Neutral Citation Number: [2023] EWHC 1023 (Ch)

Case No: BL-2022-001435

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

The Rolls Building
7 Rolls Buildings
London, EC4A 1NL

Date: 05/05/2023

Before :

MASTER KAYE

- -

Between :

(1) THIRD EYE PROJECTS LTD **(2) MR JAVID ZAHIR**	**Claimants**
- and –	
MINT S.P.A	**Defendant**

- -
- -

Mr Andrew Scott KC and Mr Andrew Blake (instructed by **Mishcon de Reya LLP**) for the **Claimants**
Mr Edward Meuli (instructed by **Morgan Lewis & Bockius UK LLP**) for the **Defendant**

Hearing dates: 23 January 2023

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Approved Judgment

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MASTER KAYE

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10 am on Friday 5 May 2023

Master Kaye :

1. This is my judgment on an application by the defendant dated 19 October 2022, seeking an order that the English court decline jurisdiction and stay the claim on the basis that Italy, and in particular the First Instance Court of Milan, is a more appropriate forum for the determination of this claim ("the Application").

2. The defendant is an Italian Company (a joint stock company with three Italian corporate shareholders). The claimants issued and served their claim on the defendant at its UK Branch in England. There is no challenge to the English court's jurisdiction.

3. The Application gives rise to two questions:

    i) whether the claim falls within the scope of a jurisdiction clause conferring exclusive jurisdiction on the courts of England and Wales. If it does then the Application will fail. (The Jurisdiction Clause Issue)

    ii) If it does not then the court must consider whether, as the defendant maintains, the First Instance Court of Milan is clearly and distinctly the more appropriate forum. (The Forum Issue)

The Legal Principles/Tests

4. I did not detect any significant difference between the parties on the principles/tests to be applied in determining either the Jurisdiction Clause Issue or the Forum Issue, only on how they were to be applied to the facts of this case.

5. The Jurisdiction Clause Issue concerns the interpretation and scope of a widely drawn jurisdiction clause in an earlier agreement. The English court's approach to construing jurisdiction clauses was set out in *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40 ("**Fiona Trust**"). Although Fiona Trust concerned an arbitration clause the principles have long been recognised to apply equally to jurisdiction clauses. The generous interpretation to be given to arbitration and jurisdiction clauses following Fiona Trust has been extended to cover multi-contract disputes.

6. In *Terre Neuve Sarl v Yewdale Ltd* [2020] EWHC 772 (Comm) ("**Terre Neuve**") Bryan J considered the scope of this extended principle and in doing so reviewed the earlier authorities where it had been extended. He described this as the Extended Fiona Trust Principle, and set out six points to be considered to determine whether a jurisdiction clause in an agreement was fairly capable of applying to a later dispute even if that later dispute arose under a subsequent agreement at [31] as follows:

> "The following six points can be made about the Extended Fiona Trust Principle:-
>
> (1) The principle is based on the construction of the relevant jurisdiction clause (which I will refer to as being contained in "Contract A"): it is not based on an implication or implied incorporation of the jurisdiction clause from Contract A into a related contract (henceforth known as "Contract B").

(2) As a matter of contractual construction, the wording of the clause in Contract A must be fairly capable of applying to disputes in Contract B. For example, a clause which stated that "any dispute under this contract shall be referred to arbitration" may not apply to disputes arising out of a (related) Contract B.

(3) It is not legally or commercially odd or improbable that an agreement should have no jurisdiction clause. Equally an agreement may have no jurisdiction clause *and* not be covered by a jurisdiction clause in a different agreement. This was confirmed in *Am Trust Europe Ltd v Trust Risk Group* at [46] (albeit in reference to *competing* jurisdiction agreements):

"There is no presumption that a jurisdiction (or arbitration) agreement in contract A, even if expressed in wide language, was intended to capture disputes under contract B; the question is entirely one of construction".

However, the absence of any *competing* jurisdiction clauses in any agreements within a particular set of agreements concluded by the parties for the same purpose, at the same time, and with the same subject matter, can be a relevant consideration (*Etihad* at [102(v)]).

(4) This principle normally applies where the parties to Contract A and Contract B are the same. This arises from the fact that the Extended Fiona Trust Principle ultimately involves an exercise in contractual construction. One would normally expect the parties to Contract A to intend that their dispute resolution mechanism be binding upon the parties to Contract A rather than also applying to persons who were not party to that contract at all. Where the principle is applied to a situation in which the parties to Contract A and Contract B are different, then it is possible that the court may conclude that it was the Contract A parties' intention that third parties should be able to rely on Contract A (for example in a Himalaya clause situation), or the court might conclude that only the common parties between Contract A and Contract B are bound by the jurisdiction clause in Contract A. However, the latter is an inherently unattractive prospect, as it involves the fragmentation of disputes pursuant to the same agreement (Contract B) – possibly even disputes concerning the very same obligations. This is the very menace which it was assumed in Fiona Trust rational businessmen want to avoid (of course agreements which appear to have been deliberately and professionally drafted are to be given effect, even where this may result in a degree of fragmentation in the resolution of disputes: see Dicey, 15th Edition at 12-110). The effect of Fiona Trust is that fragmentation of disputes under one agreement is unlikely to be what the parties intended. However, it is perfectly possible that there may be fragmentation of the resolution of disputes across several agreements (although

whether this was the parties' intentions is to be considered when construing the contracts).

(5) The Extended Fiona Trust Principle normally applies where Contract A and Contract B are interdependent (Point (5a)), or have been concluded at the same time as part of a single package or transaction (Point (5b)), or (if concluded at different times) dealt with the same subject-matter (Point (5c)).

(6) A jurisdiction agreement in Contract A will generally apply to Contract B where that contract was entered into at the same or a similar time as Contract A. In this regard:

(a) In *Etihad* at [104], the judge noted that jurisdiction agreements in Contract A generally did not apply to a different agreement (Contract B) which had been concluded *prior to* the jurisdiction agreement coming into existence:

"Whilst it is not impossible for a jurisdiction agreement to have, on its true construction, such retrospective effect, a party seeking to rely upon a subsequently agreed jurisdiction agreement, in a separate contract, is likely to face an uphill struggle: see e.g. *Satyam*. One reason is that the earlier contract had an existence of its own, and hence an applicable law, prior to the conclusion of the subsequent agreements. If there was no jurisdiction agreement at the time it was concluded, then it may be difficult to conclude that it is to be found in a subsequent agreement, particularly if (as in *Choil*) the disputes arising under the later agreement are likely to have a very different character to disputes arising under the earlier agreement."

(b) Further, if Contract B was concluded prior to Contract A and the Contract A parties intended for the jurisdiction clause to deal with disputes under Contract B, one would normally expect Contract A to deal expressly with jurisdiction under Contract B. Quite apart from anything else the parties already know about Contract B's existence.

(c) If Contract A was concluded prior to Contract B, and a jurisdiction clause in Contract A was intended to cover Contract B, one might expect Contract B to cross-refer back to Contract A (albeit that ultimately what one is construing for present purposes is Contract A and on normal principles of contractual construction it stands to be construed at the date on which it was entered into). It is also to be borne in mind that it may be more difficult to conclude that parties to a particular jurisdiction agreement intended for that agreement to apply to disputes arising out of contracts that have not been concluded yet, particularly if such future contracts are not being discussed as part of the same package of agreements, or if the future contracts

> are in fact separated by a significant period of time from the conclusion of the jurisdiction agreement."

7. In this case the Jurisdiction Clause Issue is one to be considered by reference to the Extended Fiona Trust Principle.

8. When considering the Forum Issue following the UK's departure from the European Union, the Brussels Recast Regulation has ceased to have effect: *Dicey, Morris & Collins on the Conflicts of Laws* (16th Edn) at 12-009. These proceedings were issued on 8 September 2022 after the expiration of the transition period and are therefore governed by the common law.

9. Consequently, the applicable principles when considering the Forum Issue are those set out in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("**The Spiliada**") in the speech of Lord Goff at 475C – 478E.

