also important to record my understanding that the Consortium Banks were all Indian banks, including the branch of SCB which I am referring to as SCB India.

26. In 2013 there was a default by Winsome on its repayment obligations pursuant to the PMFs. I understand that there was a similar default by Forever Previous. By this time over $1 billion worth of precious metals had been drawn down by Winsome and Forever Precious pursuant to the PMFs. These defaults resulted in calls on the SBLCs given by the Consortium Banks to the Bullion Banks. The Bullion Banks were then paid, by the Consortium Banks, pursuant to the SBLCs, what they were owed under the PMFs by Winsome and Forever Precious. This left the Consortium Banks out of pocket. The Consortium Banks then sought to recover their losses from Winsome, and (as I understand matters) from Forever Precious, and from the First Defendant by civil proceedings in India. The proceedings, which I understand to have been based on the working capital consortium agreements (the JWCC Agreements) between the relevant Consortium Banks and, respectively, Winsome and Forever Precious, were pursued to judgment. The Consortium Banks also pursued enforcement proceedings in India, in the form of corporate insolvency proceedings against Winsome and Forever Precious, personal insolvency proceeding against the First Defendant, and garnishee proceedings against companies based in the UAE in respect of debts said to be owed by the UAE companies to Winsome and Forever Previous. These various proceedings appear to have met with only limited success. Both Winsome and Forever Previous were placed into liquidation in India on 1st September 2020. The defaults were very substantial. Repayment of approximately $700 million was sought in respect of Winsome's default, and $388 million in respect of Forever Precious' default (in this judgment all references to dollars are to US dollars). In terms of recovery in the civil proceedings in India, there is evidence that there has been some recovery from Winsome but, as I explained in the November Judgment ([NJ/158]), the actual figure for this recovery is unclear, beyond the point that it is no more than a small fraction of the amount of the defaults. It would also appear to be the case that the Consortium Banks have now exhausted their options, in terms of the proceedings in India against Winsome and Forever Precious arising out of the defaults, and in terms of recovery of their losses from Winsome and Forever Precious. The personal insolvency proceedings against the First Defendant, to which I shall return later in this judgment, are the subject of continuing dispute in India.

27. I accept Mr Grant's point that there were effectively two defaults, or sets of defaults. The first default comprised the failure of Winsome and Forever Precious to pay what was due to the Bullion Banks under the PMFs. The second default comprised the failure of Winsome and Forever Precious to pay what was due to the Consortium Banks under the JWCC Agreements. It seems to me that the second default may also be said to have included the failure of the First Defendant to meet his obligations to the Consortium Banks, such as they may have been, as guarantor of Winsome and Forever Precious.

28. At the time of these defaults (**"the Defaults"**) the First Defendant explained to the Consortium Banks that Winsome and Forever Precious had exported substantial amounts of gold and jewellery to certain distributor companies in the UAE under the control of the Fifth Defendant (Mr Obidah), upon terms requiring payment within 180 days. The First Defendant further explained that these UAE distributor companies (there were thirteen companies identified as part of this explanation) then sold the gold and jewellery to their customers, but then suffered

substantial losses themselves in respect of FX and commodities transactions into which they had entered. This left them unable to meet their liabilities to Winsome and Forever Precious, which in turn resulted in the Defaults. The same explanation was given by the Fifth Defendant (Mr Obidah), on behalf of the UAE companies. The Three Defendants have said that the First Defendant gave the explanation which he did simply because he was repeating what he had been told by the Fifth Defendant.

29. The Claimants say that these explanations were fraudulent. The Claimants say that the Defaults were engineered by the Applicants. What in fact happened, so the Claimants say, was that the bullion advanced by the Bullion Banks was sold (either in raw or processed form), and the proceeds of sale were then passed (the Claimants say laundered) through a web of corporate entities comprising layers (**"Layers"**) of different companies, of which the Claimant Companies, with Carte, comprised Layer 2. Ultimately, so the Claimants say, the proceeds of the fraud ended up in corporate entities owned and/or controlled by the Applicants, for the benefit of the Applicants. Although the movement of the funds took place through the various Layers of companies pursuant to what were described as derivatives transactions, the Claimants say that these transactions were shams. There is a very useful funds flow chart which shows the movement of the relevant funds through the five corporate Layers. This chart (**"the Chart"**) is at Appendix 1 to the first affidavit of Colin Diss (the Seventh Claimant and one of the Liquidators) which was sworn on 26th May 2022 in support of the without notice application for the WFO. The UAE distributor companies are identified as the Layer 1 companies, although the Chart shows only four of these companies as passing funds to the Layer 2 companies.

30. I will use the general expression **"the Alleged Fraud"** to refer to the alleged fraud outlined above. I stress that this is a general expression, which is not intended to be specific in referring to the mechanics of the Alleged Fraud. While this was a point of more importance at the October Hearing, it remains the case that the Claimants are still unable to identify precisely how they say the Alleged Fraud occurred.

31. In this context my attention was drawn to a recent letter from the Claimants' solicitors to the Applicants' solicitors, which is dated 25th November 2022. In that letter the Claimants' solicitors explained that information obtained from two overseas banks cast further light on the movement of the funds shown on the Chart. If I have understood the letter correctly, the central points which it was making were (i) that certain of the funds may have passed through the Layer 1 companies and the Layer 2 companies more than once, with the consequence that the total amount of the funds passing through the Layers of companies may have been less than previously thought, aggregating to a sum in the region of $550 million, and (ii) that one of the Layer 1 companies (the UAE distributor companies), Al Mufied, received $1.22 billion from Emirates Gold DMCC which did not all pass through the Layer 2 companies but was instead apparently paid to other entities with alleged connections to the Applicants, including Winsome and Forever Precious. I mention the letter at this stage because its content was said by Mr Grant and Mr Higgo to be relevant to the arguments over jurisdiction. In terms of the overall background to this action what is most apparent from this letter is that the Claimants' investigation of the Alleged Fraud is very much a continuing process, and that the Claimants have

yet to identify precisely how the Alleged Fraud occurred, assuming that it occurred at all. Both points are relevant to the arguments over jurisdiction. It may also be the case that the Alleged Fraud is not correctly characterised as a fraud involving the misappropriation of some US $1 billion. For present purposes this is a less important point, given that the scale of the Alleged Fraud, if it occurred, was clearly very substantial.

32. A more detailed account of the movement of the funds through the Layers of companies shown in the Chart can be found in the November Judgment, at [NJ/36-41]. This account should however now be read subject to the further information referred to in the letter of 25th November 2022.

The claims made by the Claimants in this action

33. I have summarised the claims made in the action in the November Judgment. In the context of jurisdiction however, the correct identification of the substance of the dispute between the parties is very much in issue. For this reason, I repeat my summary of the claims in the action.

34. Following the May Hearing, the Claimants formally commenced this action (**"the Action"**) by claim form issued on 31st May 2022. The Claimants have pleaded out their claims in lengthy Particulars of Claim dated 22nd June 2022. In outline, the claims made against the Defendants in this action (**"the Claims"**) are as follows:
    (1) A claim for equitable compensation and/or an account of profits on the basis that the Defendants were shadow directors of the Claimant Companies and acted in breach of the fiduciary duties which they are said to have owed to the Claimant Companies by causing or permitting the Claimant Companies to become instruments of the Alleged Fraud.
    (2) Proprietary claims for the recovery of the proceeds of the Alleged Fraud held by the Defendants, on the basis that the Defendants hold those proceeds on constructive trust for the benefit of the Claimant Companies.
    (3) A claim for an account of profits for the knowing/unconscionable receipt by the Defendants of the proceeds of the Alleged Fraud.
    (4) A claim for equitable compensation and/or an account of profits for the dishonest assistance of the Defendants in the breaches of fiduciary duty and breach of trust which occurred by reason of the movement of the proceeds of the Alleged Fraud through the Claimant Companies and the Layer 3 company, which was a company called Docklands Investments Limited (**"Docklands"**). Docklands is also a company registered in this jurisdiction. Its liquidators are also the Liquidators.
    (5) A claim for damages for unlawful means conspiracy.
    (6) Claims for relief under the Insolvency Act 1986 (**"the 1986 Act"**), namely claims under Sections 212, 213 and 423 of the 1986 Act.
    (7) Claims for contribution under the Civil Liability (Contribution) Act 1978 (**"the 1978 Act"**).
    (8) It is generally convenient to discuss the Claims as the claims of the Claimants. Strictly speaking the claims made under the 1986 Act are applications which fall to be made by the Liquidators, while the remaining claims are the claims of the Claimant Companies.

35. So far as quantum is concerned and so far as the Claims can be quantified, the Claims are made for the pleaded sum of $932,466,942.36, which is said in the Particulars of Claim to be the proceeds of the Alleged Fraud which passed through the Layers of companies shown on the Chart. I will use the neutral expression **"the Funds"** to refer to the funds which are said to have been the proceeds of the Alleged Fraud. In the light of the further information contained in the letter from the Claimants' solicitors dated 25th November 2022, it would seem that the correct figure for the proceeds of the Alleged Fraud, and thus the amount of the Funds will need to be revised.

36. An obvious question which arises in relation to the Claims, so far as they are claims for damages/compensation, is how the Claimant Companies can have suffered any actual losses when they were, on the Claimants' case, merely conduits through which the Funds passed as part of the alleged fraud. The answer to this question, on the Claimants' case, is that the transfer of the Funds through the accounts of the Claimant Companies has left the Claimant Companies with liabilities to those who lost out as a result of the Defaults; namely the Consortium Banks (or at least principally the Consortium Banks). As in the November Judgment, it is convenient to adopt Mr Higgo's expression **"the Inbound Claims"** to refer to the claims which the Consortium Banks have, or may have against the Claimant Companies.

37. The Applicants have not yet filed Defences in the Action. It is important to keep in mind, in the context of the Claims, that this is because the Applicants are disputing jurisdiction in relation to the Action. It is clear that the Applicants each deny all the Claims. I keep firmly in mind, so far as this is relevant to the jurisdiction dispute, that the Applicants have yet to make their full responses to the Claims, and cannot be criticised for not yet having done so.

38. For the sake of completeness I should repeat that the claims under Sections 212 and 213 of the 1986 Act have been commenced by separate 1986 Act application notices issued in the Manchester Business and Property Courts in June 2022. These applications (**"the Insolvency Applications"**) have been transferred to this court, but my understanding is that no order has yet been made for the Insolvency Applications to be case managed and heard with the Action. This would make obvious case management sense, assuming that the Action proceeds to trial but, as at the October Hearing, does not matter for present purposes. The claims under the 1986 Act are pleaded in the Particulars of Claim and it is convenient, for the purposes of this judgment, to discuss the claims under the 1986 Act as claims in the Action. It is also convenient to use the Action as a shorthand expression for the Action and the Insolvency Applications, unless it is necessary to differentiate between the two sets of proceedings.

39. There is one other event which it is helpful to record in the context of this summary of the Claims. By claim form issued on 23rd June 2022 Docklands, the Layer 3 company identified above, has commenced its own proceedings against the Defendants (Claim Number BL-2022-001010). As in the Action, these proceedings have been commenced by Docklands acting by the Liquidators. The Liquidators have also, in their capacity as liquidators of Docklands, made applications under Sections 212 and 213 of the 1986 Act against the Defendants.

These applications have been made by application notice issued on 23rd June 2022. I will refer to these proceedings, meaning both the proceedings commenced by claim form and the proceedings commenced by insolvency application notice as **"the Docklands Proceedings"**. The claims made in the Docklands Proceedings, which are pleaded in Particulars of Claim dated 23rd August 2022, are equivalent to the Claims.

The applications in the Action

40. It is important to be specific as to the matters I am dealing with in this hearing, by way of the Jurisdiction Applications. As matters stand, there are six application notices which have been issued. They are as follows:
    (1) The Claimants' application, by application notice issued on 1st June 2022, for the WFO to be continued until trial. This application was heard at the October Hearing, and has been dealt with in the November Judgment.
    (2) The application of the Three Defendants, by application notice issued on 6th July 2022, for an order that the WFO and passport surrender orders (which were also contained in the order which I made at the May Hearing) be discharged on the grounds of non-disclosure and unfair presentation by the Claimants at the First Hearing. This application was heard at the October Hearing, and has been dealt with in the November Judgment.
    (3) The application of the Three Defendants, by application notice issued on 6th July 2022, for an order under CPR Part 11(1) declining jurisdiction over, or staying the Claims. This is the first of the applications which I am referring to as the Jurisdiction Applications. I am dealing with this application in this judgment.
    (4) The application of the Three Defendants, by application notice issued on 6th July 2022, for an order under CPR 3.4(2)(b) that the Claims be struck out as an abuse of the process of the court. Subject to the outcome of the jurisdictional challenge, this application remains outstanding, and has yet to be heard.
    (5) The application of the Third Defendant, by application notice issued on 6th July 2022, for:
        (i) An order under CPR Part 11 declaring that the English court has no jurisdiction to try the Claims or should not exercise any jurisdiction which it may have, and ordering the setting aside of the claim form, Particulars of Claim and May 2022 Order and/or staying the Action. This is the second of the applications which I am referring to as the Jurisdiction Applications. I am dealing with this application in this judgment.
        (ii) An order under CPR 3.4(2)(a) or (b) striking out the claim form and the Particulars of Claim. Subject to the outcome of the jurisdictional challenge, this application remains outstanding, and has yet to be heard.
        (iii) An order that the WFO be set aside and discharged, or alternatively varied, with liberty to enforce the cross-undertaking in damages. This application was heard at the October Hearing, and has been dealt with in the November Judgment.
    (6) The application of the Third Defendant in the Insolvency Applications, by application notice dated 6th July 2022, for an order that the Insolvency Applications be set aside, or alternatively an order that the Insolvency

Applications be struck out and/or a declaration that the court will not exercise jurisdiction and/or an order that the Insolvency Applications be stayed. Strictly speaking, this application was not before me at the October Hearing, and was not before me at this hearing because it has been issued in the Insolvency Applications. In reality, this application was simply, and strictly speaking, the procedurally correct way of challenging the Claims, so far as they are made in the Insolvency Applications. As such, it plainly belongs with the other applications made by the Applicants. I understood it to be common ground between the parties that I should treat this application as being before me at this hearing, so far as it challenged jurisdiction in the Insolvency Applications. I also understood it to be common ground that I should treat the jurisdictional challenge of the Three Defendants as extending to the Insolvency Applications. Accordingly this application of the Third Defendant, so far as it challenges jurisdiction, is the third of the applications which I am referring to as the Jurisdiction Applications, and is the third of the applications with which I am dealing in this judgment. So far as this application of the Third Defendant seeks a strike out order, the application remains outstanding and has yet to be heard, subject to the outcome of the jurisdictional challenge.

41. In summary, I am concerned in this judgment with the three applications, as identified above, which together constitute the Jurisdiction Applications.

42. Equivalent applications to those set out above have been made by the Applicants in the Docklands Proceedings, challenging jurisdiction and seeking strike out orders. I am not concerned with those applications in this judgment, although I assume that my decision on the Jurisdiction Applications will, at least, have implications for the jurisdictional challenges in the Docklands Proceedings.

The scope and circumstances of this judgment

43. As in the November Judgment, before I come to my consideration of the Jurisdiction Applications, there are a couple of important points to make about the scope and circumstances of this judgment.

44. First, I repeat from the November Judgment the obvious point that there has been no trial of the Claims, either in the Action or in the Insolvency Applications. In general terms, I am not in a position, on this hearing, to make findings on disputed questions of fact in this judgment and, unless I indicate to the contrary, I do not do so. In particular, I repeat that I am not in a position to decide and I do not decide, in this judgment, whether the Alleged Fraud did take place, or whether the Applicants or any of them had any involvement in the Alleged Fraud, if it did take place.

45. Second, the November Judgment did not deal with the jurisdictional challenges, although it does contain material relevant to the jurisdictional challenges. The only point to highlight is that I have decided, in the November Judgment, that the Claimants have a good arguable case in relation to the Claims. The only exception to this is the claim for contribution pursuant to the 1978 Act. I did not find it necessary, in the November Judgment, to decide whether there was a good arguable case in this respect; see [NJ/390].

46. Third, and subject to the outcome of the Jurisdiction Applications, there are the strike out applications which remain outstanding. I am not dealing with the strike out applications in this judgment. In particular Mr Higgo explained, in his skeleton argument for this hearing, that he was reserving two of the arguments on which the Third Defendant's jurisdictional challenge was based to the hearing of the strike out applications. As such, those particular arguments were not pursued at this hearing. This position was of course expressed to be subject to the outcome of the Jurisdiction Applications. The question of the relationship between this judgment and the strike out applications only arises if the Jurisdiction Applications are unsuccessful. For this reason I will defer any further discussion of this question, if it should be required at all, until after I have made my decision on the Jurisdiction Applications.

