Neutral Citation Number: [2024] EWHC 763 (Ch)

Claim No: BL-2022-BHM-000002

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

Priory Courts
33 Bull Street
Birmingham, B4 6DS

Date: 4 April 2024

HIS HONOUR JUDGE RICHARD WILLIAMS
(Sitting as a High Court Judge)

- -

MR ZAKIR HAROON MUSSA

Claimant

-and-

(1) MR ZUBAIR OSMAN GANI ISSA
(2) THE VICTORIA FOREX BUREAU LIMITED
(3) MR ARIF GABA
(4) MRS MUNIRA ARIF GABA
(5) MR SOHAIL ARIF GABA

Defendants

- -

Mr Zakir Haroon Mussa, the **Claimant**, represented himself
James Morgan KC and **Mr Mohammed Hay** (instructed by Samuel Louis Solicitors) for the **Defendants**

Hearing dates: 9 January and 4 April 2024

JUDGMENT

Introduction

1. This is my judgment following the hearing of the Defendants' application challenging the jurisdiction of the court in England to determine the Claimant's

claims against them for damages in the total sum of £1,892,002 allegedly arising from breach of an oral banking agreement made between (i) the Claimant and (ii) D1 and/or D2.

2. The application was made as long ago as 29 March 2022. Through no fault of the parties, it has taken an inordinate length of time for the application to be finally heard.

3. The Defendants challenge the jurisdiction of this court on the following grounds:

    a. D1 and D2, who do not reside/operate in England, have not been validly served with the proceedings.

    b. There are parallel court proceedings brought by the Claimant in Malawi, and the Claimant is required to make an election, since he cannot pursue both.

    c. The court should in any event decline to exercise its jurisdiction over the Defendants because Malawi is clearly the more appropriate forum to resolve the dispute.

    d. In the alternative, there should be a case management stay in the present proceedings until the existing proceedings in Malawi have been concluded.

Background

4. D1 is the managing director and a shareholder in D2, which is a company that was incorporated in Malawi on 20 August 1997. D2 is licensed by the Reserve Bank of Malawi to operate a foreign exchange bureau.

5. In his witness statement dated 11 April 2023, the Claimant states by way of background that:

    a. The Claimant previously resided in Malawi where he ran several businesses, which were sold when the Claimant moved to the UK in 2005.

    b. However, due to currency restrictions in Malawi, the Claimant could not transfer all his monies to the UK.

    c. Therefore, the Claimant instructed D1 and D2 to manage the funds on his behalf. This included (i) receiving payments from various third parties who owed money to the Claimant and (ii) making payments to various third parties on the Claimant's instructions.

6. On 24 July 2020, the Claimant commenced proceedings in the High Court of Malawi ("***1st Malawi Proceedings***") against Messrs Mahomed Mussa and Moshin Mussa ("***the Mussa Defendants***") claiming repayment of a sum totalling $1,327,900 being both the principal amounts and charges due under loan agreements allegedly made on "1st August 2015, 1st July 2016, 1st January 2017, 1st January 2017, 1st October 2017, 1st October 2017, 1st February 2019 and 1st February 2019".[1]

[1] It was alleged that the loans were made to support the Mussa Defendants' businesses in Malawi being Mussa Nurmahomed and Phazi Industries Limited, which were subsequently added as defendants to the First Malawi Proceedings.

7. The Mussa Defendants denied having received the alleged loans and, on 30 September 2020, the Mussa Defendants applied for an order for security of costs (*"1st Malawi Security for Costs Application")*.

8. On 9 March 2021, the Claimant applied in the 1st Malawi Proceedings for summary judgment against the Mussa Defendants on the ground that they did not have an arguable defence on the merits to the Claimant's claim ("***Malawi Summary Judgment Application***").

9. On 29 April 2021, the Malawi Summary Judgment Application was dismissed by Justice Msungama.

10. On 21 July 2021, the Claimant applied to join D1 to the 1st Malawi Proceedings ("***Malawi Joinder Application***") on the grounds that:

    a. It was agreed with D1 that the Claimant would pay the loan monies to the Mussa Defendants via D2.

    b. D1 was not willing to give an account of the funds received from the Claimant.

11. On 10 September 2021, Justice Msungama dismissed the Malawi Joinder Application for the following reasons:

    "[10.] In this matter, one would think that when the funds, which by the way, are not a small amount by any standards, were being sent to the [Mussa] Defendants, if such was the case, through [D1], there must have been documentation which was executed between [D1] and the Claimant evidencing the deposit of the funds to [D1]. Copies of such documents as well as copies of the instructions issued to [D1] should be available to both the Claimant and [D1]. Assuming the funds were transferred from the UK, as seems to be the suggestion when one reads the sworn statement filed earlier by the Claimant…. And copies of the purported loan agreements executed between the parties….., there must be approvals which were granted by the fiscal authorities in both the UK and Malawi as such transmission of such a large sum has to be through such authorities. There certainly should be exchange control approvals that must have been granted. So in my opinion, even if the intended 5th Defendant were to deny ever having received funds from the Claimant for his onward transmission to the [Mussa Defendants], the Claimant does not have to bring him as a party to prove that point. The Claimant can prove that point by bringing documentary evidence which was exchanged between him and the intended 5th Defendant and also documentation relating to exchange control formalities issued by the relevant fiscal authorities either Malawi or the UK or in both jurisdictions. I therefore find that it is unnecessary to bring in [D1] a party for purposes of proving the transmission of the funds to the [Mussa Defendants].

    [11.] Further, ….. [it] is absolutely unnecessary to add [D1] as a party merely to facilitate his giving of an account of the funds which he purportedly received from the Claimant. There is nothing to suggest that he is not a compellable witness. He can be called to come and testify. He can also be compelled to produce certain documents which are in his possession…."

12. On 10 September 2021, the Claimant commenced separate proceedings in the High Court of Malawi ("***2nd Malawi Proceedings***") against D1 claiming the total sum of

$1,650,000 in respect of various sums of money allegedly deposited with D1 for the purposes of lending the same to the Mussa Defendants, but which money D1 then failed to pay to the Mussa Defendants.

13. On 28 October 2021, D1 filed a defence to the 2nd Malawi Proceedings denying liability. In particular, it was D1's defence that:

    a. At no time was D1 acting in his personal capacity, since on the Claimant's own case he was always transacting with D2.

    b. If, which was denied, any such monies passed through D2, it was the correct defendant.

    c. D1 did not receive any instructions or money from the Claimant and was not aware of any business arrangements between the Claimant and the Mussa Defendants.

14. On 5 January 2022, the Claimant issued the present proceedings ("***the English Proceedings***") against the Defendants. D3, D4 and D5 are respectively D1's sister, brother in law and nephew. D3, D4 and D5 are living together in a rented property in Leicester.

