Neutral Citation Number: **[2023] EWHC 1294 (Ch)**

Case No: CR-2022-001347

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch D)

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

Date: 26 May 2023

Before :

Tom Smith KC
(sitting as a Deputy Judge of the High Court)

- -

Between :

DURNONT ENTERPRISES LIMITED **Claimant**

- and –

(1) FAZITA INVESTMENT LIMITED
(2) WLADYSLAW JAROSZEWICZ
(3) MICHAEL CARL JAROSZEWICZ
(4) M-JWK-MANAGEMENT SPÓŁKA Z OGRANICZONA ODPOWIEDZIALNOŚCIA (formerly M-JWK-MANAGEMENT SPÓŁKA Z OGRANICZONA ODPOWIEDZIALNOŚCIA SP.J and M-JWK Sp. z. o.o. SKA)
(5) ANNA BANDURSKA
(6) JAN CZEREMCHA
(7) MACIEJ DE MAKAY
(8) BNP PARIBAS BANK POLSKA S.A. (formerly BGZ BNP PARIBAS S.A., formerly RAIFFEISEN BANK POLSKA S.A.)
(9) POLISH REAL ESTATE INVESTMENT LIMITED **Defendants**

- -
- -

Philip Riches KC, Andrew Dinsmore and Richard Greenberg (instructed by **Peachey & Co**) for the **Claimant**
The Defendants did not appear and were not represented

Hearing dates: 11-12 May 2023

- -

JUDGMENT

Tom Smith KC :

Introduction

1. There are two principal applications made by the Claimant which are before the Court:

   (1) First, for 'second stage' permission pursuant to CPR r. 19.15 to continue a derivative action against the First to Eighth Defendants (the "**Permission Application**");

   (2) Secondly, for permission, insofar as necessary, to serve the Amended Claim Form out of the jurisdiction pursuant to CPR rr. 6.36 and 6.37 and other documents pursuant to CPR r. 6.38 (the "**Service Out Application**").

2. The Claimant, Durnont Enterprises Limited ("**the Claimant**"), was represented by Philip Riches KC, Andrew Dinsmore and Richard Greenberg.

3. The Company (as defined below) did not file any evidence or appear at the hearing. However, I am satisfied that the Company was served with the Permission Application on the basis of the evidence of service which I have seen and which was included in the hearing bundles. Permission to serve the Permission Application on the Company out of the jurisdiction was not sought by the Claimant because it relied on the jurisdiction clause in the SSA (as defined below). In addition to service of the Permission Application, the Company was provided with notice of this hearing.

4. The Defendants did not appear at the hearing. So far as they are concerned, the Service Out Application was in the usual way made on a without notice basis.

5. The hearing took place on 11 and 12 May 2023. For the reasons explained below, I grant in part the relief sought by the Claimant under the Permission Application and the Service Out Application essentially in relation to the

claims made against the First to Fifth Defendants. However, I also refuse in part the relief sought essentially in relation to the claims sought to be made as against the Sixth to Eighth Defendants.

6. Prior to the hearing, the Claimant had applied for permission to amend the existing Particulars of Claim. During the hearing, the Claimant indicated that it wished to make further amendments to the draft amended Particulars of Claim which was before the Court. Following the hearing a further draft amended Particulars of Claim was provided by the Claimant under cover of a note dated 19 May 2023. This is the document which I refer to below as the "**APOC**".

Background

7. It is necessary to set out the relevant parts of the facts so far as they appear on the evidence available at this stage. The claim relates to Polish Real Estate Investment Limited ("**the Company**"), the Ninth Defendant. The Company is incorporated under the law of Cyprus. However, its business was investment in property located in Poland.

8. The Claimant says that the Company is a joint venture between its shareholders, which are or represent certain groups of Norwegian and Polish investors, for the purpose of making such investments in property in Poland. The Claimant, which is also a Cypriot company, says that it is a 27.94% shareholder in the Company. The Claimant is an investment vehicle for Norwegian investors including two Norwegian individuals, Peter Gram ("**Mr Gram**") and Kim Steimler ("**Mr Steimler**").

9. The Company's investments were made through a closed-ended investment fund called Alpha Real Estate Fundusz Inwestycyjny Zamkniety (the "**Fund**"). The Company held 100% of the investment certificates (the "**Certificates**") in the Fund, which in turn owned real-estate assets through subsidiary companies. As I understand it, the Certificates represent ownership interests in the Fund.

10. It is said that, prior to the matters which form the subject of the claim, the Company's assets in the form of the Certificates had an approximate value of around €100 million. This is supported by evidence in the form of a witness statement from Mr Steimler dated 13 May 2016 which explains that the net assets at that time were worth about €87.5 million to €103.5 million. Those assets mainly comprised a shopping centre in Bialystok, a shopping centre in Grudziadz, some development land in Gdansk and some cash.

11. The First Defendant ("**Fazita**") was one of the original investors in the Company. Fazita is said to be associated with Wladyslaw Jaroszewicz and Michael Jaroszewicz, who are the Second and Third Defendants to the Claim. Michael Jaroszewicz is the son of Wladyslaw Jaroszewicz. Specifically, it is said that they control Fazita which is said to be their investment vehicle. Fazita has a 19.65% interest in the Company.

12. One of the other original investors in the Company was Sazia Investments Limited ("**Sazia**") controlled by Jan Jaroszewicz, who is the brother of Wladyslaw and the uncle of Michael. Sazia has a 19.47% interest in the Company. It is said that Jan Jaroszewicz and Sazia support the Permission Application.

13. The Eighth Defendant, BNP Paribas Bank Polska S.A. ("**the Bank**"), was also one of the investors in the Company and holds a 11.19% interest. The Sixth and Seventh Defendants, Jan Czeremcha and Maciej de Makay, are or were directors of the Company nominated by the Bank. As explained below, there is a question as to whether the Bank has now sold its interest.

14. There are also certain minority Norwegian and Polish investors in the Company.

15. The Fourth Defendant ("**M-JWK**") is a company incorporated under the laws of Poland, and is an indirect subsidiary of the Fund. It is said that at all material times Wladyslaw Jaroszewicz and Michael Jaroszewicz also had effective control and/or influence over M-JWK.

16. The Fifth Defendant, Anna Bandurska, is said to be an associate of Wladyslaw Jaroszewicz and Michael Jaroszewicz. In particular, Ms Bandurska is the sole board member of a company called JWK Management Sp. z.o.o. ("**JWK**"). Until 2019, JWK was the entity with the sole right to represent M-JWK and with control and conduct of its affairs.

17. Although not a defendant to the claim, another relevant entity is A-JWK Management Sp. z o.o. S.K.A. ("**A-JWK**"). A-JWK was also an indirect subsidiary of the Fund and was the owner of the Bialystok shopping centre. As I understand it, JWK also had the right to represent A-JWK and to control and conduct its affairs.

The Company

18. The shares in the Company are divided into three classes: A Shares, B Shares and Ordinary Shares. The A Shares are held by Fazita and Sazia. The B Shares are held by the Claimant. The remaining shares held by the Bank and other investors are Ordinary Shares.

19. Under the terms of the SSA (as defined below) and the Articles of Association (the "**Articles**"), each A and B shareholder may appoint up to 4 directors of the Company. The A and B shareholders then have in effect a right of veto over both resolutions of the Board and resolutions of the Company's members. So far as the Board is concerned, this is because as a matter of quorum it is necessary for at least one A director and at least one B director to be present at each meeting. Moreover, under the Articles (Regulation 81), a resolution may be passed only if consented to by all of the A and B directors present and entitled to vote. As for members resolutions, there are also quorum requirements which require a minimum number of A and B shareholders to be present (Regulation 41) and any resolution requires the affirmative vote of all A and B shareholders present and entitled to vote (Regulation 53).

20. The present directors of the Company are Wladyslaw Jaroszewicz (with Michael as his nominated alternate), Jan Jaroszewicz, Mr Gram nominated by the Claimant, Mr Steimler also nominated by the Claimant, and Mr de Makay nominated by the Bank. Wladyslaw Jaroszewicz and Jan Jaroszewicz are A Directors, Mr Gram and Mr Steimler are B Directors and Mr de Makay is an Investor Director. It is said that Mr de Makay replaced Mr Czeremcha as a director on 7 March 2016, although Mr Czeremcha has continued to represent the Bank on various occasions. I was also told that there is a question over the validity of Mr de Makay's appointment.

The SSA

21. The relationship between the parties is, at least in part, governed by a share subscription agreement dated 9 July 2007 ("**the SSA**") between the Company, the original shareholders in the Company including Fazita, and the Bank. Under the SSA, the parties thereto agreed the terms upon which the Bank would subscribe for convertible bonds, and the terms upon which the joint venture between them would be conducted.

22. The SSA is governed by English law and contains an exclusive English jurisdiction clause (see Clause 32). This is relevant to the Service Out Application.

23. Under Clause 3 of the SSA, the Bank agreed to subscribe for, and the Company agreed to issue, convertible bonds with a total nominal value of €20 million (the "**Convertible Bonds**"). They initially had a maturity date of 27 July 2010, but that was subsequently amended to 31 December 2016 (with a further possibility of extending to 31 December 2018 with the Bank's consent). In addition, on the same date as the SSA, the Bank entered into a share purchase agreement under which it agreed to purchase shares in the Company (the "**SPA**"). Certain of the provisions of the SSA also regulate the governance and management of the Company.

24. The Claimant subsequently became a party to the SSA on 19 December 2007, when it entered into a Deed of Adherence to the SSA. The SSA was also subsequently amended by certain Deeds of Amendment.

The Claim

25. In broad terms, the Claimant's claim is that the assets of the Company, being the Certificates, have been expropriated by steps taken by Wladyslaw Jaroszewicz and Michael Jaroszewicz.

26. The matters relied on and alleged by the Claimant in this respect include the following.

The 2014 SPA

27. On or around 18 December 2014, the Bank entered into an agreement with PSPT Sp. z.o.o. ("**PSPT**") pursuant to which the Bank agreed to sell its shares in the Company to PSPT for €8 million ("**the 2014 SPA**"). It is said that PSPT was at the time (and up until 14 February 2018) wholly owned and controlled by Michael Jaroszewicz (Rothe 1 [76]). It is also said by the Claimant that the 2014 SPA was kept secret from the Claimant at the time, and that it was entered into by the Bank in breach of provisions of the SSA and the Articles.

28. Under the terms of the 2014 SPA, the Bank agreed to sell its shares to PSPT for a price of €8 million. It was a condition precedent to the obligations to buy and sell the shares that the sale of the Bialystok shopping centre be completed (Clause 4.1(a)). The Claimant infers that the intention was that the net proceeds of that disposal would be used to fund the purchase by PSPT of the shares, notwithstanding that PSPT was a company owned by and controlled by Michael Jaroszewicz. However, it does not appear that this is in fact what subsequently took place.

29. As well as being signed by Michael Jaroszewicz on behalf of PSPT, the 2014 SPA was signed by Mr Czeremcha on behalf of the Bank and Ms Bandurska

on behalf of A-JWK. It appears that A-JWK was a party because it was the owner of the Bialystok shopping centre.

30. I was also shown an Annex to the 2014 SPA dated 14 February 2018 (the "**SPA Annex**"). This was entered into by, *inter alia*, the Bank, PSPT and A-JWK. It made a number of amendments to the 2014 SPA. This included amending the purchase price to €6 million, with a €4 million deposit payable by PSPT. The condition precedent relating to the sale of the Bialystok shopping centre was removed (presumably because it had already been sold by this time: see below) and replaced with a similar condition relating to the sale of the Grudziadz shopping centre. Various other changes were also made.

31. The present position in relation to the 2014 SPA is not clear. It is said that on or around 11 April 2018 the Bank purported to give notice that it had transferred all its rights and obligations under the SSA to PSPT pursuant to the 2014 SPA. However, I was told that the Claimant's most recent inquiries of the Cypriot companies registry show that the Bank is still registered as the holder of the shares. It is unclear whether the €6 million purchase price, or the deposit, has been paid by PSPT.

32. Mr Rothe says he was told by Michael Jaroszewicz at a meeting in April 2018 that "*Michael confirmed at the meeting (amongst other things) that the Bank (as per its notice) had sold its rights and obligations in respect of its shares (but not the shares themselves) in the Company for €6m, €4m having been paid with €2m deferred, and this transaction was based on an agreement entered into in 2014 and amended in February 2018*" (Rothe 1 [208]). In the meantime, it also appears that steps have been taken in relation to PSPT including the sale by Michael Jaroszewicz of his shares in PSPT to A-JWK.