The evidence for this hearing

47. For the purposes of this hearing the parties sensibly made use of the same electronic platform of documents as was used for the October Hearing. The bundles of documents on the platform were therefore the same as those I had for the October Hearing, subject to a considerable amount of updating. As I recorded in the November Judgment, the materials before me at the May Hearing were extensive, and duly expanded further for the October Hearing, including hundreds of pages, in the form of affidavits and witness statements, and thousands of pages of exhibits.

48. In relation to the May Hearing the principal evidence before me was a first affidavit of Colin Diss, one of the Liquidators. This first affidavit was lengthy, running to 393 paragraphs. The exhibit thereto ("CD1") ran to 2710 pages. At the May Hearing this evidence was supplemented by a second affidavit of Colin Diss which, while shorter, ran to 42 paragraphs.

49. A good deal of further evidence, in the form of witness statements and, shortly before the October Hearing, a third affidavit of Colin Diss was served between the May Hearing and the October Hearing. This evidence included affidavits made by each of the Applicants, giving disclosure of their assets, which were required by the order which I made at the May Hearing. While extensive reference was made to all of this evidence in the course of this hearing, it should be noted that only a limited part of this evidence was directed specifically to the question of jurisdiction. It is not necessary to enumerate the various witness statements individually. In this judgment I will follow the same system of reference as I used in the November Judgment. After introducing each witness statement or affidavit to which I make reference, I will (with the exception of the Applicants' disclosure affidavits) refer to the relevant witness statement or affidavit by name and number; that is to say **"Diss 1"** for the first affidavit of Colin Diss, and so on for other witnesses. As in the November Judgment it will be understood that I intend no discourtesy to the relevant witness by this form of reference.

50. There is one other feature of the evidence for this hearing which I should highlight at this stage. The arguments in the Jurisdiction Applications raised a number of questions of Indian law, both substantive and procedural. There was however

before me no dedicated expert evidence on the relevant Indian law. I use the expression *"dedicated"* because I mean that there was no expert evidence, in the form of an expert report or expert reports to the court, dealing with the questions of Indian law which were raised in the arguments. This was unfortunate because it became increasingly obvious, in the course of the oral submissions, that the absence of dedicated expert evidence on questions of Indian law was, or at least might be of importance in the Jurisdiction Applications and, equally, might be damaging to one or other of the parties.

51. In the absence of any dedicated expert evidence, I was referred to advice on Indian law which had previously been obtained by the parties. The relevant advice to which I was referred comprised the following:
    (1) A memorandum dated 26th May 2022 provided by the Mumbai office of AZB & Partners (**"AZB"**), an Indian law firm, to the Claimants' previous solicitors. This memorandum (**"the AZB Memorandum"**) contains advice given in response to various questions raised by the Claimants' previous solicitors in a letter dated 22nd May 2022. In summary, the advice deals with (i) a general outline of various aspects of the operation of the Indian legal system, (ii) the extent to which equivalent claims to the Claims exist under Indian law, and (iii) whether there are other causes of action which might be available under Indian law. So far as other causes of action available under Indian law are concerned, the AZB Memorandum does not give any substantive advice, but simply states that a review of the facts and documents in the matter would need to be undertaken, in order to analyse whether any other such causes of action might be available. The AZB Memorandum concludes with a section setting out qualifications and limitations to the advice given. There are also two Annexures to the AZB Memorandum, lettered A and B.
    (2) A memorandum dated 8th September 2022 provided by Rejdeep Panda, a partner in the New Delhi office of Dua Associates (**"Dua"**), an Indian law firm, to the solicitors previously acting for the Three Defendants. The memorandum (**"the Dua Memorandum"**) responds to a letter of instruction from the Three Defendants' solicitors, dated 7th September 2022, seeking advice on various procedural questions under Indian criminal and civil law. The Dua Memorandum concludes with a section setting out qualifications to the advice given. There are also a number of annexures to the Dua Memorandum, lettered A-F, setting out various provisions from relevant Indian statutes.
    (3) A further note from AZB dated 26th September 2022, responding to various questions raised by the Claimants' current solicitors. In summary, the advice in this note (**"the AZB Note"**) is principally concerned with responding to the advice given in the Dua Memorandum. The AZB Note also concludes with a section setting out qualifications and limitations to the advice given.

52. There was no objection from any of the parties to my looking at the advice contained in the documents referred to in my previous paragraph. None of those documents could however be described as an expert report to the court. I stress that this is not a criticism of the authors of the documents. It is quite clear that

neither AZB nor Dua were instructed to produce any sort of expert report to this court.

The law

53. As I have said, the case of the Applicants is that India is plainly the more appropriate jurisdiction than England for the resolution of this dispute, with the consequence that the court should decline jurisdiction over the Action, or stay the Action pursuant to the provisions of CPR Part 11.

54. The parties were agreed that the leading case in this area, which sets out the basic principles which govern jurisdictional challenges of the kind made in the present case, is the decision of the House of Lords in *Spiliada Martime Corporation v Cansulex Ltd* [1987] AC 460. In his speech, at 474B-D, Lord Goff identified the fundamental principle, which was then only recently recognised in English law, in the following terms:

> *"In cases where jurisdiction has been founded as of right, i.e. where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may now apply to the court to exercise its discretion to stay the proceedings on the ground which is usually called forum non conveniens. That principle has for long been recognised in Scots law; but it has only been recognised comparatively recently in this country. In The Abidin Daver [1984] A.C. 398, 411, Lord Diplock stated that, on this point, English law and Scots law may now be regarded as indistinguishable. It is proper therefore to regard the classic statement of Lord Kinnear in Sim v. Robinow (1892) 19 R. 665 as expressing the principle now applicable in both jurisdictions. He said, at p. 668:*
>
> > *"the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice."*

55. Lord Goff then went on to explain how this fundamental principle fell to be applied where a stay of proceedings was sought on the basis that the appropriate forum for the relevant proceedings was another jurisdiction. Lord Goff identified the basic principle in the following terms, at 476C:

> *"(a) The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice."*

56. So far as the burden of proof is concerned, Lord Goff said this, at 476D-E:

> *"(b) As Lord Kinnear's formulation of the principle indicates, in general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant a stay (see, e.g., the Societe du Gaz case, 1926 S.C.(H.L.) 13, 21, per Lord Sumner; and Anton, Private International Law (1967) p. 150). It is however of importance to remember that each party will seek to establish the existence of certain matters which will assist him in persuading the court to exercise its discretion in his favour, and that in respect of any such matter the evidential burden will rest on the party who*

asserts its existence. Furthermore, if the court is satisfied that there is another available forum which is prima facie the appropriate forum for the trial of the action, the burden will then shift to the plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country (see (f), below)."

57. Lord Goff then went on to consider what weight the court should give to the fact that the plaintiff would, in such a jurisdiction challenge, have founded jurisdiction as of right. What advantage should this give the plaintiff? Lord Goff considered that this factor was properly reflected in the following formulation of the burden upon the defendant, at 477E-F:

"In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see MacShannon's case [1978] A.C. 795, per Lord Salmon); and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas."

58. In terms of the matters which the court should consider, in deciding whether there exists some other forum which is clearly more appropriate for the trial of the relevant action, Lord Goff identified the following factors, at 477G-478B:

"(d) Since the question is whether there exists some other forum which is clearly more appropriate for the trial of the action, the court will look first to see what factors there are which point in the direction of another forum. These are the factors which Lord Diplock described, in MacShannon's case [1978] A.C. 795, 812, as indicating that justice can be done in the other forum at "substantially less inconvenience or expense." Having regard to the anxiety expressed in your Lordships' House in the Societe du Gaz case, 1926 S.C. (H.L.) 13 concerning the use of the word "convenience" in this context, I respectfully consider that it may be more desirable, now that the English and Scottish principles are regarded as being the same, to adopt the expression used by my noble and learned friend, Lord Keith of Kinkel, in The Abidin Dover [1984] A.C. 398, 415, when he referred to the "natural forum" as being "that with which the action had the most real and substantial connection." So it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction (as to which see Credit Chimique v. James Scott Engineering Group Ltd., 1982 S.L.T. 131), and the places where the parties respectively reside or carry on business."

59. Lord Goff identified the consequences, if the answer to the question of whether there was some other available forum which was clearly more appropriate was in the negative, in the following terms, at 478C:

> *"(e) If the court concludes at that stage that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay; see, e.g., the decision of the Court of Appeal in European Asian Bank A.G. v. Punjab and Sind Bank [1982] 2 Lloyd's Rep. 356. It is difficult to imagine circumstances where, in such a case, a stay may be granted."*

60. If the answer to the question was in the affirmative, Lord Goff identified the second stage of the inquiry in the following terms, at 478D-E:

> *"(f) If however the court concludes at that stage that there is some other available forum which prima facie is clearly more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. In this inquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction; see the The Abidin Daver [1984] A.C. 398, 411, per Lord Diplock, a passage which now makes plain that, on this inquiry, the burden of proof shifts to the plaintiff. How far other advantages to the plaintiff in proceeding in this country may be relevant in this connection, I shall have to consider at a later stage."*

61. It will be noted that there are two stages, or limbs to the test formulated by Lord Goff in *Spiliada*. These two stages can be summarised in the following terms in a case, such as the present case, where the question is not whether permission should be granted to serve out of the jurisdiction, but rather whether jurisdiction can be challenged in circumstances where jurisdiction is established as of right.
    (1) At the first stage the burden is upon the defendant to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. At this stage the court should look first to see what factors there are which point in the direction of another forum or, putting the matter another way, connect the relevant dispute to another forum. Equally, the court should look to see what factors there are which connect the dispute with England.
    (2) If the defendant discharges this burden, the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted. At this stage the burden shifts to the claimant to demonstrate such circumstances. In considering whether there are any such circumstances, the court will consider all the circumstances of the relevant case.

62. So far as the first stage is concerned it is, I think, important to keep in mind that there are two distinct questions to be answered. The first question is whether the relevant alternative forum is actually shown to be an available forum. If the defendant, on whom the burden rests, fails to demonstrate that the alternative forum is an available forum, the jurisdiction challenge falls at the first hurdle, and

must fail. This requirement is set out in the following terms, in Dicey, Morris & Collins on the Conflict of Laws, 16th Edition, at 12-031:

> *"Availability of the foreign forum. The first limb of the Spiliada test requires it to be shown that the foreign forum is ''available'' as well as being more appropriate for the trial of the action. A foreign court will be considered to be ''available'' to a claimant if by the time of the application for a stay, it would be open to the claimant to institute proceedings against the defendant before that court. This requirement means that the foreign court must have jurisdiction (personal and subject matter) to determine the claimant's claim. An undertaking by the defendant to submit to the jurisdiction of a foreign court can make the foreign court available even though it would not have been so without the undertaking."*

63. In terms of what qualifies as a point on availability, the editors of Dicey, Morris & Collins continue, at 12-032, in the following terms (underlining added):

> *"Availability and advantage distinguished. Once availability is determined, factors that go to the practicability of pursuit of the claim in the foreign forum are normally better considered under the second limb of the Rule, which focusses on whether the claimant is being deprived of a legitimate advantage in bringing a suit in England. This applies equally to the question whether the claimant will be able in practice to fund the action. The same is true of submissions that it would be difficult for the claimant to manage or supervise the process of litigation; or that the claimant would not obtain a fair trial; or that the remedy which is sought would be unavailable in the foreign court; or that because of the foreign court's choice of law rules, the claimant would lose in the foreign court. Similarly, the impact, if any, of a time-bar that might be applied by the foreign court to preclude the claimant's proceedings is addressed under the second limb of the test. That said, the line which divides the two limbs of Spiliada from each other is neither completely impermeable, nor drawn in such a way that there are no factors which do not appear on both sides of it: from time to time a court will locate under one limb of Spiliada material which, arguably at least, might more comfortably belong to the other. But when it is recalled that the overall test is one which asks what the interests of justice require, and when it is remembered that the analysis in Spiliada is designed to manage, rather than constrain that test, it will rarely be a matter of legitimate complaint that this has happened."*

64. By way of example of a case where the relevant jurisdiction was shown not to be available, I refer to *Unwired Planet International Ltd v Huawei Technologies (UK) Ltd* [2020] UKSC 37. In this case the appellants had put forward China as the appropriate alternative forum for the relevant claims brought by the respondents. The judge at first instance (Birss J as he then was) had concluded, after hearing what was described as extensive expert evidence on the point, that the Chinese courts did not have jurisdiction to deal with the claims which were concerned with the terms of a global licence for the manufacturing of telecommunications equipment on fair and reasonable terms. Notwithstanding the admission of further evidence in the Court of Appeal, the Supreme Court agreed with the judge that the jurisdiction challenge therefore failed at the first hurdle; see the decision of the Supreme Court at [97-98]. Put simply, the

jurisdiction challenge failed at the first hurdle because, on the evidence, the Chinese courts did not have jurisdiction to determine the relevant dispute, and were thus not an available jurisdiction.

65. If the alternative forum is shown to be an available forum, the second question within the first stage of the test is whether the defendant has succeeded in demonstrating that the other available forum is clearly or distinctly more appropriate than the English forum. This is a question for the discretion of the court, or perhaps more accurately a question for the evaluation of the court.

66. The burden of demonstrating that there is an alternative forum which is clearly or distinctly more appropriate is a heavy one. The position is explained in the following terms in Fentiman, International Commercial Litigation, 2nd Edition, at 13.39:

> *"The standard for establishing the forum conveniens is high. A defendant seeking a stay of proceedings must not merely show that the English court is not the optimal forum for resolution of the dispute, but that there is an alternative court which is 'clearly or distinctly more appropriate'. This reflects the fact that, having competence by virtue of service in the jurisdiction, the court is self-evidently an appropriate forum. It also avoids the risk a court might too readily decline to exercise a jurisdiction established as of right by the claimant."*

67. It is important to note that the dividing line between the two stages of the test is not impermeable. As the editors of Dicey, Morris & Collins note, at 12-032 (see above), a particular factor may be considered at one stage of the test, which might arguably be said to sit more comfortably as a factor to be considered in the other stage of the test. A factor may go to both stages of the test, or be considered at one stage of the test notwithstanding an argument that it is more relevant to the other stage of the test.

68. By way of useful summary of what was said by Lord Goff in *Spiliada*, and of the factors to be taken into account by the court in relation to the first stage of the test, I refer to what was said by Waller LJ in *Deripaska v Cherney* [2009] EWCA Civ 849, at [20]. In reading this extract it should be kept in mind that this was a service out case so that, in contrast to the present case, the burden was on the claimant to persuade the court that England was clearly the appropriate forum for the trial of the action:

> *"20. I accept that there are instances in the authorities when the word "appropriate" and the word "natural" in relation to forum are used interchangeably. Indeed Lord Goff himself could be said to be doing so, even in the judgment in The Spiliada, in the passage at 478C, to which I have already referred but will quote in full below, where he spells out what is involved at the "second stage". Lord Goff himself in Connelly v RTZ Corporation PLC [1998] AC 854 at 874D, in a stay case where the "natural" forum was Namibia, was satisfied that "this is a case in which, having regard to the nature of the litigation, substantial justice cannot be done in the <u>appropriate</u> forum, but can be done in this jurisdiction"(my underlining). But in the The Spiliada Lord Goff had made clear that it would be better to distinguish*

between "natural", i.e. the forum with which the case had the most natural connection, and "appropriate", which may be different, to meet the ends of justice [see 478A quoted above]. In my view the summary in the notes on page 22 of the White Book under CPR6.37(4) Forum Conveniens summarises the position correctly:-

> *"Subject to the differences set out below, the criteria that govern the application of the principle of forum conveniens where permission is sought to serve out of the jurisdiction are the same as those that govern the application of the principle of forum non conveniens where a stay is sought in respect of proceedings started within the jurisdiction. Those criteria are set out in The Spiliada, above:*
>
> *(i) The burden is upon the claimant to persuade the court that England is clearly the appropriate forum for the trial of the action.*
>
> *(ii) The appropriate forum is that forum where the case may most suitably be tried for the interests of all the parties and the ends of justice.*
>
> *(iii) One must consider first what is the "natural forum"; namely that with which the action has the most real and substantial connection. Connecting factors will include not only factors concerning convenience and expense (such as the availability of witnesses), but also factors such as the law governing the relevant transaction and the places where the parties reside and respectively carry on business.*
>
> *(iv) In considering where the case can be tried most "suitably for the interests of all the parties and for the ends of justice" ordinary English procedural advantages such as a power to award interest, are normally irrelevant as are more generous English limitation periods where the claimant has failed to act prudently in respect of a shorter limitation period elsewhere.*
>
> *(v) If the court concludes at that stage that there is another forum which is apparently as suitable or more suitable than England, it will normally refuse permission unless there are circumstances by reason of which justice requires that permission should nevertheless be granted. In this inquiry the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the claimant will not obtain justice in the foreign jurisdiction. Other factors include the absence of legal aid or the ability to obtain contribution in the foreign jurisdiction.*
>
> *(vi) Where a party seeks to establish the existence of a matter that will assist him in persuading the court to exercise its*

discretion in his favour, the evidential burden in respect of that matter will rest upon the party asserting it."