10. The claimants referred me to Mrs Justice Joanna Smith's recent summary of the Spiliada principles in *BRG Noal GP Sarl v Kowski* [2022] EWHC 867 (Ch) at [45] and [49] summarised as follows:

    i) The defendant bears the burden of showing that there is some other available forum with competent jurisdiction which is the appropriate forum, i.e. in which the case may be tried more suitably for the interests of all parties and the ends of justice.

    ii) The alternative forum must be "*clearly and distinctly*" more appropriate.

    iii) The court looks at factors pointing to the natural forum, i.e. the forum with which the action has the most real and substantial connection, including the governing law, location of witnesses & documents, and where the parties conduct business.

    iv) If the defendant discharges this burden, the burden shifts to the claimant to show special circumstances justifying the continuation of proceedings in England.

    v) Where there is another forum available which *prima facie* is clearly more appropriate the court will ordinarily grant a stay unless there are special circumstances requiring the trial to take place in England.

    vi) A stay will not be refused simply because the claimant would be deprived of a personal advantage. The question is whether substantial justice would be available in the other forum.

    vii) No presumption arises from the fact that a defendant was served in England as of right.

11. Further if the legal issues are complex or the legal systems very different this will assist in pointing towards the appropriate forum as it is said that a court applies its own law more reliably than a foreign court will: *Dicey* at 12-034, *BRG Noal* at [74].

12. There are therefore two stages to the test formulated by Lord Goff where, as here, English jurisdiction has been established. First it is for Mint to establish that there is

another forum available that is not merely available but is clearly and distinctly more appropriate for the trial of the dispute. This requires consideration of the factors which connect the dispute to that alternative forum and those that connect it to England.

13. The second stage is a broader based consideration which is focussed on consideration of whether the claimants are being deprived of some legitimate advantage.

The Parties

14. In this judgment for ease of reference I will refer to the claimants as either the claimants, Third Eye or Mr Zahir as appropriate and I will refer to the defendant as Mint.

15. I have had the benefit of detailed written and oral submissions from Mr Meuli for Mint and Mr Scott KC and Mr Blake for the claimants, which I have considered carefully and taken into account even if each and every argument or submission is not fully set out in this judgment. The bundle for the hearing extended to over 1,200 pages in addition to an authorities bundle of over 500 pages. There was no doubt that the parties had taken the opportunity to fully set out their positions in relation to the Jurisdiction Clause and Forum Issues.

16. The Application was supported by the witness evidence of Luca Censoni ("**Censoni 1**") . Mr Censoni is an Italian lawyer and external legal adviser for the defendant who had been appointed as a director and board member of Mint by one of its shareholders. In addition the applicant relied on an expert report on Italian law from Avv. Ferrero. The claimants' evidence in response was provided by Shona Coffer, a solicitor for the claimants ("**Coffer 1**"), and an Italian law expert, Avv. Rossi. Avv. Ferrero filed a further short report dated 4 January 2023 in which he had sought to identify areas of agreement and disagreement between the experts. This highlighted that for the purposes of the Application there were limited differences between the experts on key issues.

17. There had been a dispute about Section D of Avv. Ferrero's first report which appeared to stray into areas which would be a matter for the judge in this jurisdiction. The defendant raised a concern about a section of Avv. Rossi's report which purported to construe the meaning of the agreement in dispute. This too appeared to stray outside the proper scope of expert evidence. By the time of the hearing the parties had sensibly agreed that the court should simply ignore the limited parts of the expert reports that strayed beyond the proper bounds of expert evidence for the purposes of the Application.

18. Both parties sought permission to rely on their expert evidence. This is the type of application in which such evidence can be of assistance and I granted permission.

Brief Background:

19. Third Eye is an English-incorporated company with a registered office in England. Mr Zahir is its sole director and shareholder. Third Eye is his personal services company providing his services as an IT Consultant to Third Eye's clients. Mr Zahir is a British citizen who has worked in this jurisdiction since 2004. The claimants say that the IT Consultancy business is carried on exclusively from the UK.

20. Mint is a joint stock company with three Italian corporate shareholders. It was incorporated and registered under the laws of Italy in 2008, with its registered office at Via Lodovico il Moro 25, Milan, Italy. It carries on business in the digital advertising sector, employing 80 employees in Italy and engaging freelance software designers elsewhere.

21. Mint, originally called Gagoo S.R.L, had two wholly owned English incorporated subsidiaries. Outplay Limited (which was dissolved in 2018 as part of a restructuring exercise) and Myntelligence Limited ("**Myntelligence**") which was eventually merged with Mint by way of absorption in 2020. Myntelligence's registered office was in London. Its sole director, Mr De Matteo, was resident in the UK and it operated exclusively from the UK.

22. On 1 May 2016 Myntelligence entered into an consultancy agreement with Third Eye under which Third Eye would provide Mr Zahir's services to Myntelligence, in particular making him available to Myntelligence as its CTO ("**the Consultancy Agreement**").

23. The Consultancy Agreement included an English law and English exclusive jurisdiction clause at [22]:

> "22 GOVERNING LAW AND JURISDICTION
>
> 22.1 This Agreement shall be construed in accordance with the laws of England & Wales and all disputes, claims or proceedings between the parties relating to the validity, construction or performance of this Agreement shall be subject to the exclusive jurisdiction of the Courts of England & Wales."

24. Notably this jurisdiction clause is limited in scope and focussed on the validity, construction or performance of the Consultancy Agreement.

25. On 1 November 2016, Third Eye, Myntelligence and Mint (still then known as Gagoo) entered into a restricted stock purchase and shareholder rights agreement ("**SPA"**), pursuant to which Mint transferred 1.5% of its shares in Myntelligence (48 shares) to Third Eye, subject to certain vesting conditions. Notwithstanding the vesting conditions in fact by December 2017 Third Eye had become the registered owner of the 1.5% shareholding. Mint retained 98.5% of the shares.

26. The SPA was subject to an English law and English exclusive jurisdiction clause at [9]:

> "9. General provisions
>
> 9.1. Governing Law. This Agreement (and any dispute or claim relating to it or its subject matter (including non-contractual claims)) is governed by and is to be construed in accordance with English law.
>
> 9.2. Jurisdiction. The parties irrevocably agree that the courts of England and Wales shall have exclusive jurisdiction to settle any

> claim, dispute or issue (including non-contractual claims) which may arise out of or in connection with this Agreement."

27. Clause 9.2 is, by any measure, an extremely widely drawn jurisdiction clause which includes not only any claim or dispute, as is relatively common, but also includes any issue and non-contractual claims. In addition it is not limited to claims etc relating to the SPA but includes any which may arise out of or in connection with the SPA. Mr Scott says that this dispute falls within the broad scope of the jurisdiction clause on any proper analysis of what is in fact in dispute between the parties. Although Mr Meuli accepted that the jurisdiction clause was widely drawn he argued that it was still not wide enough to encompass this dispute.

28. In addition the governing law clause at clause 9.1 also has a generous ambit such that any dispute relating to the subject matter of the SPA including non-contractual claims is governed by and to be considered in accordance with English law.

29. Myntelligence was not as successful as Mint had hoped. It suffered trading losses and was being financially supported by Mint/Gagoo by way of loans which were said to amount to €1.8m in December 2017. Mint says it was not prepared to continue to fund Myntelligence's losses and decided to relocate Myntelligence's business activities to Italy with the intention of simplifying Mint's corporate structure. This culminated in a cross-border merger between Myntelligence and Mint ("**the merger**") by way of absorption in 2020. It is this merger and its consequences that are the source of the dispute.

30. Prior to Brexit, the Companies (Cross-Border Mergers) Regulations 2007 (2007/2974) made provision for three forms of cross-border merger. Merger by absorption of a wholly owned subsidiary was the least onerous, providing a quick, convenient mechanism for intra-group restructuring. It enabled a holding company to acquire the assets and liabilities of its wholly owned subsidiary. It was not subject to the safeguards applicable where there were, for example, minority shareholder rights such as Third Eye's shareholding. As Mr Censoni acknowledges there were additional costs associated with undertaking the merger other than by absorption.