The Subrogation Claim

33. Following the 2014 SPA, it is then said that in January 2016, Wladyslaw Jaroszewicz and/or Michael Jaroszewicz, through their control and/or influence over JWK, M-JWK and/or Ms Bandurska, procured that M-JWK bring a claim

against the Company in the High Court of Justice of England and Wales for around €16 million. This was done by purportedly asserting the Bank's rights in respect of the Convertible Bonds issued by the Company by way of subrogation following M-JWK having paid sums to the Bank by way of repayment of the Bonds ("**the Subrogation Claim**").

34. The Claimant relies on what is said to be the unusual feature of an almost wholly owned subsidiary of the Fund bringing a claim against the Company which held all the Certificates in the Fund. Moreover, the alleged subrogation arose as a result of M-JWK making payments to the Bank in respect of the Convertible Bonds prior to the due dates of such payments. This is because, as noted above, the final maturity date of the bonds had been amended to be 31 December 2016, with certain minimum payment amounts due in the meantime.

35. In addition, the Claimant says that the payments made by M-JWK were not in accordance with the arrangements which had been put in place for the repayment of the Convertible Bonds under a Framework Financial Settlements Agreement (the "**FFSA**") and Escrow Account Agreement (the "**Escrow Agreement**"). In broad terms, under these arrangements, the repayment of the bonds was to be made by the Fund itself from excess cashflow generated by subsidiary companies of the Fund. It is said that Wladyslaw and Michael Jaroszewicz and the Bank must have been aware that the payments made by M-JWK to the Bank were not in accordance with these arrangements.

The April 2016 PoA and the Collateral Agreement

36. On 25 April 2016, Wladyslaw Jaroszewicz, it is said without the Company's knowledge or authorisation, purported to execute a power of attorney, purportedly on behalf of the Company ("**the April 2016 PoA**"), authorising Mr Pawel Tokarski ("**Mr Tokarski**"), a Polish lawyer, to, *inter alia*, negotiate settlement on behalf of the Company of M-JWK's Subrogation Claim.

37. On 26 April 2016, Mr Tokarski then concluded a purported agreement by which the Company was to transfer to M-JWK the entirety of the Certificates

in the Fund as collateral for the Company satisfaction of M-JWK's claim (the "**Collateral Agreement**").

38. In broad terms, the Collateral Agreement provided for the Certificates to be transferred to M-JWK as collateral with M-JWK having the right to apply the market value of the Certificates in satisfaction of its claims. It appears to have been the intention that, if the market value of the Certificates as established by valuation exceeded the amount of the claims, then M-JWK would account to the Company for any surplus. However, as the Claimant points out, Clause 3(c) of the Collateral Agreement appears on one view to give M-JWK a discretion in that respect. If that is the correct interpretation, then that would clearly be a very odd feature. More generally, the Claimant says that the Collateral Agreement was uncommercial because the value of the collateral being provided (all the Certificates, which were said to have a value of approximately €100 million) was so far in excess of the amount of the alleged debt (approximately €16 million). In addition, the Claimant points to the fact that Wladyslaw and Michael Jaroszewicz appear to have caused M-JWK to sue its own parent company and to have then themselves appointed Mr Tokarski to enter into an agreement relating to that claim on behalf of the Company.

39. It appears that the Certificates were then transferred by the Company to M-JWK some time after the Collateral Agreement was entered into but before 11 May 2016 when Mr Steimler and Mr Rothe were told that the transfer had taken place (Rothe 1 [147]).

<u>The 28 April 2016 Board meeting</u>

40. On 28 April 2016, a meeting of the Board of the Company took place, with the purpose, *inter alia*, of approving the appointment of legal representatives to advise the Company on defending M-JWK's claim. However, Wladyslaw Jaroszewicz and Michael Jaroszewicz took the position that the meeting was not valid because no company secretary was present. The Claimant says that an inference should be drawn that they took this position with the intention of preventing the Company from defending M-JWK's claim. The existing

company secretary had resigned on 27 April 2016 which the Claimant says was the result of a veiled threat by Wladyslaw Jaroszewicz (Rothe 1 [131]).

41. In May 2016, an annex to the Collateral Agreement was also entered into (the "**Annex**"). It is said that the Annex imposed a similar arrangement to the Collateral Agreement whereby, if M-JWK's claim against the Company was not satisfied by 31 December 2017 (rather than 30 June 2016 under the Collateral Agreement), M-JWK would be entitled to have recourse to the Certificates in satisfaction of its claim.

The Cyprus Injunction

42. On 6 May 2016, Wladyslaw Jaroszewicz and Fazita obtained an *ex parte* injunction from the courts of Cyprus against the Company, the Claimant, Sazia, Jan Jaroszewicz and Mr Steimler prohibiting implementation of the resolution of the Board, made at the 28 April 2016 board meeting, which had authorised the Company's directors to obtain legal advice and representation in respect of M-JWK's claim (the "**Cyprus Injunction**"). The application for the injunction appears to have been subsequently withdrawn.

Exit discussions

43. During May 2016, the Board of the Company (including Mr Gram and Mr Steimler) discovered various matters including that the Company was no longer the owner of the Certificates, and received copies of the Collateral Agreement (but not the Annex) and the 2016 PoA (see Rothe 1 [148]). Mr Gram and Mr Steimler then saw the Annex for the first time on or about 17 June 2016 (Rothe 1 [156]).

44. During the summer and autumn of 2016, there were discussions regarding a potential exit by the Claimant from the Company. It appears that lawyers on behalf of M-JWK agreed to give undertakings in relation to the Certificates. It is said that this was at that time a source of reassurance to Mr Steimler and Mr

Gram that the Certificates would not be sold, transferred or dealt with by M-JWK (Rothe 1 [156]).

45. In December 2016, the Company submitted to the English Court's jurisdiction in relation to the Subrogation Claim. Certain extensions to the time for the filing of a defence to the claim by the Company were then granted by agreement.

46. The exit discussions culminated in a framework agreement between, *inter alia*, the Claimant, PSPT and Mr Steimler and Mr Gram dated 2 March 2017 (the "**Framework Agreement**"). In broad terms, under that agreement, and subject to the satisfaction of certain conditions precedent, PSPT was to make an offer to purchase the shares of the Claimant and other shareholders in the Company at a price calculated in accordance with the agreement. It appears however that no such offers have in fact been made. It was not said to me that this was a breach of the Framework Agreement by PSPT and it may simply be that the conditions precedent to the obligation on PSPT to make such offers have not been satisfied.

The Default Judgment

47. It is then said that, on or around 3 March 2017, Wladyslaw Jaroszewicz and/or Michael Jaroszewicz procured that M-JWK entered default judgment against the Company in the sum of €16,248,116, inclusive of interest, with costs to be assessed (the "**Default Judgment"**). This is said to have only been obtainable because the Company did not file a Defence because it was believed by Mr Gram and Mr Steimler that the exit arrangements had been generally agreed (Rothe 1 [176], [181]). As noted above, the Framework Agreement had been entered into on 2 March 2017. M-JWK's solicitors then served the Default Judgment on the Company on 6 March 2017.

The sale of the Bialystok shopping centre

48. On or around 9 November 2017, the Alfa shopping centre in Bialystok was sold for around €92 million. The Claimant and the Company were aware of this at the time. The Claimant pleads that the sale of the Bialystok shopping centre meant that, during the period when it is said that M-JWK improperly held the Certificates, a significant asset which was properly an asset of the Company was disposed of (APOC, paragraph 54). In the original Particulars of Claim (paragraph 54), it was also said that the proceeds of this sale were not paid, as they should have been, to the ultimate benefit of the Company. However, that allegation has now to some extent been modified in the APOC.

49. In this respect, it is clear from Mr Rothe's second witness statement that the Claimant was told at a meeting which took place in April 2018 that the sale of the shopping centre had generated net proceeds of €32 million of which €5-9 million was said to be available for distribution (Rothe 2 [11.1]). It appears that the proceeds were used, at least in part, to repay or prepay certain debt and tax liabilities of the Fund (Rothe 2 [11.3]). As I understand it, the debt which was settled included certain bonds issued by Fund companies, including A-JWK and M-JWK, to the Fund. The Claimant complains that this was prejudicial because it restricted the ability of the Fund to obtain distributions from the Fund companies by way of repayment of that debt.

The Return Transfer Agreement

50. On or around 16 October 2018, Wladyslaw Jaroszewicz, Mr de Makay, Mr Steimler and Mr Gram signed a purported Return Transfer Agreement between the Company and M-JWK (**"the Return Transfer Agreement"**), pursuant to which M-JWK was to return the Certificates in the Fund that it had obtained pursuant to the Collateral Agreement. It appears that the Certificates were then returned to the Company.

51. The Claimant however challenges the validity of the Return Transfer Agreement as a matter of Polish law because it says that the intention behind this agreement was to facilitate the appropriation of the Certificates through the Bailiff Sales (APOC, paragraph 60).

Issuance of Series H Certificates

52. In July 2018 the Fund issued 261,091 certificates in a new Series H class (the "**Series H Certificates**"). It is said that this was not disclosed to or approved by the Company at the time, but that it diluted the Company's interest in the Fund. The Claimant says that it is to be inferred that the entity or entities to whom the Series H Certificates were issued was M-JWK or another entity or entities ultimately owned or controlled by Wladyslaw Jaroszewicz and/or Michael Jaroszewicz. It says that this is supported by, amongst other things, what happened in relation to the Series I-K Certificates. However, it is to be noted that M-JWK was itself owned by the Fund.

The First and Second Bailiff Sales

53. By around 3 December 2018, after the Certificates had purportedly been returned to the Company, Wladyslaw Jaroszewicz and/or Michael Jaroszewicz procured that M-JWK execute the Default Judgment against the Certificates held by the Company, by way of a bailiff seizure and sale of the Certificates. It is said that the relevant Certificates were acquired by M-JWK and for less than their true value.

54. It is then said that a second bailiff sale took place, possibly on or around 11 June 2009. Again, it is said that the relevant Certificates were sold to M-JWK for less than their true value.

The Series I-K Issuances

55. Then, it is said that on 4 November 2019, an Extraordinary Meeting of Investors in the Fund approved the issue of further new certificates. It is said that the meeting was not on notice to the Company and to its full board. Pursuant to the decision, between November 2019 and May 2020, the Fund issued around a further 59,308,000 investment certificates in new Series I, J and K (the "**Series I-K Certificates**") which it is said again diluted the

Company's interest in the Fund (to the extent that the Company had any such interest after the Bailiff Sales). The Series I-J Certificates were purchased by Alfa B Alfa Park 5 sp. z o.o. SKA ("**Alfa B**"). It is said that Michael Jaroszewicz was at all material times the ultimate beneficial owner of Alfa B and that it is to be inferred that Wladyslaw Jaroszewicz also exercised a degree of control over Alfa B.

The Third Bailiff Sale

56. Finally, it is said that a third bailiff sale took place probably in April 2020 (together with the first and second bailiff sales, the "**Bailiff Sales**"). On this occasion, the Certificates were acquired by another entity, M2 Alfa Park 5 Sp. z.o.o. SKA ("**M2 Alfa Park**"), which is also said to be controlled (but not owned) by Wladyslaw and/or Michael Jaroszewicz. It is said by the Claimant that the sale was for a price at significantly less than their true and fair value.

57. The position in relation to the further issuances of the Certificates and the Bailiff Sales is complex. One of the peculiarities is that M-JWK was itself a company owned by the Fund. As such, there is an element of circularity in that a subsidiary company was in effect acquiring interests in its own shareholder. That clearly raises a question as to the reasons why this was being done. However, it may also mean that, in terms of the causing of loss to the Company, the key steps were the ones where the Company's interest in the Fund was extinguished, namely, the issuance of the Series I-J Certificates and the Third Bailiff Sale.

Overall

58. Overall, the Claimant says that Wladyslaw Jaroszewicz and/or Michael Jaroszewicz deliberately and dishonestly conspired to engineer a situation where, as a result of a purported debt (itself wrongfully procured) of around €16 million owed to M-JWK, the Company appears to have been entirely divested of assets worth over €100 million in 2015. The Claimant invites the inference to be drawn that those assets or the proceeds of sale of those assets

are now in the hands of entities owned and/or controlled by Wladyslaw Jaroszewicz and/or Michael Jaroszewicz.

59. So far as the Fifth to Eighth Defendants are concerned, it is said that they acquiesced in and/or failed to take steps to prevent and/or failed to inform the Company about the alleged wrongdoing and were therefore party to it.

The Alleged Loss

60. The loss which it is said that the Company has suffered is pleaded in paragraph 70 of the APOC and comprises:

(1) The alleged loss of value of the Certificates and loss of profit on such Certificates following the Bailiff Sales which took place between December 2018 and 2020.

(2) The loss of the value of the Series H and Series I-K Certificates and loss of profit on such certificates, and the loss of value in the Certificates caused by the issues of the Series H and Series I-K Certificates.