69. While a good deal of further material, both in terms of case law and textbook commentary, was cited to me, I do not think that it is necessary to go through any more of the legal materials at this stage. I have considered all of the legal materials cited to me, but I will make further reference to the legal materials only as is necessary in my discussion of the parties' arguments. There is however one other general point which is worth making at this stage in relation to the operation of the two stage test established in *Spiliada*. The general point is this. In order to decide a jurisdictional challenge it is necessary for the court to identify the true dispute between the parties. In carrying out this exercise it is important to look to the substance of the dispute, and not to be misled by the particular nature of the claims made in this jurisdiction. As the Supreme Court explained in *Unwired*, at [94]:

> *"[94] Leaving aside questions as to the burden of proof, at common law the forum conveniens doctrine requires the English court to decide whether its jurisdiction or that of the suggested foreign court is the more suitable as a forum for the determination of the dispute between the parties. The traditional way in which this question has been framed speaks of the 'forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice' (per Lord Collins in AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC 7, [2011] 4 All ER 1027, [2012] 1 WLR 1804 (at [88]), adopting the language of Lord Goff in Spiliada Maritime Corp v Cansulex Ltd, The Spiliada [1986] 3 All ER 843, [1987] AC 460). The requirement in complex litigation to define, at the outset, what is 'the case' to be tried runs the risk that the court will by choosing a particular definition prejudge the outcome of the forum conveniens analysis, as the Court of Appeal decided had occurred at first instance in Re Harrods (Buenos Aires) Ltd [1991] 4 All ER 334, [1992] Ch 72; rvsg [1991] BCLC 69, [1992] Ch 72. Harman J had characterised 'the case' as a petition under the English Companies Act for relief for unfair prejudice in the conduct of the affairs of an English registered company, which made it 'blindingly obvious' to him that England was the appropriate forum. But the company carried on business entirely in Argentina. The matters complained of all occurred there, where there was a parallel jurisdiction to provide relief under Argentinian legislation. So the Court of Appeal preferred Argentina as the appropriate forum. Like the Court of Appeal in the present case, we therefore prefer for present purposes to identify the dispute between the parties as the matter to be tried, lest reference to 'the case' should introduce undue formalism into the analysis of a question of substance."*

70. The case of *Re Harrods (Buenos Aires) Ltd* [1992] Ch.72 provides a cautionary tale as to how the court can go wrong in this respect. The case involved an unfair prejudice petition which was the subject of a jurisdictional challenge on the basis that Argentina was the more appropriate forum for the dispute. Harman J had considered it blindingly obvious that England was the more appropriate forum, but in considering the question of what the relevant action was about, the judge had addressed himself to the relief sought under what was then Section 459 of the

Companies Act 1985, and the powers of the court to provide relief under that Act. The Court of Appeal disagreed with the judge. As Bingham LJ (as he then was) pointed out, the judge's reference to Section 459 in identifying what the action was about unconsciously built in a bias towards the choice of an English forum.

71. As Bingham LJ went on to point out, at 124H-125C, the factors connecting the action to Argentina were strong and obvious. Those factors are worth setting out, as they provide a useful illustration of the sort of case where an alternative jurisdiction is the appropriate jurisdiction:

> *"It is common ground that the factors connecting this action with the Argentine forum are strong and obvious. All the economic, logistical and management considerations which loom large in any substantial action point strongly towards Argentina. The company carried on business, and the acts complained of were done, there not here. The witnesses are there, not here, and in the main speak Spanish, not English, a significant matter in an action where credibility is very much in issue. The documents and records are there, not here, and are in Spanish, not English. The court there would bring to the evaluation of factual evidence a familiarity with local conditions which a court here would necessarily lack. Expert evidence would be needed here which would not be needed there. The court there would be much better placed to assess the significance of related proceedings which have already taken place there. While an English court called on to try this case would no doubt do so as best it could, the difficulties would in my view be such as to make the reliability of the outcome problematical."*

72. While the relevant company was incorporated in England, Bingham LJ did not think that this factor could bear the weight placed upon it by the judge, given the *"robust corporeal, existence"* of the company in Argentina. In terms of the relief which could be granted by the English courts, Bingham LJ said this, at 126C-D:

> *"The judge was powerfully impressed by the fact that the Argentine court cannot afford the buy-out relief claimed by the minority shareholder under section 459 of the Companies Act 1985. As I understand him, he regarded this as a very weighty factor connecting this action with the English forum. I think this matter more properly falls for consideration at the second stage of the Spiliada test when (the greater appropriateness of another forum having been established) it is necessary to consider whether justice requires that a stay should not be granted and whether it appears that one party cannot obtain justice in the foreign forum. In applying this test it cannot of itself be enough that some difference exists between English law or procedure and those of the foreign forum because such will always be the case (and was, for example, in de Dampierre v. de Dampierre [1988] A.C. 92). The test must be applied as one of substance, not legal technicality."*

73. In terms of the relief which could be obtained in Argentina, Bingham LJ said this, at 126E-127A:

> *"If I have correctly characterised the substance of this action, it seems to me exaggerated to hold that the minority shareholder cannot obtain substantial justice in Argentina. If successful, it will not obtain an order for purchase of its shares by the majority shareholder at a price uplifted to take*

account of loss caused by the majority shareholder's conduct. Uncontradicted evidence of Argentine law does, however, establish that the minority shareholder may if successful recover against the majority shareholder damages for loss caused by the majority shareholder's deceit or negligence. The majority shareholder is directly liable for negligent or unlawful handling of the company's business. There is nothing in the evidence to suggest that the damages recoverable by the minority shareholder would not include compensation for loss sustained on sale of the company's business or assets during winding up, even though the minority shareholder had asked for the company to be wound up, if the request for winding up were shown to be a direct result of the majority shareholder's conduct. Nor, as it seems to me, is there evidence to support the judge's proposition (however true in this country) that sale of a company's assets by a liquidator would be likely to produce a depreciated price in Argentina; much might turn on an Argentine liquidator's power to continue the company's business until it could be profitably sold as a going concern. On the facts of this case, I can see no reason why the relief obtainable in England is significantly better than the relief obtainable in Argentina and the evidence falls far short of showing that it would be unjust to confine the majority shareholder to its remedies in Argentina. The alternative relief sought by the minority shareholder in its petition, the winding up of the company, may be granted in either forum; the only difference is that an English order will be ineffective in Argentina (where it matters) whereas an Argentine order will be effective there. And an Argentine winding up order will of course sever the minority shareholder's relations with the majority shareholder and the company."

74. I have quoted from the judgment of Bingham LJ in *Re Harrods* at some length because it seems to me to provide useful guidance on the correct application of the two stages of the *Spiliada* test.

75. Keeping in mind all of the guidance provided by the legal materials cited to me at this hearing, I turn to consider the arguments of the parties.

The arguments of the parties

76. It is not necessary for me to outline the individual arguments of the parties at this stage. I can do this in my discussion of the individual arguments. The rival positions of the parties can be summarised more shortly, as follows:
    (1) So far as the first stage of the *Spiliada* test is concerned, the Applicants contend that there is another available forum for the resolution of this dispute, namely India, which is clearly or distinctly the more appropriate forum than England.
    (2) The Claimants dispute both of these contentions. The Claimants say that, for various reasons, India is not in fact an available forum, with the consequence that, as in *Unwired*, the Jurisdiction Applications fail at the first hurdle. If, contrary to this argument, India is an available forum, the Claimants say that it has not been demonstrated that India is, clearly or distinctly, the more appropriate forum than England.
    (3) The Claimants did not, in their arguments, specifically address themselves to the second stage of the *Spiliada* test. Their arguments were concentrated

on the first stage of the test. That said, and depending upon my analysis of the position in relation to the first stage of the test, it seems to me that it is open to me to consider the second stage of the test, if and in so far as the Claimants have established circumstances relevant to the second stage of the test; that is to say circumstances by reason of which justice requires that a stay should not be granted, notwithstanding that India is clearly or distinctly the more appropriate forum.

77. So far as my own analysis of the competing arguments is concerned, I will adopt the following course.
    (1) I will consider first the much-argued issue of the correct characterisation of the dispute which is the subject matter of the Action.
    (2) I will then consider the question of whether it has been demonstrated by the Applicants that India is an available forum for the resolution of this dispute; that is to say the first of the questions to be answered in the context of the first stage of the *Spiliada* test.
    (3) I will then consider the question of whether it has been demonstrated by the Applicants that India is clearly or distinctly the more appropriate forum for the resolution of this dispute than England. For this purpose I will consider individually each of the factors (using this expression in a broad sense) which featured in the arguments of the parties. After completing this task, I will carry out the evaluative exercise required, by reference to all of the relevant factors, and give my answer to the second of the questions to be answered in the context of the first stage of the *Spiliada* test.
    (4) I will then consider the second stage of the *Spiliada* test, if and to the extent that there are any relevant circumstances established by the Claimants which it is relevant to consider in this context.

78. I bear in mind that (3) and (4) above only arise if my answer to (2) above is that India is an available forum. The position is, on the authorities, likely to be the same in relation to (4), if my answer to (3) is that it has not been demonstrated that India is clearly or distinctly the more appropriate forum. In my view however I should go through each of (2), (3) and (4), regardless of my answers to (2) and (3).

<u>What is the correct characterisation of the dispute?</u>

79. For the Three Defendants Mr Grant (supported by Mr Higgo) submitted that it was plain that this was an Indian dispute involving the pursuit by SCB, in conjunction with Grant Thornton, of losses suffered by SCB India and the other Consortium Banks in India, in respect of which SCB India and other Consortium Banks have already taken substantial steps, in pursuit of these losses, in India.

80. In his written and oral submissions Mr Grant took me through the various contractual arrangements pursuant to which Winsome and Forever Previous were supplied with bullion by the Bullion Banks, and pursuant to which the Consortium Banks became the effective guarantors of the obligations of Winsome and Forever Precious to the Bullion Banks. As Mr Grant submitted, in an analysis which I have accepted earlier in this judgment, the Defaults involved what were effectively two defaults, or sets of defaults. The first default comprised the failure of Winsome and Forever Precious to pay what was due to the Bullion Banks under

the PMFs. The second default comprised the failure of Winsome and Forever Precious to pay what was due to the Consortium Banks under the JWCC Agreements. As I have said, it seems to me that the second default may also be said to have included the failure of the First Defendant to meet his obligations to the Consortium Banks, such as they may have been, as guarantor of Winsome and Forever Precious.

81. Turning to the Alleged Fraud itself, Mr Grant pointed out that this involved an alleged conspiracy between the Defendants to cause Winsome and Forever Precious to default on their obligations to the Bullion Banks, with the ultimate victims of the Alleged Fraud being the Consortium Banks. As Mr Grant also emphasized, his characterisation of the dispute was derived from what was pleaded in the Particulars of Claim in the Action, and did not require me to disregard the pleaded case. Mr Grant summarised the position in the following terms, in his oral submissions:

> *"Once it is appreciated, we say, picking up an earlier submission of mine that, the true dispute in this case concerns loss suffered by the consortium banks in India, than* [then] *the fact that the claimant companies were not litigants in India is neither here nor there."*

82. For the Claimants Mr McQuater disputed this analysis. His contention was that one must look to the Particulars of Claim, and that if one did so, one would find a series of CPR Part 7 and 1986 Act claims brought by English companies and their English insolvency officeholders against the Applicants. The Claims were said all to be based upon the Applicants' use of these companies as vehicles to launder the proceeds of the Alleged Fraud, as a consequence of which the Claimant Companies are now exposed to substantial liabilities, by way of proofs of debt in the English liquidations, from the Consortium Banks.

83. The above is no more than a brief, and only partial summary of the more detailed written and oral submissions of counsel on the question of the correct characterisation of this dispute. The summary is however sufficient to identify the essential differences between the parties in this respect.

84. To my mind, and perhaps not surprisingly, there were problems with the characterisation of the dispute on both sides. So far as the Applicants were concerned, it seems to me that their characterisation concentrated on the contractual framework within which the Defaults took place, and on the Defaults themselves. This is however only part of what the dispute is about. In particular, this characterisation seems to me to overlook two essential features of the dispute.

85. First, the dispute is concerned with the Alleged Fraud. The Alleged Fraud is not however confined to the allegation that the Alleged Principal Conspirators, who are defined as all of the Defendants in the Particulars of Claim, orchestrated the Defaults. Equally important, the Alleged Fraud involved the alleged laundering of the Funds through the web of companies shown on the Chart. For this purpose it does not seem to me to matter that the Chart may be incomplete and/or inaccurate in terms of the movement of the Funds and/or the quantum of the Funds. The relevant point is that the Alleged Fraud was an international fraud which involved the alleged laundering of the Funds through a network of

companies in different jurisdictions including, in particular, the English registered Claimant Companies. I do not accept that, in the characterisation of the dispute in this case, one can, as it were, dismiss the passing of the Funds through an international web of companies as relating only to the disposal of the proceeds of the actual fraud. I do not think, at least for the purposes of this jurisdiction dispute, that the Alleged Fraud can be separated into component parts in this way.

86. Second, the Consortium Banks are not the claimants in the Action. The claimants are the Claimants. What this means is that a key feature of the dispute is whether the Claimant Companies, whom I have described on several occasions as mere conduits for the Funds, are able to bring claims in their own names and/or by the Liquidators against the Defendants. This in turn engages questions of (i) whether the Claimants can demonstrate any recoverable loss, so far as they claim damages or compensation, which in turn engages questions relating to the Inbound Claims, and (ii) whether the Claimant Companies have any right to make proprietary claims in relation to the Funds which passed through their bank accounts. One can test how important these questions are in this dispute by reference to what happened at the October Hearing. At the October Hearing, and as is demonstrated by the November Judgment, a substantial amount of time was taken in relation to these questions, in the context of the issue of whether the Claimants had a good arguable case in relation to the Claims.

87. It is perfectly true that the dispute engages, and indeed may be said to derive from the losses suffered by the Consortium Banks, but it seems to me to distort the characterisation of the dispute in this case to say that this is what the dispute is essentially about. In this context it seems to me to be important, as it was at the October Hearing (albeit in a different context) to maintain a distinction between how the Claims have come about, and what the Claims are about. The Claims are a product of the Grant Thornton Scheme, as I defined the Grant Thornton Scheme in the November Judgment. If the strike out applications come to be heard, the fact that the Claims are a product of the Grant Thornton Scheme will form the basis of one of the arguments which Mr Higgo has reserved to the hearing of the strike out applications. For present purposes however I do not think that the question of what the Claims are about is answered by pointing to the Grant Thornton Scheme and, on that basis, asserting that this dispute is essentially and only concerned with the recovery of losses suffered by the Consortium Banks.

88. In summary therefore, and bearing in mind the importance of looking at substance rather than formality (see *Unwired* at [94]), it seems to me that the Applicants' characterisation of the dispute captures only part of the dispute or, more accurately, only part of the Alleged Fraud and only part of what is in dispute in relation to the Claims.

89. The same seems to me to be true of the Claimants' characterisation of the dispute. It is quite clear from the authorities that the dispute in the present case is not correctly characterised by simply making reference to the Claims as they are pleaded in the Particulars of Claim. This approach seems to me to risk falling into the same error as Harman J in *Re Harrods*. It seems to me that the characterisation of this dispute is not correctly limited to the Applicants' use of

the Claimant Companies as vehicles to launder the proceeds of the Alleged Fraud, as a consequence of which the Claimant Companies are now exposed to substantial liabilities, by way of proofs of debt in the English liquidations, from the Consortium Banks. Again, this captures only part of the Alleged Fraud. The Alleged Fraud also involved, indeed may be said to have had its inception in the initial misappropriation of the bullion drawn down from the Bullion Banks, or the initial misappropriation of the proceeds of that bullion. The Alleged Fraud also involved the Defaults, which are alleged to have been the consequence of that misappropriation.