31. By December 2017 Third Eye held 1.5% of the shares in Myntelligence, such that it was not wholly owned by Mint. Merger by absorption was not therefore available.

32. On 20 December 2017, Mr de Matteo signed a board resolution, as director, by which Myntelligence purported to allot 1,112,760 shares in Myntelligence to Mint. No cash was advanced for the issue of those shares. It was said to be a debt for equity swap converting part of Mint's loans/debt into equity on the basis that Myntelligence was not in a position to repay the shareholder loan. However, Third Eye was not offered the opportunity to participate in the allotment, was not given notice of it and did not consent to the dilution of its shareholding. Third Eye say that this is contrary to its statutory pre-emption rights pursuant to s.561 of the Companies Act 2006. The effect of the allotment, if valid, was to dilute Third Eye's shareholding from 1.5% to 0.0043%. However, Myntelligence was still not a wholly owned subsidiary of Mint.

33. On 29 December 2017, again without Third Eye's knowledge, Myntelligence purported to cancel Third Eye's shares altogether. The claimants say this was in breach of Third Eye's rights under and arising from the SPA. Myntelligence did so by filing forms at

Companies House stating that it had purchased Third Eye's shares in accordance with Part 18 of the Companies Act 2006.

34. The claimants say no attempt was made to comply with the Companies Act 2006 and there was no lawful basis for cancelling the shares. They were not asked, did not consent to and had no knowledge of the proposed purchase. They say that the statement in the form filed at Companies House that the shares had been purchased was and is untrue. No such purchase did or could have taken place.

35. Neither Mint nor Myntelligence told Third Eye that its shareholding had been diluted nor that its shares had been cancelled. In the meantime the claimants continued to provide Mr Zahir's services to Myntelligence pursuant to the Consultancy Agreement.

36. The claimants say they only became aware of the (unlawful) dilution and subsequent cancellation of Third Eye's shares in Myntelligence in 2019. They confronted Mint and Myntelligence and negotiations took place. At that stage the merger by absorption had not been concluded. The claimants say the negotiations resulted in an agreement whereby instead of Third Eye retaining its 1.5% shareholding in Myntelligence it would receive shares of an equivalent value and with equivalent rights in Mint following the merger (the "**Mint Agreement**"). The claimants say that the Mint Agreement is informal but rely on, for example, an email sent on 14 February 2019 at 15.56 from Mr Frank, a director of Mint, to Mr Zahir (copied to both Mr De Matteo, the director of Myntelligence and Mr Censoni) which is set out at paragraph 19 of the Particulars of Claim as evidence of it:

> "Dear Javad
>
> I want to assure you that the value of your 1.5% stake in Myntelligence is and will be preserved, in no circumstance, anyone of us has ever thought something different. As you know the whole group is going through a restricting by merging the operating companies (ie Myntelligence and TheOutplay into the holding company [Mint]). I apologize if during the various steps that have been undertaken to get to the merger we have evidently failed to clarify to you the process that has erased your stock in Myntelligence. Once the merger will be completed you will receive the shares of the merged entity which will correspond to the value of your original stake(1.5%) in Myntelligence…"

37. This was followed by a further email at 16.08 from Mr Frank, also set out in the Particulars of Claim at paragraph 20, in which he explained:

> "A merger with 100% owned companies is much faster, easier, and less expensive, in particular in this case where we are dealing with an international merger. If we proceed with a reallocation [of Myntelligence shares to Third Eye], for example we would have to hire UK fiscal advisors who will take time and money. With 100% ownership[ie following the cancellation of the shares] we avoid all that".

38. The claimants say that without the Mint Agreement, a lawful merger by absorption could not proceed as the dilution and cancellation were not effective (and that Mint and Myntelligence knew this). The Mint Agreement therefore enabled the merger by absorption to proceed on the basis of an agreement between the parties (Mint, Myntelligence, and the claimants) that Third Eye would not maintain/assert its rights in relation to its shares in Myntelligence and in return following the merger Third Eye would receive equivalent shares to those it held in Myntelligence in Mint. The informal nature of the Mint Agreement means that it contains no jurisdiction clause of its own and the question of what law governs this dispute is a live issue between the parties when I come to consider the Forum Issue.

39. Mint says that in so far as there was any agreement in 2019 it was a freestanding agreement unconnected with the SPA. However, they have not explained what it was for and why it was entered into – if on their case it was entered into at all. The claimants say it is clear that the Mint Agreement arises out of or is connected to the SPA and falls within clause 9.2 of the SPA.

40. Following the Mint Agreement, on 1 November 2019, Myntelligence commenced the Merger process by giving notice by way of a Form CB01 to the UK Registrar of Companies of intention to merge with Mint by way of absorption of a wholly owned subsidiary. The merger by absorption took effect on 6 March 2020 and resulted in the transfer of Myntelligence's assets and liabilities to Mint. Myntelligence was then dissolved. The claimants' case is that the merger and subsequent dissolution of Myntelligence were only lawfully possible because the claimants had the benefit of the Mint Agreement. On the claimants' case this clearly demonstrates the connection between the Mint Agreement and the SPA pursuant to which Third Eye's shares in Myntelligence had originally been granted.

41. The claimants say that the Mint Agreement was acknowledged by Mint both during the course of the merger and after it completed. They rely for example on emails sent from Mr Frank to Mr Zahir on 11 November 2019 before the merger had completed and on 20 October 2020 after it had completed in which Mr Frank said: "*[W]ith regard to your shares we will deal with them in a separate moment, being understood that no-one has ever had the intention not to respect what has been originally agreed*" and "*no one of us has forgotten our agreement*".

42. The claimants continued to provide Mr Zahir's services pursuant to the terms of the Consultancy Agreement but now to Mint as the merger by absorption had taken place. At the same time the claimants sought to obtain the allotment of shares in Mint pursuant to the Mint Agreement.

43. On 18 November 2021 Mr Frank emailed Mr Zahir offering a management incentive plan package (the "**MIP Package**") by one of the Italian shareholders in Mint, by which Mr Zahir was offered rights equivalent to 0.5% of the shares in Mint, which he was told would have a guaranteed value of €1.2m provided that Tikehau Investment Management SAS (a large French private equity firm, which has invested in Mint through an Italian SPV) generated a certain rate of return. Mr Zahir declined to accept the MIP Package.

44. In the meantime Third Eye continued to provide Mr Zahir's services to Mint under the Consultancy Agreement.

45. The claimants say that despite the Mint Agreement, Mint has refused to issue Mint shares to Third Eye. Mint admits that Third Eye has not been registered as a shareholder. Because Mint is challenging forum it has not filed a defence. Mr Censoni's evidence does not give any indication of the nature of Mint's defence, focussing instead on forum issues.

46. In pre-action correspondence between June and August 2022 Mint denied that the Mint Agreement was entered into on the terms alleged. It does not however, provide any details as to what it says were the terms of any agreement reached. Further Mint says that the dilution of the shareholding and cancellation of the shares was effective as a matter of English law. Mint did not provide any explanation for its position nor answer any questions raised by the claimants when they sought to clarification prior to issuing this claim in September 2022. It has not done so since and so at the time of this hearing it is not possible to assess the nature of any such defence beyond that set out in the pre-action correspondence.

47. If Mint say that the cancellation of the shares was effective as a matter of English law, a key issue to determine in this claim will be the validity of the dilution and cancellation of the shares. If Mint say that the Mint Agreement is not what is pleaded which would seem to follow if they say that the dilution and cancellation were effective, then again the question of the validity of the dilution and cancellation will be the key issue to determine in this claim. Issues or disputes about the validity of the dilution and cancellation of the shares appear to me to fall within the scope of the SPA on any basis.

48. On 14 July 2022 Mint gave notice to terminate the Consultancy Agreement. Given the length of time over which Third Eye had provided Mr Zahir's services to Myntelligence/Mint they calculated the termination date as 15 February 2023. Mr Zahir was described as being on gardening leave at the time of this hearing although the letter of termination assumed that Third Eye would continue to provide Consultancy Services throughout the notice period.