15. On 29 March 2022, the Defendants filed an acknowledgment of service of the English Proceedings in which they challenged jurisdiction.

16. On 6 April 2022, D1 applied in the 2nd Malawi Proceedings for an injunction ("***Malawi Injunction Application")*** restraining the Claimant from pursuing the English Proceedings on the ground that: "By commencing another action against [D1] and his affiliates in the United Kingdom over the same subject matter as the present action, the Claimant is abusing the process of court."

17. On 9 May 2023, D1 applied in the 2nd Malawi Proceedings for an order for security for costs ("***2nd Malawi Security for Costs Application***") on the grounds that (i) the Claimant resided out of the jurisdiction and (ii) had no business or assets in Malawi.

18. On 16 June 2022, the Malawi Injunction Application was dismissed by Justice Alide.

19. On 29 November 2023, Justice Manda granted the 1st Malawi Security for Costs Application for the following reasons:

    "… the Claimant is clearly stating that [D1] never played his role of making money available to the [Mussa Defendants]. Simply put, the [Claimant] is making the assertion that the [Mussa Defendants] never got the money because [D1] denied receiving money from him. The question then is why is the [Claimant] suing the [Mussa Defendants]? On this note I must agree with the observations of Justice Msungama (in his ruling of 10th September 2021) that the [Claimant] is being uncertain and inconsistent by making an additional or alternative claim against [D1]……..

    It is to be accepted that a litigant has to be given his day in court. That is a matter of his right. However, it is also the duty of the court to guard against its abuse and not to entertain frivolous and vexatious claim or actions. Uncertainty in terms of who to sue is a clear indication of a frivolous and vexatious action. I would thus

opine that asking for security for costs when it comes to such actions, cannot be considered to be stifling the action. This is especially in the context of this matter which has now been going on for almost three years without any real headway. Further as noted by [Justice Msungama], for a transaction of the magnitude that the claimant is asserting, there seems to be no proof (in terms of fiscal documents) that the alleged funds were transferred from the UK to Malawi.

From the foregoing and having considered the court record as it now stands, and further considering that the claimant is resident outside the jurisdiction, I must find that the application for security for costs is well grounded and I do proceed to grant the same. Clearly the [Claimant] is not in a position to pay the costs should [he] be called upon to do. After all it has not been disputed that he is impecunious! It also stands to doubt as to whether it is the actions of the [Mussa Defendants] that caused the [Claimant's] impecuniosity since by the [Claimant's] sworn statement, the person who was supposed to have transferred the alleged sums to the [Mussa Defendants], is denying that he received the alleged money!"

20. As a result of Justice Manda's decision and the Claimant's failure to make payment, the 1st Malawi Proceedings are effectively stayed.

21. A reserved judgment is awaited on the 2nd Malawi Security for Costs Application, and, on 5 December 2023, there was a Pre-Trial Conference before the trial judge, Justice Alide, in the 2nd Malawi Proceedings.

22. In ***VTB Capital plc v Nutritek International Corpn*** [2013] 2 AC 337, Lord Neuberger of Abbotsbury made the following observations generally in relation to jurisdictional disputes:

"[82.] The first point is that hearings concerning the issue of appropriate forum should not involve masses of documents, long witness statements, detailed analysis of the issues, and long argument. It is self-defeating if, in order to determine whether an action should proceed to trial in this jurisdiction, the parties prepare for and conduct a hearing which approaches the putative trial itself, in terms of effort, time and cost. There is also a real danger that, if the hearing is an expensive and time-consuming exercise, it will be used by a richer party to wear down a poorer party, or by a party with a weak case to prevent, or at least to discourage, a party with a strong case from enforcing its rights.

[83.] Quite apart from this, it is simply disproportionate for parties to incur costs, often running to hundreds of thousands of pounds each, and to spend many days in court, on such a hearing. The essentially relevant factors should, in the main at any rate, be capable of being identified relatively simply and, in many respects, uncontroversially. There is little point in going into much detail: when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial."

23. Despite those words of warning by Lord Neuberger, the hearing bundles for the present application extended to 709 pages and the legal authorities bundle extended to 315 pages. The Defendants' schedule of costs for the hearing totalled £142,010.

24. I am unable in the course of this judgment to refer to all the evidence and argument relied upon by the parties, but I have taken it all into account in reaching my decisions.

The overriding objective

25. The procedural code governing the English Proceedings is embodied in the Civil Procedure Rules ("***CPR***"). The ethos of the CPR is encapsulated in r.1.1, which provides:

> "The overriding objective
> 1.1
> (1) These Rules are a procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.
> (2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
> (a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;
> (b) saving expense;
> (c) dealing with the case in ways which are proportionate –
> (i) to the amount of money involved;
> (ii) to the importance of the case;
> (iii) to the complexity of the issues; and
> (iv) to the financial position of each party;
> (d) ensuring that it is dealt with expeditiously and fairly;
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and
> (f) enforcing compliance with rules, practice directions and orders.
>
> ……."

26. The court is required to give effect to the overriding objective of dealing with cases justly and at proportionate cost:

    a. whenever exercising any power given to it under the rules or when interpreting any rule – CPR r.1.2; and

    b. by actively managing cases – CPR r.1.4.

D1 and D2 have not been validly served with the English proceedings?

27. CPR r.6.9(2) provides that:

    a. A defendant, who is an individual, shall be served at his "usual or last known residence".

    b. A defendant, which is a company that is not registered in England and Wales, shall be served within the jurisdiction at any place where the company carries on its activities/business.

28. CPR r.6.37 provides that where a defendant is located outside England and Wales then the permission of the court is required to serve the claim form on that defendant out of the jurisdiction.

D1

29. It is argued on behalf of D1 that he is permanently and habitually resident in Malawi and should have been served, if permission had been given to do so, out of the jurisdiction, in Malawi pursuant to CPR r.6.37. In the absence of any such permission having been sought and obtained, the English court has no jurisdiction over D1 and the claim form against him ought to be set aside.

30. The Claimant argues that D1 came to settle in the UK in 2020 and thereafter declared himself as a UK resident on the register at Companies House.

31. In ***Varsani v Reflo Ltd*** [2010] EWCA Civ 560 the Court of Appeal considered the meaning of "usual residence" in the context of an international businessman with more than one home. It was held that:

    a. The legal test to be applied is whether the claimant is able to satisfy the court that there is a "good arguable case" that the English property was the defendant's "usual residence" when the proceedings were served.

    b. The first instance judge explained that a "good arguable case" is a lower test than proof "on a balance of probabilities" but, because the issue is determined, effectively finally, at the interlocutory stage, a "good arguable case" requires the claimant to establish that he has a much better argument on the available material than the defendant. The first instance judge's description of the persuasive burden was not challenged on the appeal.

    c. A defendant can reside in more than one place at the same time.

    d. The term "usual residence" means that which is in ordinary use. There is a notion of regularity about it but not necessarily comparative intensity of use.

    e. The test to be applied in determining a defendant's usual residence is their pattern of life, taking into account the nature of the use of the premises as well as the duration of the periods of occupation.