90. I am wary of trying to encapsulate, in a few short sentences, the correct characterisation of this dispute or, to use the language of the Supreme Court in *Unwired* at [94], the matter to be tried in this dispute. As the Supreme Court warned in *Unwired*, at [94]:

> *"The requirement in complex litigation to define, at the outset, what is 'the case' to be tried runs the risk that the court will by choosing a particular definition prejudge the outcome of the forum conveniens analysis, as the Court of Appeal decided had occurred at first instance in Re Harrods (Buenos Aires) Ltd [1991] 4 All ER 334, [1992] Ch 72; rvsg [1991] BCLC 69, [1992] Ch 72."*

91. The Action seems to me to qualify as complex litigation, thereby engaging the risk identified in *Unwired*. Without therefore seeking to be exhaustive, and mindful of the need not to put myself into any kind of straitjacket in considering the arguments of the parties in the Jurisdiction Applications, I express the following conclusions on the characterisation of the dispute, or matter to be tried in this case:
    (1) The Applicants' characterisation of the matter to be tried is incomplete. It does not capture all of the key elements of the Alleged Fraud which the trial judge will have to consider. It does not pay proper attention to the fact that the claimants in the Action are the Claimants, not the Consortium Banks, and thereby misses much of the essential dispute between the Claimants and the Applicants.
    (2) The Claimants' characterisation of the matter to be tried is incomplete. It does not capture all the key elements of the Alleged Fraud which the trial judge will have to consider.
    (3) The matters to be tried, if boiled right down, can conveniently be divided into two broad matters. First, there is the question of whether the Alleged Fraud, including all of its alleged elements, occurred. The Alleged Fraud, if it occurred, was an international fraud, whose elements included the misappropriation of the bullion or its proceeds, the orchestration of the Defaults, and the laundering of the Funds through an international web of companies. Second, there is the question of whether, in all the circumstances of the Alleged Fraud, the Claimant Companies and/or the Liquidators have their own claims against the Defendants. The question of the losses suffered by the Consortium Banks and their recoverability is an important part of the second question, but it is not the only part, and it does not, by itself, constitute the matter to be tried.

<u>Stage one of the *Spiliada* test - is India an available forum?</u>

92. The Claimants advanced the following reasons for their contention that India is not an available forum:
    (1) There is no evidence that the Claims, so far as they are statutory claims brought under the 1986 Act and the 1978 Act, would be available in the Indian courts, either as they are constituted or in some equivalent or analogous form.
    (2) None of the Applicants is now resident in India, and none had given an undertaking to submit to the jurisdiction of the Indian courts.
    (3) There is a bankruptcy moratorium in place in India which is said to prevent the commencement of any new proceedings against the First Defendant in India.
    (4) There is no evidence that the Indian courts would recognise the authority or standing of the Liquidators to act on behalf of the Claimant Companies in bringing claims in the Indian court. The same applies to the claims under the 1986 Act which the Liquidators bring in their own capacity as voluntary liquidators of the Claimant Companies. As such, it has not been demonstrated that the Indian courts would be available to the Liquidators, either in respect of claims brought in the names of the Claimant Companies or in their own capacity as voluntary liquidators of the Claimant Companies.

93. In oral submissions Mr McQuater indicated that he was not pursuing the first of the above points, following a review of the advice given by AZB.

94. So far as submission to the jurisdiction was concerned, Mr Grant and Mr Higgo, on behalf of their clients, offered undertakings to submit to the jurisdiction of the Indian courts. A written version of the proposed undertakings was provided by Mr Grant on the morning of the second day of the hearing. It was drafted as an undertaking given by the Three Defendants, but I understood Mr Higgo, on behalf of the Third Defendant, to be offering an undertaking in the same terms. Mr McQuater took what I understood to be two points on the offered undertakings. The first point was that the undertakings referred to the claims of the Claimants *"as presently advanced"* in the Action. This did not allow for possible amendment of the claims, which Mr McQuater suggested was likely in a fraud case of this kind. The second point was that if I was to grant a stay of the Action on the basis of the undertakings, there would need to be a liberty to apply in the event of subsequent problems with the submission of the Applicants to the jurisdiction of the Indian courts.

95. In relation to the first of these points Mr Grant indicated in his oral submissions in reply that the Three Defendants would be willing, in principle, to agree to some revision of the wording of the proposed undertaking, so as to cater for the possibility of amendment. In relation to the second of these points Mr Grant indicated in his oral submissions in reply that the Three Defendants would, in principle, be willing to agree to a permission to apply provision to accompany the undertakings and to guard against a problem of the kind identified by Mr McQuater. I understood Mr Higgo to adopt the same positions on behalf of the Third Defendant.

96. As I was reserving this judgment, I left matters on the basis that the parties would consider further the wording of the proposed undertakings, and let my clerk know if any further progress was made. In the event I received by my clerk a letter from the Three Defendants' solicitors dated 21st December 2022, which explained where matters had got to in terms of the further consideration of the terms of the undertakings and enclosed the relevant correspondence. The letter also enclosed a draft revised form of undertaking which, it was suggested, was intended to address the concerns expressed by the Claimants' solicitors. So far as the relevant correspondence was concerned, the position was not a happy one. Cutting a rather longer story short, the Claimants' solicitors first responded to the attempts by the Applicants' solicitors to agree the terms of the undertakings by effectively declining to engage with the re-drafting of the terms of the undertakings; see the letter from the Claimants' solicitors dated 14th December 2022. Thereafter, and following receipt of a revised version of the form of undertaking from the Three Defendants' solicitors (the same revised draft which was subsequently sent to my clerk) the Claimants' solicitors wrote further, on 19th December 2022, setting out a series of objections to the wording of the revised draft undertaking. So far as those objections are concerned, it is easiest simply to quote them, as they appear in the letter:

> *"1. The revised draft does not involve the Defendants undertaking actively to participate in any Indian proceedings, including by the filing of Defences – which you will appreciate could affect any subsequent enforcement steps. This is a matter which is relevant to whether India is a more appropriate forum than England and Wales.*
>
> *2. In a similar vein, the revised draft does not involve the Defendants undertaking to give evidence in person in any proceedings in India, as would ordinarily be the case in this jurisdiction. Again, this is relevant to whether India is a more appropriate forum than England and Wales.*
>
> *3. The revised draft does not refer to all of the English Court Claim Numbers reflecting the proceedings related to the Claimant Companies which have been issued and served against the Defendants.*
>
> *4. We remain concerned that the revised wording does not adequately protect our clients in circumstances where the manner in which any claims might be advanced in India has not been explored. The Defendants only propose to submit in respect of claims "as presently advanced", including any "variation" in the claims "for the purposes of advancing the said claims as civil claims in India" and any amendments permitted in India thereafter. Our clients are concerned that any claim in India might need to be entirely or substantially reformulated, and it is far from clear to us whether any such changes would constitute a "variation" of the claims that are "presently advanced". At the lowest, it seems to us that there is scope for argument on this issue."*

97. In terms of the response to these objections, it is again easiest to quote the response of the Three Defendants' solicitors, as set out in their letter to my clerk dated 21st December 2022.

"In respect of the four grounds upon which the Claimants maintain that they cannot agree to the wording of the proposed undertaking, it is the Defendants' position that the items at paragraphs 1 and 2 of Hogan Lovells' letter have already been addressed in oral submissions. For completeness, we enclose with this letter the decision of the High Court of Delhi in International Planned Parenthood Federation v Madhu Bala Nath (2016) SCC OnLine Del 85 which confirms that the courts of India accept evidence given by video link (see in particular [2], [4] and [17]). The point made at paragraph 3 of the Claimants' letter is not clear (and we note that it was not raised at the hearing itself). Our clients' intention is that the proposed undertaking will extend to all civil claims issued and served by the Claimants against the (active) Defendants in England. We had understood that all such claims had been identified in the written draft of the undertaking. If it is the Claimants' position that we have omitted a claim number, the Claimants are invited to identify that claim number so that our clients can consider including it within the proposed undertaking. The Defendants believe that the item at point 4 has already been properly addressed by the reformulated undertaking."

98. The Third Defendant adopted the same position as the Three Defendants, so far as this response was concerned; see the letter from the Third Defendant's solicitors to my clerk dated 3rd January 2023.

99. This was not the end of the correspondence. On 3rd January 2023 the Claimants' solicitors responded to the letter of 21st December 2022, from which I have quoted above. This further letter identified the claim numbers to which reference was required, and put forward the contentions of the Claimants' solicitors in relation to the Indian authority (*International Planned Parenthood Federation v Madhu Bala Nath*) cited by the Three Defendants' solicitors. This was followed by a letter dated 5th January 2023 from the Three Defendants' solicitors to my clerk. The letter enclosed a revised form of undertaking which included reference to all the claim numbers identified by the Claimants' solicitors, and also extended to the Docklands Proceedings. The letter confirmed the willingness of the Three Defendants to consider further revisions to the proposed form of undertaking, if the court should take the view that the revised form of undertaking on offer was in any way inadequate. This chain of correspondence was completed by a letter from the Third Defendant's solicitors to my clerk, dated 6th January 2023, which confirmed the willingness of the Third Defendant to offer an undertaking in the same revised terms as that offered by the Three Defendants by the letter of 5th January 2023.

100. Returning to the letter from the Claimants' solicitors dated 19th December 2022, and taking each of the four points raised by the Claimants' solicitors in relation to the proposed undertakings in turn, my conclusions on these points are as follows:
    (1) I do not think that the first ground of objection has merit. I am not persuaded that the wording of the undertaking needs, in this respect, to go further than the terms of the draft undertaking (as most recently revised). In any event, the purpose of the undertakings, as I understand them, is to deal with the problem of the jurisdiction of the Indian courts not being

available because the Applicants are not resident in India. As such, it seems to me that the undertakings should be confined to the issue of submission to the jurisdiction, and are not required to extend to the conduct of the proceedings in India. A concern in that respect seems to me to be a point which, if it goes anywhere, is relevant to the second question within the first stage of the *Spiliada* test and/or to the second stage of the *Spiliada* test.

(2) So far as giving evidence in person is concerned, this was addressed by Mr Grant in oral submissions. I accept the submission of Mr Grant, for the reasons which he gave, that it is not appropriate to extend the terms of an undertaking to submit to the jurisdiction to an additional obligation to give evidence in person. I have read what is said on this topic in the post-hearing correspondence, but I am not persuaded that the undertaking to submit to the jurisdiction of the Indian courts is required to extend to the manner in which the Applicants may come to give their evidence in any Indian proceedings. Again, the point may be relevant to other parts of the *Spiliada* test.

(3) As I understand the position, the problem of identification of the relevant claim numbers has now been resolved, by the most recent post-hearing correspondence.

(4) So far as the fourth ground of objection is concerned, it seems to me that the revised draft form of undertaking adequately addresses the potential problem of amendment of the claims. In this context I also bear in mind that the Applicants are, in principle, agreeable to some sort of permission to apply provision in the event of some future problem with the submission to the jurisdiction provided by the undertaking. The drafting of such a provision has yet to be worked out, but it could be capable of addressing a problem of this kind.

101. In conclusion on the question of the undertakings, it seems to me that the undertakings which have been offered by the Applicants deal with the problem of the Applicants being non-resident in India. This is subject to such undertakings being coupled with an appropriate provision giving the Claimants permission to apply in the event of future problems with the submission of the Applicants to the jurisdiction of the Indian courts. The precise terms of this provision remain to be resolved, either by agreement or by further determination of the court.

102. It is important to stress the limited nature of the conclusion which I have just reached. Although the point is an obvious one, it does seem to me that it has somewhat been lost sight of in some of the recent correspondence which I have seen from the Claimants' solicitors. The undertakings do not resolve the question of availability of the jurisdiction in India, still less the Jurisdiction Applications. The undertakings, coupled with an appropriate permission to apply, resolve one part of the dispute over availability of the jurisdiction; namely the problem of the Applicants not being resident in India. Equally, the resolution of the precise terms of an appropriate permission to apply may or may not need to be agreed or determined, depending upon my overall decision on the Jurisdiction Applications.

103. I turn next to the bankruptcy moratorium which is in place in India. In his second witness statement dated 6th July 2022 Mr Travers, a partner in the solicitors previously acting for the Three Defendants in this case, explains his

understanding, at paragraph 6.6, that one of the Consortium Banks, the State Bank of India, obtained an order from the Indian National Company Law Tribunal which had the effect of imposing an interim moratorium (i) suspending or staying any other proceedings pending, and (ii) barring the initiation of new proceedings against the First Defendant in respect of any debt owed by the First Defendant. The relevant order was made on 7th January 2022 as part of personal insolvency proceedings commenced against the First Defendant, in his capacity as guarantor of the debts of Winsome, by the State Bank of India. In the AZB Memorandum the National Company Law Tribunal and the National Company Law Appellate Tribunal are identified as Tribunals which exercise jurisdiction under the Insolvency and Bankruptcy Code 2016 (**"the IB Code"**), which is a single comprehensive law for the insolvency of corporates and individuals in India.

104. Further information about this interim bankruptcy moratorium (**"the Moratorium"**) can be found in the Dua Memorandum. The Moratorium was imposed pursuant to Section 96 of the IB Code, subsection (1) of which provides as follows:

> *"(1) When an application is filed under section 94 or section 95-*
>
> *(a) an interim moratorium shall commence on the date of the application in relation to all the debts and shall cease to have effect on the date of admission of such application; and*
>
> *(b) during the interim-moratorium period-*
>
> *(i) any legal action or proceeding pending in respect of any debt shall be deemed to have been stayed; and*
>
> *(ii) the creditors of the debtor shall not initiate any legal action or proceedings in respect of any debt."*

105. Mr Panda summarises the effect of the Moratorium in the following terms, in the final paragraph of the Dua Memorandum:

> *"In view of the above, the effect of the order dated January 07, 2022 of NCLT, Ahmedabad would be the imposition of an interim moratorium which would have the effect of staying or barring any action or proceeding, including by the Indian Consortium Banks, in respect of any debt against the First Defendant."*

106. There was argument before me as to what was meant by the reference to *"debt"* in Section 96 of the IB Code. This question is addressed in the AZB Note, at paragraphs 31-34. The advice given in paragraph 32 is as follows:

> *"Under the IBC, 'debt' is defined as a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt[48]:*
>
> *(i) 'Financial debt' is defined in section 5(8) of the IBC. It extends to a variety of debts including, e.g., "money borrowed against the payment of interest";[49] and*
>
> *(ii) 'operational debt' is defined as "a claim in respect of the provision of goods or services including employment or a debt in respect of the [payment] of dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority"."*

107. It is not clear to me, reading the advice in the AZB Note, whether the Moratorium would catch claims made by the Claimants against the First Defendant in India. The position is in fact more problematic than this. It seems to me that if one is to decide whether the Moratorium would catch such claims, one first needs to know what those claims, under Indian law, would be. The position in that respect is also unclear. It is also not clear to me whether and, if so, to what extent the Moratorium would extend to the remaining Defendants, if and in so far as a claim brought by the Claimants against the First Defendant in India, which was caught by the Moratorium, was one in respect of which the remaining Defendants were said to be jointly liable with the First Defendant. All I have in these respects is the advice given in the AZB Note, which does not seem to me to be sufficiently focussed to allow me to make a decision of this kind.

108. In his reply submissions Mr Grant described the Claimants' point on the Moratorium as an *"utter red herring"*. I do not agree. It is clear that the Moratorium has been ordered. It is also clear that, if and so long as it remains in place, it prevents the commencement of proceedings in India against the First Defendant in respect of debts. The extent of what qualify as debts is unclear. On the available evidence it seems to me that there is at least a risk that the Moratorium, if and in so far as it remains in place, might prevent the commencement of claims or certain claims by the Claimants against the First Defendant, and conceivably might prevent the commencement of claims or certain claims against the remaining Defendants.