49. The claimants' principal claims are to enforce the Mint Agreement, whether by an order for specific performance or damages. Alternatively, they claim in proprietary estoppel on the basis that they have detrimentally relied on the promises and assurances made by Myntelligence and Mint. They seek, in equity, relief analogous to that sought on the primary contractual claim.

50. However, the claimants say that if in fact Mint were to deny the existence of the Mint Agreement and/or maintain that the dilution and cancellation were effective as a matter of English law, then the corollary of that would be that the claimants would seek permission to introduce alternative claims:

    i) a personal claim against Mint (in its own right and as the successor to Myntelligence's liabilities) for breach of Third Eye's rights under the contract of membership formed by Myntelligence's articles of association. The claimants say that the articles did not permit, and pursuant to the Companies Act 2006 could not lawfully have permitted, the cancellation of Third Eye's shares;

    ii) a claim for breach of contract in relation to the SPA on the bases that: (i) it expressly granted Third Eye "*all the rights of a stockholder*" with respect to its vested shares; and (ii) it contained conventional implied terms as to non-

derogation from grant and prevention of performance. Without the Mint Agreement, Myntelligence and Mint would have breached these express and implied terms under the SPA by depriving Third Eye of its shares and the benefit of the rights attaching to its shares, and by putting themselves in a position in which they were unable to continue to perform their obligations under the SPA;

iii) a claim in unjust enrichment, on the basis that Mint has been enriched at Third Eye's expense by appropriating for itself – without Third Eye's consent - the value of Third Eye's interest in Myntelligence; and

iv) a claim to set aside the Merger on the basis that, having regard to the unlawfulness of the Purported Expropriation, Myntelligence was not a wholly owned subsidiary of Mint. That being the case, the English Court had no jurisdiction to issue a pre-merger certificate pursuant to regulation 6 of the UK CBMR and/or the English Court was misled by Myntelligence's failure to draw that points to its attention.

51. Mr Meuli sought to argue that the court could not take into account or have regard to, and the claimants could not rely on the claimants' evidence (signed with a statement of truth) setting out their unpleaded potential alternative claims in order to show a connection with England, yet he also sought to argue that the court could and should take into account what he said about Mint's possible defences without those having been pleaded or included in any evidence.

52. Here if Mint denies the existence of the Mint Agreement, or at least on the terms pleaded by the claimants, then any dispute between the parties in relation to (i) the dilution and cancellation of the shareholding in Myntelligence and/or (ii) if Mint were to argue that the dilution and cancellation of the shareholding were valid, those would both appear to me to be matters that would come within the scope of Clause 9 of the SPA as disputes or issues including non-contractual claims that arise out of or in connection with the SPA particularly having regard to the likely alternative claims that might give rise to.

The Jurisdiction Clause Issue: Does the dispute fall within the scope of a clause 9.2 of the SPA?

53. Clause 9.2 includes "any claim, dispute or issue" which is of itself a broad starting point but in addition it includes non-contractual claims. The scope of the clause includes any of those types of claim, dispute or issue arising out of or in connection with the SPA. It is an exceptionally wide jurisdiction clause and much wider than the equivalent clause included in the Consultancy Agreement.

54. Can it be said that the wording of clause 9.2 in the SPA (Contract A) is fairly capable of applying a dispute which arises under the Mint Agreement (Contract B)? I accept, of course, that just because the Mint Agreement has no jurisdiction clause, that does not mean it is covered by Clause 9 of the SPA. It is not a binary question.

55. Mr Meuli argued that when one applied the Extended Fiona Trust Principle the dispute about the Mint Agreement did not fall within clause 9 of the SPA (or at the very least the claimants did not have a good arguable case/the better of the argument that it did).

56. Normally (but not invariably) the parties to Contract A and Contract B will be the same because ultimately the question is whether the dispute under Contract B can be brought within the jurisdiction clause in Contract A (see *Terre Neuve* [31(4)]) and it is a matter of construing the scope of the jurisdiction clause.

57. Mr Meuli argues that here not only are there different parties to each agreement but there are also different legal relationships between the parties. In particular he argues that as Mr Zahir is a party to the Mint Agreement when he was not a party to the SPA this all militates against the Mint Agreement falling within the scope of the clause 9.2 and the Extended Fiona Trust Principle applying.

58. The claimant pleads that the Mint Agreement was made between Mint, Myntelligence and the claimants. I did not find that to be surprising given the claimants' case is that the allotment of shares in Mint under the Mint Agreement was the resolution of the dispute in relation to the dilution and cancellation of Third Eye's shares in Myntelligence.

59. Whilst the parties to Contract A and B would normally be the same the difference here is nothing to the point. Mr Zahir is sole director and shareholder of Third Eye, his personal services company. He was the person who negotiated on behalf of Third Eye (as its sole director and shareholder) in relation to the Mint Agreement. He signed the SPA. He provided his services through Third Eye to Mint/Myntelligence. Although not the alter ego of Third Eye, Mr Zahir is so closely connected to Third Eye, Mint and Myntelligence and the events in issue and as sole shareholder has the benefit of both the SPA and the Mint Agreement, that this is one of those cases which is the exception to the phrase "normally". Whether or not party to the SPA, he was and will continue to be involved with the dispute as the sole director and shareholder of Third Eye in its assertion of its rights whether under the Mint Agreement or the SPA (which will depend on the defence advanced by Mint) and at least at this stage appears to have no different interest to Third Eye.

60. Mr Meuli sought to argue that it is doubtful that Myntelligence were a party to the Mint Agreement because (i) Myntelligence was not a necessary party to the Mint Agreement, (ii) the claim does not plead that Myntelligence assumed any obligations or derived any contractual rights, (iii) Mr Frank who sent the emails in February 2019 was not a director of Myntelligence and (iv) the claim as pleaded refers to the Mint Agreement being between Mint and the claimants.

61. In the face of the claimants' pleaded claim summarised at paragraph 9 of the particulars of claim as set out below, and in the absence of any evidence challenging it, this did not seem to me to be a compelling submission:

> 9. Myntelligence and Mint wished to progress the Merger as a merger by absorption of a wholly-owned subsidiary notwithstanding that, as a result of Third Eye's shareholding, Myntelligence was not a wholly-owned subsidiary of Mint. In order to achieve that result, Myntelligence and Mint:
>
> (1) sought to dilute and cancel Third Eye's shareholding without reference to Third Eye, which steps were obviously unlawful and ineffective without Third Eye's (informed) consent; and

> (2) when Mr Zahir asked for Third Eye's shareholding to be restored (those steps having then come to his attention), agreed with the Claimants that Third Eye would instead receive shares in the merged entity, Mint, equivalent in value to its 1.5% shareholding in Myntelligence (and insisted that had been their intention all along).

62. At the time the Mint Agreement was negotiated, the merger had not taken place. The (unlawful) dilution and cancellation of the Third Eye's shares by Myntelligence (for the benefit of Mint) were the transactions which were the subject of the dispute between Myntelligence, Mint and Third Eye. But for the Mint Agreement, on the claimants' case, the merger by absorption could not have been validly undertaken. Myntelligence was clearly a proper party to the Mint Agreement.

63. Normally (but not invariably) Contract A and Contract B will be interdependent in some way whether concluded as part of a package of transactions, entered into at the same or similar times and/or if not, then dealing with the same subject matter. However, the circumstances of each case and how and when and why Contract B came into existence and its interrelationship with Contact A must be considered so as to determine whether it can fairly be said that the dispute arising under Contract B is covered by the jurisdiction clause in Contract A.

64. Mr Meuli argues that the Mint Agreement was not interdependent but a freestanding agreement entered into some years after the SPA. He argues that the subject matter of the dispute is the failure to allot Mint shares unconnected with the SPA which dealt only with the claimants' rights in relation to the shares in Myntelligence. Consequently he argued that the Mint Agreement did not arise out of and was not connected with the SPA.