The Derivative Claims

61. The APOC plead both direct and derivative claims brought by the Claimant. The Claimant pleads the following derivative claims:

(1) against Fazita and the Bank for breach of the SSA (the "**SSA Claims**");

(2) against all of the First to Eighth Defendants under Article 415 of the Polish Civil Code ("**PCC**") (the "**Article 415 Claims**");

(3) against Wladyslaw Jaroszewicz, Michael Jaroszewicz, Mr Czeremcha and Mr de Makay for breach of the fiduciary duties they owed to the Company under Cypriot law (the "**Fiduciary Duty Claims**").

62. The Claimant also seeks to set aside the Default Judgment on the basis of alleged fraud in relation to and involving M-JWK (the "**Default Judgment Claim**"). As part of this claim, the Claimant also claims restitution, alternatively damages or equitable compensation, in respect of all benefits said to have flowed from the Default Judgment (APOC, paragraph 86). This claim is said to lie against M-JWK itself, but also against Fazita, Wladyslaw Jaroszewicz, Michael Jaroszewicz, and Ms Bandurska.

63. It is also convenient at this point to mention the issue of reflective loss. The Claimant's primary position is that the question of whether the principle barring the recovery of reflective loss (the reflective loss principle) applies is governed by Cypriot law, as the law of the place of incorporation of the Company, and that, as a matter of Cypriot law, the reflective loss principle would bar any direct claim by the Claimant for damages for the diminution in value of its shareholding in the Company. However, the Claimant says in the alternative that, if the issue is governed by Polish law as the *lex causae*, then it would be entitled to maintain such a direct claim under Article 415 because Polish law does not contain the reflective loss principle or an equivalent to it.

The M-JWK Action

64. It is to be noted that on 17 June 2022, M-JWK issued proceedings in the High Court against, *inter alios*, the Company and the Claimant seeking various declarations relating to the Default Judgment (the "**M-JWK Action**"). The Second and Fourth to Seventh Defendants in the M-JWK Action filed their defence on 19 December 2022. The Third Defendant in the M-JWK Action filed its defence on 28 February 2023.

65. I was informed that the Claimant in that action (M-JWK) and the Second to Seventh Defendants (the Claimant in this action, Sazia, Jan Jaroszewicz, Mr Steimler, Mr Gram and Mr Rothe) have agreed an order under which the M-JWK Action is to be stayed until the final determination of the Permission and Service Out Applications (i.e. including until the determination of any appeals or challenge to any permissions which are given to bring the claim and for

service out). Following this, there is to be a joint directions hearing of the M-JWK Action and the present claim once service of the present claim has taken place and any defences have been filed.

Procedural History

66. The Claim Form was issued on 25 April 2022. The same day, the Claimant filed an application for permission to continue the derivative claims.

67. The Claimant also applied for permission to apply for an extension to the validity of the Claim Form on 22 June 2022. This permission was granted by Deputy ICC Judge Greenwood by an Order dated 24 June 2022.

68. The 'first stage' permission for bringing the derivative claims required by CPR Part 19 was granted by Mr Justice Meade on 16 September 2022. The Company was then made a respondent to the application as required by CPR r. 19.15(3) and the application was served on the Company on 27 September 2022 in Cyprus. On 4 October 2022 ICC Judge Burton gave directions for the determination of the 'second stage' of the Permission Application, including for the filing of evidence. However, no evidence has been filed by the Company and it does not appear at this hearing.

69. On 13 October 2022, the Claimant filed an application to extend the validity of the Claim Form. ICC Judge Prentis granted such permission on 17 October 2022 such that the Claim Form is valid until 14 March 2024.

The Permission Application

70. I deal first with the Permission Application.

<u>The Legal Framework</u>

71. Given that the Company is incorporated outside England, it falls outside the substantive provisions of the Companies Act 2006 allowing derivative claims

to be pursued by a shareholder: see section 260(1) and the definition of "*company*" in section 1(1).

72. However, prior to the coming into effect of the Companies Act 2006, the fact that the claimant was a member of a foreign company was no bar to the jurisdiction of the English court in relation to a derivative claim. In *Konamaneni v Rolls-Royce Industrial Power (India) Ltd* [2002] 1 WLR 1269, Lawrence Collins J held that the English court had jurisdiction to entertain a derivative claim brought by shareholders on behalf of a foreign company.

73. Further, the Courts have taken the view that the provisions of the Companies Act 2006 dealing with derivative claims in relation to English incorporated companies have not ousted this ability to deal with derivative claims in relation to foreign incorporated companies: *Novatrust Limited v Kea Investments Limited & Ors* [2014] EWHC 4061 (Ch), per HHJ Pelling QC at [26]-[27]; *Kallakis v AIB Group PLC & Ors* [2020] EWHC 460 (Comm), per Moulder J at [36]; see also *Abouraya v Sigmund* [2014] EWHC 277 (Ch), per David Richards J at [15]-[16].

74. It follows that the common law principles governing the circumstances in which the court will give permission for the commencement or continuation of a derivative claim apply to the present proceedings. Nevertheless, the procedure in sections 261, 262 and 264 (as the case may be) and in CPR r. 19.15 is applicable to companies which fall outside the Companies Act 2006 pursuant to CPR r. 19.17(4), (5).

75. As David Richards J stated in *Abouraya v Sigmund* [2014] EWHC 277 (Ch) at [16], the modern statement of the common law principles is contained in the judgment of the Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No.2)* [1982] Ch 204. This repeated and built on the statement of principle contained in the earlier decision of the Court of Appeal in *Edwards v Halliwell* [1950] 2 All ER 1064. At p.222, the Court of Appeal in *Prudential Assurance* (above) stated:

> "*... the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in Foss v Harbottle*."

76. As summarised by the Court of Appeal at p.211, the exception arises:

> "*where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholder's action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue*."

77. As to the meaning of "*prima facie case*", in *Abouraya v Sigmund* (above) at [53], David Richards J said:

> "*A prima facie case is a higher test than a seriously arguable case and I take it to mean a case that, in the absence of an answer by the defendant, would entitle the claimant to judgment. In considering, whether the claimant has shown a prima facie case, the court will have regard to the totality of the evidence placed before it on the application*."

78. The application of this test was further discussed in in *Bhullar v Bhullar* [2016] BCC 134 by Morgan J at [21]-[26].

79. As noted above, the first element of the test identified by the Court of Appeal concerns a *prima facie* case of entitlement to the relief claimed. The second element concerns a *prima facie* case that the action falls within the scope of the rule in *Foss v Harbottle*. That is the approach where the company is an English incorporated company. However, where the company is a foreign incorporated company, then the question arises of which law governs the right of a shareholder to bring a derivative claim.

80. In *Konamaneni* Lawrence Collins J identified two possibilities (at [45]): first, English law as the *lex fori* on the basis that the right of shareholders to sue is a matter of procedure; secondly, the law of the place of incorporation of the company as the law governing the relationship of the company and its shareholders. As between these options, he said that, if it had arisen for decision, he would have held that the law of the place of incorporation governs (see [50]). In *Novatrust Limited v Kea Investments Limited & Ors* [2014] EWHC 4061 (Ch) HHJ Pelling QC at [31] also applied the law of the place of incorporation to this question. I propose to adopt the same approach.

81. Accordingly, in the present case, on this aspect the Claimant must establish a *prima facie* case that the requirements for bringing a derivative action under Cypriot law are satisfied.

Whether the English Court should determine the question

82. Although I did not receive submissions specifically on this point, there is also a further issue which in my view requires to be considered. This is whether the Court should, even if it has jurisdiction to do so, proceed to determine the question of whether or not permission to bring the derivative claims should be given, or whether this should left to the Cypriot courts as the courts of the place of incorporation of the Company.

83. In this respect, HHJ Pelling QC stated in *Novatrust Limited v Kea Investments* [2014] EWHC 4061 (Ch) that (at [25]):

> "*Prior to the coming into effect of the Companies Act 2006, the English courts had jurisdiction over foreign company derivative claims to the extent that such claims were permitted by the law of the country of incorporation of the company concerned – see Konamaneni v. Rolls Royce Industrial Power (India) Limited and others [2002] 1 WLR 1269 ("Konamaneni") per Lawrence Collins J as he then was at [44] – [50] but subject to the qualification that the Courts of the place of*

> *incorporation of the company concerned would generally be the most appropriate forum for determining such a dispute and thus generally England would not be clearly the appropriate forum for determining such a dispute – see Konamaneni at [65] to [67].*"

84. The point referenced by HHJ Pelling QC from *Konamaneni* is perhaps more clearly expressed by Lawrence Collins J at [128] of the judgment in that case (see also [55]). At [128], he said:

> "*In my judgment the courts of the place of incorporation will almost invariably be the most appropriate forum for the resolution of the issues which relate to the existence of the right of shareholders to sue on behalf of the company.*"

85. However, Lawrence Collins J also said (at [66]) that:

> "*I also consider that the effect of Pergamon Press Ltd v Maxwell [1970] 1 WLR 1167 is, at the least, that if issues arise relating to the exercise of what Pennycuick J described as discretionary powers of management, then I should accord considerable weight to the potential role of the courts of the place of incorporation. I doubt whether they have exclusive jurisdiction to deal with such issues. For example it may be wholly unjust to require recourse to an offshore haven to pursue fraudulent directors in a case which has no connection with the jurisdiction other than that it is the place of incorporation.*"

86. The statements made in *Konamaneni* were also referred to and applied by Lewison J in *Reeves v Sprecher* [2008] BCC 49. In that case, Lewison J treated these statements as being relevant to the decision whether to grant permission under Part 19 to bring derivative claims. He decided that the Courts in Nevis (where the company was incorporated) should decide whether or not there should be permission to bring the derivative claims. Lewison J stated (at [17]):

> "*In my judgment this is not an exceptional case of the kind to which Lawrence Collins J. referred. No doubt in the sort of case that he was contemplating the foreign corporation would have had some assets within the jurisdiction; or the acts of the fraudulent directors might have been committed within the jurisdiction. None of that applies to the present case. The only connection that PTM has with this jurisdiction is the fact that Mr Reeves lives here and has chosen to instruct an English legal team*."

87. It is apparent from Lewison J's approach that the question of which forum is the proper one for deciding any issues which relate to the existence of the right of shareholders to sue on behalf of the company is closely related to the question of which forum is the proper one for determining those claims themselves.

88. *Konamaneni* itself concerned a derivative claim in relation to an Indian company, Lawrence Collins J set aside the order which had been made for service out of the jurisdiction. However, that was a case where he considered that overall the Indian connections with the case were "*overwhelming*" ([188]).

89. In the present case, so far as the underlying claims are concerned, there are significant connections with this jurisdiction. I address the evidence in relation to this in connection with the Service Out Application. As explained there, I conclude that England is the proper forum for the determination of those claims. Conversely, other than the fact that the Company is incorporated in Cyprus, and as a result Cypriot law governs the directors' duties, there appear to be no material connections with Cyprus. This appears to make the present case closer to the type of case which Lawrence Collins J had in mind at [66] of *Konamaneni* rather than the case facing Lewison J in *Reeves v Sprecher*.

90. In the present case, it is also presently unclear to what extent there may be a dispute as to the existence of the Claimant's right to sue on behalf of the Company. The Company has not sought to dispute the Permission Application. Even if there was subsequently such a dispute raised by the relevant

Defendants, then I do not see that the English Court would have any real difficulty in resolving it given the close similarity between English and Cypriot law on this point.

91. As such, on the facts of this case, I think that it is appropriate for this Court to proceed to determine the Permission Application.

Prima facie case of entitlement to the relief claimed

92. In my view, it is helpful to begin this part of the analysis by considering the position in relation to the Article 415 Claims, since they engage the position of all of the Defendants.

Article 415 Claims

93. The Claimant submits that there is (at least) a *prima facie* case against the First to Eighth Defendants pursuant to article 415 of the Polish Civil Code. In support of its position, the Claimant has adduced the first witness statement of Mr Ola Rothe, and two expert reports of Polish law from Mr Pawel Moskwa, an advocate and partner in the firm of MJH Moskwa, Jarmul, Haldyj i Partnerzy. Mr Moskwa is an independent expert and his evidence has been prepared in accordance with the requirements of CPR Part 35.

94. Article 415 of the Polish Civil Code in broad terms imposes liability on anyone who causes damage to another person by their fault. Mr Moskwa explains that the prerequisites for liability under article 415 are: (i) the occurrence of a harmful event, (ii) the occurrence of damage, (iii) the existence of an adequate link between the harmful event and the damage, (iv) unlawfulness of the conduct of the perpetrator, and (v) fault on the part of the perpetrator.

95. So far as unlawfulness is concerned, the relevant act must be contrary to the applicable legal order which means contrary to specific legal provisions or normal norms and customs (referred to as "*the community principles of coexistence*"). Mr Moskwa says that "*the community principles of coexistence*

are moral norms commonly accepted in the whole society or social group, ordering or prohibiting a specific behaviour, even though it is not prescribed or prohibited by a specific legal norm" (Moskwa 1 [10]).