32. In his witness statement dated 24 May 2022, D1 stated that:

    a. He was born in Malawi and has lived there his whole life. When Malawi gained independence in 1964, D1 was entitled to apply for a British passport and did so, although he continues to have permanent residence status in Malawi.

    b. He conducts his main business in Malawi, although he travels internationally in the course of that business including to the UK.

    c. He is the director of 3 limited companies registered in England and Wales and incorporated variously during the period 3 May 2021 to 24 January 2022. The companies comprise (i) a corporate vehicle used to acquire an investment property in the UK and (ii) two other companies established with friends.

    d. D3, D4 and D5 live in Leicester in rented accommodation. Since 2015, D1 has visited and stayed with them 2-3 times a year, staying typically for around 1-2 weeks at a time.

e. D1's other sister, who is not a party to the English Proceedings, also lives in Leicester in another rented property.

f. D1's family are permanent residents of Malawi, although his 2 children (aged 19 and 15) are currently living in Leicester at a property rented by D1 for their use under a tenancy agreement dated 14 July 2021. Once his 2 children have completed their education in the UK, they will return to Malawi.

33. It is not seriously disputed that D1's main centre of business has continued to be Malawi. It is difficult to see how D1 could have maintained the business in Malawi without also residing there. However, as already noted, a person can reside in more than one place at the same time. D1 claims that he maintains only infrequent connections in England. However, on his own evidence, it is clear that D1 has very close personal connections to Leicester. Not only do D1's sisters live in Leicester, but also more importantly so do his young daughters.

34. By my calculation, when D1 signed the tenancy agreement for the Leicester property on 14 July 2021 his daughters would have been aged 18 and 14. It is highly improbable that, at those ages, D1's daughters would have been living on their own in a property in Leicester. It is perhaps unsurprising therefore that D1 admittedly stays in England on a regular basis visiting his close family. It is the inevitable nature, quality and pattern of the time that D1 spends in England, which in my view means the Claimant has a much better case in establishing that England is a usual place of residence of D1 than D1 has of establishing the contrary.

D2

35. It is not disputed that D2 is a company registered in Malawi and which does not have a place of business in England and Wales.

Giving effect to the overriding objective

36. Whilst I am persuaded that the Claimant has a much better case in establishing that England is a usual place of residence of D1, the address given for service of the English Proceedings upon D1 is the Leicester address of the property of D3, D4 and D5, rather than the address of the Leicester property rented by D1.

37. Further, it cannot be disputed that the Claimant was required, but failed, to apply to the English court for permission to serve the English Proceedings on D2 out of the jurisdiction.

38. However, the court has the power to make orders retrospectively under CPR r.3.10 to cure a procedural defect in service. If I am persuaded that the English Proceedings ought properly to continue despite the Defendants' further challenges below, it strikes me as being wholly contrary to the overriding objective to set aside the claim forms against D1 and D2 on procedural grounds relating to defective service, which would simply result in the Claimant reissuing these claims. In those circumstances, the interests of justice would demand that I grant retrospective permission to the Claimant to (i) serve D1 at the address given for him on the claim form and (ii) serve D2 out of the jurisdiction.

Election

39. CPR r.3.4(2)(b) provides that the court may strike out a statement of case if it appears to the court that the statement of case is an abuse of the court's process.

40. D1 argues that:

    a. The Claimant chose first to commence and prosecute the 2nd Malawi Proceedings against D1, but now attempts to bring proceedings against him (and others) in England. The circumstances are therefore unusual in that the same party is the claimant in both actions (as opposed to being an unwilling or reluctant defendant in one).

    b. In ***Australian Commercial Research and Development Ltd v ANZ McCaughan Merchant Bank Ltd*** [1989] 3 All ER 65, Sir Nicolas Browne-Wilkinson V-C held that a claimant who initiated proceedings against the same defendant in two separate jurisdictions in respect of the same subject matter was required to elect which set of proceedings he wished to pursue.

    c. That approach reflects the general point that it is an abuse to bring vexatious proceedings, i.e. two or more sets of proceedings in respect of the same subject matter which amount to harassment of the defendant in order to make them fight the same battle more than once with the attendant multiplication of costs, time and stress - ***David Shaw Silverware North America Ltd v Denby Pottery Company Ltd*** [2013] EWHC 4458 (QB) (at para [40]).

    d. D1 has no jurisdictional objection to the continuation of the 2nd Malawi Proceedings and for the Claimant to discontinue the English Proceedings against him. The Claimant is not apparently willing to do that. There has been *some* suggestion that he might be willing to elect to end the 2nd Malawi Proceedings, but there is no evidence to that effect. Further, this court would need to be certain that this had actually happened before it allowed the English Proceedings to continue.

41. The Claimant argues that:

    a. The nature of the 2nd Malawi Proceedings and the English Proceedings may be the same, but the substance of the claims is different.

    b. Some of the sums under the banking agreement were received by D1 in Malawi, but other sums were received by D3, D4 and D5 in the UK acting as agents of D1.

    c. As a complex international transaction, it is therefore right and proper that the Claimant be allowed to execute his case strategy as he sees fit in this complex case.

    d. Forcing the Claimant to make an election is therefore tantamount to imposing a case strategy on the Claimant, which would deliberately sabotage the Claimant's case.

    e. Under the law of principal and agent, where the principal is in Malawi (D1) and the agent is in the UK (D3, D4 and D5), the English court will have jurisdiction over both the principal and agent.

42. It is necessary to consider the respective statements of case to determine whether the claims in the 2nd Malawi Proceedings and the claims in the English Proceedings are in respect of the same subject matter.

43. The Claimant's statement of case in the 2nd Malawi Proceedings is:

> "[1.] THE CLAIMANT STATES THAT:
>
> a. The Defendant is an owner/shareholder/director or manager of a certain forex bureau styled Victoria Forex Bureau. He is therefore in the local and international forex transmittance business.
>
> b. In the year 2015 or thereabouts, the Claimant deposited various sums of money with the Defendant in the knowledge that the Claimant would need the money in Malawi for purposes of lending out same to Mahomed, Moshin Mussa, Phazi Industries Ltd and Mussa Nurmahomed (**the Debtors**).
>
> c. The Defendant agreed to receive instructions from the Claimant and to release the said monies to the Debtors as and when instructed to do so pursuant to the loan agreements between the Claimant and the Debtors under the Claimant and Debtors' business arrangement, of which the Defendant was aware of.
>
> d. On diverse states, the Claimant instructed the Defendant to release and deliver the loan sums to the Debtors and the Debtors stated then that they received the money through the Defendant who owns/runs or manages Victoria Forex Bureau and whose staff and agents at the said bureau collected and delivered the money to the Debtors upon the instructions of the Claimant to the Defendant.
>
> e. When the debts fell due for repayment, the Debtors failed to settle the debts when the Claimant demanded payment through court action, the Debtors have stated that they never received the money from the Defendant or at all.
>
> f. When asked to provide an account of how and when he paid the monies to the Debtors, the Defendant refused to provide such an account and also refused to come to court to testify to that effect, leading the Claimant to believe that the Defendant may have failed to pay the money to the Debtors.
>
> g. On account of the failure by the Defendant to pay the loan sums to the Debtors as and when instructed by the Claimant, the Claimant has suffered loss and damage.
>
> **Particulars of Loss and Damage**
>
> i. Loss of use of the money
> ii. Loss of the business earnings of 4% per month ($15,000 per month).
>
> h. On account of the failure by the Defendant, the Claimant was forced to commence court proceedings against the Debtors and has therefore suffered special damage and loss.
>
> **Particulars of Special Damage**

