Neutral Citation Number: [2019] EWHC 3004 (Comm)

Case No: CL-2013-000666

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 14/11/2019

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

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Between:

SANA HASSIB SABBAGH	**Claimant**
- and -	
(1) WAEL SAID KHOURY	
(3) SAMER SAID KHOURY	
(4) TOUFIC SAID KHOURY	
(5) SAMIR HASSIB SABBAGH	
(6) SUHEIL HASSIB SABBAGH	
(7) WAHBE ABDULLAH TAMARI	
(8) CONSOLIDATED CONTRACTORS GROUP SAL (HOLDING COMPANY)	
(9) CONSOLIDATED CONTRACTORS INTERNATIONAL COMPANY SAL (OFFSHORE)	
(10) HASSIB HOLDING SAL	**Defendants**

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Ms Sonia Tolaney QC, Mr Simon Colton QC, Mr James Walmsley and Mr Andrew Lodder (instructed by **Latham & Watkins**) for the **Claimant**
Mr Philip Edey QC, Mr Andrew Fulton and Mr Andrew Scott (instructed by **DLA Piper UK LLP**) for the **first, third, fourth, eighth and ninth defendants**
Mr Alexander Layton QC, Ms Jessica Hughes and Mr Robert Avis (instructed by **CMS Cameron McKenna Nabarro Olswang LLP) for the fifth, sixth, seventh and tenth defendants**

Hearing dates: 10-11 October 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is the hearing of:

   i) An application by the claimant by an Application Notice dated 19 December 2018 for:

      a) Declarations that:

         i) a "*concession*" made on her behalf that certain Share Sale Agreements relied on by the defendants, which I describe in more detail later in this judgment, were "*existent, valid and effective*" is not an admission for the purposes of CPR Part 14; and

         ii) the claimant is not precluded from challenging the existence, validity and / or effectiveness of the Share Sale Agreements in these proceedings by reason of the concession; or

      b) An order either under CPR Part 14 or the general law giving permission to withdraw the concession, if such permission is required;

   ii) An application by the first, third, fourth, eighth and ninth defendants ("Khoury defendants") by an Application Notice dated 31 January 2019 for an order pursuant to CPR r.3.4 striking out various paragraphs or parts of paragraphs within the claimant's Reply to the Khoury defendants' Defence on the grounds that either (a) the challenged parts of the Reply are inconsistent with the concession the subject of the claimant's application referred to in paragraph 1(i)(a)(i) above and/or (b) that the parts of the pleading under challenge introduce new causes of action that should be permitted only if and to the extent that the claimant can obtain permission to amend her Claim Form and/or Particulars of Claim to raise them; and

   iii) An application by the fifth, sixth, seventh and tenth defendants ("Sabbagh defendants") by an Application Notice dated 31 January 2019 for similar orders in relation to the Reply to the Sabbagh defendants' Defence to those sought by the Khoury defendants.

   The high level of hostility between the parties to this litigation – first noted by Carr J at paragraph 11-13 of her judgment referred to below – and the lack of proportionality with which it has been approached has continued with these applications. In most other contexts, the length of applications of this sort could proportionately be measured in hours rather than the two days it took and the skeletons would have been a few pages in length. The claimant's skeleton ran to 25 pages including 13 footnotes and was signed by three leading counsel and two junior counsel and the main skeleton filed on behalf of the defendants ran to 42 pages, contained no fewer than 108 footnotes and was signed by leading counsel and two juniors. The remaining defendants' skeleton ran to two pages only because it adopted what was said in the other defendants' skeleton but even that was signed by leading counsel and two juniors. Even allowing for the value at risk in this litigation all this is obviously disproportionate.

Relevant Background

2. The claimant is the sister of the fifth and sixth defendants and the daughter of the late Mr Hassib Sabbagh ("HS"). In 1950, HS and the late Mr Said Toufic Khoury ("STK") founded what became the Consolidated Contractors Company group of companies ("Group"). Since 1984, the eighth defendant has been the ultimate holding company for the Group. The eighth defendant is a Lebanese registered company, as are at least some of the other companies that form the Group. The Group is valued "*… in the sum of at least US$5 billion …*"[1]. The first, third and fourth defendants are STK's sons and cousins of the claimant. The first defendant is the chairman of the eighth defendant and the third and fourth defendants are two of its directors. The first to seventh defendants control the eighth defendant. The tenth defendant is a Lebanese registered company controlled by the fifth and sixth defendants. Its directors are the third, fifth, sixth and seventh defendants. The seventh defendant is also a cousin of the claimant. None of the defendants has any connection with England and Wales other than the first defendant. The claimant has no connection with England and Wales either.

3. On 29 June 2002 HS suffered a severe stroke. In these proceedings, the claimant alleges that HS's stroke rendered him unable to manage his business or his own affairs. On 12 January 2010 HS died intestate. The claimant, fifth and sixth defendants are HS's heirs under Lebanese law and each is entitled to one third of his estate. Relations between the claimant and the defendants broke down over disputes concerning the latter's management of and dealings with their father's assets both following his stroke down to his death and following his death. It was those alleged dealings that led the claimant to commence these proceedings.

4. In these proceedings, the claimant alleges first that from a date shortly after HS suffered his stroke the defendants other than the seventh and tenth defendants conspired to misappropriate assets that belonged to HS. This claim is referred to in these proceedings as the "*Asset Misappropriation Claim*". That element of the claimant's claim is not directly relevant to the claimant's application or to the part of the defendants' applications that mirrors the claimant's application. The claimant's other allegation in these proceedings is referred to by the parties as the "*Share Deprivation Claim*". This claim is concerned with shares in the eighth defendant that the claimant alleges HS owned at the date of his death. It is this part of the claimant's case that is affected by the claimant's application and that part of the defendants' applications that mirrors the claimant's application.

5. In the Share Deprivation Claim, the claimant alleges that at the date of his death HS owned 399,915 shares in the eighth defendant and that following HS's death the defendants conspired to deprive her unlawfully of her entitlement to one third of this shareholding by procuring the transfer of the shares to the tenth defendant. It is common ground that the tenth defendant is the registered holder of the shares.

6. The defendants' case in relation to the Share Deprivation Claim is:

> "… there was no unlawful conspiracy and that the shares now held by [the tenth defendant] are derived from transfers of shares in [the eighth defendant] which Hassib made prior to his death

[1] Sabbagh v. Khoury and others [2017] EWCA Civ 1120 at ¶4.

> (and prior to his stroke) in favour of Sana, Samir and Suheil. … it is now common ground that by three share transfer agreements made in 1993 ("the 1993 Agreements") Hassib agreed to transfer to his children 199,960 of his then holding of 199,970 shares in [the eighth defendant] subject to the retention by him of a usufruct in the shares for his life. Sana became entitled to receive 20,000 shares (for a stated consideration of US$1,333,333) and Samir and Suheil each became entitled to receive 89,980 shares at a price of US$6m. In September 1993 Hassib agreed to transfer 2 more of his remaining shares in [the eighth defendant] to each of his sons leaving him with only 6 shares.
>
> 11. Further agreements were entered into in 1995 between Hassib and his children and between Sana and her two brothers, the cumulative result of which (after taking into account increases in the share capital of [the eighth defendant]) was that Sana became entitled to 100,000 shares and Samir and Suheil to 199,960 and 199,961 shares respectively. Then in 1998 Sana transferred her entire holding of 100,000 shares back to Hassib who in turn transferred them to [the ninth defendant]. His remaining 3 shares in [the eighth defendant] were transferred to Suheil. If this sequence of agreements was effective to pass ownership of the shares and any necessary corporate formalities were complied with, the net result of the agreements and transfers executed between 1993 and 1998 was that Hassib had ceased to own any shares in [the eighth defendant] but had retained his usufruct rights over 399,915 shares. By an agreement dated 16 July 2006 (but whose date is in issue) Samir and Suheil transferred 399,915 shares to [the tenth defendant] subject to Hassib's usufruct. The [ninth defendant] retained the shares it had acquired in April 1998."[2]

Of the 1993 agreements, Sana was a party to and had initialled and signed one of them – see paragraphs 38-39 of Carr J's judgment in Sabbagh v. Khoury and others [2014] EWHC 3233 (Comm) – but was not a party to the other Share Sale Agreements made in 1993 – see paragraphs 37 and 39 of Carr J's judgment. The claimant was a party to and had initialled and signed each of the 1995 Agreements – see paragraph 45 of Carr J's judgment – and the 1998 Agreements were signed by the claimant and her father – see paragraphs 49 and 50 of Carr J's judgment. The focus during the jurisdictional hearings was on the two 1993 Agreements to which the claimant was not a party because it was common ground that "*... the shares purportedly transferred under the two 1993 Agreements* [to which the claimant was not a party] *effectively comprise all the shares that [the claimant] contends were owned by [HS] on his death ..."* – see the claimant's outline submissions for the jurisdiction hearing before Carr J at footnote 89 and paragraph 109 of the Court of Appeal's judgment in Sabbagh v. Khoury and others [2017] EWCA Civ 1120.