96. So far as fault is concerned, it is said that: "*the essence of the fault is personal culpability of a given behaviour, that is assessment whether, in the given circumstances, the perpetrator should have and could have acted in such a manner, as not to cause the damage*" (Moskwa 1 [15]) and that "*[w]hat matters is, whether in the given circumstances he could be expected to have foreseen that his behaviour would cause or might cause the above effect*" (Moskwa 1 [16]). As I understand it, this is therefore an objective standard rather than one which necessarily requires a subjective knowledge or suspicion of wrongdoing on the part of the defendant. However, it is also said that "*[t]he degree of fault may also be important in determining the scope of claims in case of joint and several liability of several persons.*" (Moskwa 1 [17])

97. Mr Moskwa also explains that in addition to the perpetrator causing the damage directly, the tort liability may be also borne by other persons pursuant to the provisions of article 422 of the Polish Civil Code ("*Liability for damage is borne not only by the direct perpetrator but also by any person who incites or aids another to cause damage and a person who knowingly takes advantage of damage caused to other person*"). The liability of such persons is, pursuant to article 441(1), joint and several with the perpetrator, if he is also obliged to redress the damage.

98. Mr Moskwa expresses the view that, as a matter of Polish law, assuming that the facts pleaded in the original Particulars of Claim are established, then the Company would be able to establish liability against the other Defendants under article 415. Mr Moskwa also addresses the Defendants' potential defences to the Article 415 Claims but concludes that those defences are unlikely to succeed.

99. For present purposes, I accept the evidence of Mr Moskwa as to the relevant matters of Polish law, principally relating to the requirements for bringing a

claim under article 415. That evidence appears *prima facie* to be credible and I have no reason to doubt it.

100. Mr Riches fairly pointed out that Mr Moskwa's evidence goes beyond merely stating the relevant parts of Polish law but also applies those principles to the facts as pleaded in the original Particulars of Claim. As such, it may be said that he has expressed an opinion on the ultimate question which is a matter for this Court. It may also be that at a trial these parts of his evidence would be considered to be inadmissible for this reason. However, at the present stage of the proceedings, when the Court is concerned with the question of whether the *prima facie* case standard is met, it seems to me to be legitimate to take into account all of Mr Moskwa's evidence. That is particularly so because the parts of his evidence where he has applied the requirements of Polish law to the pleaded facts also helpfully identify the relevant parts of Polish law which are said to satisfy the 'unlawfulness' requirement under Article 415.

101. That said, whilst I have taken into account the views which Mr Moskwa has expressed about whether the pleaded facts would, if assumed to be true, satisfy the requirements of Article 415, I have also considered the question for myself. That is not least because Mr Moskwa's conclusions are expressed in summary form and do not elaborate on how the underlying facts, which I have set out above, are said to give rise to claims against each of the Defendants. Further, I also note that his views were expressed in relation to the original Particulars of Claim which has subsequently been amended.

Article 415 Claims – Fazita, Wladyslaw and Michael Jaroszewicz and M-JWK

102. As to the ingredients of a claim under Article 415, Mr Moskwa expresses the opinion that, assuming that the factual matters in the Particulars of Claim are established, then the Company would be able to establish liability against Fazita and M-JWK under Article 415 in connection with:

    (1) breach of community principles of life (this appears to be synonymous with the community principles of coexistence referred to above);

(2) breach of the general prohibition against appropriation of someone else's movable property or property rights (derived from article 284 of the Polish Criminal Code); and

(3) breach of the general prohibition of causing another person to disadvantageously dispose of property by misleading him, or by taking advantage of a mistake or inability to adequately understand the actions undertaken (derived from article 286 of the Polish Criminal Code).

103. It is said that liability would be established against Wladyslaw Jaroszewicz and Michael Jaroszewicz by reason of the same matters together with breach of the general prohibition of causing damage to an entity by person managing its business by way of exceeding powers granted to such person or by failing to perform his duties (derived from article 296 of the Criminal Code), including breach of the obligation of loyalty and to act in good faith, which they owed to the Company by virtue of their positions as manager/director of the Company.

104. In my view, the evidence discloses a *prima facie* case against Wladyslaw Jaroszewicz, and Michael Jaroszewicz in this respect.

105. First, although there appears to have been a legal basis for the Subrogation Claim, it appears unusual for what was in effect a wholly owned subsidiary of the Fund to bring an action against the Company which owned all the Certificates in the Fund. Further, on the evidence which I was shown as to the value of the assets of the Fund, the nature of the Collateral Agreement and the Annex in relation to the value of the security granted relative to the amount of the debt do appear *prima facie* to be uncommercial and at least call for explanation. It may be that such an explanation will be forthcoming. However, absent such an explanation, I see that the Court could infer that the purpose of these steps was to enable M-JWK, and through it, Wladyslaw and Michael Jaroszewicz, to obtain ownership and control of the Certificates. It may well be the case that the Collateral Agreement did not itself cause the Company any loss, since the Certificates were subsequently returned to the Company. But,

even if this is right, the evidence of the conduct of Wladyslaw and Michael Jaroszewicz in relation to the commencement of the Subrogation Claim and the entry into the Collateral Agreement would in my view be at least potentially supportive of the Claimant's claim arising out of the subsequent steps in the chronology.

106. As to the subsequent steps, the key parts of the chronology appear to be the obtaining of the Default Judgment in March 2017, followed by the Bailiff Sales and the issuance of the new Series H-K certificates. The timing of the Default Judgment, coming immediately after the entry into the Framework Agreement, appears odd, and raises a question as to what the purpose of this step was. The Bailiff Sales are on their face unusual in that the sales appear to have taken place to associated parties (M-JWK and Alfa B) and the evidence put forward by the Claimant is that they were at prices much lower than fair value. The issuance of the Series H-K Certificates also appear on its face unusual since they were again issued in large part to M-JWK, which was a subsidiary of the Fund.

107. More generally, looked in the round, the Claimant's case is that, prior to the steps complained of, the Company had Certificates in the Fund worth €100 million. At the end of those steps, it appears to have been left with nothing, save for the discharge of approximately €16 million of Convertible Bonds owed to the Bank. The evidence suggests that Wladyslaw and Michael Jaroszewicz were the principal instigators of these steps.

108. Whilst Wladyslaw and Michael Jaroszewicz may of course have a compelling answer to the matters raised, for all these reasons, in my judgment, the Claimant has at this stage demonstrated a *prima face* case in relation to the Article 415 Claims against them.

109. So far as M-JWK is concerned, it held the Certificates at the time of the sale of the shopping centre, was the recipient of the transfer of the Certificates pursuant to the Collateral Agreement and was the claimant in the Subrogation Claim, which the Claimant contends was a step in the chain of allegedly

unlawful conduct. It also appears to have been a principal recipient of the Certificates consequent on the Bailiff Sales and of the Series H-K certificates. There is therefore, in my view, material also to support a *prima facie* case under article 415 against M-JWK.

110. So far as Fazita is concerned, it is said that Wladyslaw Jaroszewicz's and Michael Jaroszewicz's conduct involved acting through Fazita and the knowledge and/or acts of Wladyslaw Jaroszewicz and Michael Jaroszewicz are to be attributed to Fazita (and/or Fazita is liable for such acts) (APoC, paragraph 66(a)(v)). The part of this claim based on attribution to Fazita of the acts of Wladyslaw and Michael Jaroszewicz was not developed in any detail. However, Mr Riches also explained that it was the Claimant's case that Fazita was also liable under Article 415 for its own omissions since, fixed with the knowledge of Wladyslaw and Michael Jaroszewicz , it failed to warn the other shareholders or take its own steps as a shareholder to prevent loss to the Company. I accept that there is a *prima facie* case in this respect.

Article 415 Claims – Ms Bandurska, Mr Czeremcha, Mr de Makay and the Bank

111. The claims against the Fifth to Eighth Defendants are of a different nature. They are dealt with together in the APoC at paragraph 67 where it is alleged that they at least suspected (or failed to carry out due diligence in respect of) the wrongdoing of Wladyslaw Jaroszewicz, Michael Jaroszewicz, Fazita and/or M-JWK.

112. Mr Moskwa expresses the opinion that, assuming that the factual matters set out in the original Particulars of Claim are established, then the Company would be able to establish liability against them under article 415 in connection with:

(1) breach of community principles of life;

(2) breach of the general prohibition against appropriation of someone else's movable property or property rights (derived from article 284 of the Criminal Code);

(3) breach of general prohibition of causing another person to disadvantageously dispose of property by misleading him, or by taking advantage of a mistake or inability to adequately understand the actions undertaken (derived out from article 286 of the Criminal Code); and

(4) breach of general prohibition of causing damage to an entity by person managing its business by way of exceeding powers granted to such person or by failing to perform his duties (article 296 of the Criminal Code).

113. So far as Ms Bandurska is concerned, she was not a director of the Company. It is however said that she was appointed as a director or officer in relation to various entities in the Fund structure. In particular, she is said to have been the sole board member of JWK which until 2019 had the right to represent M-JWK and with control and conduct of its affairs. There is some evidence of her direct involvement in the matters complained of: she did, for example, give the witness statement for the Subrogation Claim and was involved with the enforcement of the Default Judgment and the Bailiff Sales. Mr Rothe also gives evidence that Wladyslaw and Michael Jaroszewicz had control and influence over Ms Bandurska and that she was their close associate.

114. Aside from her own involvement, it also appears that the basis for the claims under article 415 rests on Ms Bandurska's alleged knowledge of the conduct of Wladyslaw and Michael Jaroszewicz and her alleged failure to intervene or investigate. Mr Moskwa considers that her liability would arise in part as the abettor to Fazita, Wladyslaw and Michael Jaroszewicz and M-JWK (presumably pursuant to article 422) and in part as the direct perpetrator (in relation to the community principles of coexistence). Overall, I therefore consider that the evidence discloses a *prima facie* case under article 415 and article 422 against Ms Bandurska.

115. The case against the Bank and the two Bank directors, Mr Czeremcha and Mr de Makay is, however, in my view rather different. It is put in part on the steps taken in relation to the 2014 SPA. The Claimant relies on this as evidence of the Bank and Mr Czeremcha being prepared to deceive the Claimant and allow a breach of the SSA to occur. However, as explained below, I do not consider that the evidence supports a case that the entry into the 2014 SPA was in breach of the SSA or the Articles. In any case, the 2014 SPA does not itself appear to be directly related to the alleged loss caused to the Company or to have caused loss to the Company itself.

116. Aside from this, the Claimant's case is principally based on the contention that an inference should be drawn that Mr de Makay and, through him, the Bank knew or suspected the alleged wrongful conduct of Wladyslaw and Michael Jaroszewicz but turned a blind eye.

117. There is however no real evidence that the Bank or Mr Czeremcha or Mr de Makay were involved in, or were aware of, the steps being taken in relation to grant of the 2016 PoA or the entry into the Collateral Agreement, still less that they were aware of or a party to what is said to have been their intended purpose. The Bank and its representatives were aware that M-JWK was paying the Convertible Bonds early and that such payment may not have been consistent with the arrangements put in place under the FFSA and the Escrow Agreement for repaying the Convertible Bonds. There is also some evidence that the Bank and Mr de Makay may have been aware that M-JWK's purpose in making the payments was to enable it to bring a subrogated claim against the Company (Rothe 1 [144]). However, it is difficult to see that this supports the case that the Bank and its representatives had any involvement in the alleged misconduct of Wladyslaw and Michael Jaroszewicz in relation to the grant of the 2016 PoA and the entry into the Collateral Agreement. In any event, as explained above, it does not appear that the Collateral Agreement itself has caused the Company any loss (since the Certificates were subsequently returned by M-JWK to the Company).

118. As described above, the key events which appear to have caused loss to the Company were the entry of the Default Judgment followed by the Bailiff Sales and the issuance of the Series H-K certificates. However, there is no evidence which I was shown of the involvement of the Bank, Mr Czeremcha or Mr de Makay in these matters.

119. Mr Riches also relied on the fact that Mr de Makay had been involved in causing an application to be made in the Company's name to the Warsaw Bankruptcy Court for it to be placed into an insolvency proceeding (Rothe 1 [264]). However, it is difficult to see that the Court could draw an inference from this, whether by itself or in conjunction with any other matter, that the Bank and its representatives had been involved in the alleged wrongdoing by Wladyslaw and Michael Jaroszewicz.