65. He argued that the subject matter of the SPA and the Mint Agreement differed to such an extent that the claim could not be brought within the Extended Fiona Trust Principle. He submitted that under the SPA both Third Eye and Mint are shareholders of Myntelligence but under the Mint Agreement there was a new relationship whereby Third Eye was intended to become a shareholder in Mint itself. Whilst he accepted that the SPA and arrangements with Myntelligence were the genesis of the Mint Agreement he argued that that connection was not sufficient since the relationship had been as shareholder of Myntelligence and by the time of the Mint Agreement, Third Eye was no longer a shareholder in Myntelligence. Thus he argued that the Mint Agreement reflected a fundamentally different relationship between Mint and Third Eye.

66. However, this seemed to be to be an artificial and strained distinction. The claimants' case is that the Mint Agreement was a consequence of the (unlawful) dilution and cancellation of Third Eye's shareholding in Myntelligence. The Mint Agreement represented the resolution of that dispute.

67. It appears to me that the validity of the dilution and cancellation of Third Eyes' shares in Myntelligence is the substance of the dispute. This did not therefore appear to me to be a strong point in Mint's favour. If the claimants are right the dilution and cancellation were unlawful. Aside from the other consequences/remedies that might arise, including a claim to seek to set aside the dilution and cancellation, if the claimants are right, Mr Meuli's submission would seem to enable Mint to benefit from its own wrongdoing.

The claimants' case is that the Mint Agreement is the resolution of the dispute arising from the (unlawful) dilution and cancellation of Third Eye's shares in Myntelligence. On the claimants' case the Mint Agreement is plainly connected to the SPA and it seems to me that one can see a clear line running between the two.

68. A fundamental difference between the parties is what they say is the substance of the dispute. Mr Meuli argues that the real substance of this dispute is about the allotment of shares in an Italian company. As part of the Forum Issue he focusses on that aspect of the dispute, arguing that the substance of the claim is therefore an issue of Italian law. However, it seems to me that whether considered as part of the Jurisdiction Clause Issue or the Forum Issue the real substance of the dispute that gives rise to this claim is the lawfulness of the dilution and cancellation which will have to be determined by reference to the Companies Act 2006 and matters of English Company law generally. It is the claimants' case that it was that dilution and cancellation which resulted in the negotiations and the informal agreement which is the Mint Agreement. So far as it is possible to ascertain the position, it appears to be Mint's case that the dilution and cancellation were lawful. Given that seems to be Mint's position although Mr Meuli seeks to argue that the Mint Agreement is a freestanding agreement it is difficult to see it other than in the context of what went before.

69. Mr Scott KC points to the breadth of Clause 9.2 and argues that at the very least the Mint Agreement and the underlying dispute arise out of or in connection with the SPA. He submits that when one considers the factual background and the genesis of the Mint Agreement, which Mint accepted was the SPA, one can analyse it as operating as a variation to it. The Mint Agreement confirms that in exchange for giving up and/or not pursuing the return of Third Eye's shares in Myntelligence, Third Eye would be given an equivalent shareholding by value in Mint. Critically the Mint Agreement only arose because of the existence of the SPA. It was in the circumstances in effect a commercial share swap allowing Mint to proceed with its merger by absorption.

70. Mr Meuli sought to argue that the alternative claims such as the proprietary estoppel claim could not on any basis be said to come within the scope of Clause 9.2. However, Mr Scott submits that such a claim would be in connection with enforcement of the SPA in any event and so would fall within the broad scope of Clause 9.2. Just because an alternative remedy did not arise under or in connection with the SPA would not in any event mean that the entire claim ceased to come under Clause 9.2. If the rest of the claim properly fell within clause 9.2 it would not preclude the proprietary estoppel claim being pursued under clause 9.2 as well.

71. I agree with Mr Scott. Clause 9.2 on its face includes non-contractual claims and issues arising under or in connection with the SPA which would seem to me to be broad enough to encompass the proprietary estoppel claim. In any event even if one of several claims made by the claimants were not to fall squarely within clause 9.2, unless it is clear that that is what the parties intended, fragmentation of claims should be avoided where possible. Here there is no evidence to support a deliberate fragmentation. If I were to be satisfied that the core claims fall within clause 9.2 but thought there was some credible basis for arguing that the proprietary estoppel claims fell outwith the scope of clause 9.2 I would have no hesitation in this case in determining that that was insufficient to deprive the claimants of the benefit of bringing their claims here under clause 9.2. As it is I consider that in fact the proprietary estoppel claims would fall within the scope of clause 9.2.

72. Mint argues on a similar basis that the Mint Agreement cannot be considered to be part of an overall transaction or package. Mr Meuli says it was not (and could not have been) in contemplation when the SPA was entered into in 2016. He argues that it only came into existence after the SPA had become redundant following the dilution and cancellation of the shares. Consequently he argues that the Mint Agreement has to be separate and freestanding. These arguments assume in Mint's favour that the steps that Mint/Myntelligence took in relation to Third Eye's shares in Myntelligence were legally effective as a matter of English company law and or would allow Mint/Myntelligence to rely on their own alleged wrongdoing to succeed in thwarting the claimants' claim and/or their entitlement to rely on clause 9.2. These do not seem to me to be compelling arguments in Mint's favour.

73. Whilst the Extended Fiona Trust principle is said to normally apply where the parties are the same, the contracts are interdependent or form part of a package and generally applies where the contracts are entered into at the same time it is clear from *Terre Neuve* that it does not preclude other scenarios. Mr Scott says Third Eye, Mint and Myntelligence were all parties to the SPA and are all parties to the Mint Agreement as pleaded in the Particulars of Claim. Although Mr Zahir is also a party to the Mint Agreement that is of no significance as Third Eye is his corporate vehicle of which he is the sole director and shareholder. Further it was Mr Zahir who signed the SPA on behalf of Third Eye in 2016.

74. On the claimants' case the SPA and the Mint Agreement are interdependent since the one would not exist without the other. It is the dilution and cancellation of the shares without consent which provides the factual background to the Mint Agreement. In the absence of the Mint Agreement, which varied Third Eye's rights to its shares/reinstatement of its shares under the SPA, Third Eye was and would have continued to assert its rights under the SPA. If as the claimants say that dispute was settled by the Mint Agreement then the current dispute is about the terms of that settlement which arises out of and in connection with the SPA. Although one of the remedies sought in this claim is the allotment of shares in Mint that does not change the substance or ultimate subject matter of the claim for the purposes of determining whether it is covered by Clause 9.2.

75. It seems to me that the jurisdiction clause in the SPA is broad enough include any claim, dispute or issue arising out of the breaches of it, including being wide enough to encompass a dispute about the validity of the dilution and cancellation of Third Eye's shares and the existence and terms of the subsequent compromise - the Mint Agreement.

76. Mr Scott argues there is nothing significant about the timing in this case since the SPA and the Mint Agreement are inextricably linked on the claimants' case as the one varies or settles the dispute arising under the other. The Mint Agreement substitutes Third Eye's shareholding in Myntelligence for rights under the Mint Agreement.

77. Mr Scott referred me to Bryan J's consideration of *Emmott v Michael Wilson* [2009] 1 Lloyd's Rep 233 in *Terre Neuve* at [34]. In *Emmott*, Teare J found that an arbitration clause in a 2001 agreement gave jurisdiction in relation to a 2005 oral agreement. In that case, as here, the two agreements were not discussed at the same time as in reality it was said that the 2005 agreement was a variation of the 2001 agreement regarding Mr Emmott's consideration for his participation in the quasi partnership formed

pursuant to the 2001 agreement. It was said that the 2005 agreement arose out of the relationship between the claimant and the defendant which they entered into as a consequence of the existence of the 2001 agreement. In that case the explanation for the 2005 agreement was Mr Emmott's entitlement under the 2001 agreement and as such the contracts were said to deal with the same subject matter and so fall within the Extended Fiona Trust Principle.

78. The position is similar here where the substance of the dispute and the fact that on the claimants' case it arises out of the SPA all point to the Extended Fiona Trust Principle applying and the dispute falling within Clause 9.2.