[2] Sabbagh v. Khoury and others [2017] EWCA Civ 1120 at ¶10-11.

7. Although the claimant had issued and advanced her claim on the basis that she had been wrongfully deprived of and was entitled to 133,305 shares in the eighth defendant, on 25 April 2014, before the jurisdiction hearing before Carr J, the claimant stated that the Share Deprivation Claim was not for the delivery up of the shares the claimant claimed to have been deprived of but was a delict claim (according to either Lebanese or Greek law) for damages for loss of the shares to which she claims to have been entitled[3].

8. Following the commencement of these proceedings, the defendants challenged jurisdiction. The initial hearing took place in 2014 before Carr J – see Sabbagh v. Khoury and others [2014] EWHC 3233 (Comm) ("Carr J's judgment") – and the appeal and cross appeal were heard in 2017 – see Sabbagh v. Khoury and others [2017] EWCA Civ 1120 ("the Court of Appeal's Judgment"). Carr J identified the concession she understood to have been made in paragraph 34 of her judgment namely that by:

> "… the time of the substantive hearing of the jurisdiction applications it was clear that Sana now expressly does not dispute the "*existence, validity or effectiveness*" of the 1993, 1995 or 1998 transactions"

Carr J described the claimant's concession that the 1993, 1995 and 1998 Agreements were valid and legally effective as "*... a central concession ...*" because she had advanced "*... a positive case (that they were shams and ineffective) ... in her submission of September 2012 [and] the subsequent Particulars of Claim do not address them at all.*" – see paragraph 109 of Carr J's judgment. The Court of Appeal's understanding of the concession being made was similar to that of Carr J, for as it observed:

> "Sana's original position was that the family agreements made between 1993 and 1998 were artificial or sham transactions with no legal effect. But she no longer disputes the existence, validity or effectiveness of the agreements as such. Her case now is that, as a matter of Lebanese law, the agreements fall to be treated as gifts rather than agreements to sell which would continue to bind Hassib (and his heirs) even after his death. As gifts they would lapse on death unless completed as transfers before then. She says that the agreements were ineffective to divest Hassib of ownership of the shares which were later transferred to [the tenth defendant] because the formalities of board approval, registration and reissuing of the shares required under Lebanese law and the articles of association in relation to the earlier agreements were not complied with."[4]

9. The jurisdiction issues were argued both at first instance and on appeal on the basis that the claim was that the defendants were guilty of conspiracy to do unlawful acts with the intention of harming the claimant because that was the sole basis on which the claim had been pleaded in the Claim Form and Particulars of Claim. These two elements of the claimant's case – that she did not dispute the existence, validity or effectiveness of the agreements on which the defendants relied and that her claim depended exclusively

[3] Sabbagh v. Khoury and others ibid. at ¶155 and Sabbagh v. Khoury and others [2019] EWCA Civ 1219 at ¶33.
[4] Sabbagh v. Khoury and others ibid. at ¶12.

on pleading and proving intentional wrongdoing by the defendants – are what give rise to the applications that I have to determine.

10. The claimant provided some draft re-amended Particulars of Claim to the Court of Appeal in which she attempted to re-state the Share Deprivation Claim. The draft re-amended Particulars of Claim placed before the Court of Appeal included an allegation that the sales to which the Share Sale Agreements referred were not genuine sales and the agreements were shams and of no effect – see paragraphs 23-25 of the draft. There can be no doubt that the claimant was seeking to resile from the concession made before Carr J – see the exchange between Patten LJ and Mr Peto QC, then appearing on behalf of the claimant (together with various other leading counsel and counsel), on 6 February 2017 at transcript pages 9 line 15 to 10 line 4 and 65 line 18 to 66 line 14. The underlying basis of the Court of Appeal's decision to refuse the claimant permission to rely on new evidence in support of her Share Deprivation Claim in the appeal was that it would be open to the claimant to apply to amend her Particulars of Claim in relation to the Share Deprivation Claim if her appeal in relation to the jurisdiction issue succeeded but that application would have to be made to the Commercial Court and disposed of on its merits as they were at the date when that application was determined – see the transcript of the hearing on 6 February 2017 at pages 14-15. It was not anywhere suggested by anyone that this alternative case could be raised by pleading it in the Replies.

11. In the event, the claimant succeeded on her appeal and the defendants failed on their cross appeals with the result that the claimant established jurisdiction against all the defendants she wished to sue in relation to each element of her claim.

12. Following judgment by the Court of Appeal and the refusal of permission to appeal further by the Supreme Court, the defendants had to decide whether to acknowledge service and accept the jurisdiction of the English Courts or to refuse to acknowledge service – see CPR r. 11(7)(b).

13. Each defendant decided to acknowledge service and accept the jurisdiction of the English Courts but in each case they purported to qualify the terms on which they acknowledged service. Thus in its letter of 26 March 2018, CMS Cameron McKenna Nabarro Olswang LLP on behalf of the Sabbagh defendants qualified their Acknowledgement of Service as being "*… confined to the existing claims set out in the Claim Form, to the limited extent that the Court of Appeal accepted the English court's jurisdiction over such claims, but subject to the numerous concessions your client has made including but not limited to her explicit abandonment of any claim to be presently entitled to or for delivery up of shares …"*. Jones Day, the solicitors then acting for the first defendant similarly qualified his Acknowledgement of Service – see their letter of 26 March 2018. Baker McKenzie qualified the other Khoury defendants' Acknowledgement of Service as being "*… only in respect of the two claims as set out in the Claimant's Claim Form … and is subject to the numerous concessions the Claimant has made to date …"* and added that:

> "We understand that the Claimant intends to seek to amend her Particulars of Claim and our clients' position as to whether any such amendment(s), if allowed, impact on the jurisdiction of the court over our clients as regards any claims other than those to

> which this Acknowledgement of Service is filed is fully reserved, including as to jurisdiction and/or the arbitrability of any such amended claims"

In the circumstances, it is probable that the amendment Baker McKenzie had in mind was one substantially in terms of the draft re-amended Particulars of Claim that had been placed before the Court of Appeal.

14. Ms Tolaney QC submitted on behalf of the claimant that it was not open to the defendants to qualify their Acknowledgements of Service in this manner[5]. Mr. Layton QC on behalf of all the defendants disputed that this was so. It is convenient to address that issue at this point in the judgment.

15. I am satisfied that Ms Tolaney's submission is mistaken for the following reasons. In principle, foreign based defendants can qualify their Acknowledgements of Service in the manner adopted by the defendants in these proceedings – see Glencore International AG v. Exter Shipping Limited and others [2002] EWCA Civ 524; [2002] 2 All ER (Comm) 1 *per* Rix LJ at paragraph 45, where he said that a "*... foreign defendant ... brought here against his will and (subject to the role of international treaty, such as the Brussels and Lugano Conventions, which raises different issues) can limit his submission to the jurisdiction and prima facie is regarded as doing so on a claim by claim basis."*. As Rix LJ added at paragraph 50 "*... in the absence of a general submission to the jurisdiction ... the general rule is that permission has to be obtained within the four corners of the English long arm statute for each separate claim made against him ...*". The qualifications contained in the correspondence I have referred to eliminate any suggestion of a general submission to the court's jurisdiction. Where there has not been a general submission and the claimant seeks to introduce a claim by applying for permission to amend the Claim Form and/or Particulars of Claim, it is open to the defendants to argue that the amendment should not be permitted on the basis that the court has no jurisdiction – see Maple Leaf Macro Volatility Master Fund and another v. Rouvroy and another [2009] EWHC 257 (Comm) *per* Andrew Smith J at paragraph 190. That is not something that is possible where an attempt is made to achieve the same result by the pleading of a Reply, for which permission is not required.