i. Loss of use of the money which would have been earned on a monthly basis;
ii. Cost of various trips to Malawi to demand repayment of the debt;
iii. Costs of Legal Proceedings (solicitor and own client and party and party costs) against the Debtors;
iv. In making the demands for payment of the debts, the Claimant was put under constant threats on his life by the Debtors and therefore suffered anxiety."

44. Whilst the English Proceedings have been pleaded more fully, the Particulars of Claim dated 8 March 2022 contain the following by way of "Introduction" and "Summary of the Claimant's case":

"[1.] The Claimant is a UK resident who previously resided in Malawi, whereupon he ran several businesses. In July 2005 the Claimant moved from Malawi to the UK and sold his said businesses. However, because of certain currency restrictions in Malawi at the time the Claimant could not transfer all his monies to the UK. Instead, the Claimant instructed the First Defendant and the First Defendant's company, the Second Defendant, to manage his funds on his behalf. This included payments from various parties to whom the Claimant had made loans to and likewise making loan payments out to various parties under the Claimant's instructions.

…….

[7.] It is the Claimant's case that the First and Second Defendants have essentially acted as his agents and bankers in Malawi by receiving payments from the Claimant and from various loanees to whom the Claimant had made loans to and by making various payments out under the Claimant's Instructions.

[8.] From August 2015 to February 2019 the Claimant entered into several loan agreements with a Mr Mahomed Mussa and Mr Moshin Mussa and their companies Mussa Nurmahomed and Phazi Industries Limited ("the loanees") for sums totalling £750,000 and $750,000 USD plus interest.

…….

[10.] In addition to the First and Second Defendant retaining monies from the Claimant when he left Malawi from 2015 to 2018 the Claimant made various payments to the First and Second Defendant directly or via the Third to Fifth Defendants in the UK in order for the First and Second Defendant to make payment to the loanees. During the currency of this period the First Defendant has produced various statements of accounts confirming that the loan payments had been made to the loanees or their nominees.

[11.] Unfortunately, the loanees have reneged on their loan obligations by failing to make any loan repayments to the Claimant. As a result of which the Claimant issued civil proceedings in Malawi against the loanees ….. for repayment of the loans and interest …….

[12.] The loanees' defence in the Malawi proceedings was that in fact no payments had been made by the First and/or Second Defendant to them.

……

[14.] Accordingly, it is contended that the Claimant has been subjected to a significant fraud in the UK whereby the First and Second Defendant have made dishonest representations to the Claimant that his Instructions were being followed and that his monies were being properly paid to the loanees. It now transpires that none of the Claimant's monies were paid to the loanees and indeed the First Defendant is now completely denying any actual knowledge of the loanees.

[15.] In the premises the Claimant claims damages from the First and/or Second Defendant in the sum of £1,815,702….. plus £76,300 …. From the Third to Fifth Defendants, which has been paid to them in the UK and which they have never account[ed] for."

45. As currently pleaded, the central questions to be determined in both the 2nd Malawi Proceedings and the English Proceedings are:

    a. Did D1 represent to the Claimant that D1 would, via D2, manage the Claimant's money by making loans to third parties in Malawi; and

    b. If so, what, if any, payments were made by or on behalf of the Claimant to D1/D2, whether directly or indirectly through agents, for that purpose?

46. Ultimately, it is the Claimant's case in both jurisdictions that he has been the victim of a significant fraud perpetrated against him by D1 through a corporate vehicle, D2. On the Claimant's own pleaded case in the English Proceedings:

    a. The vast majority of funds were deposited directly with D1/D2.

    b. D3, D4 and D5, acting as agents, received relatively modest sums totalling £76,300, which represents only 4% of the overall value of the claim. As argued on behalf of the Defendants, D3, D4 and D5 are at best minor players in the litigation.

47. The Claimant chose to bring proceedings against D1 initially in Malawi and then, some 4 months later, also in England over the same subject matter and involving testimony from the same primary witnesses with the Claimant and D1 being witnesses in their own cases. In my judgment, it is contrary to the overriding objective and an abuse of process to permit the Claimant to pursue parallel proceedings in England against D1 as a "case strategy", which would otherwise inevitably result in:

    a. additional time, expense and inconvenience;

    b. duplication and thereby disproportionate allocation of court resources; and

    c. the potential for inconsistent findings of disputed facts, which would be disastrous for the fair and efficient administration of justice.

48. If, as I have now determined, there is no good reason to allow the Claimant to continue the English Proceedings against D1 in circumstances where they materially overlap with the ongoing 2nd Malawi Proceedings, the Claimant has indicated that he would be willing to make an election to discontinue the 2nd Malawi

Proceedings to enable him to continue the English Proceedings. Such an election, if made, brings me on to consider the question of which jurisdiction is the more appropriate to resolve the underlying dispute in any event.

Forum conveniens

Applicable legal framework

49. In the recent case of ***Limbu & 23 others v Dyson Technology Limited*** and others [2023] EWHC 2592 (KB), Clive Sheldon KC (sitting as a Deputy High Court Judge) helpfully summarised the law as to jurisdiction particularly in the context of where, as here, some of the defendants were based in England and others were not:

> [27.] There is no dispute between the parties as to the relevant law that the Court needs to apply with respect to this application. Following the EU UK Withdrawal Agreement, the Brussels (Recast) Regulations no longer apply to fresh claims against parties domiciled in England. Rather, the principles set out by the House of Lords in ***Spiliada Maritime Corporation v. Cansulex Ltd***. [1987] 1 AC 460 ("*Spiliada*") apply both to D1 and D2 (they are defendants domiciled in England, where service is of right: "service in" cases) and D3 (a defendant in respect of whom permission to serve abroad has been obtained: "service out" cases). In both types of case, the question for the Court is "to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice": *Spiliada* at p480G. 28. With respect to "service in" cases, the burden of proof rests on the defendant to show that England is not the natural or appropriate forum and that there is another available forum which is clearly and distinctly more appropriate: Stage 1. If so, then the burden shifts to the claimant to show that there are special circumstances such that justice requires the trial to take place in England: Stage 2.
>
> [29.] With respect to "service out" cases, the burden of proof is on the claimant at Stage 1 to show that England is the appropriate forum for the trial of the action, and that it is "the proper place in which to bring the claim" (CPR rule 6.37(3)). According to Lord Goff in *Spiliada* at p481D the claimant must show that this is "clearly so". If the claimant fails to establish that England is the proper forum, then Stage 2 will apply.
>
> [30.] The instant case involves a mix of both "service in" (D1 and D2) and "service out" (D3) cases. In these circumstances, "the court is looking for a single jurisdiction in which the claims against all the defendants may most suitably be tried": per Lord Briggs JSC in ***Lungowe v. Vedanta Resources plc.*** [2020] AC 1045 ("*Vedanta*") at §68. A jurisdiction in which a claim against some of the multiple defendants could not be tried can still qualify as a proper place. In *Vedanta* at §69, Lord Briggs JSC explained that the inability to try a claim against some of the multiple defendants is "only one factor, albeit a very important factor indeed, in the evaluative tasks of identifying the proper place". A trial involving only some of the defendants "would risk multiplicity of proceedings about the same issues, and inconsistent judgments".
>
> [31.] In ***Tugashev v. Orlov*** [2019] EWHC 645 (Comm), Carr J observed at §261 that the courts will often take into account the desirability of all related claims being tried together, and that may be a powerful factor outweighing factors connecting the claim to another jurisdiction. In her review of the case law, Carr J. noted that in ***JSC BTA Bank v. Granton Trade Ltd.*** [2010] EWHC 2577

(Comm), Christopher Clarke J had considered that a distinction should be drawn between major and minor players in the litigation stating that "a decision as to appropriate forum must necessarily take account of the relative importance in the case of different defendants". In *Vedanta* at first instance, Coulson J. referred to the concept of the tail not wagging the dog: see [2016] EWHC 975 (TCC) at §168.

[32.] The two stages envisaged by *Spiliada* should not be regarded as totally rigid. It has been held that the line dividing these two stages is "neither completely impermeable nor drawn in such a way that there are no factors which do not appear on both sides of it": ***Municipio De Mariana v BHP Group (UK) Ltd.*** [2022] 1 WLR 4691. 33. The exercise to be carried out by the Court is not the exercise of a discretion but an evaluative or a balancing exercise: see Lords Wilson and Neuberger in ***VTB Capital Plc. v. Nuritek International Corp*** [2013] 2 AC 337 ("*VTB*") at §§96, 156.

[34.] In carrying out this exercise, the Court "must start by seeing what are likely to be the issues between the parties in the proposed action": per Lord Diplock at p66 in ***Amid Rasheed Shipping Corp. v Kuwait Insurance Co.*** [1984] AC 50; and Lord Clarke in VTB at §192-3.

[35.] At Stage 1, the Court examines the connecting factors between the case and one or more jurisdictions in which it could be litigated. Lord Goff in *Spiliada* described this at p478A as being the forum "with which the action had the most real and substantial connection". In assessing this, Lord Briggs JSC observed in *Vedanta* at §66 that: "Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred."

[36.] The place of commission of a tort is a relevant starting point when considering the appropriate forum for a tort claim. Viewed by itself, and in isolation, "the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. . . . The significance attaching to the place of commission may be dwarfed by other countervailing factors": see *VTB* at §51, per Lord Mance (in a case concerning an international commercial transaction).

[37.] Where defendants domiciled in England (commonly known as "anchor defendants") have agreed to submit to a foreign jurisdiction, but the claimant has made a deliberate choice to sue in this forum and has thereby engendered the risk of irreconcilable judgments, it "would offend the common sense of all reasonable observers to think that the proper place for this litigation to be conducted was England": see Lord Briggs in *Vedanta* at §87.

[38.] Where (as in the instant case) foreign law applies, it has been said that "if the competing fora have domestic laws which are substantially similar, the governing law will be a factor of little significance": ***Navigators Insurance Company and Ors v Atlantic Methanol Production Company LLC*** [2003] EWHC 1706 (Comm) at §48 (citing Dicey, Morris & Collins, *The Conflict of Laws* (13th Edition) (now 16th Edition at §12-033)).

[39.] In *VTB*, Lord Mance explained at §46 that:

> 'The governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum.'

[40.] At Stage 2, having concluded that a foreign jurisdiction is the proper place in which the case will be tried, the Court will look to see if there are "circumstances by reason of which justice requires that a stay should nevertheless not be granted", and "all the circumstances of the case" will be considered: per Lord Goff in *Spiliada* at p478D-E. One relevant factor may be if "there is a real risk that substantial justice will not be obtainable in that foreign jurisdiction": per Lord Briggs JSC in *Vedanta* at §88. That will require "cogent evidence", but "Cogent evidence does not mean unchallenged evidence": per Lord Briggs in *Vedanta* at §96.

[41.] In assessing whether there is a "real risk" that substantial justice will not be obtainable, the Court is not conducting a trial and, although there must be evidence that the risk exists, the Court does not need to be satisfied on the balance of probabilities that facts have been established or that the risks will eventuate: see ***Cherney v Deripaska*** [2009] 2 CLC 408, per Waller LJ at §29.

[42.] "Substantial justice" will not be available if there is a real risk that the claimants will be denied access to justice in the foreign jurisdiction. This may be because of the lack of independence or competence of the relevant judiciary or, in the context of large group claims, the lack of a fair civil procedure suitable for handling large group claims. It may also be because of the practicable impossibility of funding such group claims, or the absence of "sufficiently substantial and suitably experienced legal teams to enable litigation of this size and complexity to be prosecuted effectively, in particular against a defendant . . . with a track record which suggested that it would prove an obdurate opponent": per Lord Briggs JSC, describing at §89 the analysis of Coulson J at first instance in *Vedanta* (see [2016] EWHC 975 (TCC)).

[43.] Caution should be applied when considering whether "substantial justice" can be obtained in the foreign jurisdiction for a number of reasons. First, it has been observed that there have been "judicial warnings of undoubted authority that the English court should not in this context conclude, other than in exceptional cases, that the absence of a means of funding litigation in the foreign jurisdiction, where such means are available in England, will lead to a real risk of the non-availability of substantial justice": see Lord Briggs JSC in *Vedanta* at §93 referring to ***Connelly v RTZ Corpn plc*** (No 2) [1998] AC 854 ("*Connelly*"), 873 per Lord Goff, and ***Lubbe and Others v Cape Plc*** [2000] 1 WLR 1545 ("*Lubbe*"), 1555 per Lord Bingham.