109. The potential problems created by the Moratorium seem to me to constitute a significant point, but the question which arises is whether it is a point which goes to the availability of jurisdiction; that is to say to the first question within stage one of the *Spiliada* test. This is not an easy question to answer. I was referred to a discussion of the question of availability of jurisdiction in Briggs, Civil Jurisdiction and Judgments (Seventh Edition). At 22.08, the author says this:

> *"So to the first limb of Spiliada. The first requirement is that the forum which the defendant proposes as being clearly more appropriate than England for the trial be available for the resolution of the dispute between the parties.*[67] *There are potentially three aspects to availability; and depending on how many of them are properly seen as part of the definition of 'availability' (the better view is that only the first of the three is part of 'availability'), the defendant will have the burden of proof in relation to all of them.*
>
> *The first requirement is that the foreign court must be shown* [68] *to have personal jurisdiction over the defendant.* [69] *In a case in which the defendant is otherwise present or resident within the territorial jurisdiction of the foreign court, or has contractually submitted in advance to its jurisdiction, it will be likely (but it must still be established) that the foreign court is one whose jurisdiction is available to the claimant.* [70] *In such a case, the claimant will have been, and will be, able to bring proceedings in the foreign court; it may be otherwise if the defendant has judicial immunity from suit under the law applied by the foreign court.* [71] *"*

110. I have also already quoted Dicey, Morris & Collins, at 12-032, where the editors explain the distinction between the availability of the alternative jurisdiction and

the advantages or disadvantages of the alternative jurisdiction. For ease of reference, I repeat the relevant extract:

> *"Availability and advantage distinguished. Once availability is determined, factors that go to the practicability of pursuit of the claim in the foreign forum are normally better considered under the second limb of the Rule, which focusses on whether the claimant is being deprived of a legitimate advantage in bringing a suit in England. This applies equally to the question whether the claimant will be able in practice to fund the action. The same is true of submissions that it would be difficult for the claimant to manage or supervise the process of litigation; or that the claimant would not obtain a fair trial; or that the remedy which is sought would be unavailable in the foreign court; or that because of the foreign court's choice of law rules, the claimant would lose in the foreign court. Similarly, the impact, if any, of a time-bar that might be applied by the foreign court to preclude the claimant's proceedings is addressed under the second limb of the test. That said, the line which divides the two limbs of Spiliada from each other is neither completely impermeable, nor drawn in such a way that there are no factors which do not appear on both sides of it: from time to time a court will locate under one limb of Spiliada material which, arguably at least, might more comfortably belong to the other. But when it is recalled that the overall test is one which asks what the interests of justice require, and when it is remembered that the analysis in Spiliada is designed to manage, rather than constrain that test, it will rarely be a matter of legitimate complaint that this has happened."*

111. Returning to the extract from Briggs which I have cited, it is suggested that the relevant alternative jurisdiction may be considered not to be available if the defendant has judicial immunity from suit under the law applied by the foreign court. I have retained the footnotes in the quotation. The footnoted case, at footnote 71, is *Harty v Sabre International Security Ltd* [2011] EWHC 852 (QB). This was a service out case, where the question was whether permission should have been granted to the claimant to serve the proceedings on the two defendants out of the jurisdiction. The defendants contended that the proceedings had to be brought in Iraq. One of the issues in the case was whether the first defendant had immunity from suit in Iraq. The judge, MacDuff J, decided that the first defendant did have immunity from suit. This immunity from suit was not however treated as a matter going to the availability of jurisdiction. Rather, this was treated as a point relevant to the second stage of the *Spiliada* test and, as such, was the decisive point in the judge's decision that no stay of the proceedings should be granted. As the judge explained, at [11.2]:

> *"I agree that, prima facie, the courts of Iraq would be the natural forum and – subject to the Claimant's submissions about the security position – if I had been persuaded that there was no immunity, I would have been minded to grant a stay. But things are not equal. The second stage of the Spiliada formula has to be invoked. Justice cannot and will not be done in Iraq because of the First Defendant's immunity. Justice requires that the English court should accept jurisdiction. In view of my decision on immunity (and my decisions in parts 10.2 and 10.3 of this Judgment) it seems to me that this submission is unanswerable."*

112. So far as I can see, there was no argument in *Harty* that the immunity of suit point went to the availability of the Iraqi jurisdiction. Accordingly, I do not think that *Harty* can be treated as authority that an alternative jurisdiction should be treated as not being available where the relevant defendant has immunity from suit in that jurisdiction.

113. In these circumstances it seems to me that I must fall back on the general guidance provided by the legal materials cited to me in deciding whether the Moratorium point goes to the availability of jurisdiction. In particular I refer to the guidance, extracts from which I have cited above, in Briggs and in Dicey, Morris & Collins. Applying that guidance, it seems to me that the Moratorium point is not a point which goes to the availability of the jurisdiction in India. In my view, the existence of the Moratorium, assuming that it would catch claims, or some of them made by the Claimants against the First Defendant or the Defendants in India, does not mean that the jurisdiction of the Indian courts is not available. Rather, it seems to me to fall on the same side of the line as matters such as the existence of a time bar in the foreign jurisdiction, or the lack of availability of a particular remedy in the foreign jurisdiction, or a less favourable legal environment in the foreign jurisdiction, all of which are identified by the editors of Dicey, Morris & Collins as going to the second stage of the *Spiliada* test, and also to the second question within the first stage of the *Spiliada* test.

114. I therefore conclude that, although I regard the Moratorium point as a significant point, I do not regard the point as one which goes to the availability of India as an alternative jurisdiction in the present case.

115. This leaves the final point on availability, which is the question of whether the Indian courts would recognise the authority or standing of the Liquidators to act on behalf of the Claimant Companies in bringing claims in the Indian court or in bringing claims in their own names in their capacities as liquidators.

116. The starting point, in this context is that the Claimant Companies are English registered companies which are in creditors' voluntary liquidation pursuant to an English insolvency process. The Liquidators hold office as English insolvency office holders. The Liquidators also hold office as voluntary liquidators. They do not hold office pursuant to any order of the court, either in this jurisdiction or elsewhere.

117. Mr McQuater referred me to the Cross-Border Insolvency Regulations 2006, and specifically to Article 15 of the UNCITRAL Model Law on Cross-Border Insolvency. His point was that the Model Law has been incorporated into English law by the 2006 Regulations. The Model Law contains provisions which permit an overseas insolvency office holder to apply for and obtain recognition from an English court. Whether the same would apply in India, so that the Liquidators could obtain recognition of their status in India, for the purposes of bringing proceedings in India was, so Mr McQuater submitted, uncertain. I was told by Mr McQuater, although only on the basis of what was described as an internet search, that India had not subscribed to the Model Law. As such, so Mr McQuater submitted, the Applicants had failed to discharge the burden of showing that the authority and standing of the Liquidators would be recognised in the Indian

courts. It was submitted that this was a point which went to the availability of the jurisdiction, with the consequence that the Applicants had failed to discharge the burden of demonstrating that India was an available jurisdiction.

118. This part of the Claimants' case drew vigorous protest from Mr Grant, in his oral submissions in reply. The essence of his protest was that this particular point had not been raised by the Claimants until their skeleton argument for this hearing, which only arrived, in accordance with directions which I gave for the filing of skeleton arguments for this hearing, shortly before the hearing. Mr Grant said that the position was compounded by earlier correspondence between the parties in which the Claimants' solicitors had signalled an intention not to put in any further factual evidence in relation to the issue of jurisdiction. Essentially, Mr Grant's complaint was that the Applicants had been taken by surprise, in relation to the point on recognition of the Liquidators, and had had no fair opportunity to deal with the point.

119. Mr Grant's other response to this point was to refer me to the advice in the AZB Memorandum. The AZB Memorandum commences with a statement that it has been prepared pursuant to a letter dated 22nd May 2022 from the Claimants' previous solicitors *"as counsel to"* the Claimants. The Claimants are then listed. The Claimant Companies are recorded as being in liquidation. The Liquidators are recorded as joint liquidators of the Claimant Companies. Mr Grant pointed out that the AZB Memorandum discusses causes of action available in Indian law, but nowhere suggests that the status of the Liquidators would not be recognised in the Indian courts. This would have been an obvious point for AZB to make, if there was a problem in this respect, given that it would have rendered the discussion of causes of action academic.

120. I was not impressed by Mr Grant's first point. Despite the impressive vigour of Mr Grant's submissions the reality is that it was for each party to decide what, if any, expert evidence of Indian law they wished to adduce at this hearing and to seek from the court such permission as might be required for that evidence. The parties chose, respectively, not to adduce any such expert evidence. The Claimants chose to confine this part of their case to the advice obtained from AZB. The Three Defendants and, effectively by association, the Third Defendant chose to confine this part of their case to the advice obtained from Dua. The consequences of this evidential position must lie where they fall.

121. I have taken the time to review the earlier correspondence between the parties to which I was referred by Mr Grant. In particular, I have reviewed the letter from the Claimants' solicitors to the Applicants' respective solicitors dated 9th September 2022, to which Mr Grant made specific reference. All that letter did was to confirm that the Claimants did not intend to rely upon any further factual evidence in relation to *"the aspects of the Defendants' applications which fall to be determined at the December hearing"*. I agree with Mr Grant that this language was slightly odd because, so far as I can see, the Claimants had not previously served any evidence specifically on the question of jurisdiction, although this may have been a reference to the evidence in Diss 1 which was addressed to the question of jurisdiction. The key part of the letter is however the following paragraph:

> *"We await an update from the Defendants regarding the Indian law evidence (if any) which they think may be needed at the December hearing. We also note the letter from Jones Day of yesterday's date, which enclosed a memorandum of Indian law on which their clients wish to rely at the October hearing* [the Dua Memorandum]. *We will respond to this by way of separate letter, and reserve the Claimants' rights in this regard in the interim."*

122. As can be seen, this part of the letter made it perfectly clear that the ball was in the Applicants' court, so far as Indian law evidence was concerned. It was for the Applicants to decide what evidence of Indian law they wished to adduce. Their decision was to go no further than the Dua Memorandum. This is confirmed by a review of the further correspondence between solicitors in October and November 2022, where the question of expert evidence was further discussed, but no agreement was reached on the service of expert evidence on Indian law. In this context I should mention that Withers LLP replaced Jones Day as solicitors for the Three Defendants on 9th November 2022. Ultimately, by a letter dated 15th November 2022 the Three Defendants' solicitors informed the Claimants' solicitors that the Three Defendants *"do not propose to rely on further expert evidence for the purposes of the December hearing."*. I assume that the reference to *"further expert evidence"* was made because the Dua Memorandum was treated as expert evidence. The relevant point however is that the October and November correspondence culminated in a confirmation of the earlier decision of the Three Defendants not to go beyond the Dua Memorandum. While the letter of 15th November 2022 was written by the Three Defendants' solicitors, the position of the Third Defendant was not any different on this topic.

123. Turning to Mr Grant's second point, I am wary of reading anything into the silence of AZB, or Dua for that matter, on this particular point. So far as I can see neither AZB nor Dua were asked to advise on the question of recognition in the Indian courts of voluntary liquidators appointed pursuant to an English insolvency process. In those circumstance I do not think that I can safely assume, from the silence of AZB and Dua, that this particular point would not pose any difficulty in the Indian courts.

124. So far as I can see, the closest that the existing advice comes to addressing this point is in the AZB Memorandum, at paragraph 13, where AZB consider the possibility of statutory causes of action available under the IB Code. The advice given by AZB is as follows:

> *"While the IBC does include provisions which are similar to some of the provisions of the (UK) Insolvency Act 1986 listed in paragraph 8 of the Letter, these provisions are applicable to applications made and reliefs sought in the context of companies and other corporate entities which are undergoing a corporate insolvency resolution process or a liquidation process under the IBC."*

125. This advice is not however dealing with the recognition of voluntary liquidators appointed pursuant to an English insolvency process. Rather, it is dealing with the availability of statutory causes of action under the IB Code. The advice given by AZB may be relevant to the second question within the first stage of the

Spiliada test and/or to the second stage of the *Spiliada* test, but it does not seem to me to go to the question of availability, or to cast any light on the more general recognition question.

126. There is however what seems to me a better point for the Applicants in this context, which also emerges from Mr Grant's submissions. The point is this. As matters stand I do not know whether there is any issue at all regarding the recognition of voluntary liquidators in India. There is nothing before me to put this question in issue. In relation to this part of the Jurisdiction Applications, namely the question of availability of forum, the Claimants are not pursuing the first point which they raised in this context. This first point concerned the question of whether relief was available in India equivalent to the statutory claims under the 1986 Act made in the Action. So far as the Model Law is concerned, I have read Article 15, to which I was directed, and other Articles. Assuming that India has not adopted the Model Law, it is a long way from clear to me that this would or might result in a situation where voluntary liquidators of English companies were not recognised as having authority to act in Indian proceedings.

127. It strikes me as a surprising proposition that the authority of a voluntary liquidator in an English liquidation would not be recognised by an Indian court, but I say this without the benefit of what I regard as any proper submissions, or evidence on this point. I am bound to assume that this is because no one has asked this question of the Indian lawyers. AZB appears not to have been asked this question. Dua appears not to have been asked this question.

128. The burden does of course lie on the Applicants to demonstrate that India is an available forum for the pursuit of the claims which the Claimants have against the Defendants, albeit the claims which can be made in India are not required to be identical to the Claims; see my discussion of the relevant law earlier in this judgment. More simply, the burden lies on the Applicants to demonstrate that India is an available forum for the resolution of this dispute. It seems to me however that this point has its limits. In my view, it is not sufficient for the Claimants, as it were, simply to sit back and require the Applicants to deal with any hypothetical point on the availability of jurisdiction which might arise. In my view there needs to be something, before the burden arises, which demonstrates to the court that the relevant point is not hypothetical, but is one which raises an actual issue on the availability of the relevant jurisdiction.

129. I can illustrate this point by reference to the Moratorium. In the case of the Moratorium there is evidence that the Moratorium was in place and, although this is not entirely clear to me from the evidence which I have seen, the Moratorium appears still to be in place. There is also advice from Indian lawyers on its effect. The advice leaves important questions unanswered as to what the effect of the Moratorium would be if the Claimants were seeking to pursue their claims against the First Defendant in proceedings in India. If I had come to the conclusion that the Moratorium was a matter going to availability of forum, it seems to me that the Moratorium would have posed a significant problem for the Applicants, on whom the burden would have rested to demonstrate that the Moratorium did not prevent the pursuit of such claims. The burden would however have arisen

because the Moratorium would have been identified as giving rise to a clear issue on the question of availability of forum.

130. I can also illustrate this point by reference to the Applicants' residence in this jurisdiction. The Applicants' residence in this jurisdiction raises a clear issue on the availability of jurisdiction which the Applicants have had to address. The only difference with this issue of residence is that, unlike the Moratorium issue, the issue does actually go to the question of availability of forum. For present purposes however the relevant point is the same. The Applicants' residence raises a clear issue on the availability of jurisdiction, in respect of which the burden is on the Applicants to demonstrate that the jurisdiction is available.

131. In relation to the question of whether the Liquidators' authority to act on behalf of the Claimant Companies would be recognised in Indian proceedings, the position is not the same. There is no evidence or submission before me which leads me to think that this would be an obstacle, let alone a fatal obstacle to the pursuit of Indian proceedings by the Claimants. No one has identified a reason for thinking that this would be a problem. No one appears to have asked or inquired whether this would be a problem. In these circumstances I do not regard myself as entitled to come to the conclusion that India is not an available forum for the resolution of this dispute, simply on the ground that it has not been demonstrated that Indian law would recognise the authority of the Liquidators to act on behalf of the Claimant Companies. Put shortly, I do not regard this question as having been put in issue, such as to engage the burden of demonstrating that India is an available forum in this respect.

132. In these circumstances I do not regard myself as entitled to come to the conclusion that India is not an available forum because it has not been demonstrated that the Indian courts would recognise the authority or standing of the Liquidators to act on behalf of the Claimant Companies in bringing claims in the Indian court. I strongly suspect that the authority of the Liquidators would be capable of recognition under Indian law, but in my view there is nothing in the evidence or submissions in the Jurisdiction Applications to raise a valid question mark in this respect.

133. Drawing together all of the discussion in this section of this judgment I conclude that it has been demonstrated that India is an available forum for the resolution of this dispute. The Applicants have offered undertakings which, subject to the resolution of the permission to apply provision which is required in this context, resolve the problem of submission to the jurisdiction. Beyond that, there is nothing else which has been raised which, in my judgment, either goes to the question of availability of jurisdiction or raises a question mark over the availability of that jurisdiction.

<u>Stage one of the *Spiliada* test – is India clearly or distinctly the more appropriate forum than England?</u>

134. I now turn to the second question to be answered in the first stage of the *Spiliada* test. Is India clearly or distinctly the more appropriate forum than England for the Claimants' claims to be heard or, putting the matter more simply, for the resolution of this dispute? In considering this question I will take individually

each of the factors (or each of the related groups of issues) which featured in the argument. It will be noted that, in posing this second question within the first stage of the *Spiliada* test, I do not frame the question by reference to the Claims. I take this course in order to avoid the trap, identified in *Re Harrods* and in other authorities, of considering jurisdiction issues by reference to the particular relief claimed in this jurisdiction.