79. None of Mr Meuli's arguments individually or cumulatively persuaded me that the dispute about the Mint Agreement did not arise out of or in connection with the SPA and fall within the very wide terms of the clause 9.2. But for the SPA which gave rise to Third Eye's shareholding in Myntelligence there would be no dispute. The subsequent actions of Myntelligence and Mint in diluting and cancelling the claimants' shares to enable the merger by absorption of Myntelligence into Mint was a consequence of Third Eye's shareholding in Myntelligence. The negotiations in 2019 evidenced by the emails between Mr Frank and Mr Zahir as directors of Mint and Third Eye, the shareholders in Myntelligence, and copied to the director of Myntelligence, relate to how Mint, as Myntelligence's parent company, sought achieve its aim of undertaking a merger by absorption in the face of claimants assertion of Third Eye's continuing rights as shareholders in Myntelligence.

80. It seems plain that it arises out of a dispute, claim or issue under the SPA including non-contractual claims. It is the alleged wrongful dilution and cancellation of Third Eye's shares in Myntelligence that gives rise to that dispute and the subsequent Mint Agreement. The Mint Agreement on the claimants' case is the mechanism by which Mint was enabled to proceed with its merger by absorption. In so far as Mint assert that the dilution and cancellation were valid or lawful that relates back to the parties' rights under the SPA.

81. As is clear from the authorities the exercise the court has to undertake when considering questions of jurisdiction includes considering what the substance of the dispute is and whether the subject matter of it brings it within the relevant jurisdiction clause. In the absence of any clearly articulated defence from Mint as to why the dilution and cancellation were effective and/or what they say about the Mint Agreement it is difficult to assess any counter argument and its merit. But in so far as any defence were to be either that the dilution and cancellation were lawful or that the Mint Agreement was something other than the claimants say then the alternative claims raised by the claimants would be engaged and those disputes clearly arise out of or in connection with the SPA. In the absence of any clear evidence of an intention on the part of the parties to fragment the process by which their claims are to be resolved it seems to me that having all the disputes whatever their nature dealt with together weighs in favour of and is further support for the application of the Extended Fiona Trust Principle.

82. For all these reasons it seems to me that it is clear that the claim, disputes or issues including non-contractual claims that the court will have to determine on the claim as advanced by the claimants arise out of or in connection with the SPA and are therefore governed by the clause 9.2. There is as I say a clear line to be drawn and a connection

between the SPA and the Mint Agreement and the subject matter and substance of the dispute.

83. That being the case the Forum Issue would not arise. However, in case I am wrong about the Jurisdiction Clause Issue I have concluded that England is the natural forum for this claim. Although Italy and more particularly Milan is an available forum for resolution of this dispute, Mint has failed to discharge the burden of demonstrating that Italy was clearly and distinctly the more appropriate forum than England for the trial of this claim. Consequently even if I am wrong about the Jurisdiction Clause Issue the court should not decline jurisdiction in this case and nor should the claim be stayed on the basis of jurisdiction.

The Forum Issue

84. I have concluded this for the following reasons which I address briefly. I have already set out the background to the dispute and many of the arguments that arose in relation to the Jurisdiction Clause Issue come back into account in considering the appropriate forum.

85. It is accepted by both parties, and their experts agree, that Italy, and more particularly the Court of First Instance of Milan, is an available jurisdiction and Mint has confirmed that it would submit to the jurisdiction of that court.

86. Contrary to the submissions made by Mr Meuli the court does not simply look at the claim as pleaded when considering the forum for the claim but looks at how it might develop and all the circumstances. The exercise the court has to undertake when considering forum is a discretionary one which requires the court to take into account all relevant matters and is broad based. This includes looking at the reality of the likely scope of the dispute between the parties. Thus both the nature of the defence so far as it could be understood and the claimants' likely response to that defence (their alternative claims) were relevant factors to consider for both Jurisdiction Clause Issue and the Forum Issue.

87. As Mr Scott reminded me, in commercial cases there may be no particular forum that can be described as the natural forum (*Spiliada* Lord Goff at 477 C-G). As set out in the *White Book* 2022 at 6.37.16 when referring to Lord Goff's speech the court "… *has to identify in which forum the case could most suitably be tried for the interests of all the parties and for the ends of justice.*"

88. Further it should be noted that the Mint Agreement was entered into before the end of the Brexit transition period such that determination of the law to apply will be by reference to EU law.

89. Mint says that Italy/Milan is clearly and distinctly the more appropriate forum because on its analysis and approach the contractual and proprietary estoppel claims are governed by Italian Law, which is materially different from English Law.

90. Mint says it cannot be inferred that the Mint Agreement was governed by English law. Mint considers that the issues likely to arise for determination are primarily focussed on Italian company law relating to the allotment of shares in an Italian company and/or enforcement of such an allotment as a matter of Italian company law. This would

therefore require expert evidence on Italian law if the claim were to proceed in England. Further even if the claim were pursued in England any enforcement activity in relation to the shares in Mint would be likely to need to be determined in Italy.

91. Mint argues this all points towards Italy as the appropriate forum since an Italian court would apply its own law more reliably than an English court. Further it would increase the costs and complexity of the proceedings unnecessarily to either have the Italian law issues determined in England or to have a separate set of enforcement proceedings in Italy.

92. Mint relies on a number of the factors already considered in relation to the Jurisdiction Clause Issue as pointing towards Italy. However, I preferred Mr Scott's analysis on these points for the reasons set out above.

93. For completeness, Mint argued that (i) the Mint Agreement was entered into when the parties knew that the SPA had been rendered redundant and (ii) on the claimants' case the Mint Agreement is an agreement to issue shares in Mint, an Italian company. Mint argues that this amounts to a deliberate change in policy from the previous course of conduct as under the SPA, Third Eye and Mint were shareholders in an English company, Myntelligence. The choice of English law in relation to disputes arising under the SPA is consistent with it relating to matters concerning an English company. Mint argues that such a choice is instructive when considering what the parties would have chosen for the Mint Agreement which they argue relates to an Italian company and a dispute in relation to its shares.

94. Mint say that the characteristic performance of the Mint Agreement is the issue of shares to Third Eye rather than any forbearance. Since Mint is an Italian company whose habitual residence and central administration is in Italy and the characteristic performance relates to its shares, it follows that the Mint Agreement is governed by Italian Law under Art 4 (2) of Rome 1.

95. Mr Meuli argues that even if that is wrong, the country most closely connected with the Mint Agreement is still Italy. He argues that the place of the Mint Agreement should not be considered a weighty factor. It was either accepted in England or communicated to Mint in Italy. It is therefore a neutral factor.

96. He argued that the place of principal performance and subject matter of the dispute were based in Italy. His analysis is that it is the issuing of shares in Mint to Third Eye and their registration on the register of shareholders in Italy which constitutes the principal performance and the subject matter of the dispute. This points towards the claim being more closely connected to Italy.

97. He argues that the claim for specific performance engages the rights of third parties based in Italy – Mint's Italian shareholders. And in any event Mint does not have the power to comply with any order to transfer the shares, it is a matter for the Italian shareholders based in Italy. This too points towards Italy.

98. The Mint Agreement is not closely connected to the SPA or the Consultancy Agreement and further any English law claims were settled by the Mint Agreement. The alternative claims were not yet pleaded.

99. Mr Meuli argued that the less important factors such as places of business, place of contracting were evenly balanced between Italy and England. He pointed to Mint's place of business - Italy. He noted that Mint had no UK clients and only had a UK branch for administrative reasons. Mr Zahir was currently on gardening leave from Mint and although he had carried on business from the UK he had travelled to Milan and was the CTO for Mint.

100. In relation to the proprietary estoppel claim the experts agreed that there was no equivalent or at least no direct read across in Italian law. *Dicey* suggests that there are two alternative analyses as to how to approach the claim in proprietary estoppel. Mr Meuli considers both options, concluding both point towards Italian law as being clearly and distinctly the more appropriate forum.