16. The authority relied on by Ms Tolaney – Masri v Consolidated Contractors International (UK) Ltd and others (No 3) [2008] EWCA Civ 625; [2009] QB 503 – does not assist the claimants for, as Lawrence Collins LJ (as he then was) said in that case:

> "I accept that both under CPR r 6.20 (and its predecessor RSC Ord 11, r 1) and under the Brussels I Regulation, it is not permissible to add by way of amendment additional claims unless the jurisdictional requirements are fulfilled for those claims (including, in the case of CPR r 6.20, the obtaining of permission to serve out of the jurisdiction)"

Short of this "*A defendant who submits to the jurisdiction is subject to the incidents of litigation*". Although none of these cases say so in terms, I have no doubt that it is not open to a claimant to avoid these consequences by seeking to insert additional claims

[5] See Transcript Day 2, page 147, lines 7-17.

in a Reply. Such conduct is an abuse and is likely to result in the offending part of the Reply being struck out under CPR r. 3.4(2)(b).

17. I now return to the procedural chronology. Following completion of the jurisdictional challenge appeal process, the claimant obtained permission to amend her Particulars of Claim from Males J on 20 August 2018. The amendments sought did not reflect the draft amendments that had been placed before the Court of Appeal. The amendments for which permission was given did not resile from the concession made by the claimant in the jurisdiction proceedings by putting in issue the existence, validity or effectiveness of the Share Sale Agreements, nor did they set up any alternative causes of action to those relied on at the jurisdiction stage as the defendants allege the claimant has done in her Replies. The defendants served their Defences and, on 3 December 2018, the claimant served her Replies.

18. In her Replies, the claimant purportedly disavowed her concession concerning the existence, validity or effectiveness of the Share Sale Agreements – see paragraphs 32-34 of the Reply to the Khoury defendants' Defence, where at paragraph 34 it is pleaded that:

> "For the avoidance of doubt [the claimant] is not bound by the concession that she made during the course of the Defendants' jurisdiction challenge that she did not deny the existence, validity or effectiveness of the 1993 Agreements or other agreements. If contrary to [the Claimant's] case she is presently bound by such concession, she hereby withdraws such concession or (if required) will seek permission to withdraw such concession. …"

It is that part of the Reply pleading that gives rise to what I will call the Concession Issue.

19. In addition, the defendants maintain that the claimant has set up what the defendants describe as a "*… new and alternative case that the defendants are liable for non-intentional wrongdoing".*[6] The basis for this assertion is what has been pleaded in paragraphs 89(8), 91(3)-(4), 92(3)(a) and 93 of the Reply to the Defence of the Khoury defendants. In essence the same point arises in relation to each paragraph – the claimant maintains her primary case concerning what she claims was the defendants' intention to harm her but in the alternative pleads that "*… the Khoury defendants are nonetheless liable under the relevant provisions of both Lebanese and Greek law by reason of … the … imprudence and/or carelessness in their conduct …"* – see paragraph 89(8). In paragraph 93, the claimant asserts that the claims made by her against the defendants do " *… not require intentional wrongdoing …"* and that they would be liable even if they did not know they were acting unlawfully "*… by reason of the seriousness of the wrongs which the defendants committed"* and were "*… nonetheless liable by reason of the imprudence, carelessness … in participating in such acts"*.

20. In her written submissions, in relation to the assertion that the Replies set up a new and alternative case based on non-intentional wrong doing, Ms Tolaney stated that it had always been and remained the claimant's only case that the defendants deliberately

[6] Khoury Defendants' skeleton for this hearing, ¶8.

intended to cause her harm and that the sole purpose of the pleading in the Reply that the defendants challenge was to set up the point that it was not a defence for the defendants to establish that even if they did intend to harm her they did not intend to act unlawfully. Mr Edey submitted on behalf of the defendants (this being an argument that by agreement between the lawyers for the defendants he advanced on behalf of all of them) that this was not the effect of what had been pleaded. I agree with Mr Edey's submission. He maintained that if an alternative case based on non-intentional wrong doing was to be advanced it should have been by way of an application to further amend the Particulars of Claim, not merely because it was an alternative cause of action that could or should not be pleaded in a Reply but must be pleaded in the Particulars of Claim but also because it was only in such a context that the issues concerning jurisdiction could properly be understood and analysed. I agree. As I have said already, attempting to plead an alternative cause of action in a Reply against a foreign-based defendant who has acknowledged service on a qualified basis is likely to result in the offending part of the Reply being struck out. In addition, the alternative formulation appeared to rely on the same primary facts that were relied on as demonstrating an intention on the part of the defendants to cause the claimant harm and the defendants did not understand and could not reasonably be expected to understand how a non-intentional claim – that is one that depended on imprudence or carelessness as pleaded in the Reply – could be advanced by reference to the primary allegations on which the intention to harm case was based. I agree with these submissions as well. As I explain below, Ms Tolaney did not in the end disagree with them either. Her point was that the position had been fully explained in her skeleton and that should be enough comfort for the defendants. For the reasons that I explain below, I do not accept Ms Tolaney's submission.

The Jurisdiction Challenges

21. Given the basis on which the defendants resist the claimant's application and support their own applications, it is necessary that I set out in some detail the circumstances in which the concession concerning the validity of the Share Sale Agreements came to be made, the basis on which the defendants challenged jurisdiction and the basis on which those challenges were resolved principally by the Court of Appeal in Sabbagh v. Khoury and others (ibid).

22. The claimant's case at the commencement of proceedings for maintaining that the court had jurisdiction was that the first defendant was one of the defendants against whom conspiracy was alleged, he was resident in England and thus was the anchor defendant by reference to which the English court obtained jurisdiction against all the other defendants other than the tenth defendant by operation of Art. 6(1) of either the applicable Brussels Regulation (Regulation 44/2001) or the Lugano Convention. As against the tenth defendant, the claimant sought and obtained permission to serve the proceedings out of the jurisdiction under CPR r. 6.37 and Paragraph 3.1 of Practice Direction 6B (the necessary and proper party gateway).

23. By the time of the hearing before Carr J, the defendants were all challenging jurisdiction and had issued an application seeking a mandatory stay of the proceedings under section 9 of the 1996 Act for a stay of that part of the claim that involved a challenge to the validity of the Share Sale Agreements and a case management stay of these proceedings

pending the completion of the references to arbitration of the validity issues in the event that the challenge to jurisdiction failed.

24. In summary, the defendants maintained that service of the proceedings outside England and Wales ought to be set aside or the proceedings stayed because:

    i) The claim against the alleged anchor defendant (the first defendant) was hopeless on the merits and so he could not be used to secure jurisdiction against the other defendants under Art. 6(1) of either the Brussels Regulation or the Lugano Convention ("Merits Issue");

    ii) The Share Deprivation Claim involved matters that the claimant was bound to arbitrate and thus there should be a mandatory stay of those matters by operation of section 9 of the Arbitration Act 1996 and a discretionary case management stay of the remainder while the matters which the claimant was bound to refer to arbitration were resolved by an arbitrator or arbitrators ("Arbitration Issue"); and

    iii) The main subject matter of the dispute was a succession claim within the meaning of Art. 1(2)(a) of the Brussels Regulation and the Lugano Convention and thus outside their scope with the result that the proceedings could only have been obtained by obtaining permission from the court under CPR Part 6 and any such application would have been bound to fail on *forum conveniens* grounds ("Succession Issue").

The Shares Sale Agreements and the Arbitration Issue

25. The ostensible substantive effect of the Share Sale Agreements is summarised in the quotation from the Court of Appeal's judgment in Sabbagh v. Khoury and others (ibid) set out above. No more detail is necessary for present purposes. As I have said already, the claimant did not refer in either the Claim Form or the Particulars of Claim to the existence or effect of the Share Sale Agreements, nor did she do so in the amended Particulars of Claim finally served after completion of the jurisdictional challenges. There was no inherent difficulty in doing so because the claimant had referred to the existence or effect of the Share Sale Agreements in the draft re-amended Particulars of Claim that she had placed before the Court of Appeal. The first time they are mentioned in a served pleading by the claimant is in the Replies that are the subject of the defendants' applications.

26. Each of the Share Sale Agreements was subject to an arbitration agreement in identical terms being:

> "Any dispute, controversy or question of interpretation arising under, out of, or in connection with this Agreement, or any breach or default hereunder shall be submitted to, and determined and settled by, arbitration in accordance with the following procedures."

27. The claimant was a party to or had signed one of the 1993 Agreements, the 1995 Agreements and the 1998 Agreements. She was not a party to any of the other Share Sale Agreements and thus by definition could not be bound by or a party to the

arbitration agreement within those of the Share Sale Agreements to which she was not a party. Carr J concluded that there was no realistically arguable basis on which the Share Deprivation Claim could be maintained against the first defendant as the anchor defendant and so there was no jurisdiction in respect of the Share Deprivation Claim. The Court of Appeal overturned that conclusion, which meant that the Court of Appeal then had to consider the Succession and Arbitration Issues.