120. I have taken into account that Mr Moskwa opines that, if the facts pleaded in the original Particulars of Claim are assumed to be true, then he considers that the requirements under Article 415 are satisfied in relation to the claims against the Bank, Mr Czeremcha and Mr de Makay. However, as noted above, his evidence contains no attempt to link the evidence and the chronological narrative to the requirements for a claim under Article 415. I have also borne in mind that the Claimant may reasonably say that it has not been provided with full information by the Defendants. However, it is still necessary for the Claimant to show a *prima facie* case. Having considered the matter for myself, I do not see that the Claimant has shown a *prima facie* case on the evidence against the Bank, Mr Czeremcha or Mr de Makay.

Knowledge of the Claimant

121. I have also borne in mind that there is evidence that the Claimant and its representatives acquired knowledge of various of the matters which are now said to give rise to the wrongdoing at various times in the chronology. Much of this is set out in Mr Rothe's second witness statement to which I was referred. For example, in May 2016 the Claimant became aware of the Collateral Agreement and the transfer of the Certificates to M-JWK. The

Claimant was also aware of the Subrogation Claim and that it was being pursued by M-JWK in England, and it became aware in March 2017 that the Default Judgment had been entered.

122. Mr Riches submitted that this evidence had to be seen in the context of the closeness of the relationship between the parties at that stage and the level of trust which the Claimant, Mr Steimler and Mr Gram placed in Wladyslaw and Michael Jaroszewicz.

123. It is in any event difficult to know how Polish law would treat these matters and whether or how it would regard them as giving rise to a defence to a claim under Article 415. Mr Moskwa has analysed these matters as giving rise to a potential defence of contributory negligence, but he says that in his view the Claimant has good and reasonable arguments to the contrary. In my judgment, these matters might be capable of forming a defence by some or all of the Defendants to some or all of the Polish law claims made under Article 415. However, in the absence of the Defendants having yet provided any answer to the Claimant's claim and evidence and in the absence of any further Polish law evidence explaining how these matters would give rise to such a defence as a matter of Polish law, they do not cause me to conclude now that the Claimant has not demonstrated at this stage a *prima facie* case against the First to Fifth Defendants.

124. I would also note that the initial failure by the Claimant to act after becoming aware in May 2016 of the Collateral Agreement and the transfer of the Certificates may be explained at least in part by the discussions about the exit which then subsequently took place and the assurances which had been given that M-JWK would not deal with the Certificates. Mr Rothe has also given evidence (Rothe 1 [182]) explaining why Mr Steimler and Mr Gram were not overly concerned about the Default Judgment at the time, essentially because the debt remained in the group (because M-JWK was owned by the Fund) and assurances had been given in relation to dealings with the Certificates.

Fiduciary Duty Claims

125. The Claimant also submits that there is a *prima facie* case against Wladyslaw Jaroszewicz, Michael Jaroszewicz, Mr Czeremcha and Mr de Makay for breach of fiduciary duties they owed to the Company under Cypriot law (i.e. the Fiduciary Duty Claims).

126. Each of those individuals was a director, or an alternate director, of the Company for some or all of the relevant period. I accept that there is a *prima facie* case that, as a matter of Cypriot law, they owed the duties to the Company as alleged by the Claimant in the APOC at paragraphs 30 and 32.

127. Further, on the basis of the matters pleaded in paragraphs 33 to 65 and 67 to 68 of the APOC, I consider that there is a *prima facie* case that Wladyslaw Jaroszewicz and Michael Jaroszewicz acted in breach of those duties with the result that they are liable in damages to the Company. So far as the facts are concerned, the essential basis of the claims is the same as in relation to the claims under the Polish Civil Code considered above. I have also considered the potential defences to the Fiduciary Duty Claims which are discussed in Mr Papadopoulos' second report. I do not consider that these mean that the *prima facie* case threshold is not satisfied.

128. However, for the same reasons as explained above in relation to the Article 415 Claims against the Bank, Mr Czeremcha and Mr de Makay, I do not consider that a *prima facie* case has been demonstrated by the Claimant in relation to the Fiduciary Duty Claims against Mr Czeremcha and Mr de Makay.

SSA Claims

129. The Claimant also submits that as against Fazita and the Bank there is a *prima facie* case for a claim by the Company for breach of the SSA (i.e. the SSA Claims). Specifically, it is said that there is at the very least a *prima facie* case that clause 24.1 of the SSA is to be construed in the way contended for in paragraphs 26 to 29 of the APoC.

130. Clause 24.1 of the SSA provides that:

> "*Each of the parties (other than [the Company]) undertakes to the others that he will exercise all powers and rights available to him as a director, officer, employee or shareholder in [the Company] (or in any other Group Company) in order to give effect to the provisions of this Agreement and to ensure that [the Company] complies with its obligations under this Agreement*."

131. The Claimant says that on the true construction of clause 24.1, each shareholder undertook to the other shareholders in the Company, including the Claimant and the Company itself, that it, or any person or entity appointed by it, controlled or influenced by it or acting on its behalf in the capacity of director, officer, shareholder or employee of any entity within the Fund and/or holding assets of the Fund:

    (1) would act in good faith in the best interests of the joint venture and of the members of the Company as a whole; and

    (2) would comply with their fiduciary duties and other duties arising by virtue of their position as director, officer or shareholder of any entity within the Fund.

132. Alternatively, it is said that these terms were implied terms of the SSA. Further or alternatively, it is said that on a true construction of the SSA, the shareholders agreed to act honestly and transparently in their dealings with the Company and its assets. Alternatively, that this was an implied term of the SSA.

133. The terms of the SSA do not expressly state the undertakings and duties in the terms pleaded by the Claimant. However, I would accept that, where Clause 24.1 refers to each party exercising all powers and rights available to it as a director, officer, employee or shareholder in the Company in the required

manner, this extends to the conduct of directors appointed by that party. At the very least, there is in my view a *prima facie* case to that effect.

134. The Claimant also says that, insofar as it is necessary to rely on the pleaded implied terms, the SSA sets out the terms on which the parties to the joint venture would conduct that joint venture and is therefore the type of contract into which such duties of good faith are more readily implied: *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 All ER (Comm) 1321 at [142]-[143]; *Bates v Post Office Ltd* [2019] EWHC 606 (QB) at [702]-[737].

135. In *Yam Seng*, Leggatt J referred to what he described as "*relational*" contracts and said that (at [142]):

> "*Such 'relational' contracts, as they are sometimes called, may require a high degree of communication, co-operation and predictable performance based on mutual trust and confidence and involve expectations of loyalty which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long-term distributorship agreements*"

136. This lends support to the Claimant's contention given that the SSA is in some ways akin to a joint venture agreement. On the other hand, it may be said that the SSA is different from a shareholders or joint venture agreement in that its original purpose was to set out the terms upon which the Bank would subscribe for, and the Company would issue to it, the Convertible Bonds.

137. In *Bates v Post Office* Fisher J stated (at [721]):

> "*These cases, both appellate and first instance, all demonstrate in my judgment that there is no general duty of good faith in all commercial contracts, but that such a duty could be implied into some contracts, where it was in accordance with the presumed intention of the parties.*

> *Whether any contract is relational is heavily dependent upon context, as well as the terms. The circumstances of the relationship, defined by the terms of the agreement, set in its commercial context, is what decides whether a contract is relational or not.*"

138. At [725] of the Judgment, Fisher J identified characteristics which he considered were relevant to the determination of whether a contract was "*relational*" or not. It appears to me that at least some of those characteristics are satisfied in the present case: for instance, I do not see that there are any specific express terms in the SSA which prevent a duty of good faith being implied. Others of the characteristics which, for example, relate to the intentions and objectives of the parties are however very fact sensitive and are no doubt capable of argument.

139. The relevant test for present purposes is whether the evidence discloses a case that, in the absence of an answer by the Defendants, would entitle the Claimant to judgment. In my view, on the basis of the evidence of Mr Rothe this test is met in relation to the SSA Claims. Mr Rothe gives evidence as to the long standing nature of what he says was the joint venture from the late 1990s, how this was based on a division of responsibility, and that it was based on what he says was a "*trustworthy business relationship*" between Mr Steimler and Mr Gram and Wladyslaw Jaroszewicz and a "*close personal friendship*" between Mr Steimler and Wladyslaw Jaroszewicz.

140. Assuming (as I do) that the Claimant is right that there is a *prima facie* case on its construction of the SSA, then it follows from what I have already found that there is a *prima facie* case that Fazita breached clause 24.1 of the SSA by virtue of the conduct of Wladyslaw and Michael Jaroszewicz (essentially for the same reasons that there is a *prima facie* case in relation to the Article 415 Claims against Fazita and Wladyslaw and Michael Jaroszewicz and in relation to the Fiduciary Duty Claims against Wladyslaw and Michael Jaroszewicz).

141. On the other hand, I do not consider that there is a *prima facie* case that the Bank breached clause 24.1 of the SSA by virtue of the conduct of Mr

Czeremcha and Mr de Makay (essentially for the same reasons that there is in my view no *prima facie* case in relation to the Article 415 Claims against the Bank, Mr Czeremcha and Mr de Makay and in relation to the Fiduciary Duty Claims against Mr Czeremcha and Mr de Makay).

142. The Claimant also pleads that the Bank breached clauses 17 and 24.2 of the SSA (which in turn refer to relevant restrictions on the transfer of shares in the Company's Articles of Association: see regulations 22 to 26) by entering into the 2014 SPA, which it is said involved the Bank's shares in the Company being agreed to be purchased by PSPT. However, I do not see that this is correct since the 2014 SPA appears to envisage that, prior to any transfer of the shares taking place, there would be compliance with the pre-emption provisions contained in the Articles: see e.g. Clause 4.2, the definition of "*Transfer Notice*" and the form of Transfer Notice attached as Schedule 1 to the 2014 SPA, and Clause 5.1. As noted above, it does not appear that any transfer of the shares has in fact taken place. Further, I have not seen any evidence that, even if there had been a breach in this respect, that this has itself caused any loss to the Company. Accordingly, I do not consider there is a *prima facie* case in relation to this claim against the Bank either.

143. I therefore consider that the Claimant has not demonstrated a *prima facie* case in relation to the SSA Claims against the Bank, although it has as against Fazita. I note, however, that the Claimant also claims certain declaratory relief as part of the SSA Claims in its own right, i.e. not as a derivative claim: see APOC, paragraph 84.

The Default Judgment Claim

144. The Claimant also claims to set aside the Default Judgment on the grounds that it was obtained by fraud.

145. In support of its position, the Claimant relies on *Royal Bank of Scotland Plc v Highland Financial Partners LP* [2013] 1 CLC 596. In that case, the Court of Appeal (at [106]) set out the principles to be applied if a party alleges that a

judgment must be set aside because it was obtained by the fraud of another party as follows:

(1) first, there has to be a "*conscious and deliberate dishonesty*" in relation to the relevant evidence given, or action taken, statement made or matter concealed, which is relevant to the judgment sought to be impugned;

(2) secondly, the relevant evidence, action, statement or concealment (performed with conscious and deliberate dishonesty) must be "*material*". This means that the fresh evidence that is adduced after the first judgment has been given is such that it demonstrates that the previous relevant evidence, action, statement or concealment was an operative cause of the court's decision to give judgment in the way it did. As the Court of Appeal stated, "*put another way, it must be shown that the fresh evidence would have entirely changed the way in which the first court approached and came to its decision*".

(3) thirdly, the question of materiality of the fresh evidence is to be assessed by reference to its impact on the evidence supporting the original decision, not by reference to its impact on what decision might be made if the claim were to be retried on honest evidence.

146. In support of its contention that these requirements are satisfied in the present case, the Claimant relies on the matters pleaded in paragraph 53 of the APOC. These are:

(1) First, the contention that the procuring of the Default Judgment was part of (and, the Claimant infers, intended to facilitate) a continuing course of fraudulent conduct on the part of Wladyslaw Jaroszewicz and/or Michael Jaroszewicz (as set out above and below), which had the intention of expropriating the Company's assets, in the form of its Certificates in the Fund, to (the Claimant infers) entities ultimately owned or controlled by them at the expense of the Company's members as a whole.

(2) Secondly, it is said that at the time that M-JWK requested the court to enter the Default Judgment, M-JWK was aware that the allegation in paragraph 34(h)(v) of its Particulars of Claim dated 25 January 2016 (namely that "*PREI's assets against which any judgment would be enforced are mainly investment certificates in a Polish closed-end investment fund*") was untrue. In particular, it is said that by this time, as M-JWK knew, the Company's assets in the form of the Certificates had been transferred to M-JWK. Accordingly, it is said that M-JWK invited the court to enter default judgment on a basis it knew to be untrue.

147. In the course of submissions, it was explained to me that one aspect of the first ground is the complaint that the Claimant was induced to allow the Company not to file a defence in circumstances where the Framework Agreement had just been entered into. In addition, it also appears that the Claimant contends that the debt claim by M-JWK was itself invalid in circumstances where the debt arose as a result of a voluntary early repayment by M-JWK to the Bank, and where this was not consistent with the arrangements which had been put in place for the repayment of the Convertible Bonds.