101. He argues that if a proprietary estoppel claim is said to be a claim that relates to assurances given in respect of shares in Mint, it is likely to be construed by reference to Rome 2. In those circumstances the argument would be that the relevant damage occurred in Italy because the remedy sought is either Mint shares or the value of the Mint shares. Mint supports this analysis on the basis that any failure to register Third Eye as a shareholder in Mint could only have occurred in Italy and in all the circumstances the tort/delict is manifestly more closely aligned to Italy than any other country for the same reasons (Article 4(3)). Mint's position is that it is only in reality the background or history of the relationship that provides any link to England.

102. Mint argues that if a proprietary estoppel claim is analysed by reference to the law of property, the lex situs is Italy. Avv. Ferrero explains that Mint's shareholders are only entitled to rights upon registration in the register of members. The register is kept in Italy. The law of the place of incorporation governs how shares may be transferred. The shares are the property in question and they are in Italy.

103. Mr Scott notes that the Italian law experts agree that there is no Italian equivalent of proprietary estoppel. The question of whether the proprietary estoppel claims should be analysed by reference to Rome 1 or Rome 2 for the purposes of determining forum and whether they are characterised as contractual or non-contractual claims does not need to be determined now to determine forum in this case when other factors point more clearly to England and it cannot be said that Italy is clearly and distinctly the more appropriate forum in this case.

104. Further although the experts agree that Italian courts would permit expert evidence on matters of English law, and the fact that there is no legal equivalent of proprietary estoppel as a matter of Italian law would not be a determinative factor, here it is nonetheless a factor that points towards the English courts as the more appropriate forum as they would be able to apply their own law more reliably.

105. Overall I prefer Mr Scott's analysis and approach. As set out above I have concluded that in reality the claim arises from the loss of Third Eye's shareholding in Myntelligence and the subsequent negotiations and eventual agreement in 2019 to put right the alleged wrongful dilution and cancellation of Third Eye's shares in Myntelligence (the Mint Agreement). I agree with Mr Scott that the characteristic performance of the Mint Agreement is about the agreement to resolve the issue of the dilution and cancellation in the context of the proposed merger rather than Mint issuing

the shares in itself in Italy. I agree for the reasons I have already set out the real substance of this dispute arises out of the dilution and cancellation.

106. When determining the claim as presently formulated, on any basis a court will first need to consider the steps taken to dilute and cancel the shares as a matter of English law. If Mint defends either on the basis that that the dilution and cancellation were lawful and/or there was no Mint Agreement and/or the Mint Agreement was for some different purpose that will require the court to consider first the English company law aspects of the claim. If Mint defends on any of those bases then that will give rise to the alternative claims being brought by the claimants all of which would appear to squarely fall to be determined under clause 9.2 of SPA in any event, even if it were arguable that this particular claim as currently pleaded did not. As set out above, clause 9.2 of the SPA is an exclusive law and jurisdiction clause. At least part of the defence and the alternative claims would therefore appear to fall within the scope of clause 9.2. This would produce a very unsatisfactory outcome where the parties had clearly chosen English law and jurisdiction clauses for the resolution of disputes under the SPA. It does not point towards Italy as being clearly and distinctly the more appropriate forum.

107. So far as the Mint Agreement itself is concerned, it is an informal agreement and as I have identified Mint's own position in respect of its existence and terms has not yet been set out clearly.

108. However, Mr Meuli argues that the differences between English law and Italian law in relation to contractual interpretation are stark. The experts agree that unlike English law, as a matter of Italian law subjective interpretations of contractual obligations and subsequent conduct are generally admissible in Italy. This he says points towards Italy as the more appropriate forum. Italian courts would be more likely to determine issues of Italian law more accurately and quickly. It would make English proceedings more expensive and complex requiring parties to retain English and Italian lawyers.

109. Mr Scott reminds me that as pleaded the Mint Agreement is an informal agreement not contained in a single document, with the emails simply part of the overall evidence of what was agreed. Consequently evidence of subsequent conduct is not inadmissible in England and there is therefore no material difference in construing the terms of the Mint Agreement in Italy or England and it would be an issue of fact for the trial judge for which all evidence of what was agreed will be relevant. Indeed that same analysis will apply to the question of where the contract was in fact formed and which law applies to it so far as it is not clear.

110. This issue of contractual interpretation as identified by Mint seemed to be a neutral factor as between England and Italy.

111. Mr Scott approached the question of forum from a different direction, starting with the commercial relationship between Myntelligence, Mint and Third Eye. Both the Consultancy Agreement and the SPA had exclusive English law and jurisdiction clauses. He submitted that this tended to militate against Mr Meuli's analysis that there was a deliberate change in policy and/or that the choice of law for the SPA as English law is instructive as pointing to a choice that the law governing the disputes was by choice the jurisdiction in which the relevant company or obligations were based. I agree and as set out above one can see a clear line flowing through the commercial relationship between Mint, Third Eye and Myntelligence from the SPA to the Mint

Agreement and beyond. This favours England both because on analysis I consider there to be a connection with the SPA for the reasons I have given and because the substance of the dispute and the weight of the issues to be determined are not matters of Italian law but matters of English law. And indeed the absence of any express choice of law tends itself to point towards a continuation of the choice of English law for the resolution of the dispute arising out of the SPA and contained in the informal Mint Agreement. It does not to my mind demonstrate that Italy is clearly and distinctly the appropriate forum but tends in the other direction.

112. On the claimants' case, unless Mint admits the unlawful dilution and cancellation of the shares the primary focus of the claim will be the internal affairs of an English company and English company law. The focus will be on the lawfulness of the actions taken to dilute and cancel Third Eye's shares in Myntelligence. This will include considering what the Registrar of Companies was told when the cancellation of the shares took place and whether it was untrue.

113. The court is confronted with an informal agreement which Mint does not appear to accept. However it appears to me that English law questions arise on any basis if Mint simply does not admit that the dilution and cancellation were invalid and/or argues that the relevant pre-emption rights were not engaged

114. Company law issues often raise technical legal issues of some complexity. Here in particular a court will have to consider the company law relevant to the dilution and cancellation of shares in an English company on any basis. Although the application of company law to a dispute no longer gives rise to exclusive jurisdiction to the "home" court of the company it does add weight to the more general consideration that a court is more likely to reliably apply its own law than a foreign court. It seems to me that where the substance of the dispute in reality engages with company law and the internal affairs of a company that will be a factor pointing towards the law of the company when considering questions of forum. Mr Meuli accepted this principle simply arguing that it was Italian company law that the court needed to consider.

115. Mr Scott argues that since the claim seeks to enforce Mint's personal obligation to issue the shares and/or seeks damages by way of compensation it will be for Mint, if the claimants are successful, to consider when or how, or indeed if, to comply with any order made. The fact that Mint's shareholders are in Italy is both common ground and the claimants say, not relevant to this aspect of determining forum. It is a peripheral issue which will only become relevant at all if the claimants obtain an order for specific performance rather than damages and if Mint do not comply with it. Consequently, the law applicable to Mint's internal administration or its shareholders is of limited relevance to the question of forum. I agree. It seemed to me that the relevance of Italian company law would only arise if the claimants were successful, elected for specific performance rather than damages, and Mint were unable or unwilling to comply. Thus the only stage at which Italian company law will definitely need to be considered is as a matter of enforcement in relation one of the possible remedies to which the claimants may be entitled. This did not seem to me to point clearly and distinctly towards Italy.

116. Mint argues that all the other factors also point towards Italy and in particular Milan as the natural forum or were evenly balanced between Italy and England such that the overall conclusion should be that Italy was the natural forum and/or clearly and distinctly the more appropriate forum. In particular as set out above, on Mint's analysis,

the claim concerns the internal workings of an Italian company and its Italian shareholders and the subject matter of the dispute is shares in Mint said to have been promised by an Italian director of Mint and that any order for specific performance of the transfer of the shares would need to bind the Italian shareholders all of which would point towards Italy as Mint's place of incorporation as the more natural forum.