28. The Court of Appeal identified the questions that had to be answered concerning the Arbitration Issue at paragraph 121 of its judgment as being first whether as a matter of Lebanese law the claimant was bound by the arbitration agreements relied on by the defendants and secondly whether the Share Deprivation Claim was within the scope of the arbitration agreements relied on. The Court of Appeal rejected the defendants' contentions concerning the impact of arbitration in paragraphs 131-132 of the Court of Appeal judgment in these terms:

> "1993 Agreements: share deprivation claim
>
> 131. Once again, in our view Sana is not bound by the arbitration clauses in question since she was not a party to the agreements, and nor does Sana seek to enforce or defend claims on the contracts as Hassib's heir. We would also reject the argument that Sana must necessarily bring the claim as heir in order to be able to contend that the 1993 Agreements are properly characterised as gifts. On the very limited expert evidence bearing on this point, it appears that this is a procedural requirement of Lebanese law which does not affect the proper characterisation of the claim.
>
> 132. Further, and finally, the share deprivation claim would fall outside the scope of the arbitration clauses in the 1993 Agreements, since the claim does not relate to the interpretation, enforcement or performance of the contract in question, which are the only proper subjects of the clause under Article 762 of the Lebanese Code of Commerce."

The defendants' case concerning arbitration was rejected on three separate grounds being (1) the claimant was not bound by the 1993 Agreements that were material because she was not a party to them or the arbitration agreements within them; (2) the claimant was not seeking to enforce or defend claims on the contracts (because she was advancing a delictual claim against the defendants for damages) and (3) the Share Deprivation Claim did not fall within the scope of the arbitration agreements within the 1993 Agreements because the otherwise wide scope of the arbitration agreement within each of the Share Sale Agreements was limited by Art. 762 of the relevant Lebanese Code to disputes relating to the interpretation, enforcement or performance of the contract in question. As I read the judgment of the Court of Appeal any one of these reasons would have been enough to defeat the defendants' case concerning arbitration.

The Concession

29. Paragraph 12 of the Court of Appeal's judgment, if read in isolation, suggests that it understood the concession to apply to all the Share Sale Agreements including those in 1995 and 1998, to which the claimant had been a party. All these agreements are relied on by the defendants in combination as together rendering unsustainable the claimant's case that HS owned the shares at the date of his death – see Paragraph 6 and 75 of the Khoury defendants' Defence and paragraphs 45-63 of the Sabbagh defendants' Defence – and the Khoury defendants plead express reliance on the concession as extending to all the Share Sale Agreements including those dated in 1995 and 1998 – see paragraph 75(1) of their Defence. The claimant maintains however that when the jurisdiction hearing took place, the defendants had confined their reliance to the 1993 agreements and all parties understood and proceeded on that basis. On that basis she contends that the concession made no difference whatsoever to the outcome of the proceedings before either Carr J or the Court of Appeal because (i) the concession had no impact on the conclusions that the claimant was not bound by the 1993 Agreements in question and (ii) on proper analysis the defendants could have sought but chose not to seek a mandatory stay in relation to the issues that rose under the 1995 Agreements, and which arose irrespective of whether the concession had been made or not.

The Succession Issue

30. The defendants submitted both before Carr J and the Court of Appeal that the principal subject matter of both the Share Deprivation Claim and the Asset Misappropriation Claim was succession and thus fell outside the scope of the Brussels Regulation and Lugano Convention by virtue of Article 1(2)(a) in each. I mention this part of the jurisdiction challenge only because it was submitted on behalf of the defendants that the withdrawal of the concession impacted not only the Arbitration Issue identified above but also the Succession Issue.

31. The Court of Appeal did not approach this issue by reference to the concession. At paragraph 159 it identified the question that arose as being whether the subject matter of the dispute was to be regarded as a claim to recover the shares in the eighth defendant and the other assets that allegedly formed part of HS's estate at his death or whether the claim was a delictual claim to recover the value of those assets from the defendants. The Court of Appeal decided that it was the latter. As it observed at paragraphs 160-162:

> "… this is not a claim against the estate and if the claim is brought in tort or deceit to recover the value of assets to which Sana as heir has title then it becomes more difficult to see why that should be treated as a matter of succession simply because the claimant's title derives from the Lebanese law on heirship as opposed to being based on a contractual purchase or inter-vivos gift. By the same token, it would be difficult to characterise a claim by an heir to recover property stolen from her by an unconnected third party as succession simply because she had inherited it. The same would apply to a claim by an estate to recover the property of the deceased which a third party had misappropriated. The nature of the rights being protected by the

> action is the ownership by the heir or administrator of the relevant asset: not their right to succeed to or administer the estate. Why, one asks, should the analysis be any different merely because the alleged misappropriation has been carried out by defendants who include the other heirs or beneficiaries?
>
> 161. If one applies the test of identifying the nature of the rights which the proceedings serve to protect, it seems to us that this is undeniably Sana's ownership of any shares or other assets which Hassib held at his death. The fact that in order to determine the scope of the claim it is necessary first to decide whether specific assets such as the shares were still owned by Hassib when he died is not sufficient in itself to characterise the subject matter of the claim as succession. That much is clear from the judgment in *Marc Rich*. Nor do we accept Mr Layton's submission that the fact that Sana's rights derive from her position as one of her father's heirs is sufficient in itself to designate the claim as a matter of succession. The source of the ownership is irrelevant to the nature of the claim. In terms of legal effect, it is no different from the title of the trustee-in-bankruptcy in *Re Hayward*. The subject matter of the dispute is not whether Sana is an heir, but whether the defendants have misappropriated her property.
>
> 162. If one looks to the Succession Regulation for assistance as to the scope of the succession exception this, in our view, merely serves to confirm the result of applying the jurisdictional test. We do not accept that Sana's claim can be described as the determination of the disposable part of the estate or its sharing out. It seems to us that those sub-categories are descriptive, as we said earlier, of issues about entitlement and administration which are not in issue in these proceedings. For these reasons, we consider that the judge was right to reject the objections to jurisdiction based on the claim being a matter of "succession"."

There is nothing within this analysis that suggests the concession could have had any impact on resolution of the Succession Issue and on that basis it is difficult to see how any credible prejudice could be suffered by the defendants in relation to the Succession Issue if the claimant were permitted to withdraw the concession.

Defendants' Case concerning the Concession in Summary

32. The defendants' case is that the concession concerning the existence, validity or effectiveness of the Share Sale Agreements is an admission within the meaning of CPR r. 14.1(1), that the permission of the court is required before an admission can be withdrawn by operation of CPR r. 14.1(5) and that permission ought not be to given applying the principles set out in Paragraph 7.2 of Practice Direction 14 – Admissions since the defendants will be seriously and irremediably prejudiced if the claimant is permitted to withdraw her concession.

33. In the alternative, the defendants allege that the purported disavowal of the concession contained in the Replies ought to be struck out under CPR r.3.4 as being an abuse of process. The basis of this submission is that permission was required and unless the court is now willing to give permission the part of the Replies in which the claimant withdraws the concession ought to be struck out as an abuse. I agree that if permission is required and is not given then the relevant part of the Replies would have to be struck out as an abuse. As to the need for permission I accept that the principles set out by Mann J in BT Pension Scheme Trustees Limited v. British Telecommunications Plc [2011] EWHC 2071 (Ch) apply by analogy in a case such as this and that the claimant, having succeeded on the jurisdiction issues in proceedings in which the concession was given, ought not now to be permitted to withdraw that concession without the court's permission. I accept therefore that the burden rests on the claimant to show that she ought to be permitted to withdraw her concession and for permission to be granted the court must be satisfied that there will not be a real risk of prejudice to the defendants if the claimant is permitted to withdraw the concession – see BT Pension Scheme Trustees Limited v. British Telecommunications Plc (ibid.) at paragraphs 41-44. As Mann J put it at paragraph 44(iii), "*... if taking the point would risk causing prejudice to the other party, in the sense that it might have been deprived of the opportunity of dealing with the case differently in the court below, then it is unlikely that resiling will be allowed. The greater the risk, the less likely it is that it will be allowed ...*" and at paragraph 44(iv) "*... there is a low threshold of risk for these purposes ...*".