[44.] Second, as Lord Goff noted in *Connelly* at p874D, "seeking to take advantage of financial assistance available here to obtain a Rolls Royce presentation of his case, as opposed to a more rudimentary presentation in the appropriate forum" would not be sufficient to justify such a refusal.

[45.] Third, and more generally, Lord Briggs warned in *Vedanta* at §11 that the "conclusion that a foreign jurisdiction would not provide substantial justice risks offending international comity. Such a finding requires cogent evidence, which may properly be subjected to anxious scrutiny"."

***Spiliada* – Stage 1 – Connecting factors**

Place(s) where (i) the wrongful acts/omissions occurred and (ii) the harm occurred

50. The Defendants argue that:

    a. The following events alleged by the Claimant must have taken place in Malawi –

        i. D1 and D2 acting as his "*agents and bankers in Malawi*" (emphasis added) pursuant to the alleged oral agreement and retaining monies on his behalf in Malawi (see paras 7 and 10 of the Particulars of Claim quoted earlier in this judgment);

        ii. The Claimant entering into the loan agreements with, or on behalf of, the Mussa Defendants (see paras 8 and 9 of the Particulars of Claim quoted earlier in this judgment);

        iii. The commencement of the 1st Malawi Proceedings (see paras 11 and 12 of the Particulars of Claim quoted earlier in this judgment); and

        iv. The commencement of the 2nd Malawi Proceedings and the filing of D1's defence therein.

    b. The Claimant alleges that other events took place "in the UK", which is not jurisdictionally the same thing as England, although the pleading is vague and not properly particularized. The Claimant's witness evidence scarcely makes things any clearer.

    c. It is entirely unclear where other events, such as the making of the alleged representations, are alleged to have taken place. But the alleged representations arise out of the relationship created by the alleged banking agreement, which is alleged to be a contract to be performed in Malawi.

    d. It is apparent that the weight of the relevant events occurred in Malawi and that this is, in truth, a "Malawi case". That is no doubt why the Claimant first issued proceedings in that jurisdiction.

51. The Claimant argues that the claim is strongly connected to the UK as the majority of payments were made from and to UK bank accounts. I note that the Particulars of Claim do indeed allege as follows:

    "[26.] The Claimant either made payments directly to the First and/or Second Defendant to their Client's UK bank accounts from his Client's UK bank account.

    [27.] In addition to which the Claimant also paid cash, on instruction from the First Defendant, to the First and/or Second Defendant's agents in the UK, the Third to Fifth Defendants…"

52. However, not only are the Particulars of Claim vague, they are internally inconsistent because earlier it is alleged as follows:

> [1.] … In July 2005 the Claimant moved from Malawi to the UK and sold his … businesses. However, because of certain currency restrictions in Malawi at the time the Claimant could not transfer all his monies to the UK. Instead, the Claimant instructed the First Defendant and the First Defendant's company, the Second Defendant, to manage his funds on his behalf. This included receiving payments from various parties to whom the Claimant had made loans to and likewise making loan payments out to various parties under the Claimant's instructions."

53. Therefore, on the one hand the Claimant alleges that payments were made from his UK bank account to the UK bank accounts of D1 and D2, but on the other hand he alleges that the payments were specifically made in Malawi because having sold his business in Malawi he could not transfer his money out of Malawi to the UK due to "certain currency restrictions".

54. In his first witness statement dated 24 May 2022, D1 states that:

    a. D2 operates under the supervision of the Reserve Bank of Malawi under the Exchange Control (Foreign Exchange Bureau) Regulations 2007.

    b. D2 is not licensed to operate as a bank and cannot (i) collect or receive loans or (ii) maintain a bank-type account for customers.

    c. In Malawi, loans with a foreign/overseas component have to be registered with the Malawi authorities after getting approval from the Reserve Bank of Malawi.

    d. In order to provide a legal loan in Malawi, a person must have a registered company which is licensed to provide loans with legitimate funds. The loan must also be declared with the Malawi Revenue Authority and tax paid on the resultant profits. It is illegal to withhold tax from the Malawi revenue Authority. Providing illegal loans and not paying tax are also criminal matters in Malawi.

55. The Claimant sought in argument to explain the confused and confusing narrative on the pleaded case about monies being misapplied in England or Malawi by claiming that D1 was in fact operating a shadow/illicit banking business, including in the UK, by providing 'Hawala' and 'Safe Keeping', which are described in the Claimant's witness statement dated 11 April 2023 as follows:

    a. Forex bureaus in Malawi are only allowed to exchange currencies under the guidelines of the Reserve Bank of Malawi, but D1 circumvents the guidelines by operating, since 2002, 'Hawala' and 'Safe Keeping' for the benefit of the Malawian Asian community. This illegal activity is D1's main source of income.

    b. Hawala (sometimes referred to as underground banking) is a way to transmit money without any currency moving. Hawala networks have been used since ancient times, and today they are widely found among ex-pats sending remittances home.

c. A ‘Safe keeping’ account is like a current account. D1 and D2 keep the money and for a small fee will transfer as per the account holder’s instructions to any business or individuals.

d. In November 2002, the Malawi Government imposed surtax/vat, which triggered significant demand for D1’s services. Those who avoided government taxes used him and were able to under value or externalise forex from Malawi very easily without getting in the MRA Tax radar.

e. D1 and D2 have a special task force, who go around to shops, warehouses and factories collecting either cash Dollars, GBP sterling, Euros, South African Rands or Malawi Kwachas. In return they would offer free transfers anywhere in the world on terms of safekeeping the money for 3 to 6 months. If customers requested immediate transfer, they are charged between 5% to 15% on the total amount.

f. In the UK, D1 has a large network and has been using UK high street bank accounts to facilitate these transfers and cash payments through UK agents.

56. Exhibited to D1’s witness statement filed in support of the 2nd Security for Costs Application, and to evidence that the Claimant was impecunious, is an article from Platform Investigative Journalism, which was published in August 2022 and which reported as follows:

a. According to a source, Max Pathan, D1 uses D2 as a “front for his illegal backstreet bank” by pulling out millions of cash US dollars from local banks to help his clients buy properties in the UK, Dubai, Pakistan, Hong Kong and China, whilst bringing in goods to Malawi at low value to avoid paying customs and duties. In addition, D2 delivers cash for clients from Malawi to the UK, Dubai, Pakistan, Honk Kong, China or South Africa using couriers at 5% of the screen rate. Clients are advised that, if D2 is raided, the resulting losses will be borne equally between the parties.

b. Platform Investigative Journalism became aware of the existence of D2’s illicit operations through a lawsuit filed against D1 in the Malawi High Court and in England by another former customer, the Claimant, who was quoted as saying:

> “Our first transaction was for £25,000. [D1] asked to make payment in the UK Bank then added another £25,000, making it £50,000…. [the Mussa Defendants] would instruct me to pay out their suppliers for purchase of goods… and I would instruct [D1/D2] to release funds from the GBP Account which I held with him.”

c. D1 denied any wrongdoing. He claimed that the Claimant, who worked packing shelves at Tesco in the UK, did not have the financial means to lend money to anyone in the sums claimed. Rather the Claimant was seeking to extort D1.

d. Having been made aware in July 2022 of the allegations that D2 was operating as an ‘illegal bank’, the Reserve Bank of Malawi said that it, alongside other Law Enforcement Agencies, would be investigating the allegations.