117. Although Mint is an Italian company that does not override the connection to England particularly when one looks at the historic connections, the background to the dispute and the reality of Mint's continuing connections with England as a result of the merger.

118. Myntelligence was an English company and Mint's actions relate to that English company. Mint was party to the SPA and agreed to be bound by an English law and jurisdiction clause in relation to it. No aspects of that prior relationship included Italian law.

119. Mint retains connections with England. It is registered as a foreign company in England and was served in London at its branch office. The office is not closed. It has a physical presence in the jurisdiction. Mr Scott pointed to the evidence that when the merger took place in 2020 Mint confirmed that the merged company would continue to carry out part of its trade in the UK and some of its assets would be held and used for the purposes of the trade carried on in the UK (see recital B of the draft terms of merger).

120. Mr Censoni says that Mint opened a UK branch in January 2020 with the intention of continuing to employ the 3 employees in the UK which he understood to be necessary to obtain authorisation for the merger. He confirms that Mint's three employees work from home but that until recently Mint did not have any UK clients. It now has an Italian client who asked that the contractual relationship be between Mint and that client's UK entity in the UK.

121. Although Mr Censoni says that Mint has no substantial assets in the UK he confirms that it has bank accounts with Santander and Barclays for the management of day to day operations including engagement with the Tax authorities and payment of its employees.

122. It seemed to me that Mint retains a real connection with England and that although not decisive either way this factor does not point clearly and distinctly in favour of Italy.

123. The claimants noted that all the communications between the parties are in English and those are the building blocks of the claim. All the emails relied on are in English. Mint has not suggested there are any communications in Italian that are relevant to determining the dispute between the claimants and Mint. English therefore has an obvious advantage. English appears to be the language in which the parties communicate and the natural language of the dispute.

124. Mint say Italian courts are familiar with English and any English documents could be translated. They say that as corporate documents relating to Mint would all be in Italian and Mint was governed by Italian law that points to Italy.

125. The experts agree that the proceedings would be conducted in Italian in Italy with any English documents translated. However, as the claimants identified it appears that all the key documents relating to the dilution, cancellation and the Mint Agreement are in

English and would need to be translated and that would seem to me to be a factor that would weigh against Italy. The corporate documents relating to Mint would seem to only be relevant if at all peripherally or at the enforcement stage and only if specific performance is ordered and Mint says it is not able to comply with that order. This was not a factor that pointed towards Italy as being clearly and distinctly the more appropriate forum. It was either neutral or as I consider pointed towards England.

126. So far as witness evidence is concerned Mr Meuli says Mint's witnesses are based in Italy. He argues that Mr Zahir can be interviewed in English, in England as part of the Italian proceedings. It appeared to Mr Meuli that Mr Zahir would not need to give live evidence in any event given the evidence from the Italian law experts. I note that the expert evidence did seem to suggest that there would be no live witness evidence or cross examination suggesting a process on written evidence.

127. Avv. Ferrero suggests in para 12.1 of his second report that there would not be any cross examination or oral evidence and, instead, a process of letters rogatory. Mr Scott notes that this would mean that if the claim were conducted in Italy, the claim having been stayed here, the parties and the court would still then have to engage with a letters rogatory process in England. This would seem to me to unnecessarily increase costs and use up court resources in two jurisdictions. I agree with the claimants that would be a particularly unsatisfactory outcome. Again it does not persuade me that Italy is clearly and distinctly the more appropriate forum.

128. Although the witnesses for Mint might want to give evidence in Italian, it appears clear they can communicate in English. Further it is not clear what communications there have been in Italian relevant to the dispute. However, the expert evidence appeared to suggest that party representatives could not be cross-examined as a matter of Italian law in any event. If that is right it is not therefore clear the extent to which Mint would be able to rely on any witness evidence if the dispute were undertaken in Italy.

129. Mr Scott points to the strong connection with England. Mr Zahir has been to Italy but is not based there. The claimants are an English company and an English national based in England. He notes that Mint does not suggest that the claimants have any real connection with Italy.

130. Mr Scott suggests that the issue of where and how witness evidence should be given was ultimately one of convenience but on balance he suggests that it weighs towards England.

131. This is a claim in which the parties have communicated with each other in English in relation to any relevant communications that appear to have crossed the line between them and which will need to be analysed to determine the position contractually. I do not know and there was no evidence to tell me whether there are other communications internally within Mint or with Myntelligence which were in Italian and which may be relevant.

132. However, it seems clear that if the claim were to be conducted in Italy all the key correspondence would have to be translated from English to Italian. The position on witness evidence appears to be unnecessarily costly and duplicative if a process of letters rogatory is required. If the claim were conducted in England there would be no need for letters rogatory. It is not clear the extent to which any interpreters would be

needed in respect of the Italian witnesses but I take into account that they have communicated in English and that the former director of Myntelligence lived and worked in England for some years.

133. When one considers the convenience of witnesses, English courts permit evidence by video link in any event subject to the necessary permission, so that would relieve the Italian witnesses of the need to travel to England, whereas the Italian experts have confirmed that evidence by video link to the extent live evidence is permitted at all is not permitted in Italy.

134. None of this points to Italy being clearly and distinctly more appropriate and indeed it appears to me to point towards England as the more appropriate forum.

135. Mr Scott also points to the alternative claims which would be raised by the claimants in the event that Mint were to pursue the defences they identified in their pre-action correspondence. For each of those alternative claims the only jurisdiction is England as they fall within Clause 9.2 of the SPA and/or are matters relating to the internal affairs of an English company. Further, the claim to set aside the Merger would appear to fall within the natural forum of England given the substance of it. Mr Scott points to the chaos and risk or irreconcilable claims in the event that some of the claims were in England and some in Italy.

136. I have to take into account not only the claim as pleaded but all the circumstances and cannot therefore ignore those alternative claims, nor in fairness to Mint, the only information I have about their proposed defence. Mint has had many months to set out its defence more fully and to answer the questions raised by the claimants and has chosen not to do so. It seeks to stay this claim on the basis of forum without doing so. If it had an answer to the points and issues taken against it in terms of forum it has not taken the opportunity to deploy them and must take the consequences.

137. It seems to me the issues raised by possible defence and alternative claims weigh heavily against Italy as being clearly and distinctly the more appropriate forum. It seems to me to be preferable to avoid the risk of fragmentation, irreconcilable decisions, and increased costs and time.

138. As set out in this judgment I consider that the substance of the dispute and the issues which the court is going to have to determine point clearly towards determination of disputes here. The question of the allotment of Italian shares which the defendant focussed on may never arise. If the claimants are successful it may be that there is an award of damages or it may be that there is an order to transfer shares but it will be for the claimant to elect at a later stage. The court does not determine forum by speculating about the eventual outcome.

139. The defendant has not set out a positive case/defence or provided any evidence that would enable the court to understand why it considers that the Italian company law issues are central to this dispute. It is not for the court to speculate about the nature of any positive case that might be advanced in the future. Whilst I have taken into account what Mint has said in pre-action correspondence I bear in mind that if a defendant is wholly reticent about his case, he can have no complaint if the court does not take into account what points he may make, or evidence he may call, at any trial: *VTB Capital* at [91] (Lord Neuberger).

140. As is clear from the authorities the defendant bears the burden of persuading the Court to exercise its' discretion to grant a stay by establishing both that England is not the appropriate forum and that there is another available forum which is clearly or distinctly more appropriate.

141. I have weighed up the various factors as set out in this judgment and when I stand back and consider them in the round I have reached the clear conclusion that Mint has not demonstrated that the Italian courts are clearly and distinctly a more appropriate forum than the English courts to determine this dispute.

142. Although Italy is an available forum I am not persuaded that the case may be determined in Italy more suitably for the interests of all the parties and for the ends of justice. Indeed for the reasons set out in this judgment it appears to me that in fact the factors identified by the parties are either neutral as between England and Italy or the balance weighs in favour of England as being the more appropriate and suitable jurisdiction for the determination of this claim. I do not therefore need to consider the second question that arises in *Spiliada*.

143. For all these reasons the Application is dismissed.