Defendants' Case concerning the Alleged New Claims in Summary

34. In relation to the "*... new and alternative case ...*" issue, the defendants allege that what is set out in the Replies is a new cause of action and as such it should have been pleaded by way of amendment of the Claim Form and/or Particulars of Claim for which permission would have been required and which the defendants would have been entitled to resist on jurisdictional grounds given the qualified nature of their submission to the jurisdiction of the court. They add that by pleading it in the short form way adopted in the Reply and seeking to incorporate by reference the particulars set out in the Particulars of Claim given in support of the intentional harm case, the claimant's case has become incoherent to the point where the defendants do not and cannot reasonably be expected to understand the case against them. They submit that even if technically a new cause of action could be set up in a Reply, the way in which it has been done creates a manifestly unfair position for the defendants and largely defeats the purpose of pleadings to set the agenda for trial. They submit that if forced to plead the alternative case by way of amendment to the Particulars of Claim, the claimant would have to apply for permission to amend, which would enable the defendants to resist the amendment unless it was in terms that enabled the alternative cases to be understood. Finally and in any event the defendants maintain it is too late to permit further amendments to either the Claim Form or the Particulars of Claim and that any application to amend would be resisted on that basis.

The Concession Issue - Discussion

The Applicability of CPR Part 14

35. Ms Tolaney submitted that CPR Part 14 was of no application to the concession or its purported withdrawal. I reject that submission for the following reasons.

36. As is noted in the introductory section in Civil Procedure Vol. 1 ("WB1"), CPR Part 14 covers three separate situations – being, firstly, "*formal admissions*" made after the start of proceedings, which is the subject of CPR r.14.1, secondly, pre-action admissions made after 6 April 2007 and after receipt of a letter of claim under one of the three pre-action protocols listed in PD 14 para.1.1(2) or, if made before a letter of claim is received, stated to be made under CPR Part 14, which is the subject of CPR r.14.1A and B and, thirdly, a debtor's admission of a debt (usually accompanied by an offer to pay by instalments) on a form provided by the court and served with the claim form, which is the subject of CPR r14.4-14.7. It is common ground that if the concession is an admission for the purposes of any part of CPR Part 14, it is one to which CPR r.14.1 applies.

37. In so far as is material, it provides:

> "**Admissions made after commencement of proceedings**
>
> 14.1 (1) A party may admit the truth of the whole or any part of another party's case.
>
> (2) The party may do this by giving notice in writing (such as in a statement of case or by letter).
>
> ...
>
> (5) The permission of the court is required to amend or withdraw an admission."

By CPR r.14.3:

> "**Admission by notice in writing—application for judgment**
>
> 14.3 (1) Where a party makes an admission under rule 14.1(2) (admission by notice in writing), any other party may apply for judgment on the admission.
>
> (2) Judgment shall be such judgment as it appears to the court that the applicant is entitled to on the admission."

The principles applicable to an application under CPR r.14.5 to withdraw an admission are contained in Practice Direction 14 – Admissions, Paragraph 7 of which provides:

> "7.1 An admission made under Part 14 may be withdrawn with the court's permission.
>
> 7.2 In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including—
>
> (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to

> light which was not available at the time the admission was made;
>
> (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
>
> (c) the prejudice that may be caused to any person if the admission is withdrawn;
>
> (d) the prejudice that may be caused to any person if the application is refused;
>
> (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
>
> (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission was made; and
>
> (g) the interests of the administration of justice."

38. Ms Tolaney submitted, correctly, that the purpose of CPR Part 14 was to reduce cost and delay and to narrow the issues in dispute between the parties. That notwithstanding, Ms Tolaney submits that (a) the scope of CPR r.14.1(2) is limited to "*a distinct element or ingredient"* of a party's case and (b) must be of such an element as is set out in a pleading. I am not able to accept either of those submissions.

39. In support of the first of these submissions, Ms Tolaney relied on a decision of Master Davison in Mack v. Clarke [2017] EWHC 113 (QB), where the Master held at paragraph 12 of his judgment that:

> "The purpose of Part 14 is set out in the commentary to rule 14.1, namely "reducing costs and delay and of narrowing the issues in dispute". To that end, the CPR "encourage parties, where appropriate, to make admissions of fact and to concede claims (or parts of a claim) and not to contest the incontestable throughout the pre-trial process". What is encouraged is the proper concession of *claims or parts of claims*. The wording of the rule itself refers to "the *whole or any part of another party's case*". It seems to me that this wording is not apt to encompass everything that would be termed an admission in the ordinary sense of the word. A defendant may, for example, admit the time, date and place of an accident. But these would not be admissions in the sense intended by Rule 14.1(1). CPR 14 taken as a whole is primarily directed towards admissions which would entitle a claimant to enter judgment against the defendant. Rule 14.1(1) is drawn somewhat more widely. It refers to "any part" of another party's case. But, in my view, that must still comprise a distinct element or ingredient of that case, for example breach of duty, causation or a head of loss. If "admission" were to bear its

> ordinary, English language definition, then Ms Elliott was correct to observe that a defendant could seldom amend without having to satisfy the detailed criteria in 14PD paragraph 7.2 – a consequence that could scarcely have been intended by the Rules Committee."

40. I do not accept that the scope of CPR r.14.1(1) is confined in the way that Ms Tolaney submits. The rule is concerned with a very practical and straightforward issue and is expressed in clear and everyday language. The phrase "… *the whole or any part of another party's case*…" does not require detailed contextual or textual analysis. The words mean what they say. There is nothing within the rule, or any of the other provisions of Part 14, that suggests it is necessary to substitute for the words "… *any part* …" of another party's case, the words "*a distinct element or ingredient"* of another party's case. I am unconvinced that this formulation is in reality any narrower than the words used in the rule but if they have the effect of limiting the scope of the rule to admissions of breaches of duty, causation or a head of loss then there is no justification for adopting them. Such a re-formulation would undermine the purpose of the rule identified by Master Davison and Ms Tolaney.

41. Although Master Davison said that "… *A defendant may, for example, admit the time, date and place of an accident. But these would not be admissions in the sense intended by Rule 14.1(1)* …" I do not agree. In the context of a claim for damages arising out of a road traffic accident for example, the claimant would have to prove each of those elements unless they were admitted. There is no justification within the text or purpose of the rule for excluding such admissions from its scope. I do not accept either that Part 14 is "… *primarily directed towards admissions which would entitle a claimant to enter judgment against the defendant*". It encompasses admissions entitling the party in whose favour the admission is made to seek judgment on the admissions made – that after all is the purpose of CPR r.14.3 – but that point does not enable what is and is not within the scope of the rule to be identified other than limiting its scope to admissions that enable an application for judgment to be made. However, there is nothing within Part 14 that expressly limits the scope of the rule in this way and there is nothing in the purpose, wider context or the language used that suggests any such intention. With respect therefore, I am not able to agree with Master Davison's conclusions as to the scope of CPR r.14.1(1).

42. As to the suggestion that it is only something that appears in a pleading that can come within the scope of CPR r. 14.1(1), again I am unable to agree. It depends upon construing the words "... *another party's case"* as meaning such a party's "Statement of Case". There is nothing concerning the purpose, wider context or the language used that justifies such a limited construction of the plain and everyday language used. Such a narrow construction is inconsistent with the language of the Part when taken as a whole for the following reasons. First, where the drafter of CPR Part 14 has intended to refer to a Statement of Case, the drafter has used that expression – see by way of example CPR r. 14.1(2). Secondly, construing the words "... *another party's case"* as meaning such a party's Statement of Case is entirely inconsistent with CPR r. 14.1A(1) where the phrase is used in the context of an admission made before the commencement of proceedings, where by definition there could be no Statement of Case. Thirdly, such a construction is inconsistent with CPR r. 14.1(2) since if what was capable of being admitted had to be set out in a pleading, it would be unnecessary to provide that the

admission could be by giving "*... notice in writing ...*". Finally, CPR Part 14 should be construed purposively. Construing it as being limited to assertions within pleadings would unnecessarily confine the scope and utility of CPR Part 14 as a mechanism for reducing cost and delay. On what principled basis could an admission in writing contained in a pleading be treated as within the scheme but an admission contained in any other written documents not be so treated, particularly when admissions in writing not contained in statements of case are permitted for the purposes of CPR r. 14.1A(1)? Whilst both parties accept that what Falk J states on this issue at paragraph 8-9 of her judgment in Obaid v. Al-Hezaimi and others [2019] EWHC 1953 (Ch) is *obiter*, nonetheless respectfully I agree with what she says both for the reasons that she gives and those that I have summarised above.

43. In summary therefore, I reject the claimant's contentions that for CPR r. 14.1(1) to apply, that which is admitted must be such as to entitle the other party to judgment or must be a constituent element of a cause of action or must be in a pleading. All that is required by the rule is that a party has admitted "*… the truth of … any part of another party's case*" by *"... notice in writing (such as in a statement of case or by letter) …*".