57. Ultimately, if it is true, as now appears to be the Claimant's case that he chose to make use of D1's illegal banking facilities, then arguably by doing so the Claimant was knowingly and willingly participating in a scheme to avoid financial controls implemented by the Government of Malawi. Those controls presumably were designed/intended to deliver greater financial stability for the people of Malawi. Against that background, the courts in Malawi are not only better equipped with specialist knowledge to determine the merits of the claim, they also have a particular interest in doing so on public policy grounds. In dismissing the Malawi Summary Judgment Application, Justice Msungama held that:

> "[29] …. [the Mussa Defendants] contend that the Claimant did not release any funds in line with the agreements which the parties may have entered into. The [Mussa Defendants] continue to argue that even if it were true that any funds were paid to them, then the agreements which facilitated that payment were void on [the] ground of illegality in that there was no Ministerial authority to repatriate funds from England to Malawi, contrary to the exchange control laws. It is the humble view of this court that the factual differences cannot be resolved through a summary process like summary judgment. Only a full trial would do justice to such issues. I would hold further that the issue of illegality that has been raised in the defence is also a legitimate triable issue that can only be adequately dealt with through trial. The consequence of this is that I have to dismiss the application for summary judgment."

58. In my judgment, even if the majority of payments were made through English bank accounts, they were, on the Claimant's own admission, made in connection with an illicit banking arrangement made in Malawi in order to avoid financial controls there. Any significance attaching to the location where the Claimant allegedly suffered loss is dwarfed by the other countervailing factors, which point to the claim having the more real and substantial connection to Malawi.

Governing law

59. In ***VTB*** Lord Mance said:

> "[46.] The governing law, which is here English, is in general terms a positive factor in favour of trial in England, because it is generally preferable, other things being equal, that a case should be tried in the country whose law applies. However, that factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles or rules applicable to such issues in the two countries in contention as the appropriate forum. Neither of these considerations here applies."

60. The Defendants argue that as a matter of English private international law and in the absence of any express choice of law by the parties:

    a. It is clear that the alleged banking agreement is governed by Malawi law as the country where the alleged service providers (D1 and D2) had their habitual residences – ***Rome I Regulation***, Article 4(1)(b).

    b. That law is also likely to govern the existence, scope and breach of the fiduciary duties alleged to arise from the alleged banking agreement – ***Dicey, Morris & Collins on the Conflict of Laws*** (16th ed) at 12-051.

c. The same applies to any claim in unjust enrichment – ***Rome II Regulation***, Article 10(1); ***Dicey*** at 36R-00 e*t seq*

61. In my judgment, the Claimant's claim essentially centres on an allegation that D1 made false and dishonest representations in order to induce the Claimant to make substantial payments to D1, D1's company and/or D1's agents. Therefore, under English law the primary bases of the claim are the torts of deceit and for unlawful means conspiracy, with the conspiracy being to obtain monies by deceit.

62. It is acknowledged on behalf of the Defendants that the issue over the applicable law governing the alleged torts of deceit and unlawful means conspiracy has the potential to be a complex issue:

    a. The basic rule is that the governing law is that of the country "*in which the damage occurs*" – ***Rome II Regulation***, Article 4(1).

    b. That expression has been the subject of much EU and domestic case law and the basic principle is that the focus is on where "the direct and immediate" damage occurred rather than consequential or secondary damage not directly attributable to the harmful event, e.g. ***AMT Futures v Marziller*** [2018] AC 439 at [15].

    c. This requires a close focus on the nature of the claim and in particular whether the real complaint is that (i) monies have been lost or paid away from a particular place or (ii) the claimant has not received a sum which he should have received: ***Dolphin Maritime & Aviation Services Ltd v Sveriges*** [2009] 1 CLC 460 at [60]. In both cases it is necessary to identify the place where the event occurred or should have occurred.

    d. Given the paucity of the pleading in the Particulars of Claim, it is not presently possible to ascertain the precise nature of the Claimant's case and the answers to the above questions. In particular the extent to which the complaint is about monies being misapplied in England and/or Malawi.

    e. In any event, where it is clear from all the circumstances of the case that the tort is manifestly more closely connected with a country other than that indicated by Article 4(1), the law of that other country shall apply: Article 4(3).

    f. As that provision expressly recognises, such a closer connection might be based on a pre-existing contractual relationship that is closely connected with the tort in question. In ***Winrow v Hemphill*** [2014] EWHC 3164 (QB), Slade J referred to the need to identify the "centre of gravity" of the tort.

    g. The better argument is that Article 4(3) would in any event result in Malawi law applying to the tort claims.

63. As already noted, there is an internal inconsistency in the Particulars of Claim such that I am unable properly to decide which is the better of the argument over the governing law.

64. However, even by giving the Claimant the benefit of the doubt and assuming that the Claimant suffered the losses in England such that the law governing the alleged torts of deceit and unlawful means conspiracy is, from an English perspective,

English law, I am not persuaded that this is a forceful factor in the evaluation exercise that I am required to undertake:

a. Any alleged payments were made under a banking agreement made in Malawi.

b. The 2nd Malawi Proceedings are proceeding, and have done so for some considerable time, on the basis that they are governed by the law of Malawi.

c. It is likely that the Malawi courts recognise and impose tortious liability for deceit, and for conspiracy to commit a deceit, on bases for material purposes equivalent to those which would be recognised under English law, since the legal system in Malawi is based on the English common law. If that is not the position then it was for the Claimant to evidence this, if he could, but he did not.

d. As already noted, the key issues underlying the claim are in any event factual and not legal - what, if anything, was said, and what, if anything, was paid in reliance of what was said?

65. Indeed, in my judgment, the only material legal issue arising, and as identified by Justice Msungama, is a potential defence of illegality on the ground that the alleged banking agreement was contrary to Malawi law, which is clearly a matter which the High Court of Malawi will be far more familiar with.