(i) Stage one of the *Spiliada* test - the location of the parties

135. The Claimant Companies are English registered companies subject to an insolvency process governed by English insolvency law. For this purpose it is not material that the Fourth Claimant is an LLP. The Liquidators, who are both partners in Grant Thornton, are English based insolvency practitioners who reside and work in this jurisdiction.

136. All of the Applicants reside in England. This is not a case where the Claimants were able to take advantage of a fleeting visit to this jurisdiction by one or more of the Applicants in order to effect service of the proceedings in the Action. To the contrary, the Applicants have, in their own evidence, emphasized their own links to this country. In his first witness statement Mr Travers, the Three Defendants' former solicitor, described the position in the following terms, at paragraph 34.1.2:

> *"My clients have confirmed to me that they did not leave India to avoid Indian criminal proceedings. They have explained to me that Mrs Sonia Mehta has not lived in India on a permanent basis since around 2004; Mr Suraj Mehta left India in around 2008/2009 and Mr Jatin Mehta began to make arrangements to leave India well before he was notified of any Indian criminal proceedings against or involving him. This is apparent from the fact that by November 2012, Mr Mehta had received his St Kitts and Nevis passport, which required an application to be made some months earlier (a matter which Mr Mehta has confirmed to me to the best of his recollection). A copy of Mr Jatin Mehta's original St Kitts and Nevis passport, which was issued on 30 November 2012, was (as set out at paragraph 32.4 above) provided to Eversheds on 15 June 2022 (a copy of the passport is at page 115)."*

137. At paragraph 34.2 of Travers 1, Mr Travers went on to say this:

> *"The fact is that the JD Respondents have resided in England since 2018 and now have firm roots in England. The JD Respondents have confirmed to me that they have not left this jurisdiction since arriving in 2018. The First and Second Respondents' grandchildren, with whom I am told they have a close relationship, attend school in England and have recently been registered to attend school for the next academic year (September 2022). My clients have specifically informed me that they have no intention of leaving this jurisdiction."*

138. Turning to the Third Defendant his position is set out in his first witness statement, dated 4th July 2022. The key matters which emerge from this witness statement in this context are as follows:

(1) Although the Third Defendant grew up in India, 2003 was the last year in which he considered that he lived in India (paragraph 12). The Third

Defendant left India in *"around 2003 to 2004"*, when he moved to America for further studies, then to Dubai (with some time spent in Germany), and then to Singapore, and then back to Dubai (paragraphs 13-19).

(2) The Third Defendant relocated to London in August 2020 and has lived here and established his life here since then, with his wife and two children (paragraph 20). The Third Defendant says, in paragraph 20, that *"We have a number of long-term connections to this country and I fully intend for our lives to be based in the UK."*.

(3) The Third Defendant describes himself as resident in the UK and paying tax here. He gives evidence that both he and his wife have businesses here, and that his children are being educated here (paragraphs 22-26).

139. The only Defendant who is not resident in the jurisdiction is Mr Obidah, who is believed to be in the UAE.

140. It is also important to note that none of the Applicants have been in India for some considerable time. The Third Defendant left India in 2003/2004. In Travers 2, Mr. Travers gives the following evidence in this context:

(1) The Second Defendant had not lived in India on a permanent basis since around 2004 (paragraph 159.1).

(2) The Fourth Defendant left India in around 2008/2009 (paragraph 159.2).

(3) The First Defendant left India at some time before November 2012 (paragraph 159.3).

(4) From February 2010 onwards, the First Defendant was a resident of the UAE and was issued a residency permit on his Indian passport. The residence visa was valid up to 7th February 2013 (paragraph 160).

(5) The First and Second Defendants applied for citizenship in St Kitts and Nevis on 10th June 2012, and were issued with passports on 21st November 2012. The First and Second Defendants renounced their Indian citizenship and were issued with renunciation certificates in January and February 2013 (paragraph 162).

141. In terms of current location, none of the Claimants or the Defendants are resident in India or are likely to become resident in India. With the exception of the Fifth Defendant all parties are, and are likely to remain resident in England. In this context however it does seem to me important to bear in mind, as Lord Goff explained in *Spiliada* (477E), that proper regard is paid to the fact that jurisdiction has been founded as of right in the relevant proceedings by the resting of the burden on the defendant to show that there is another available forum which is clearly or distinctly more appropriate than England. As such, and so far as the Applicants are concerned, their residence within the jurisdiction creates no presumption in favour of the English court being the appropriate forum; see Joanna Smith J in *BRG Noal v Kowski* [2022] EWHC 867 (Ch), at [49]. That said, the absence of such a presumption should not be overstated. As Joanna Smith J also noted in her judgment, at [48], Lord Goff expressly recognised in *Spiliada*, at 477F-G, that it will often be more difficult for a long-time resident to discharge the burden of showing that another forum is clearly more appropriate.

142. There is however another important aspect of the location of the parties, which goes beyond current location. A significant feature of this case, in the context of

jurisdiction, is that the Applicants all left India many years ago. The Third Defendant was gone by 2003/2004. The Second Defendant was gone, in terms of living in India on a permanent basis, by 2004. The Fourth Defendant was gone by 2008/2009. The First Defendant was gone by before November 2012, and had residency in Dubai from February 2010. There are no precise dates pleaded for the Alleged Fraud, but it is material to note that it was, as I understand the position, in 2013 that the Defaults occurred and the Funds were passed through the web of companies shown on the Chart (subject to any required updating/revision of the information shown on the Chart). Paragraph 145 of the Particulars of Claim pleads that the Alleged Principal Conspirators (the Defendants) combined together to commit the Alleged Fraud from 2012. It is right to point out that the pleading of the Alleged Fraud in the Particulars of Claim would suggest that it had its inception at some time prior to 2012.

143. The relevant point however is this. By the time of the operation of the Alleged Fraud all of the Defendants, with the possible exception of the First Defendant, had left India. In the case of the First Defendant, he had certainly left India by 2013, and appears not to have been resident in India since 2010. All this seems to me to be material to the question of whether India is clearly or distinctly the more appropriate forum for this case. In the Applicants' submissions there was reference to India being *"the centre of gravity"* in relation to this case. So far as the location of the parties is concerned, it seems to me that there is very little to point to India as being the centre of gravity.

144. In summary, and so far as the location of the parties is concerned, it seems to me that India does not emerge as clearly or distinctly the more appropriate forum than England. If anything, the scales seem to me to tip in favour of England in relation to this factor.

(ii) Stage one of the *Spiliada* test - the matter to be tried

145. I can take this factor fairly shortly, because I have already considered the correct characterisation of this dispute in a previous section of this judgment.

146. By way of recap, the Applicants say that this is an Indian dispute involving the pursuit by SCB, in conjunction with Grant Thornton, of losses suffered by SCB India and other Consortium Banks in India, in respect of which SCB India and other Consortium Banks have already taken substantial steps, in pursuit of these losses in India. For the reasons which I have already set out, I regard this description of the matter to be tried as incomplete, or partial. It overlooks two essential elements of this dispute. First, the dispute is concerned with the Alleged Fraud, which was an international fraud. Second, the Consortium Banks are not the claimants in the Action. The claimants are the Claimants. This in turn has a substantial effect on the nature of the matter to be tried. The Claims are not contractual claims, made by the Consortium Banks pursuant to the contractual obligations owed to them by Winsome, Forever Precious and the First Defendant under the terms of the JWCC Agreements. Rather, the Claims reflect the position of the Claimant Companies, who were used as conduits for the passing of the Funds through the Layers of companies. All of this was an integral part of the Alleged Fraud, and gives rise to claims which are very different to the contractual claims which have been pursued in India.

147. I therefore reject the argument of the Applicants that the matter to be tried is an Indian dispute. This is an incomplete description of the dispute. As I have said, the Action seems to me to qualify as complex litigation and, as such, I am wary of trying to encapsulate, in a few short sentences, the correct characterisation of the matter to be tried in this dispute. I will however repeat my own conclusion on the characterisation of the dispute, subject to the caveats which I have previously stated in respect of this characterisation.

148. The matters to be tried, if boiled right down, can conveniently be divided into two broad matters. First, there is the question of whether the Alleged Fraud, including all of its alleged elements, occurred. The Alleged Fraud, if it occurred, was an international fraud, whose elements included the misappropriation of the bullion or its proceeds, the orchestration of the Defaults, and the laundering of the Funds through an international web of companies. Second, there is the question of whether, in all the circumstances of the Alleged Fraud, the Claimant Companies and/or the Liquidators have their own claims against the Defendants. The question of the losses suffered by the Consortium Banks and their recoverability is an important part of the second question, but it is not the only part, and it does not, by itself, constitute the matter to be tried.

149. Viewed in this light the dispute is not in my view correctly characterised as an Indian dispute. There are factors pointing to various jurisdictions. The Alleged Fraud, if it occurred, was an international fraud and, not surprisingly, various jurisdictions were involved. The Claimant Companies, who were used as vehicles for the Alleged Fraud, are English companies. Other companies within the Layers were registered in other jurisdictions. The banks through which the Funds passed were in various parts of the world. The orchestration of the passing of the Funds through the Layers of companies appears to have been administered from various parts of the world, including England. The Alleged Fraud had its inception in India. The bullion from which the Funds are said to have derived was provided in India. Funding for the drawing down of the bullion was provided by the Consortium Banks, which were Indian banks. The Funds began their journey through the Layers of companies by transfer to the relevant UAE distributor companies. The dispute is substantially concerned with the governance and direction of English companies.

150. Given this position, it seems to me that what was said in *Manek v IIFL Wealth (UK) Limited* [2021] EWCA Civ 625 is plainly apposite in the present case. In his judgment in that case, with which Phillips and Underhill LJJ agreed, Coulson LJ said this, at [64]-[65] (underlining also added):

> *"64. A number of different courts have endeavoured to summarise what the investigation into 'the proper place' is designed to achieve. Whilst these comments are useful guidance, there is a danger in investing them with too much significance, and to lose sight of the Spiliada test itself. Mr Collins referred to the judgment of Gloster LJ in Erste Group Bank AG v JSC 'VMZ Red October' and others [2015] EWCA Civ 379 (at 149) where she criticised the judge below for failing to stand back and ask "the practical question where the fundamental focus of the litigation was to be found". That is a little loose as a test.*

Perhaps of more assistance, Lord Briggs said at [68] of his judgment in Vedanta Resources v Lungowe [2019] 2WLR 1051:

> *"The concept behind the phrases 'the forum' and 'the proper place' is that the Court is looking for a single jurisdiction in which the claims against all the Defendants may most suitably be tried."*

"65. In my view, that observation has a particular resonance in the present case. This was, on the Appellants' case, an international fraud. It arose out of critical misrepresentations made in England about the onward sale of the shares in an Indian company (Hermes) to a company (EMIF) domiciled in Mauritius, without revealing the fact that the ultimate purchaser, a German company (Wirecard) was going to pay much more for the same shares. <u>There was never going to be one jurisdiction which would emerge as the only candidate for the hearing of this claim.</u> The issue is whether, in all the circumstances, and taking a realistic approach to the numerous jurisdictions that might potentially be involved, the Appellants have demonstrated that England and Wales is clearly the place where the claims against all the Defendants may most suitably be tried."

151. *Manek* was a service out case, so that the burden was on the appellants in that case to demonstrate that England and Wales was clearly the place where the claims against all the defendants might most suitably be tried. In the present case, and at this stage of the *Spiliada* test, the burden is on the Applicants to demonstrate that India is clearly or distinctly the more appropriate forum than England. So far as the matter to be tried is concerned, it seems to me that the position is at best neutral in relation to this factor. I can see that India is a candidate, in terms of jurisdiction. England is also a candidate, in terms of jurisdiction. In theory, a case might be made for other jurisdictions. In terms of the matter to be tried however, it seems to me that India does not emerge as the front runner, let alone the clear front runner, in terms of jurisdiction. At best, its claim to jurisdiction is equal with that of England.

(iii) <u>Stage one of the *Spiliada* test - proceedings in India/fragmentation of proceedings</u>

152. There is a comprehensive summary of the various civil and criminal proceedings in India in the skeleton argument of the Three Defendants. It is not necessary to go through the proceedings in detail. The proceedings are very extensive. The civil proceedings can conveniently be divided into four parts.

153. First, there are the proceedings commenced by the Consortium Banks in the Debts Recovery Tribunal, seeking recovery of sums due from Winsome, Forever Precious and the First Defendant and various other parties. In general terms I take the object of these proceedings to have been to recover what was due under the JWCCs, and thereby to recoup the losses suffered by the Consortium Banks when calls were made upon the Consortium Banks by the Bullion Banks pursuant to the terms of the SBLCs. These proceedings have included extensive enforcement proceedings, pursuant to orders obtained in these proceedings, against various parties, including the UAE distributor companies, which are said to have been supplied with the bullion (or products created out of the bullion) for which they failed to pay.

154. Second, there are corporate insolvency proceedings which have been commenced in the National Company Law Tribunal, and which have resulted in the liquidation of Winsome and Forever Precious.

155. Third, there are personal insolvency proceedings which have been commenced in the National Company Law Tribunal against the First Defendant. It is said in the skeleton argument of the Three Defendants that orders have been made on the personal insolvency petition, which the First Defendant is seeking to have set aside on various grounds. It is in these proceedings that the Moratorium came to be imposed, which I am assuming remains in existence. I understand that the First Defendant's application to have the orders made against him set aside has yet to be determined.

156. Fourth, there is the civil suit which the First Defendant has commenced under what I understand to be Order VII Rules 1 and 2 of the Civil Procedure Code 1980. The document by which this civil suit has been commenced bears on its face the following description (the bold is in the original):

> ***"CIVIL SUIT UNDER ORDER VII RULE 1 AND 2 CIVIL PROCEDURE CODE, 1908 SEEKING COMPENSATION AND DAMAGES IN RESPECT OF TORTIOUS CONDUCT AND ACTIONS OF THE DEFENDANTS WHO IN CONSPIRACY WITH EACH OTHER HAVE CAUSED INJURY, LOSS AND DAMAGE TO THE PLAINTIFF."***

157. The plaintiff in this suit is the First Defendant. The defendants are De Beers plc, De Beers India Pvt Ltd, SCB, SCB India, Kroll Inc. and Kroll Associates (India) Pvt Ltd. The suit was issued on 13th June 2022, that is to say after the commencement of the Action. I accept however that the suit was notarised and intended to be issued by 27th May 2022; that is to say before the commencement of the Action on 31st May 2022; see Travers 2 at paragraph 31.2. I should also point out that the document by which this civil suit has been commenced, which contains what I take to be the First Defendant's formal statement of case, is an exceptionally lengthy document, which would have taken a considerable amount of time to prepare. The claims made by the First Defendant in this civil suit defy short summary, given the length of what I take to be the statement of case. Doing the best I can, the First Defendant is essentially alleging that he has been the victim of a long term conspiracy between the defendants, aimed at destroying his diamond business which constitutes, so it is said, unwelcome competition to De Beers. The acts of the alleged conspiracy are many and varied, and include the allegation that the Defaults were caused by the conspirators. I will refer to this civil suit as **"the First Defendant's Conspiracy Claim"**.

158. In terms of the progress of the First Defendant's Conspiracy Claim, I was told by Mr Grant that defences have been filed by the defendants and that there was to be a hearing in January or February of this year. I was not told what that hearing was but, given the scale of the proceedings, I assume that the hearing will be some kind of preliminary/procedural hearing, as opposed to the actual trial of the proceedings.

159. Turning to the criminal proceedings, there have been extensive criminal investigations and proceedings arising out of the Defaults, involving the Indian Central Bureau of Investigation, the Indian Enforcement Directorate, the Economic Offences Wing, the Serious Fraud Investigation Office, and the Judicial Magistrate Court of Ahmedabad. In addition to this, the First Defendant has commenced proceedings in the Bombay High Court challenging the validity of the proceedings commenced against him by the Indian Enforcement Directorate in which application is made for a declaration that the First Defendant is a fugitive economic offender. The criminal proceedings, in their various parts, variously concern all of the Defendants, with the exception of the Third Defendant.