44. It is next submitted on behalf of the claimant that the rule is not engaged because the concession was not given by notice in writing within the meaning of CPR r. 14.1(2). I am not able to accept that submission either. As I have explained already, in a series of letters written prior to the hearing of the jurisdiction challenge by Carr J, the claimant had asserted in correspondence that the Share Sale Agreements had no legal validity or effect[7]. However, this assertion was not mentioned in the Particulars of Claim even though it was an essential step in establishing the Share Deprivation Claim that the Share Sale Agreements did not achieve what they were ostensibly intended to achieve. Carr J described this omission as "*striking"*[8] because it had been clear to the claimant from at least 2012 that the defendants relied on the 1993, 1995 and 1998 Share Sale Agreements and her case had always been that they were shams and of no validity or effect. It was in that context that the concession came to be made. The concession is set out in paras 58-60 of the claimant's outline written submissions for the jurisdiction challenges heard by Carr J in these terms:

> "58. In seeking to mount a defence to the share deprivation claim, the Defendants' major contention appears to be that [HS] did not own shares in CC Holding on his death in 2010, and, accordingly, that there is therefore no question of any unlawful transfer of his shares taking place following that time.
>
> 59. More particularly, the Defendants argue, in summary that:
>
> (1) [HS] entered into agreements with his sons on 18 August 1993 under which he transferred to them bare ownership rights of shares in CC Holding ("the 1993 Agreements");
>
> (2) The transfers under the 1993 Agreements were approved by a decision of the board of CC Holding that day with the transfer

[7] See Carr J's judgment, ¶33.
[8] Carr J's judgment (ibid.) at para. 109.

> registered in the internal company register of CC Holding on that date; and
>
> (3) On 16 July 2006, the Sabbagh brothers transferred the bare ownership of the shares to [the tenth defendant] under further agreements concluded and registered on that date ("the 2006 Agreements")
>
> 60. [The claimant] does not deny the existence, validity or effectiveness of the 1993 Agreements. However, she disputes:
>
> (1) First, that pursuant to the 1993 Agreements, transfers were effected in accordance with the requirements of Lebanese law and the Articles of CC Holding on 18 August 1993 – or, indeed, at any time before [HS's] death; and
>
> (2) Secondly, the authenticity of the 2006 Agreements"

Later in the same submission, the claimant summarised the issues that she maintained arose in these proceedings which included the contention by the defendants that "*The 1993 Agreements – lying according to the Defendants at "the heart of the dispute" and providing a "complete answer" to the share deprivation claim, whose validity and effect (according to the Defendants)*[FN 199] *is "fundamental" to [the claimant's] claim*". Footnote 199 reads:

> "There is in fact no dispute that the 1993 Agreements were both valid and effective: see paragraph 60 above and paragraph 134(4) below."

At paragraph 134 and specifically in support of the claimant's contention that her claims were not the subject of any arbitration agreements and in relation to an assertion by the defendants that the Share Deprivation Claim depended on her attacking the validity or effect of the Share Sale Agreements, it was submitted on behalf of the claimant that "*... the relevant question is the validity and effect of the putative transfer – not the validity and effectiveness of any of the ...*" Share Sale Agreements and that none of the issues that arose in relation to the Share Deprivation Claim "*... involve challenging the validity and effectiveness of the 1993 Agreements*". I address the question whether a written submission is capable of being a "*... notice in writing ...*" below.

CPR Part 14 and the 1993 Share Sale Agreements

45. The issue that arises is whether this material constitutes an admission by the claimant of the "*… the truth of ... any part of another party's case*" .by *" ... notice in writing (such as in a statement of case or by letter) …*". In my judgment it was in relation to the 1993 Share Sale Agreements between HS and each of the claimant's brothers but not the 1995 and 1998 Agreements. My reasons for reaching that conclusion are as follows.

46. The only written concession on which the defendants rely is that contained in the outline submissions I refer to earlier and that is confined expressly to the 1993 Agreements. The issue concerning validity and effect was hotly in dispute between the parties as I

have explained until the claimant conceded that the 1993 Share Sale Agreements were not shams and of no validity or effect. The dispute between the parties concerned the effectiveness as a matter of Lebanese law of the transfers ostensibly made pursuant to the 1993 Share Sale Agreements. The claimant's case was that they took effect as gifts, that the gifts had not been formally perfected prior to HS's death and that they lapsed because they had not been formally perfected before HS died. Thus whilst it is submitted on behalf of the claimant that the concession did not involve any concession in respect of HS's ownership of the shares at his death, that is not the point. Unless and until the concession set out above is withdrawn, it is not open to the claimant to argue as part of her case on this issue that the 1993 Share Sale Agreements were shams and of no validity and effect.

47. The fact that the concession did not entitle the defendants to judgment on the Share Deprivation Claim is not the point either for the reasons explained above. There is no tenable basis for arguing that to be within the scope of CPR r.14.1(1) the admission must be such as to entitle the party to whom the admission is addressed to judgment.

48. Finally, it is said that the concession is a "*… non-denial not an admission …"* This distinction is not one that is obvious. I accept that there is a difference between a non-admission as to a fact or matter and the admission of such a fact or matter, just as I accept that there is a difference between an admission and an averment. However, the distinction between a non-admission and an admission is not one that applies here. To assert that the claimant does not deny the existence, validity or effectiveness of the 1993 Agreements is to admit the existence, validity or effectiveness of those agreements. Had the claimant said that she did not admit the existence, validity or effect of the agreements, then the defendants would have been entitled to proceed on the basis that those issues remained live. That to treat the concession as an admission is the correct approach is put beyond real doubt by the footnoted statement that there is no dispute that the 1993 Agreements were both valid and effective and the statement in paragraph 134 that none of the issues that arose in relation to the Share Deprivation Claim involved challenging the validity and effectiveness of the 1993 Agreements. This is the effect of the statements when read separately and certainly when read together.

49. It is not clear to me whether it is contended by the claimant that the written outline submissions were not a "… *notice in writing* …". If that is argued it is mistaken. The words in parenthesis within CPR r.14.1(2) are non-exclusive examples. The outline submissions were plainly in writing and they were obviously intended to be relied on and were relied on by all parties to the jurisdiction hearing before Carr J and by Carr J at least in part in arriving at her conclusions concerning the concession.

50. In reality, the only real issue that arises in relation to CPR Part 14 and the 1993 Share Sale Agreements is whether I ought to give permission to the claimant to withdraw her admission concerning the existence, validity or effectiveness of the 1993 Agreements. In my judgment the answer is both clear and obvious.

51. Although the court is mandated to have regard to all the relevant circumstances including those identified specifically in Practice Direction 14 – Admissions, paragraph 7(2) – see Woodland v. Stopford [2011] EWCA Civ 266 at paragraph 26 – in reality in this case the two that are relevant to the exercise I have to carry out are those referred to in paragraph 7(2)(c) – the prejudice that may be caused to any person if the admission

is withdrawn – and paragraph 7(2)(d) – the prejudice that may be caused to any person if the application is refused.

52. For the reasons that follow, I have concluded that the defendants will suffer no relevant prejudice if the claimant is permitted to withdraw her concession in relation to the 1993 Agreements whereas the claimant will if she is not permitted to do so and that in consequence the claimant should be permitted to withdraw her concession in relation to the 1993 Agreements.

53. As I have noted already, the main focus of the defendants in asserting that they would suffer prejudice if the claimant were permitted to withdraw the concession in relation to the 1993 Agreements was on what was called in the jurisdiction proceedings the Arbitration Issue[9]. In a nutshell, they maintained that the issues concerning validity and effect came within the scope of the arbitration agreements within each of the 1993 Agreements and that had validity and effect been in issue at the jurisdiction hearing the court and the Court of Appeal would have imposed a stay under section 9 of the Arbitration Act 1996 in relation to those issues and a case management stay in relation to these proceedings until after publication of a final award or the compromise of the reference of those issues to arbitration.

54. Although Ms Tolaney submitted orally that the defendants' stance was taken opportunistically in the course of the hearing[10], I am unable to accept that. This issue had featured heavily in the Court of Appeal because the claimant was challenging Carr J's conclusion on the Merits Issue which meant that the Arbitration Issue became important for the defendants as a ground for resisting the claimant's claim of jurisdiction. The Court of Appeal had addressed the issue in its judgment, because it took a different view from Carr J on the Merits Issue. The issue was addressed in both parties' written submissions for the applications before me – see Ms Tolaney's submissions at paragraph 41(2) and Mr Edey's submissions at paragraph 97(2), which Mr Layton QC adopted on behalf of his clients at paragraph 4 of his submissions and in the evidence filed in support of the defendants' applications referred to below.