148. Although the Claimant did not refer me to it, I note that the principles set out by the Court of Appeal in the *Highland Partners* case and by the Supreme Court in *Takhar v Gracefield Developments* [2020] AC 450 were applied in the particular context of default judgments by the Court of Appeal in *Park v CNH Industrial Capital Europe Ltd* [2022] 1 WLR 860 In that case, the Court of Appeal explained that, although the relevant procedural default or failure (such as the failure to file a defence) might provide the opportunity for default judgment to be entered, this did not mean that false statements contained in the claim form or particulars of claim could not be an operative cause of the entry of the judgment: see in particular Andrews LJ at [50].

149. So far as the second ground is concerned, it is not clear to me that this would by itself meet the requirements identified by the Court of Appeal in *Highland*

Financial Partners. The statement in the Particulars of Claim may have been untrue by the time that the Default Judgment came to be entered, but I do not see that, by itself, would have meet the necessary threshold of materiality in relation to the entry of the Default Judgment. The question of what assets were available to satisfy any judgment which was entered does not seem to me to be an operative cause of the entry of the judgment which was essentially based on the allegation that the debt was due and owing. I am also not convinced that there is a *prima facie* case that the necessary ingredient of "*conscious and deliberate dishonesty*" is met in relation to this matter seen in isolation, since it is equally plausible that the statement was true when made but that there was then an inadvertent failure to update it.

150. In my judgment, the more substantial ground is the first matter relied on by the Claimant. In this respect, the Claimant says that the entry of the Default Judgment was part of the chain of wrongful conduct by Wladyslaw and Michael Jaroszewicz to seek to misappropriate the assets of the Fund. In this respect, it might be said that the Default Judgment was not itself a cause of loss to the Company. However, it does appear to have been a necessary step to allow the appropriation of the Certificates held by the Company through the Bailiff Sales. Further, it appears that at least some of the Certificates were acquired by M-JWK, and at prices alleged to be significantly lower than their true and fair value. In addition, the evidence is that the Company and its directors were not informed of the Bailiff Sales at the time.

151. I would accept that the Claimant has shown a *prima facie* case in relation to such matters for the reasons explained above in relation to the Article 415 Claims against Wladyslaw and Michael Jaroszewicz.

152. I have also considered CPR Part 13 which sets out the procedure for setting aside a default judgment (CPR r. 13.1). Under these provisions, a default judgment may be set aside if the defendant has a real prospect of successfully defending the claim or if it appears to the Court that there is some other good reason why the judgment should be set aside (CPR r. 13.3(1)). Further, the

Court must have regard to whether the person seeking to set aside the judgment made an application to do so promptly (CPR r. 13.3(2)).

153. Mr Riches emphasised to me that the Claimant's primary position was that CPR Part 13 was not an exhaustive code for setting aside default judgments and that the Court has an inherent jurisdiction to set aside a judgment which has been procured by fraud. That is supported in my view by the Supreme Court's decision in *Takhar* and by the Court of Appeal's approach in the *Park v CNH Industrial Capital* case.

154. To the extent that CPR Part 13 was applicable, one point which would fall to be considered is whether the Claimant/the Company has acted promptly in seeking to set aside the Default Judgment. M-JWK's solicitors served the Default Judgment on the Company on 6 March 2017. Mr Rothe explains that at the time Mr Steimler and Mr Gram were not overly concerned by it and were content to let it stand given, amongst other things, that the debt was owed to a subsidiary of the Fund (M-JWK) (Rothe 1 [182]). Following this, negotiations over an exit continued, and the sale of the Bialystok shopping centre took place, and the Certificates were then returned by M-JWK to the Company.

155. In December 2018, the first bailiff sale took place. It appears that Mr Rothe had some awareness of this at the time ("*I assumed this must have related to a bailiff process in Poland because I had understood that this was a possibility*" (Rothe 1 [223])), but he did not have the full details. As I understand it, the Claimant only became aware of the second and third bailiff sales some time after those sales had taken place. It then appears that the exit discussions came to an end in around July 2020. Some forensic investigations then took place by an accountant (Karol Jacewicz) instructed by the Claimant in around March 2021. It is said that it was at this point that the Claimant learned of the damage said to have been caused by the first bailiff sale (Rothe 1 [226], Rothe 2 [16]-[17]). The present proceedings were then issued in April 2022.

156. There is clearly a basis for saying that the Claimant has not acted promptly. Even leaving aside the awareness of the Default Judgment in March 2017, it may be said that the Claimant should have acted more promptly after becoming aware of the first bailiff sale in December 2018, although Mr Rothe says that the Claimant could not have pressed any harder for further information than it did at the time (Rothe 2 [17.1]). In addition, having become aware of the results of Mr Jacewicz's investigations in March 2021, the Claimant then waited over a further year before issuing proceedings.

157. These matters might be capable of giving rise to a defence to the Default Judgment Claim. However, I bear in mind that the Claimant's primary position is that the Default Judgment falls to be set aside at common law as having been obtained by fraud and that CPR Part 13 is not an exhaustive set of remedies for setting aside a default judgment. It follows that, if the Claimant is right in its core case that the Default Judgment is tainted by fraud, it may be that the issue of acting promptly is not by any means decisive. Overall, I do not consider that at the present stage the question of delay means that the Claimant has not demonstrated a *prima facie* case in relation to the Default Judgment Claim.

158. My attention was also drawn to certain acknowledgments which formed an appendix to the Framework Agreement (the "**Acknowledgments**") (see also clause 5.10(h) of the Framework Agreement). These were signed by Mr Steimler in his capacity as a director of the Company; it was clearly envisaged that Mr Gram would provide a similar acknowledgment, although the version of his acknowledgment contained in the bundles appears to be unsigned. In the Acknowledgments, at least Mr Steimler made certain representations essentially as to the validity of the Subrogation Claim and the debt owed by the Company to M-JWK as a result of that claim.

159. Clearly, the Acknowledgments may be relevant to the Default Judgment Claim. On the other hand, the Claimant says that the Acknowledgments were provided as part of what was intended to be an exit by the Claimant from the Company and were intended to draw a line under the matter. The Claimant also says that the intended exit has not actually been carried into effect. There appears to be

some force in these points, although it is also fair to say that under the terms of the Framework Agreement the effect of the Acknowledgments is not conditional on the completion of the sale of the relevant shares.

160. The Claimant also says that Mr Steimler and Mr Gram did not have full knowledge at the time that the Framework Agreement was entered into and, in particular, did not know that the Default Judgment would be immediately entered and then used as the basis for the Bailiff Sales, even in circumstances where the exit contemplated by the Framework Agreement had not in fact taken place.

161. Overall, I do not think that I can or should conclude at this stage that the Acknowledgments mean that there is no *prima facie* case; rather, they are one of the matters which may need to be investigated at trial if this matter continues and defences are filed by the relevant Defendants.

162. There is, however, a further matter which it is necessary to deal with. As noted above, in the APOC (paragraph 86) there is also a pleaded a claim for restitution, alternatively damages or equitable compensation, in respect of all benefits flowing from the Default Judgment. This is said to include the harm pleaded in paragraph 70 of the APOC. In addition to M-JWK, this claim is said to be made against Fazita, Wladyslaw and Michael Jaroszewicz and Ms Bandurska.

163. The legal basis for this part of the claim was not developed significantly by the Claimant before me. I can see that, if the Default Judgment was to be set aside, then there may well be a restitution claim to recover the benefits transferred under it from the recipients: see e.g. Goff & Jones, *The Law of Unjust Enrichment*, 10th ed., 2-36. Since there is some evidence that M-JWK and (indirectly) Wladyslaw and Michael Jaroszewicz received such benefits, then I am prepared to conclude that there is a *prima facie* claim in restitution against them. However, I do not consider that there is such a *prima facie* case against either Fazita or Ms Bandurska since there is no real evidence that either was the direct or indirect recipient of benefits transferred under the Default

Judgment. Further, the legal basis of a claim for damages or equitable compensation against them in connection with the setting aside of the Default Judgment was not explained by the Claimant.

Limitation

164. It is also necessary to consider the position in relation to limitation.

165. In relation to the SSA Claims, they are governed by English law, as the law governing the SSA. There is a six year limitation period for breach of contract: s.5 of the Limitation Act 1980 ("**LA 1980**"), but that is subject to the provisions of s.32 LA 1980, which concern postponement of the limitation period for actions based on fraud or where relevant facts to the right of action have been deliberately concealed from the claimant by the defendant.

166. The SSA Claims were brought on 25 April 2022. The Claimant says that the relevant breaches by Fazita and the Bank occurred after 25 April 2016. Alternatively, it says that to the extent that the breaches took place before this date, then it may well be able to rely on s.32 to postpone the commencement of the limitation period. I am satisfied that there is a *prima facie* case that the SSA Claims are not time-barred.

167. The Fiduciary Duty Claims are governed by Cypriot law. It is said that Cypriot law therefore also governs the question of limitation: Retained Regulation 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), article 15(h); Dicey, Morris and Collins, *The Conflict of Laws*, 16th ed., 34-064 to 34-065.

168. The position as a matter of Cypriot law is addressed in the expert reports of Mr Papadopoulos and he considers that the applicable limitation period is probably 10 years. That evidence appears credible and for present purposes I accept that it demonstrates a *prima facie* case that the Fiduciary Duty Claims are not time-barred.

169. The Article 415 Claims are governed by Polish law and thus Polish law governs the limitation question. This is addressed in the expert reports of Mr Moskwa. He says that the relevant limitation period is (generally) three years after the day on which the aggrieved party learned or could have learned about the damage and of the person obliged to remedy it, subject to a long-stop date of 10 years (Article 442 of the Civil Code).

170. In the present case, the Claimant did in May 2016 become aware that the Company was no longer the owner of the Certificates and received copies of the Collateral Agreement and the 2016 PoA. Thus, as Mr Moskwa acknowledges, it could be argued that the three year limitation period began running at this point and expired before the present proceedings were issued (Moskwa 2 [37]). However, he considers that there is at least a *prima facie* argument that the limitation period has not expired because the three year limitation period only begins to run when the claimant is aware of the damage and the identity of the specific party who is liable to compensate for that damage. Further, if it is right that any damage to the Company was actually caused by the issuance of the Series I-J Certificates and the Third Bailiff Sale then these took place within three years prior to the issue of the proceedings in any event. There is also a longer 20 year limitation period applicable in respect of Wladyslaw and Michael Jaroszewicz arising out of their alleged breaches of the Polish Criminal Code.

171. It is of course possible that the Defendants may in due course be able to produce convincing arguments in answer to Mr Moskwa. However, in the present circumstances where no such answer has yet been produced, I am satisfied that Mr Moskwa's evidence discloses a *prima facie* case that the Article 415 Claims are not time-barred as a matter of Polish law.

172. As for the Default Judgment Claim, it is said that there appears to be no applicable limitation period because the relief is equitable and there is no corresponding remedy at common law. In the absence of any counter-argument on this point (although having considered the possible arguments identified by Mr Alun-Jones at paragraph 80.4 of his Fifth Witness Statement), I am again

prepared to accept that there is a *prima facie* case in this respect. In any event, the Default Judgment was entered on or around 3 March 2017, within six years prior to the issue of the claim, and it is difficult to see how any applicable limitation period could be less than six years.

Prima facie case of entitlement to bring a derivative claim

173. As noted above, this issue is governed by Cypriot law as the law of the place of incorporation of the Company.

174. The Claimant submits that there is (at least) a *prima facie case* that the Cypriot law requirements for bringing a derivative claim are met. In support of its case, the Claimant has adduced two expert reports on Cypriot law, from Dimitris Papadopoulos, the Managing Partners of the law firm of Papadopoulos, Lycourgos & Co in Nicosia.

175. Mr Papadopoulos has explained the requirements as a matter of Cypriot law for a shareholder to be able to bring a derivative claim. As he explains, it is apparent that Cypriot law in this area is similar to English law. Thus, it is recognised that a shareholder may be able to bring a derivative claim. In broad terms, the requirements for bringing such an action are simply that there has been wrongdoing which gives rise to a cause of action by the company and there is control over the company by the wrongdoers which prevents the company from bringing the claim. Mr Papadopoulos has further expressed the view that, assuming that the factual matters pleaded are established, then the Claimant would be able to establish that it is entitled to bring a derivative claim under Cypriot law.

176. For present purposes, I accept the evidence of Mr Papadopoulos as to the relevant matters of Cypriot law, namely, that the existence of a derivative claim by a shareholder is known to Cypriot law and that the requirements under Cypriot law for a shareholder to be able to bring such a claim are as he states. That evidence is unsurprising and appears to largely correspond to the position under English law.