160. In terms of overlap with the Action, and in terms of competing sets of proceedings, there is no consistent picture in relation to the Indian criminal and civil proceedings. The following points seem to me to be particularly material:
    (1) So far as the proceedings in the Debts Recovery Tribunal and the National Company Law Tribunal are concerned, they are, essentially, debt recovery and insolvency proceedings. They are concerned with, and arise out of the Defaults but, so far as I am aware of their content, they do not directly overlap with the Claimant's claims. By this, I mean that these civil proceedings in India are concerned with part of the factual matrix to the Claimants' claims, namely the Defaults, but do not directly overlap with the Claimants' claims themselves.
    (2) Having read what I have taken to be the First Defendant's statement of case in the First Defendant's Conspiracy Claim, there is a clear area of overlap between the First Defendant's Conspiracy Claim and the subject matter of the Claimants' claims. The First Defendant's case is that the Defaults were caused by the conspirators. The cause of the Defaults is clearly central to the questions of whether and, if so, how the Alleged Fraud took place. There are however two particular points to make in this context. First, the First Defendant's Conspiracy Claim was only commenced at the same time as the Action. As such, I assume that the First Defendant's Conspiracy Claim will have some way to go before it comes to trial in India. Second, the scale of the conspiracy claims, which might better be described as a conspiracy saga, in the First Defendant's Conspiracy Claim should not be underestimated. The alleged involvement of the defendants in the Defaults is but one part of a series of allegations of conspiracy, in various parts of the world, against the First Defendant and his diamond business. In the trial of the First Defendant's Conspiracy Claim the Defaults will be but one part of a lengthy saga of events which the court will have to investigate.
    (3) Turning to the criminal proceedings, including the various investigations, they present a piecemeal picture, in terms of overlap with the subject matter of the Claimants' claims, and in terms of the involvement of the Defendants. What there is not, so far as I can see, is any set of criminal proceedings which will clearly traverse the same ground as the subject matter of the Claimants' claims.
    (4) None of the Claimants are parties to or involved in any of the civil or criminal proceedings in India. I understand the same to be true of the Third Defendant.

161. The Applicants contended that, if the Action is permitted to proceed in this jurisdiction, the civil and criminal proceedings in India create a serious danger of conflicting judgments, as between India and England, and will cause prejudice to the Applicants, in the sense of compelling them to fight over the same subject matter in two different jurisdictions. I do not accept either of these points. I do not think that there is sufficient identity of parties or issues to create a serious danger of conflicting judgments. So far as the position of the Applicants is concerned, I do not accept that compelling them to fight the Action in this jurisdiction will compel them to fight over the same subject matter in two jurisdictions. As I have analysed the matter to be tried, in this case, and applying the evidence which I have of the content of the civil and criminal proceedings in India, I do not consider that an identity of issues exists of the kind asserted by the Applicants.

162. The existence of relevant proceedings in another jurisdiction is clearly a factor to be taken into account in the application of the *Spiliada* test. The case of *De Dampierre v De Dampierre* [1988] 1 AC 92 involved divorce proceedings commenced by the husband in France. The wife commenced divorce proceedings in London, which the husband sought to stay. A stay was refused at first instance and in the Court of Appeal, on the basis that the wife might receive less favourable financial provision in France, if she was found to have been solely to blame for the breakdown of the marriage. The House of Lords allowed the husband's appeal. As with *Re Harrods*, the case demonstrates that it is not, at least as a general rule and without more, an objection to an alternative jurisdiction either to say that the relief available in the alternative jurisdiction is not precisely the same as the relief available in this jurisdiction, or to say that the relief available may be less generous in the alternative jurisdiction. For present purposes however the following useful guidance can be found in the speech of Lord Goff, at 108B-D:

> *"The same principle is applicable whether or not there are other relevant proceedings already pending in the alternative forum: see The Abidin Daver [1984] A.C. 398, 411, per Lord Diplock. However, the existence of such proceedings may, depending on the circumstances, be relevant to the inquiry. Sometimes they may be of no relevance at all, for example, if one party has commenced the proceedings for the purpose of demonstrating the existence of a competing jurisdiction, or the proceedings have not passed beyond the stage of the initiating process. But if, for example, genuine proceedings have been started and have not merely been started but have developed to the stage where they have had some impact upon the dispute between the parties, especially if such impact is likely to have a continuing effect, then this may be a relevant factor to be taken into account when considering whether the foreign jurisdiction provides the appropriate forum for the resolution of the dispute between the parties."*

163. Applying this guidance in the present case I find it hard to see that any of the civil or criminal proceedings in India justify the view that India is the appropriate forum for the Claimants' claim to be pursued. The proceedings which may be said to have the clearest overlap with the subject matter of the Claimants' claims are the First Defendant's Conspiracy Claim, but those proceedings have only been commenced relatively recently, and they encompass allegations of conspiracy going well beyond the Defaults. As for the remaining proceedings, I do not see

any of them as having a direct impact, of the kind referred to by Lord Goff, on the essential subject matter of the Claimants' claims. I say all this independent of the fact that none of the Claimants or the Third Defendant are parties to any of the proceedings in India. I also add, in this context, that I do not regard it as correct to say that there is an overlap in parties because *"the ultimate victims"*, to use the language of the Three Defendants' argument, were the Consortium Banks. I repeat what I have said in this respect, earlier in this judgment, where I have dealt with the question of the correct characterisation of this dispute.

164. It is convenient also to consider, in this context, the question of fragmentation. The desirability of preventing fragmentation of proceedings can be a powerful factor in a dispute over jurisdiction. In *Tugushev v Orlov* [2019] EWHC 645 (Comm) Carr J (as she then was) explained the position in the following terms, at [264]:

> *"The authorities show that, although the court should be cautious before allowing the jurisdictional position of a minor player to dictate where the dispute as a whole must be tried, the desirability of preventing the fragmentation of proceedings can be a powerful factor which may in an appropriate case outweigh factors connecting the claim to another jurisdiction."*

165. So far as the Claimants are concerned, I cannot see any point on fragmentation arising, because the Claimants are not parties to proceedings elsewhere. I have already rejected the argument that the real claimants in the Action should be treated as parties other than the Claimants.

166. Turning to the Defendants, I was pressed with the argument, on behalf of the Claimants, that there would be an undesirable fragmentation of proceedings if the Claimants were compelled to pursue their claims in India. This submission was made on the basis that the Fifth Defendant has been served with the proceedings in the Action, and is clearly aware of the proceedings, but has not made any formal challenge on the basis of jurisdiction. As such, so it was contended, the Action will proceed against the Fifth Defendant in this jurisdiction, irrespective of the outcome of the Jurisdiction Applications. The Fifth Defendant is understood to be residing in the UAE, and faces criminal charges in India. As such, there is no reason to think that the Fifth Defendant could be made subject to the jurisdiction of the Indian courts, or would be willing to submit to the jurisdiction of the Indian courts. If therefore the Claimants must pursue their claims against the Applicants in India there will, so it was submitted, be a highly undesirable fragmentation of proceedings, so far as the Fifth Defendant is concerned.

167. In theory this is a powerful point. The Fifth Defendant is not a minor actor in relation to the Alleged Fraud, but one of the Alleged Principal Conspirators (to use the definition in the Particulars of Claim in the Action), together with the Applicants. It would be highly undesirable if the Action was to proceed in this jurisdiction against the Fifth Defendant alone, with the Claimants required to pursue their claims against the Applicants in proceedings in India.

168. In reality, I am doubtful that there is much in this point. The Fifth Defendant has not taken any procedural step in response to the Action. There have been only the communications from Nawal Salem which I have described above. As matters stand there appears to be nothing preventing the Claimants from entering a default judgment against the Fifth Defendant, for the sum claimed in the claim form and the Particulars of Claim. Indeed, it is hard to avoid the impression that this step has not been taken in order to avoid undermining the Claimants' fragmentation argument. In any event, no reason has been identified to me as to why default judgment could not be entered against the Fifth Defendant. In these circumstances it strikes me as unlikely that the Fifth Defendant will mount any active defence to the Action. As such, this point on fragmentation seems to me to carry little weight.

169. The Moratorium may be said to be a factor which requires consideration under the heading of fragmentation, but I prefer to consider the Moratorium separately.

170. In summary, I do not regard the various civil and criminal proceedings in India as a factor pointing to India as the appropriate forum for the resolution of this dispute. Equally, I do not regard the risk of fragmentation as being such as to point to England as the appropriate forum for the resolution of this dispute. I regard both factors as effectively neutral, by which I mean that they do not seem to me to tip the scales materially, either one way or the other.

(iv) Stage one of the *Spiliada* test - the law to be applied

171. I can take this factor fairly shortly, for the following reason. I am not asked, in the Jurisdiction Applications, to take a final view on the proper law to be applied to the Claimants' claims, or the Inbound Claims. As I understood the submissions of both Mr Grant and Mr Higgo, I am asked to form, and express a view on what is likely to be the proper law of the Claimants' claims and the Inbound Claims, without making any final or binding decision on these questions. I did not understand Mr McQuater to dissent from this position. The submissions of Mr Grant and Mr Higgo were that the proper law of the Claimants' claims and the Inbound Claims was Indian law. It will be noted that, in describing the submissions of Mr Grant and Mr Higgo, I again make reference to the Claimants' claims. This is because the Applicants' case is that the proper law needs to be considered by reference to the true dispute, which is characterised as an alleged Indian conspiracy, in respect of which the relevant events took place in India (or at least not in England), and which gave rise to losses suffered in India.

172. It will be seen that this part of the Applicants' argument essentially leads back to the question of what is the correct characterisation of the matter to be tried. I have already set out my answer to that question. Without making any decision on the proper law governing the Claimants' claims, it strikes me as unlikely that those claims are governed by Indian law. I say this because the claims essentially arise out of wrongs alleged to have been committed against the Claimant Companies, in the form of breaches of duties alleged to have been owed to the Claimant Companies and in the form of alleged conspiracy against the Claimant Companies. The remedies which are claimed are a combination of proprietary, equitable and common law remedies, by reference to the Funds which passed through the accounts of the Claimant Companies. Added to this are the remedies

claimed under the 1986 Act. Given that the Claimant Companies were and are English registered companies, and are now subject to English insolvency processes, I find it hard to see how the Claimants' claims can be said to be governed by Indian law.

173. In his submissions Mr Grant referred me to the Rome II Regulation (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11th July 2007) and, in particular, to Article 4, which provides as follows:

> *"1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.*
>
> *2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.*
>
> *3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."*

174. Mr Grant submitted that it was plain that the damage, so far as the Claimants' claims were concerned, occurred in India. In addition to this, so he submitted, if one applied the manifest connection test, it was clear that the Claimants' claims were manifestly more closely connected with India than England. I can see the force of these arguments, provided that one accepts that the matter to be tried in this case is essentially concerned with the recovery by the Consortium Banks of the losses which they sustained as a result of the Defaults. For the reasons which I have already set out however, I do not accept that this is a correct analysis of the matter to be tried. In these circumstances I do not accept that Article 4, or any other Article within Rome II points to the proper law of the Claimants' claims as being Indian law.

175. It seems to me that similar considerations apply in relation to the agreements in respect of which the second of the Defaults occurred; that is to say the JWCC Agreements. The JWCC Agreements between the relevant Consortium Banks and Winsome each contained a choice of law and jurisdiction clause which provided for the agreement to be governed by Indian law and provided for the submission of the parties to the non-exclusive jurisdiction of courts in India. It seems reasonable to assume that the JWCC Agreements between Forever Precious and the relevant Consortium Banks contained similar provisions. It also seems reasonable to assume that the SBLCs were governed by Indian law. The guarantees given by the First Defendant were also governed by Indian law.

176. The Claimants' claims however are not claims to enforce these security documents or any of them. Proceedings to enforce the JWCCs and the First Defendant's guarantees have already been commenced, by the Consortium Banks, in India. So far as the Claimants' claims are concerned, these security

documents comprise, with the PMFs, the contractual framework in respect of which the Alleged Fraud was perpetrated. Putting the matter another way, and assuming that the Alleged Fraud occurred, the Funds which should have been used to achieve compliance with the contractual obligations prescribed by the security documents were diverted through the Layers of companies to the ultimate benefit of the Defendants. The matter to be tried in the present case comprises the claims of the Claimant Companies arising out of their use as conduits for the Funds. Analysed in this way, it can be seen that the fact that the security documents were governed by Indian law does not really assist in determining the proper law of the Claimants' claims.

177. Turning to the Inbound Claims, these are of course the claims which the Consortium Banks have, or may have against the Claimant Companies. I am inclined to think, albeit without making any decision on this point, that there is merit in Mr Higgo's submission (supported by Mr Grant) that the Inbound Claims would be governed by Indian law. I do not think that it is appropriate for me to discuss this question in any detail, because I am not making a decision on this question. I therefore confine myself to the observation that I can see merit in Mr Higgo's arguments on this point. I am however doubtful as to where this takes the argument in the Jurisdiction Applications, even if I had felt able to decide this point. If the law to be applied to the Claimants' claims is English law rather than Indian law, and it has not been demonstrated to my satisfaction that this is or is likely to be the wrong analysis, the fact that the Inbound Claims are or may be governed by Indian law seems to me to be a much less material factor.

178. It is convenient to mention at this point the question of limitation in relation to the Inbound Claims, which was a point on which Mr Higgo concentrated, and was also the subject of considerable argument, as I recall, at the October Hearing. The Applicants' case is that the Inbound Claims are governed by Indian law and, as a matter of the Indian law of limitation, are statute barred. In this context Mr Higgo referred me to an extract from a report of Aman Ahluwalia, an Advocate admitted to the Bar Council of Delhi, which is contained in the exhibit (CD1) to Diss 1. The relevant extract includes discussion of the Indian law of limitation in relation to claims in tort. As I understand the position, the relevant limitation period is a relatively short one; being three years from the date when the right to sue accrues. In cases of fraud, and it may be other cases, the period of limitation does not start to run until the plaintiff or applicant has discovered the fraud or could, with reasonable diligence have discovered the fraud.

179. The essential point made by Mr Higgo was that if the Inbound Claims are governed by Indian law, it would not be appropriate for an English court to be making decisions on questions such as limitation, which will plainly be an issue in relation to the Inbound Claims, which will be governed by Indian law. As I have said, I am inclined to think, albeit without making any decision on this point, that there is merit in the submission that the Inbound Claims would be governed by Indian law, so that the point on limitation is engaged for the purposes of the jurisdiction dispute. I am not however persuaded that this is a point which carries much weight in the argument over jurisdiction. I come back to the same point which I have already made in this context. If the law to be applied to the Claimants' claims is English law rather than Indian law, and it has not been

demonstrated to my satisfaction that this is or is likely to be the wrong analysis, the fact that the Inbound Claims are or may be governed by Indian law seems to me to be a much less material factor. Putting the matter another way, the enforceability of the Inbound Claim is an issue or a set of issues relevant to one part of the Claimants' claims. I do not see that this issue or set of issues has to be resolved in India.

180. In summary, the question of the proper law of the Claimants' claims seems to me to be a factor which points to this jurisdiction as the appropriate jurisdiction for the resolution of this dispute, as opposed to India. So far as the proper law of the Inbound Claims is concerned, the position is not the same, but I do not see this particular point as one which tips the scales back in favour of India.

(v) Stage one of the *Spiliada* test - witnesses and documents

181. In Travers 2, at paragraph 14.6, Mr Travers makes the point that most of the witnesses to be called at the trial of the Action would be domiciled in India, or at least not domiciled in the UK. By way of example, Mr Travers points out that the Central Bureau of Investigation in India had identified no fewer than 95 witnesses, of whom 93 were identified as having resided in India. This was in respect of a complaint raised by Canara Bank, which was only one of the Consortium Banks. To this Mr Travers adds his belief that the vast majority of the documents would be located in India. India was the place where Winsome and Forever Precious carried on their business, and where they are in liquidation.

182. I accept that if the Action proceeds to trial, it is likely that there will be a number of witnesses who are resident in India. I also accept that there are likely to be many relevant documents in India. The Alleged Fraud had its inception in India. The starting point for any investigation of how the Alleged Fraud got off the ground will require examination of the affairs of Winsome and Forever Precious, and how it was that the Defaults came about.

183. I also accept a particular point made by Mr Higgo in this context. As Mr Higgo pointed out, if the Inbound Claims are governed by Indian law and are subject to Indian limitation periods, it seems likely that there is going to have to be an investigation into the state of the knowledge of the parties who are the claimants in relation to the Inbound Claims; that is to say the Consortium Banks. The Consortium Banks are Indian banks, with the consequence that any such investigation into state of knowledge will be concerned with the officers and employees of Indian banks, who can be expected to be in India. The relevant documents will also be under the control, it can be assumed, of the Consortium Banks, in India.