55. The defendants' case is summarised succinctly at paragraphs 30 – 35 of Mr Curle's second witness statement filed in support of the Khoury defendants' applications before me. The essence is captured by paragraphs 30 and 35, which are in these terms:

> "30. Had [the claimant] disputed that the Share Sale Agreements were valid and effective as agreements, the Defendants would have argued that this raised an issue which was manifestly within the scope of the relevant arbitration clauses. The Defendants said so in terms in relation to the 1993 Agreements between [HS] and the Sabbagh brothers at paragraph 5.29(b) of the skeleton put before Carr J. That skeleton was served as part of the first round of sequential exchange and therefore before the concession by [the claimant] in her outline submissions that there was no such challenge to validity or effectiveness. With the scope of the

[9] At Transcript, Day 2, page 114, lines 15-17, Mr Edey accepted (rightly in my judgment) that in relation to the Succession and Merits Issues, it was much harder for him to point to a different outcome had the concession not been made.
[10] Transcript, day 2, lines 6-8.

> argument having been clarified, the oral argument before Carr J proceeded on the basis of [the claimant's] concession.
>
> …
>
> 35. … any issue as to the correct characterisation of the 1993 Agreements was, on the Defendants' case, a matter which needed to be referred to arbitration under their arbitration provisions contained in those agreements, just as any issue as to the validity or effect of the Share Sale Agreements would have been. …"

In my judgment this submission fails in relation to the 1993 Agreements. My reasons for reaching that conclusion are as follows.

56. As I have noted earlier, the Court of Appeal held that two issues arose in relation to the Arbitration Issue – being first whether as a matter of Lebanese law the claimant was bound by the arbitration agreements relied on by the defendants and secondly whether the Share Deprivation Claim was within the scope of the arbitration agreements relied on. Those remain the questions that have to be answered when considering the prejudice to the defendants of permitting the withdrawal of the concession. The answer to the first of these questions, in so far as the 1993 Agreements are concerned, as set out in paragraphs 131 and 132 of the Court of Appeal judgment, is that the claimant was not a party to and thus was not bound by the 1993 Agreements between HS and each of the claimant's brothers, which were the only agreements relevant as I have explained. As Ms Tolaney submitted[11], that conclusion is unaffected by the withdrawal of the concession. That is a complete answer to the defendants' claim to have been prejudiced by the withdrawal of the concession to which CPR Part 14 could apply because the concessions in writing that were made on behalf of the claimant were confined to the 1993 Agreements as I have explained.

57. There is no material prejudice caused to the defendants in relation to the Succession and Merits Issues. In relation to the Merits Issue, had the concession not been made at the hearing before Carr J and in the Court of Appeal, the only impact would have been potentially to strengthen the claimant's merits case. It could have had no other impact and would almost certainly not have affected the Court of Appeal's decision on the Merits Issue.

58. In relation to the Succession Issue in my judgment the outcome would have been the same before Carr J and the Court of Appeal for the reasons identified by the Court of Appeal in the part of its judgment relevant to succession set out above. In essence, as the Court of Appeal put it, "*The fact that in order to determine the scope of the claim it is necessary first to decide whether specific assets such as the shares were still owned by Hassib when he died is not sufficient in itself to characterise the subject matter of the claim as succession. … Nor do we accept Mr Layton's submission that the fact that Sana's rights derive from her position as one of her father's heirs is sufficient in itself to designate the claim as a matter of succession. The source of the ownership is irrelevant to the nature of the claim …".*

[11] Transcript, Day 2, page 149 line 8 – 150, line 2.

59. That the withdrawal of the concession in relation to the 1993 Agreements does not appear in the Particulars of Claim is nothing to the point. Although I accept that the defendants accepted the jurisdiction of the Court on the limited basis set out earlier, the outcome would have been the same so far as the jurisdictional challenge is concerned whether or not the claimant had made the concession in relation to the 1993 Agreements because she was not a party to them and thus not a party to the arbitration agreements within them. It could not credibly be argued that the concession relating to the 1993 Agreements had any impact on the defendants' decision to accept the court's jurisdiction given that the claimant could not have been required to refer her claim or any issue that arose in relation to it to arbitration.

60. The claimant may suffer prejudice if she were not permitted to withdraw her concession in relation to the 1993 Agreements because she would not be able to deploy her whole case. None of the other factors identified above relating to an application under CPR r. 14.1 is material and so I conclude that in relation to the 1993 Agreements, the claimant is entitled to withdraw her concession made as I have described above. To the extent that the defendants' strike out application relates to the concession concerning the 1993 Agreements it must fail and is dismissed.

The 1995 and 1998 Agreements

61. The defendants maintain that a concession in similar terms to that made in relation in relation to the 1993 Agreements was made orally by leading counsel then appearing for the claimant (not Ms Tolaney) on day 3 of the hearing before Carr J and never resiled from until the Replies were served. They maintain that they acted to their detriment in reliance on the wider concession by reference to their rights under the 1995 and 1998 Agreements and would be irredeemably prejudiced if the claimant was now permitted to withdraw her concession in relation to the 1995 and 1998 Agreements. To the extent that the defendants cannot rely on CPR Part 14, because the concession as it relates to the 1995 and 1998 Agreements was not in writing, they are entitled as I have said to seek an order striking out the purported withdrawal of the concession contained in the Replies applying by analogy the principles set out by Mann J in BT Pension Scheme Trustees Limited v. British Telecommunications Plc (ibid.).

62. The defendants submit and I accept that the point that the claimant was not a party to the relevant agreements is not available to the claimant in relation to the 1995 and 1998 Agreements to which she was a party. They submit that the remaining reasoning of the Court of Appeal as to why the arbitration agreements were considered to be inapplicable and of no application ceases to apply once the claimant is permitted to withdraw her concession in relation to the 1995 and 1998 Agreements. It therefore follows that the Replies should be struck out in so far as they purport to withdraw the concession in relation to the 1995 and 1998 Agreements.

63. Ms Tolaney maintains however that all this is immaterial because on proper analysis the hearing before both Carr J and the Court of Appeal proceeded exclusively by reference to the 1993 Agreements at the choice of the defendants, that the concession concerning the 1995 and 1998 Agreements was made orally in the course of the hearing before Carr J by leading counsel then instructed on behalf of the claimant by which time the defendants had decided not to rely on the 1995 and 1998 Agreements or seek to arbitrate any of the issues that were live between the parties and were the subject of

the arbitration agreements within in particular the 1995 Agreements. Ms Tolaney adds that on proper analysis that concession concerning the 1995 and 1998 Agreements played no part in the approach adopted by the defendants or either Carr J or the Court of Appeal and there is no evidence that it did. Ms Tolaney submits that in consequence the defendants have suffered no prejudice and their application to strike out the withdrawal of the concession in the Replies should be dismissed.

64. Ms Tolaney submits that it was for the defendants to adduce evidence showing that a decision was taken not to pursue arbitration under the 1995 Agreements on the faith of a relevant concession. She submits that there is no evidence that is so. Whilst the legal burden rests on the claimant to establish that there is no real risk of prejudice to the defendants, I accept that if and to the extent that the defendants maintain that a decision was taken by them or on their behalf either before the hearing before Carr J or the Court of Appeal not to rely on the arbitration agreements within the 1995 and 1998 Agreements to which the claimant was a party, it was for the defendants to establish that fact by evidence. This is so notwithstanding that the legal onus of showing a lack of prejudice rests on the claimant because the only parties with the relevant evidence are the defendants on whom rests therefore the evidential burden of establishing any positive case that they relied on the concession.

65. The defendants did not adduce any such evidence. This is all the more surprising because of the emphasis placed at the hearing before me and in the evidence in support on the 1995 and 1998 Agreements and because, self-evidently, the Court of Appeal's conclusion concerning the claimant not being bound by the 1993 Agreements could not sensibly be said to be affected by the withdrawal of the concession relating to those agreements. Mr. Curle mentions the 1995 and 1998 Agreements in paragraph 3 of his second statement. He maintains that the Share Sale Agreements (including on his definition the 1995 and the 1998 Agreements) pose "*... a fundamental difficulty for [the] share deprivation claim…".* Having spent some time dealing with the impact of the 1993 Agreements at the hearing before Carr J, the next mention of the 1995 and 1998 Agreements comes in paragraph 39, where there is a passing mention of them. Finally Mr. Curle returns to the Arbitration Issue at paragraph 80 where he points out that the Court of Appeal's conclusion that the claimant was not bound by the arbitration provisions within the 1993 Agreements had no application to those of the Share Sale Agreements to which she was "*... personally party ...*". Nowhere does he suggest that any decisions were taken by or on behalf of the defendants by reference to the oral concession concerning either the 1995 or 1998 Agreements notwithstanding his reference to them in paragraph 80 or of the ostensible need for a further s.9 application, which he refers to in paragraph 82.