177. As to whether the requirements of Cypriot law are satisfied on the facts, on the basis of my conclusions above, there is a *prima facie* case of wrongdoing by the First to Fifth Defendants which gives rise to causes of action by the Company. I also accept that, on the evidence which I have seen, there is a *prima facie* case that there is (negative) control over the Company by the alleged wrongdoers which prevents the Company from bringing the claims. In this respect, I have already described above the provisions of the Articles which mean that any A director present at a Board meeting has an effective right of veto over any resolution.

178. I was informed that the Claimant and its nominated directors of the Company had not attempted to put any specific resolution before the Board of the Company to sanction the bringing by the Company of the claims which are now sought to be pursued by the Claimant as derivative claims. Rather, I was told that the Claimant had taken the position that any such attempt would be pointless given the terms of the Articles and what was said to be a history of previous blocking by Wladyslaw and Michael Jaroszewicz. I was referred in this regard to the 28 April 2016 Board meeting and the obtaining of the Cypriot Injunction. Overall, it seems to me that the Claimant's approach in this respect is a reasonable one in the circumstances.

179. I also bear in mind that the Company has not responded to the present application despite having been served with it and having been notified of the hearing. That may be reflective of what appears to be a present state of deadlock on the Board. In any event, it tends to suggest that the Company is either unwilling or unable to pursue the claims for itself.

180. For present purposes, in my judgment the Claimant has demonstrated a *prima facie* case of entitlement to bring the relevant claims as derivative claims as a matter of Cypriot law.

Other Matters

181. In *Bhullar*, Morgan J also considered whether an independent board could (rather than would) reach the conclusion that it was appropriate to bring the relevant claims (see [38]). He referred to *Iesini v Westrip Holdings Ltd* [2010] BCC 420 where Lewison J had identified the following factors as being potentially relevant in this regard:

> "*They include: the size of the claim; the strength of the claim; the cost of the proceedings; the company's ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay not only its own costs but the defendant's as well; any disruption to the company's activities while the claim is pursued; whether the prosecution of the claim would damage the company in other ways (e.g. by losing the services of a valuable employee or alienating a key supplier or customer) and so on. The weighing of all these considerations is essentially a commercial decision, which the court is ill-equipped to take, except in a clear case*."

182. *Bhullar* was a case where a pre-emptive costs order was sought from the assets of the company. In the present case, no such order is sought from the Court at the present time (although a claim for an indemnity does form part of the APOC). Nevertheless, I have also considered this question.

183. In my view, an independent board of the Company could reach the conclusion that it was appropriate to bring the claims identified where I have concluded there is a *prima facie* case. The amount of the claim is large, and the loss to the Company apparently substantial. It also concerns what appears in substance to amount to the entirety of the Company's assets. Further, it appears that any disruption to the Company would be minimal since it does not appear to have any other functions. On the other potentially relevant matters, such as the ability of the relevant Defendants to satisfy a judgment, the evidence is very limited. However, looking at matters in the round, I am satisfied that this is a

case where an independent board could conclude that it was appropriate to bring the claims.

184. In this regard, I also take into account that Jan Jaroszewicz and Sazia support the Permission Application. Thus, there is a director and material shareholder outside of the Claimant who support the Permission Application.

Conclusion

185. In conclusion, on the question of permission to bring the derivative claims:

(1) I grant permission to bring the Article 415 Claims against Fazita, Wladyslaw and Michael Jaroszewicz, M-JWK and Ms Bandurska but not against Mr Czeremcha, Mr de Makay or the Bank. I note, however, that the Claimant maintains its own direct claims under Article 415 against Mr Czeremcha, Mr de Makay or the Bank on the footing that (contrary to its primary position) Polish rather than Cypriot law governs the reflective loss issue (APOC, paragraphs 71 and 72).

(2) I grant permission to bring the Fiduciary Claims against Wladyslaw and Michael Jaroszewicz but not against Mr Czeremcha or Mr de Makay.

(3) I grant permission to bring the SSA Claims against Fazita but not against the Bank. I note also that the Claimant brings its own direct claims for declaratory relief in connection with the SSA (APOC, paragraph 84).

(4) I grant permission to bring the Default Judgment Claim against M-JWK and Wladyslaw and Michael Jaroszewicz (including the restitution claim), but not against Fazita or Ms Bandurska.

The Service Out Application

186. I turn to the Service Out Application. This application is supported by the fifth witness statement of Nicholas Alun-Jones, a partner in Peachey & Co, the solicitors for the Claimant.

187. All of the Defendants and the Claimant are outside the jurisdiction. The Claimant therefore applies for permission to serve the claim form out of the jurisdiction (where necessary) pursuant to CPR rr. 6.36 – 6.37 and other documents pursuant to CPR r. 6.38. In relation to the derivative claims, the application for permission to serve out obviously falls to be considered in light of my conclusions, set out above, on the Permission Application.

188. As to the requirement for permission to serve out, the Claimant must establish that (i) there is a serious issue to be tried, (ii) one of the jurisdictional gateways in PD6B applies, and (iii) England is the proper place to bring the claim.

Serious issue to be tried

189. On the basis of what I have already determined above in relation to the Permission Application, I consider that there is a serious issue to be tried in relation to the derivative claims between the Claimant and the relevant Defendants where I have given permission. This is for the same reasons I have explained above as to why I consider that there is a *prima facie* case of entitlement to relief in respect of these claims.

190. As noted above, it also appears from the APOC that the Claimant maintains certain direct (i.e. non-derivative) claims. These raise certain further issues which need to be considered at this stage.

191. So far as the direct Article 415 Claims made by the Claimant are concerned, the Claimant advances these in the alternative in the event that Polish law rather than Cypriot law governs the reflective loss issue. However, it is the Claimant's primary position that Cypriot law does govern this question. In this

respect, the Claimant referred to dicta of Sir Michael Burton in *UCP plc v Nectrus Ltd* [2020] PNLR 9 at [28]-[32] (a different view having been taken by Christopher Hancock QC in *KMG International v Chen* [2019] EWHC 2389 (Comm)). One potential difficulty which this gives rise to is that, on the Claimant's own primary case, the direct Article 415 claims are barred because the issue is governed by Cypriot law and the claims would be barred by the reflective loss principle which forms of part of Cypriot law. However, I recognise that the law does not appear to be completely settled in this area. As such, I conclude that this does not prevent the Claimant satisfying the relatively low threshold of a serious issue to be tried in relation to these direct claims.

192. However, the evidential material relied on by the Claimant to support the direct Article 415 claims is, it appears, the same as that relied on for the derivative Article 415 claims. As explained above, I have concluded that this material does not disclose a *prima facie* case against the Bank, Mr Czeremcha and Mr de Makay. For the same reasons, I do not consider that this material discloses a serious issue to be tried in relation to the direct Article 415 claims against these defendants. I therefore refuse permission to serve out of the jurisdiction (insofar as it is sought) in relation to the direct Article 415 claims as against the Sixth to Eighth Defendants.

193. To the extent that the Claimant seeks permission to serve the direct Article 415 claims out of the jurisdiction on the First to Fifth Defendants then I conclude that there is a serious issue to be tried, again for the reasons explained above in relation to the derivative Article 415 claims.

194. So far as the direct claims under the SSA is concerned, the Claimant claims a range of declaratory relief as set out in (a) to (g) of paragraph 84 of the APOC. For the reasons explained above, I do not see that there is a serious issue to be tried in relation to the alleged unlawfulness of the 2014 SPA (sub-paragraph (a)). In relation to the remaining sub-paragraphs (b) to (g), I am prepared to find that there is a serious issue to be tried. I do not consider, however, that the Sixth to Eighth Defendants are necessary parties to these claims for declaratory relief. Accordingly, I would conclude that there is a serious issue to be tried in

relation to these claims as against the Second to Fifth Defendants, but not as against the Sixth to Eighth Defendants. So far as the First Defendant is concerned, I assume that the Claimant relies on the jurisdiction clause in the SSA such that permission to serve out of the jurisdiction is not sought.

Jurisdictional gateways

195. The test for these purposes is whether there is a good arguable case that the relevant gateway is applicable. The application of this test has been elaborated on in a number of cases including, more recently, by the Court of Appeal in *Kaefer Aislamientos SA de CV v AMS Drilling Mexico de CV* [2019] 1 WLR 3514. I have reviewed and applied the guidance provided by the Court of Appeal in that case.

196. There is a potential question as to how the good arguable case standard relates to the *prima facie* case for permission to bring a derivative action; in other words, in the context of a derivative claim where it is a necessary part of being able to bring the claim that there is permission given to serve out of the jurisdiction is it necessary to show a *prima facie* case that the claim falls within the relevant gateway? I do not need to resolve that point; in this case, I am satisfied that the relevant gateways apply to the claims in question whichever standard is applied.

The SSA Claims

197. So far as the derivative SSA Claims against Fazita are concerned, no permission to serve out of the jurisdiction is required given the jurisdiction clause in the SSA. I have refused permission to bring the derivative SSA Claims against the Bank, and the direct SSA claims have been dealt with above.

The Article 415 Claims

198. So far as the Article 415 Claims against Fazita are concerned, the Claimant's primary position is that the jurisdiction clause in the SSA applies. The

Claimant says that the Article 415 claims are a "*dispute, claim or controversy arising out of or in connection with*" the SSA and that such a broad construction accords with Lord Hoffmann's judgment in *Fiona Trust & Holdings Corp v Privalov* [2007] UKHL 40, [12]-[14]. In that case, Lord Hoffmann said that there is a presumption that rational businessmen intended for all disputes arising out of their relationship to be determined in the same forum. The House of Lords held that the contractual arbitration agreement in that case covered a claim that the contract in question had been procured by bribery.

199. On the other hand, it might be said in the present case that the SSA is primarily directed at the position of the Bank as the investor subscribing for shares in the Company, and that it is not quite the same as a shareholders agreement intended to cover all aspects of the relationship between the shareholders in the Company. It is also necessary to have in mind that in the present case the question is whether the English Court has jurisdiction in relation to claims founded on the Polish Civil Code which do not themselves necessarily rely on breaches of the SSA but rather on breaches of other provisions of Polish law.

200. The Claimant's alternative position is that gateway 3.1(4A) in Practice Direction 6B (the "**4A Gateway**") applies (in combination with CPR r. 6.33(2B)(b)) because: (i) the SSA Claims made against Fazita fall within CPR r. 6.33(2B)(b) (i.e. they are claims in respect of which the English Court has jurisdiction pursuant to the jurisdiction agreement in the SSA) for the purposes of PD6B, §3.1(4A); and (ii) the Article 415 Claims arise out of "*the same or closely connected facts*" as the SSA Claims. In this respect, it is said that both the SSA Claims and the Article 415 Claims against Fazita arise out of the same underlying facts, namely their respective involvement (or, in the case of the Bank, acquiescence etc.) in the alleged conspiracy to expropriate the Company's assets.

201. I agree that there is a good arguable case (and a *prima facie* case) that the 4A Gateway applies in the present case to the Article 415 Claims against Fazita.

202. In the circumstances, I propose to grant the Claimant permission to serve the Article 415 Claims on Fazita out of the jurisdiction on the basis that the 4A Gateway applies. I will not therefore decide the Claimant's other case that permission is not required for such claims because of the jurisdiction clause in the SSA. The Claimant will however be able to rely on such argument, if it so wishes, in the event of any challenge to the grant of permission for service out.

203. So far as the other relevant Defendants to the Article 415 Claims are concerned, the application is made in reliance on the necessary and proper party gateway in paragraph 3.1(3) of Practice Direction 6B (the "**NPP Gateway**"). This applies where there is a "*real issue which it is reasonable for the court to try*" between the claimant and the 'anchor' defendant who has been or will be served otherwise than in reliance on this paragraph (3.1(3)(a)) and "*the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim*" (3.1(3)(b)). As to the application of the second limb of this test, one question is whether the claims against the defendants involve "*one investigation*" or whether they are "*closely bound up*" or involve a "*common thread*": *Altimo Holdings v Kyrgyz Mobile Telecom Ltd* [2012] 1 WLR 1804 at [87].

204. It is also to be noted that the NPP Gateway can apply where the defendant is a necessary and proper party to a claim which falls within the 4A Gateway: *Eurasia Sport Ltd v Aguad* [2018] 1 WLR 6089, per Floyd LJ at [46] to [50].

205. It is said that there is between the Claimant (on behalf of the Company) and Fazita real issues in relation to both the SSA Claims and the Article 415 Claims which it is reasonable for the Court to try. I agree with this for the reasons explained above.

206. It is then further said that there is a good arguable case that the Second to Fifth Defendants are necessary or proper parties to those claims. The SSA Claims and the Article 415 Claims against Fazita on the one hand and the Article 415 Claims against the Second to Fifth Defendants are founded on the same factual allegations regarding the alleged conspiracy to expropriate the Company's

assets. There is a common thread to the claims which will form part of one investigation arising out of the same or similar facts. I agree that there is a good arguable case (and a *prima facie* case) to this effect.