184. I can see some force in these points, particularly in relation to Mr Higgo's point on the limitation issue. In terms of overall analysis however, the problem with all these points seems to me to be that they only go so far. The Alleged Fraud was an international fraud. The orchestration of the Alleged Fraud, if the Alleged Fraud occurred, involved the misappropriation of the proceeds of the bullion which had been drawn down pursuant to the PMFs, and their transfer (or laundering as the Claimants would put it) through the Layers of companies. In the course of their journey through the Layers of companies, the Funds passed

through banks in China (Macau), Barbados and the UAE. This was an international operation and if, as the Claimants say, it was being orchestrated by the Defendants, there is no particular reason to think that such orchestration was being conducted from India. The evidence of the Applicants' whereabouts at the time when the Alleged Fraud was being carried out would suggest that the orchestration, if it occurred, was not being conducted from India. This in turn suggests that it is wrong to think that the preponderance of witnesses and documents in this case will be in India.

185. The Claimant Companies, with the exception of the Fourth Claimant, were all members of a group of companies which comprised the Transactional Services Unit of the Amicorp Group. In the case of the Fourth Claimant, a company within the Amicorp Group was one of its members. The Amicorp Group is described in the Particulars of Claim as providing company administration and other services. The Amicorp Group included Amicorp (UK) Limited (**"Amicorp UK"**), which is a company registered in this jurisdiction. The Claimants' case is that the movement of the Funds through the Layers of companies was dealt with by the Transactional Services Unit, which was based within Amicorp UK and was under the control of Daniel Skordis, former managing director of Amicorp UK. Mr Skordis is said to have been resident in this jurisdiction at all material times. Mr Skordis had previously been a registered director of the Third Claimant and the Sixth Claimant and was, on the Claimants' case, a de facto and/or shadow director (member in the case of the Fourth Claimant) of the remaining Claimant Companies. Mr Skordis signed what purported to be some of the derivatives transactions pursuant to which some of the Funds were represented as passing through the Layer 2 companies. The Claimants also say that Mr Price, who was a registered director of the Claimant Companies (with the exception of the Fourth Claimant) was resident at all material times in this jurisdiction. Mr Price is a former employee of the Amicorp Group, and a former managing director of Amicorp UK.

186. In his submissions Mr Grant took me to the records of interviews conducted with Mr Skordis and Mr Price and other individuals. Mr Grant's principal purpose was to demonstrate that Mr Skordis and Mr Price simply signed what was put in front of them and were mere cyphers.

187. There is a mass of evidence to consider in this context, but I draw two principal conclusions from this mass of evidence. The first is a conclusion which I have already stated; namely that the Alleged Fraud was an international fraud, in respect of which the various actors, whatever the extent of their role, were located in various parts of the world, including England. Second, the question of who was pulling whose strings in relation to the web of transactions by which the Alleged Fraud is said to have been implemented remains to be resolved. I do not think that I am in any position to draw any conclusions, beyond what I have said in the context of good arguable case in the November Judgment, as to those persons who were actively involved in the relevant transactions, and those persons who were no more than cyphers.

188. The relevant point which emerges from my very brief review of the mass of evidence concerning the transactions by which the Alleged Fraud is said to have

been implemented is this. There clearly exist connections between this jurisdiction and the Alleged Fraud, just as there are connections between other jurisdictions and the Alleged Fraud. This includes the location of witnesses who are or may be important witnesses in the resolution of this dispute. This does not strike me as a case where the majority, let alone all of the important witnesses are or are likely to be located in India.

189. Beyond all this there is the obvious, but nonetheless important point that the Applicants are resident in this jurisdiction, and apparently intend to remain in this jurisdiction. Indeed, in the case of the Three Defendants, the evidence is that their passports are being held by the Home Office in relation to an unspecified immigration matter; see the letter from the Three Defendants' solicitors to the Claimants' previous solicitors dated 30th May 2022. According to the separate firm of solicitors who are acting for the Three Defendants in relation to this immigration matter, the Three Defendants sent their only passports to the Home Office on 13th September 2018. By letter dated 7th June 2022 the Claimants' previous solicitors sought information as to when the Three Defendants expected to recover their passports. So far as I am aware, that information has yet to be provided. This unresolved inquiry is not directly relevant for present purposes. What is relevant is that the four individuals who one might expect, on any view of the matter, to be the principal witnesses or amongst the principal witnesses at the trial of the Action, or at any trial of the Claimant's claims are resident in this jurisdiction.

190. In terms of documents it seems to me also important to keep in mind that the obligations of the parties in relation to documents will extend to documents which are or have been under their control. If documents are unobtainable, they will not be subject to the obligation of disclosure.

191. In this context I do take on board the point made, in particular, by Mr Higgo that it would not be fair to his client if he was unable to defend the Action because he could not obtain access to key documents in India. In this context I heard some argument on the question of how easy or difficult it might be to obtain documents from third parties in India. In this context I accept Mr Higgo's submission, at least to the extent that I should not assume that the obtaining of documents from India would either be easy or possible. This however assumes that, in the absence of such documents, the Third Defendant will be prejudiced in his defence of the Action. The same applies to the Three Defendants. It is not clear to me that this will be the position, for any of the Applicants. The burden will be upon the Claimants, at the trial of the Action, to prove that the Alleged Fraud did occur and, in particular, that each of the Defendants was orchestrating the Alleged Fraud and directing the activities of the Claimant Companies from behind the scenes. If the documents which may serve to demonstrate this are not available, it strikes me that this is much more likely to be a problem for the Claimants than the Applicants. Putting the matter another way, and subject to one possible exception, it is not clear to me what documents any of the Applicants might require which would be critical to their defence of the Action but which might be inaccessible because they were in India.

192. The possible exception to this which I can see, as matters stand, concerns documents held by the Consortium Banks which might be relevant to the issue of limitation, if the Inbound Claims are assumed to be governed by Indian law. I can see some force in this point, as I have already indicated, but it is not a point which, in terms of the overall picture in respect of location of witnesses and documents, seems to me to carry that much weight.

193. In summary, if one considers the witnesses whose evidence is likely to be required for this dispute, I do not think that India emerges as the clear or obvious forum for the resolution of this dispute. As between India and England, it seems to me that the scales are pretty even in this context, not least because the Applicants are all resident in this jurisdiction. So far as documents are concerned, the position seems to me to be similar. In relation to documents, I do not think that India emerges as the clear or obvious forum for the resolution of this dispute. As between India and England, it seems to me that the scales are, again, pretty even.

(vi) Stage one of the *Spiliada* test - other matters

194. I do not regard it as necessary to go through the entirety of the written and oral arguments in the Jurisdiction Applications. Under this heading it seems to me that there are only three factors which require specific mention.

195. The first of these factors is the Moratorium. I have already considered the Moratorium, in my discussion of the availability of India as a forum for the resolution of this dispute. I concluded that the potential problems created by the Moratorium did constitute a significant point, but not one which went to the availability of jurisdiction.

196. In my judgment however the potential problems created by the Moratorium are a factor which can be taken into account in the remaining stages of the *Spiliada* test. It is also clear, by reference to the extract from Dicey & Morris (12-032) which I have cited earlier in this judgment, that the boundaries between the second question within the first stage of the *Spiliada* test and the second stage of the *Spiliada* test are not impermeable. In those circumstances it seems to me that the Moratorium can be taken into account at this stage in my judgment, where I am engaged with the second question within the first stage of the *Spiliada* test.

197. It seems to me that it would be highly unsatisfactory if the Claimants were compelled to pursue their claims in India, and then found that those claims or some of them could not be pursued against the First Defendant by reason of the Moratorium. The result could be an effective fragmentation of proceedings, which would be highly undesirable. I have already discussed the Moratorium in some detail, in my discussion of availability of forum. On the available evidence it seems to me that there is at least a risk that the Moratorium, if and in so far as it remains in place, might have this effect. In the context of the question of whether India is clearly or distinctly the more appropriate forum for the resolution of this dispute, it seems to me the risk posed by the Moratorium weighs against India, and in favour of England as the appropriate forum.

198. The second factor concerns the letter from the Claimants' solicitors dated 25th November 2022, to which I have made reference earlier in this judgment. It will

be recalled that the letter stated, amongst other matters, that certain funds may have found their way back to Winsome and Forever Precious from Al Mufied, one of the Layer 1 companies.

199. The argument advanced by Mr Higgo in this context is most easily stated by quoting directly from Mr Higgo's oral submissions in reply at the hearing, as recorded on the transcript (Day 2: pages 185-186):

> *"My Lord, there were three points, as far as I was aware. The first dealt with the letter at {G/128/1}. And my point, which was correctly identified by my learned friend, was that the centre of gravity of the alleged money laundering had shifted from the claimant companies, as it had previously been suggested, to monies within Emirates Gold and that a material part of that money we're told -- but not told the amount -- was then transferred back to Winsome and Forever Precious. Now, my learned friend said: well, my Lord, this just means adding an Indian group of recipients to a long list of other recipients. But, my Lord, that is not an answer to the point that we're making about transfers back to Winsome and Forever Precious. That has a significant bearing on where the investigation needs to be focused in this case, because these are the companies who are alleged to have lost money, as a consequence of trading, by way money went out to layer 1 companies and never came back. And that Winsome and Forever Precious were just left with liabilities, which they proved by claims in the UAE. But if, in fact, they've received money from a layer 1 company, Al Mufied, that calls into question why that isn't trading, my Lord, which is what the first defendant has indicated at all times is the nature of the relationship between Winsome and Forever Precious and the layer 1 companies. And, my Lord, the defendants don't accept the premise of the alleged fraud. And that's going to have to be investigated. And that requires an analysis of what, in fact, happened; and that can only, realistically, occur in India."*

200. The difficulty with this submission is that it is based on the proposition, as it has to be for the purposes of the Applicants' case in the Jurisdiction Applications, that the centre of gravity in this case is India, and that investigations will have to be focused on India, and on the affairs of Winsome and Forever Precious. I accept that an investigation of the affairs of Winsome and Forever Precious is going to be required as part of the trial of the claims made by the Claimants. I also accept that this investigation will involve investigation of what occurred in India, although I do not accept that the investigation will necessarily be confined to what occurred in India. This was however the position before the arrival of the further information contained in the letter of 25th November 2022. I do not accept that the information conveyed by the letter of 25th November 2022 has materially changed the position in this respect. The reality is that the Claimants' claims were always going to engage an investigation of the affairs of Winsome and Forever Precious, and that investigation was always going to require at least some investigation of events in India.

201. The investigation of the affairs of Winsome and Forever Precious is however one part of the Alleged Fraud which, as I have already noted, was an international fraud. Beyond this, investigation of the affairs of Winsome and Forever Precious is only one part of claims made by the Claimant Companies that they were used

as instruments in the operation of the Alleged Fraud. Ultimately, the difficulty with this argument seems to me to come back to what Coulson LJ said in Manek, at [65], which I repeat for ease of reference (underlining again added):

> *"This was, on the Appellants' case, an international fraud. It arose out of critical misrepresentations made in England about the onward sale of the shares in an Indian company (Hermes) to a company (EMIF) domiciled in Mauritius, without revealing the fact that the ultimate purchaser, a German company (Wirecard) was going to pay much more for the same shares. <u>There was never going to be one jurisdiction which would emerge as the only candidate for the hearing of this claim.</u> The issue is whether, in all the circumstances, and taking a realistic approach to the numerous jurisdictions that might potentially be involved, the Appellants have demonstrated that England and Wales is clearly the place where the claims against all the Defendants may most suitably be tried."*

202. It seems to me that this and similar arguments from Mr Higgo and Mr Grant seek to elevate India to the status of only candidate for the hearing of the Claimants' claims. In my view the circumstances and evidence in this case fall well short of supporting this case.

203. So far as this specific argument of Mr Higgo is concerned, and for the reasons which I have given, I do not regard the argument as one which weighs against England and in favour of India in this case.

204. The third factor goes back to a couple of points which arose in the context of the undertakings offered by the Applicants to submit to the jurisdiction of the Indian courts. The Claimants have argued that the undertakings should require the Applicants actively to participate in any Indian proceedings, and to give evidence in person. I was not persuaded that the undertakings needed to go this far, but I did indicate that these two points might be relevant to the second question within the first stage of the *Spiliada* test and/or to the second stage of the *Spiliada* test.

205. I am not however persuaded that either of these points is relevant to the second question within the first stage of the *Spiliada* test or to the second stage of the *Spiliada* test. It seems to me that neither point takes matters further than my discussion of the location of the parties, earlier in this judgment, in the context of the second question within the first stage of the *Spiliada* test.

(vii) <u>Stage one of the *Spiliada* test - evaluation of whether India is clearly or distinctly the more appropriate forum than England</u>

206. At this stage of the *Spiliada* test, the burden is on the Applicants to demonstrate that India is clearly or distinctly the more appropriate forum for the resolution of this dispute than England. Drawing together my discussion of the factors which I have considered above, and taking into account all the evidence and submissions which I have received in relation to the Jurisdiction Applications, it seems to me that the Applicants have fallen well short of discharging this burden. I am not persuaded that India is clearly or distinctly the more appropriate forum than England for the resolution of this dispute.

207. Indeed, so far as this may be relevant, I do not consider that it would be right to conclude that India is, by any margin, a more appropriate forum than England. In my view the position is the other way round. Weighing all the relevant factors, evidence and arguments in the balance, I consider England to be the more appropriate forum than India for the resolution of this dispute.

208. In *Spiliada* Lord Goff contemplated the possibility that there might be circumstances in which the court might decide to grant a stay, notwithstanding a decision that there was no other available jurisdiction which was clearly more appropriate for the trial of the relevant action; see Lord Goff's speech at 478C. Lord Goff considered it difficult to imagine any such circumstances, and I cannot see any such circumstances in the present case. In the present case it seems to me to follow, from the failure of the Applicants to discharge the burden of showing that India is clearly or distinctly the more appropriate forum than England for the resolution of this dispute, that a stay must be refused.

Stage two of the *Spiliada* test – are there circumstances by reason of which justice requires that a stay should not be granted?

209. In the light of my conclusions on the second question within the first stage of the *Spiliada* test, the second stage of the *Spiliada* test does not strictly arise for decision. I do not consider it appropriate to go into the second stage of the *Spiliada* test, for two reasons.

210. First, investigation of the second stage of the test requires the hypothesis that it has been established that India is clearly or distinctly the more appropriate forum for the resolution of this dispute. Given that this has not been established, it seems to me difficult to conduct a consideration of the second stage of the test. The reasons for concluding that India was clearly or distinctly the more appropriate forum would, as it seems to me, be material to the consideration of the second stage of the test.

211. Second, the arguments at the hearing concentrated on the two questions within the first stage of the *Spiliada* test. Indeed, I did not understand the Claimants to be pointing to any particular factors as factors which called for separate consideration at the second stage of the test. The Moratorium could, as it seems to me, be said to qualify as a factor eligible for consideration at the second stage of the test, but I have regarded it as appropriate to consider the Moratorium as a factor relevant to the second question within the first stage of the test.

Overall conclusions on the Jurisdiction Applications

212. For the reasons which I have set out in this judgment, I reach the following conclusions in relation to the Jurisdiction Applications:
    (1) The Applicants have demonstrated that India is an available forum for the resolution of this dispute.
    (2) The Applicants have failed to discharge the burden of demonstrating that India is clearly or distinctly the more appropriate forum than England for the trial of this case.
    (3) The conclusion in sub-paragraph (2) above renders it unnecessary to consider whether the Claimants have demonstrated circumstances by reason of which justice requires that a stay should not be granted. For the

reasons which I have given, I have not regarded it as appropriate to go into this question.

(4) It follows from my conclusion at sub-paragraph (2) above that the court should not decline jurisdiction in the Action. Nor should the Action be stayed on the basis of jurisdiction.

The strike out applications

213. It follows, from my conclusions on the Jurisdiction Applications, that the strike out applications remain live. As with the November Judgment ([NJ/54]), it is not my intention that anything I say in this judgment should be seen as precluding the pursuit by the Applicants of their respective strike out applications. It may be that some of what I have said in this judgment may have a bearing on the issues in the strike out applications, although this strikes me as less likely than is the case with the November Judgment. Subject to this possibility it remains the position, as it was with the November Judgment, that the strike out applications are for separate hearing.

The outcome of the Jurisdiction Applications

214. The Jurisdiction Applications fall to be dismissed. I will hear the parties, as necessary, on the terms of the order to be made consequential upon this judgment. In the usual way the parties are encouraged to agree as much as they can in this respect, subject to my approval of such agreed terms.