66. If the defendants had considered that the 1995 and 1998 Agreements were material to the jurisdiction issues it is surprising that they did not submit so in clear terms either in writing or orally. Had that been their case the Court of Appeal would not have resolved the Arbitration Issue exclusively by reference to the 1993 Agreements to which the claimant was not a party – as it is apparent it did from its formulation of issue 7 between paragraph 116 and 117 of its judgment. It is equally odd that the Court of Appeal should consider the fact that the claimant was not a party to the relevant 1993 Agreements as a complete answer to the Arbitration Issue – as is implicit in what is said in paragraph 131 – if the defendants had been relying on the 1995 or 1998 Agreements at any material stage of the jurisdiction challenge or appeal. In fact it is clear that the Court of

Appeal did not consider relevant any agreements other than the 1993 Agreements to which the claimant was not a party, as is apparent from paragraph 132 of its judgment, which refers exclusively to the 1993 Agreements. If this was inaccurate and the defendants were relying on the 1995 and 1998 Agreements, it is inconceivable that they would not have said so before hand down of the judgment and in my judgment it is implausible to say the least that the Court of Appeal would have expressed themselves in the terms set out in the sub-heading and paragraphs 131 and 132.

67. Thus on the evidence that is available:

(a) the claimant's initial position had been to challenge the existence and validity of the Share Sale Agreements;

(b) a concession was made in writing prior to the hearing before Carr J that the 1993 Agreements were valid;

(c) it is apparent from the transcript of the hearing before Carr J that the defendants were proceeding at that stage by reference only to the 1993 Agreements – see Transcript, Day 2, page 10, line 18 – page 11, line 9 – and later at page 19 where Carr J asked Mr. Edey whether he was relying on the 1995 Agreements, to which he responded " *… we don't need to … no is the answer …"*;

(d) leading counsel then appearing for the claimant (not Ms Tolaney) made a concession orally on day 3 of the hearing before Carr J concerning the Share Sale Agreements generally, but there is no evidence of any decision having been taken by the defendants in reliance on the wider concession and certainly no arguments were advanced (or withdrawn) by reference to it;

(e) there is no evidence that the defendants did anything or failed to do anything concerning jurisdiction other than by reference to the concession concerning the 1993 Agreements; and

(f) neither Carr J nor the Court of Appeal proceeded in relation to the jurisdiction issues by reference to any agreements other than the 1993 Agreements, nor were they invited to proceed other than by reference to the 1993 Agreements by the defendants. It is not difficult to see why that is so – it was the 1993 Share Sale Agreements that ostensibly transferred the shares by reference to which the claimant's delict claim is advanced from HS whether by way of sale or gift, or as Mr. Edey put it in his oral submissions to Carr J *" … The real issue is what happened in 1993, that is the heart of it and that is why we rely on the 1993 agreements …"* .

Ms Tolaney invited me to speculate on what motives the defendants might have had for making these choices. It may have been as she suggests that there was a forensic advantage in maintaining that the claimant was obliged to arbitrate as HS's heir under the 1993 Agreements because it provided some support for their Succession Issue argument but it is not necessary for me to speculate about that. It is enough that the defendants clearly made the choices that she refers to in her submissions.

68. Before leaving this timing point I should record that Mr. Edey interrupted Ms Tolaney in the course of her reply submissions to suggest that another leading counsel appearing

before Carr J at the jurisdiction hearing (Mr Hunter QC) had formulated the concession on day one of the hearing before Carr J in terms that included the 1995 Agreements. However, that is immaterial because of what had happened before the start of the hearing before Carr J and what happened after Mr Hunter had spoken on day one of the hearing before Carr J, which I have summarised above.

69. Whilst it is true to say that the validity or otherwise of the 1993 Agreements could not be determined by an arbitration under any of the 1995 or 1998 Agreements to which she was a party, because Art.762 of the Lebanese Code of Commerce limits the scope of any arbitration agreement to which it applies to resolving issues concerning the interpretation, enforcement or performance of the contract in which the arbitration agreement appears[12], there were issues that could have been made the subject of a reference to arbitration under the 1995 Agreement to which the claimant was a party whether or not the validity of the 1995 Agreements had been conceded. One concerned whether the effect in law of the 1995 and/or 1998 Agreements was to preclude the claimant from arguing that no valid transfer of the shares the subject of the 1993 Agreements had taken place. This was an issue that arose whether or not the claimant conceded the validity of the 1995 Agreements. The defendants relied on this point very strongly both before Carr J and the Court of Appeal[13]. That issue was one that could have been arbitrated had the defendants wished it to be and could have been the subject of an application for a stay under s.9 applying Sodzawiczny v. Ruhan [2018] EWHC 1908 (Comm). It was not. That there was no such application provides some further support for the view that the defendants had decided that they did not want to arbitrate the issues that arose other than by reference to the arbitration agreements in the 1993 Share Sale Agreements. There is no evidence from the defendants dealing with this point. If it were to be argued that the defendants had been prejudiced by the loss of the right to apply for a s.9 stay by reference to the 1995 Agreements then this was something that required an evidential explanation.

70. As I have explained already the claim of prejudice by reference to the 1993 Agreements fails. Thus the only issue that remains is whether the defendants have suffered such prejudice by reason of the withdrawal of the oral concession in so far as it extended to the 1995 and 1998 Agreements as to justify striking out the purported withdrawal of the concession in so far as it relates to those two agreements. In his written submissions for this hearing Mr Edey formulated the position as being that the Court of Appeal "*... may have found ...*" that there were issues that the claimant was bound to arbitrate under the subsequent agreements. However, as I have explained, no attempt was made to argue any such thing before the Court of Appeal even in relation to issues that arose under the 1995 Agreement and which remained in dispute notwithstanding the concession. The reality was that the sole focus of the hearing before both Carr J and the Court of Appeal was on the 1993 Agreements. There is no evidence that demonstrates how the defendants have been prejudiced by the withdrawal of the concession. As things stand their case during the jurisdiction challenge was advanced exclusively by reference to the 1993 Agreements and they showed no inclination to arbitrate the one issue of substance that arose under the 1995 Agreements. This suggests very strongly to me that the claimed prejudice is illusory.

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[12] See the Court of Appeal's judgment. at ¶132.
[13] Ibid. at ¶106 and 109.

71. In those circumstances, the strike out application in relation to the concession fails.

The New Case Issue

72. I can deal with this issue much more quickly. Had it been the case that the claimant was seeking to advance a new claim or rather her existing claim on an alternative basis that did not involve proving intentional wrongdoing on the part of the defendants then clearly that should have been attempted only by an application to further amend the Claim Form and/or the Particulars of Claim. There are a number of reasons why this is obviously so each of which I summarised in paragraphs 20 and 34 above and each of which I accept. I agree that there is a mismatch between what appears in the Replies and what Ms Tolaney submits was the purpose of what was pleaded in the Replies. I agree that in consequence those parts of the Replies that go further than what Ms Tolaney submits was intended should be struck out. Any attempt to plead an alternative case based on something other than intentional wrongdoing must be pleaded in the Particulars of Claim.

73. Although Ms Tolaney asserted orally what she had said in her written opening submissions – see by way of example Transcript, day 1, pages 32, 34 and 35 – I do not accept that she is right when she submits that Mr Edey should not have the concerns that have led to this part of the strike out application. As long as the pleading remains in the state it is, there is a real risk of confusion, the pleadings fail to set the correct agenda for trial and it is conceivable that the defendants will be put to the cost and inconvenience of meeting assertions that the claimant maintains are not relied on. Thus the Replies in their current form are likely to obstruct the just disposal of the proceedings. I think Ms Tolaney accepted that in the end – see Transcript, day 2, page 185 line 8 to 186 line 14.

74. The only question that remains is how this should be addressed. Ideally, at the hand down of this judgment there should be an application by the claimant to amend the replies so as to reflect the claimant's case as Ms Tolaney explained it. If for whatever reason that cannot be done then those parts of the paragraphs within the Replies that are under challenge and which go further than Ms Tolaney has said was intended must be struck out. I will hear the parties further at the hand down on how this issue is to be addressed. It would be helpful if the parties could agree what must be struck out in order to give effect to this judgment. However, it is necessary to end this round of applications with the pleadings complete so that the parties can prepare for trial next year without any further issues to be resolved concerning pleadings.