207. Further, I consider that the same analysis as set out in the preceding paragraphs applies to the direct Article 415 claims against the First to Fifth Defendants.

The Fiduciary Duty Claims

208. In relation to the Fiduciary Duty Claims, the Claimant first says that the NPP Gateway applies because each of Wladyslaw Jaroszewicz and Michael Jaroszewicz are necessary or proper parties to the SSA Claims against Fazita. Alternatively, it is said that the NPP Gateway applies because they are necessary or proper parties to the Article 415 Claims against Fazita. I agree that there is in each case a good arguable case (and a *prima facie* case) that the relevant gateway applies.

209. It was also said by the Claimant in its skeleton argument that, in so far as jurisdiction is established against Wladyslaw Jaroszewicz and Michael Jaroszewicz under the NPP Gateway for the Article 415 Claims, then the 4A Gateway applies in relation to the Fiduciary Duty Claims because they also arise out of "*the same or closely connected facts*". However, in the *Eurasia Sport* case Floyd LJ said at [47] that: "*It is fair to say that the 4A gateway does not permit a claim made in reliance on the necessary or proper party gateway to be used to add a further claim against the same defendant*." That reflects the terms of paragraph 3.1(4)(c) of Practice Direction 6B which omits reference to paragraph 3.1(3). In oral submissions, the Claimant did not pursue this alternative and I therefore do not say anything further about it.

The Default Judgment Claim

210. In its skeleton argument the Claimant said that it did not need permission to serve out in relation to the Default Judgment Claim because the parties have submitted to the Court's jurisdiction or because the reasoning in *Vik v Deutsche*

Bank AG [2019] 1 WLR 1737 at [55] applies by analogy. The decision in *Vik* concerned a committal application made in connection with an order which had been obtained under CPR r 71.2. It was held that permission was not required in order to serve the application out of the jurisdiction. This was because a court order has to carry with it the means to enforce that order such that the means to enforce were a necessary incident of that order, and an order for committal was one of the means of enforcing court orders.

211. It is not clear to me that this reasoning applies equally to the Default Judgment Claim which is a claim to set aside the Default Judgment rather than to enforce it. In my judgment, the stronger basis for the Claimant's position is the contention that by obtaining the Default Judgment M-JWK had necessarily submitted to the jurisdiction of the Court and that such submission should be considered as extending to an application to set aside that judgment. On that basis, to the extent that it had been necessary for me to decide this point as part of the Service Out Application, I would have held that permission to serve out of the jurisdiction was not required in relation to the Default Judgment Claim as against M-JWK.

212. In oral submissions, the Claimant modified its position and explained that it sought permission to serve the Default Judgment Claim out of the jurisdiction on M-JWK pursuant to paragraphs 3.1(15) and/or (16) of Practice Direction 6B and for Fazita, Wladyslaw Jaroszewicz, Michael Jaroszewicz and Anna Bandurska to be served under the NPP Gateway or under paragraphs 3.1(15) and/or (16). Although there was no formal application to amend the Service Out Application, I will proceed on the basis that this was the Claimant's application. I would note at the outset that the revised application insofar as it relates to Fazita and Ms Bandurska falls away since I refused permission to bring the derivative Default Judgment Claim as against them. As I understand it, this change in relation to the application was made because of a concern that the NPP Gateway might not apply if jurisdiction over M-JWK as the 'anchor' was based on submission (see *ID v LU* [2021] 1 WLR 4992). In a supplemental note provided after the hearing, the Claimant made clear that such a possibility is viewed by the Claimant as merely arguable and that it considers that there

are grounds for viewing that authority as distinguishable in the present case, principally because of the fact that here the anchor party (M-JWK) was the claimant, in contrast to the position in *ID v LU* where the anchor party was a defendant.

213. Paragraph 3.1(15) applies where "*a claim is made against the defendant as constructive trustee, or as trustee of a resulting trust*". However, I do not see that any such claim is made in the APOC. I therefore do not consider this gateway to be applicable.

214. Paragraph 3.1(16) applies where "*a claim is made for restitution where –*

(a) the defendant's alleged liability arises out of acts committed within the jurisdiction; or

(b) the enrichment is obtained within the jurisdiction; or

(c) the claim is governed by the law of England and Wales."

215. In my judgment, there is a good arguable case (and a *prima facie* case) that this gateway applies to the restitution claim against M-JWK and that there is a good arguable case (and a *prima facie* case) that the NPP Gateway applies to the restitution claim as against Wladyslaw Jaroszewicz and Michael Jaroszewicz. I therefore do not need to consider reliance on paragraph 3.1(16) as against these two defendants (as explained above, I do not consider paragraph 3.1(15) to be applicable).

Forum

216. The Claimant submits that England is the proper place in which to bring the claims.

217. The Claimant relies on a number of factors in this respect, the principal of which are:

(1) The fact that the Company and Fazita chose English law to govern the SSA and England as the exclusive forum in which to determine disputes under the SSA in relation to the Company.

(2) The fact that it is said that the main operative documents relating to the Company have always been governed by English law because English law and the English courts were considered a neutral choice of law (the majority of the Company's shareholders being either Polish or Norwegian) and a reputable forum to settle any disputes should they arise (Rothe 1 [37(e)]). However, I note in this regard that other relevant agreements such as the 2014 SPA and the Framework Agreement are governed by Polish law.

(3) The fact that the Subrogation Claim was brought by M-JWK against the Company in England, and the Default Judgment was obtained in England.

(4) The fact that English law governs the SSA Claims and the Default Judgment Claim. Further, the SSA Claims will need to proceed in this jurisdiction in any event given the exclusive jurisdiction clause in the SSA. So far as the Default Judgment Claim is concerned, since this concerns a claim to set aside a judgment of the English Court, it is difficult to see how it could be litigated in any other jurisdiction.

(5) The fact that the Fiduciary Claims are said to be closely connected with the SSA Claims.

(6) The fact that the M-JWK Action will also be proceeding in England in any event, unless stayed by agreement or court order. The M-JWK Action was brought by M-JWK. It is the Claimant's case that M-JWK is controlled by Wladyslaw and Michael Jaroszewicz and there appears therefore to be a basis for saying that Wladyslaw and Michael Jaroszewicz caused it to bring these proceedings in England, which

overlap with the present proceedings. As noted above, defences have been filed in those proceedings.

(7) The fact that a further related claim brought on 22 July 2019 against the Company concerning alleged breaches of the SSA (the **"PSPT Claim**") has been pursued in England.

218. So far as applicable law is concerned, the Article 415 Claims are governed by Polish law and the Fiduciary Duties are governed by Cypriot law (although it appears that the relevant Cypriot law is very similar to English law in this respect). As noted above, the SSA Claims and the Default Judgment Claim are governed by English law. The question of applicable law does not therefore by itself point significantly in favour of one particular forum being more appropriate than another.

219. In terms of other factors, there are clearly material connections with Poland. In addition to Polish law governing the Article 415 Claims, the underlying assets of the Fund were located in Poland and the Bailiff Sales took place in Poland. Moreover, the permission to serve out of the jurisdiction sought in relation to each of the Second to Eighth Defendants is to serve them in Poland, presumably because this is understood to be where they are based.

220. To my mind, an important factor in the present case are the proceedings which have already been commenced in England (the Subrogation Claim leading to the Default Judgment and the M-JWK Action) and the fact that certain of the claims (the SSA Claims and the Default Judgment Claim) will need to be litigated in England in any event. There are clearly close connections between these various set of proceedings and the other claims, since they all arise out of essentially the same subject matter. In my judgment, it would be highly undesirable if there were to be concurrent proceedings in different jurisdictions at the same time concerning claims arising out of essentially the same dispute. Not only would that be a waste of time and resource, but it would also give rise to a risk of inconsistent judgments. It is clear that this is capable of being a very important factor when it comes to assessing the proper place in which

claims should be brought: see *Lungowe v Vedanta Resources* [2020] AC 1045 at [68]-[70] per Lord Briggs JSC.

221. For all these reasons, I consider that England is the proper place in which to bring the claims.

Other Matters

222. Finally, I deal with three other matters.

223. The Claimant applies pursuant to CPR r. 35.1 for permission to rely on the second expert reports of Polish and Cypriot law from Mr Moskwa and Mr Papadopulous. As is clear from the above parts of this judgment, various of the claims advanced and issues which arise are governed by Polish and Cypriot law and expert evidence on Polish and Cypriot law is therefore reasonably required to resolve the proceedings. I therefore consider that the Claimant should have permission pursuant to CPR r. 35.1 to rely on the relevant expert reports.

224. The Claimant also applies for permission under CPR r. 17.1(2) to amend the Particulars of Claim. This was originally sought in relation to the draft amended version attached to the application notice dated 2 May 2023, but this was then replaced by the APOC provided following the hearing. The amendments in the APOC are broadly either clarificatory or update and expand the pleading in light of further information now available to the Claimant. I do not see that they introduce any new cause of action. Given the nature of the amendments, and the very early stage of the proceedings, I agree that the Claimant should have permission to make these amendments. However, the draft APOC will need to be further amended to take account of my conclusions on the Permission Application.

225. The Claimant also applied for permission to file and serve a revised version of Rothe 1 and the exhibit thereto and to remove from the Court file the previous

versions of Rothe 1 and the exhibit. This was said to be because, due to an oversight, the original version of the statement made reference to and exhibited certain privileged or partially privileged documents. The application was subsequently extended by oral submission to Rothe 2 and the exhibit thereto.

226. I indicated at the hearing that I would be prepared to give permission for the Claimant to file and serve the revised version of Rothe 1, Rothe 2 and the exhibits thereto. However, I also indicated that I wished to receive further submissions on the question of the Court's jurisdiction to order that the previous version of Rothe 1, Rothe 2 and the exhibits should be removed from the Court and, even if there was jurisdiction, whether I should make such an order in circumstances where the witness statement and exhibit had been served and relied on previously, including before Meade J.

227. The Claimant provided a further note on this issue dated 19 May 2023. In relation to the jurisdiction to grant an order removing documents from the Court file, the Claimant relies on CPR r. 3.1(m). In any case, whether or not there is jurisdiction, I do not think I should make the order sought removing documents from the Court file in circumstances where the relevant material has been served, and already deployed in Court. In this respect, the Claimant accepts that Rothe 1 and exhibit were referred to, or could have been reviewed by, the Court at hearings on 24 June 2022 and 4 October 2022, and that it is likely also that they were reviewed by Mr Justice Meade ahead of his order dated 15 September 2022 which granted 'first stage' permission under CPR Part 19. In addition, I read Rothe 2 as part of my own pre-reading for this hearing and it was referred to in the Claimant's skeleton argument for this hearing. Given that these materials have already been deployed, I do not consider that I should make an order removing them from the Court file even assuming that I have jurisdiction to make such an order.

228. In its note of 19 May 2023 the Claimant also sought a further form of relief, namely, an order that:

"Pending (i) confirmation that the parties to whom the previous versions of Røthe- 1, OR1, Røthe-2 and OR2 were disclosed do not challenge the Claimant's assertion of privilege and further order of the Court consequent or (ii) final determination of any challenge to the Claimant's assertion of privilege and further order of the Court consequent upon such final determination:

(i) use of the previous versions of Røthe-1, OR1, Røthe-2 and OR2 by any person to whom any of those documents were disclosed be prohibited; and

(ii) non-parties be prohibited from accessing the previous versions of Røthe-1, OR1, Røthe-2 and OR2."

229. This order was sought in reliance on CPR r. 31.22(2) and r. 5.4C(2). However, the existing application notice of 10 May 2023 was not sought to be amended in order to make these further applications.

230. In any event, I refuse the application for the further relief as sought by the Claimant. The first limb of the further relief sought appears to amount to an injunction restraining use of the previous versions of the witness statements and exhibits. Even assuming that there is jurisdiction to grant this relief, I do not consider that I should do so on what would be a without notice basis. The Claimant has not explained why any application could not be made on a with notice basis. Further, any such application may be contentious and may raise difficult issues given that the material has already been deployed. In my judgment if the Claimant wishes to pursue this form of relief then it should do so by a properly formulated application made on notice to the relevant parties against whom the order is sought.

231. I am also not prepared to make an order now restricting any non-party from accessing the previous versions of Rothe 1, Rothe 2 and the exhibits which are on the Court file. On the basis of the Claimant's submissions, I am not satisfied

that such an order would be justified given the principle of open justice and the fact that the material has already been deployed in court. I would however be prepared to make an order under CPR r. 5.4D(2) that an application by a non-party for permission to obtain a copy of any of these documents from the Court file be made on notice to the Claimant.

Conclusion

232. I will accede in part to the applications as explained above.