D1 is currently the only named defendant in the 2nd Malawi Proceedings

66. D2, D3, D4 and D5 are not named as defendants in the 2nd Malawi Proceedings. In ***Vedanta***, Lord Briggs explained (at para [69]) that the inability to try a claim against some of the multiple defendants is "only one factor, albeit a very important factor indeed, in the evaluative tasks of identifying the proper place." However, I attach little weight to this factor for the following reasons:

a. It was the Claimant who chose first to commence proceedings in Malawi without naming D2, D3, D4 and D5 as defendants in those proceedings such that any injustice arising in that regard by requiring the Claimant to litigate in Malawi arises solely from the choices made by the Claimant.

b. As already observed, D3, D4 and D5 are minor players in the litigation.

c. In any event, D2, D3, D4 and D5 have all expressed their willingness to be bound by the decision of the Malawi court and indeed they say that they will not object to any application now made by the Claimant to join them as parties to the 2nd Malawi Proceedings.

d. There would be no difficulty in enforcing a Malawi judgment in this jurisdiction by way of registration under CPR r.74.6 pursuant to The Administration of Justice Act 1920.

Convenience, costs and delay

67. In D1's witness statement dated 24 May 2022, D1 confirms that:

a. The majority of the Defendants' witnesses being key employees of D2 live in Malawi.

b. Whilst D3, D4 and D5 live in England, they will be able to travel to Malawi to give evidence in person or give evidence via video link, which the Malawi courts are able to facilitate.

c. If the Mussa Defendants are required to give evidence, they all live in Malawi.

d. Litigation in the High Court (Commercial Court) in Malawi is conducted in English.

68. In his Directions' Questionnaire dated 7 October 2022, the Claimant stated his intention to call at trial "*4 to 6 additional witnesses, names to be confirmed*." However, at the hearing before me, the Claimant said that everyone had ganged up on him including his in-laws such that he has no additional witnesses to call at trial. Any inconvenience to the Claimant having to travel to Malawi to give evidence must be viewed in the context that it was the Claimant, who chose to commence proceedings there in the first place.

69. In the absence of any supporting witnesses, the Claimant places significant reliance upon the contemporary documents, including WhatsApp messages, exhibited to his witness statement dated 11 April 2023. Those documents run to over 200 pages. It is not disputed that those documents emanate from the Claimant's disclosure in the 1st Malawi Proceedings. Therefore, it cannot be properly argued that it would somehow be easier for the Claimant to disclose and make use of relevant documents through court proceedings in England rather than in Malawi.

70. The 2nd Malawi Proceedings are well advanced. In their letter dated 6 December 2023, D1's solicitors in Malawi, Ritz Attorneys-at-Law, confirmed that:

a. Statements of cases have been filed and served.

b. In court mediation was directed, but was unsuccessful in resolving the dispute.

c. Directions were then given for the filing and serving of –

i. documents;

ii. witness statements; and

iii. skeleton arguments.

Those directions have been complied with.

d. A Pre-Trial Conference was held on 5 December 2023 when the judge directed –

i. The Claimant's lawyers rectify anomalies in the trial bundle; and

ii. The matter be set down for trial.

71. By contrast, the Defendants have not yet filed and served their defences in the English Proceedings.

72. So far in relation to the 2nd Malawi Proceedings, the Claimant has incurred costs equivalent to some £70,000 to £80,000, and D1 has incurred costs equivalent to some £92,000. By the Claimant effectively seeking to abandon the 2nd Malawi Proceedings and start again in England, those costs will be wasted. In addition, there will inevitably be a delay of at least a further 18 to 24 months before the claim can be determined by the English court since:

    a. There will need to be a direction for the Defendants to file their defences.

    b. There will likely be a request made by the Defendants for further information in light of the inconsistencies already identified in the Claimant's Particulars of Claim.

    c. There will then need to be a costs and case management hearing to consider and direct a timetable for:

        i. Disclosure of documents;

        ii. Exchange of witness statements; and

        iii. Potentially expert evidence on banking law in Malawi.

73. By contrast, the 2nd Malawi Proceedings are now ready to be set down for trial.

74. The Claimant says that in order to pursue the 2nd Malawi Proceedings he must be legally represented, which is not the position in England. Whilst that may in theory be an advantage to the Claimant in pursuing the English Proceedings, the fact remains that the Claimant has already incurred significant legal costs by initiating and then pursuing the 2nd Malawi Proceedings to the pre-trial review stage.

Conclusion

75. In my evaluation, the relevant factors point very powerfully towards Malawi being the forum with which this dispute has the most real and substantial connection. I conclude that England is not the natural and appropriate forum for determination of this dispute, and Malawi is clearly and distinctly the more appropriate forum. Indeed, the 2nd Malawi Proceedings are close to resolution, whereas the English Proceedings have barely begun.

***Spiliada* – Stage 2**

76. Having concluded that Malawi is the proper place in which the dispute should be determined, I must now consider if there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.

77. The Claimant asserts that he cannot get justice in Malawi because the judicial system there is corrupt in that whoever pays the most wins the case. However, such an assertion must be approached with caution. In ***Vedanta*** (at para [11]) Lord Briggs warned that the "conclusion that a foreign jurisdiction would not provide substantial justice risks offending international comity. Such a finding requires cogent evidence, which may properly be subjected to anxious scrutiny".

78. The Claimant has failed to provide any cogent evidence that would justify me in reaching such a conclusion. In particular, the Claimant has failed to disclose any supporting evidence from his lawyers in Malawi. By contrast, D1 relies upon a letter dated 23 May 2022 from Ritz Attorneys-at-Law, which states that:

    a. The legal system in Malawi is based on the English common law and has been modified since 1969 developing its own particular version of the common law relevant to Malawi society.

    b. The Malawi Constitution defines the judiciary as a hierarchical system of courts, with the highest court being a Supreme Court of appeal, together with a High Court and a number of Magistrates Courts. The judiciary is totally independent and the rule of law strong in Malawi.

    c. Trials are conducted in a similar fashion to those of the English courts and are fair, with great emphasis placed on justice and equity.

79. If, as the Claimant asserts, judges in Malawi are so easily corruptible why would he ever have chosen to issue proceedings there in the first place particularly against D1, who on the Claimant's case is a very wealthy and influential businessperson in Malawi. In addition, if true, how was it that D1 was unable to use his wealth and influence to secure the injunction he sought in Malawi to prevent the Claimant from pursuing the English Proceedings. The Malawi Injunction Application was dismissed by Justice Alde, who is the allocated trial judge for the 2nd Malawi Proceedings.

80. In my judgment, there are no apparent features of Malawi law and procedure, which mean that the Claimant will not or may not be able to obtain substantial justice in Malawi on his claim there.

Overall conclusion

81. The English Proceedings materially overlap with the 2nd Malawi Proceedings such that it is an abuse of process for the Claimant to pursue claims against D1 in both sets of proceedings.

82. The Claimant has indicated that he would be willing to make an election to discontinue the 2nd Malawi Proceedings to enable him to continue the English Proceedings. However, I am satisfied that the English court should not exercise jurisdiction over the Claimant's claims against the Defendants in any event, since Malawi is the single jurisdiction in which those claims may most suitably be tried.