Neutral Citation Number: [2024] EWHC 2493 (Comm)

Case No: CL-2023-000356

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

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

Date: 3rd October 2024

Before :

Nigel Cooper KC sitting as a High Court Judge

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Between :

(1) JOYVIO GROUP CO., LTD. **(2) BJ JOYVIO ZHENCHENG TECHNOLOGY CO., LTD.** **(3) FOOD INVESTMENTS SPA** **(4) AUSTRALIS SEAFOODS S.A.** **(5) AUSTRALIS MAR S.A.** **(6) ACUÍCOLA CORDILLERA LIMITADA** **(7) SALMONES ISLAS DEL SUR LIMITADA** **(8) SALMONES ALPEN LIMITADA** **(9) PROCESADORA DE ALIMENTOS AUSTRALIS SPA**	**Claimant**
- and -	
(1) ISIDORO ERNESTO QUIROGA MORENO **(2) ISIDORO ALFONSO QUIROGA CORTÉS** **(3) BENJAMÍN QUIROGA CORTÉS** **(4) MARTÍN GUILOFF SALVADOR**	**Defendant**

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Tim Penny KC, Jack Watson, William Day and Gretel Scott (instructed by **Stewarts Law LLP**) for the Claimants/Respondents
Bankim Thanki KC, Paul Sinclair KC and Adam Sher (instructed by **Pallas Partners LLP**) for the Defendants/Applicants

Hearing dates: 5-6 June 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 3rd October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

Mr Nigel Cooper KC:

Introduction

1. The Defendants applied by an Application Notice dated 15 September 2023 ("the Application Notice") for a stay of the claims brought in this action on the grounds that Chile is a more appropriate forum ("the Application"). By a further Application Notice dated 07 May 2024, the Defendants sought permission to amend the Application Notice to encompass a dismissal or strike out of the action in the alternative to a stay. The Claimants do not oppose the amendments sought by the Defendants but say that the Court should not order the striking out or dismissal of their claims in any event.

2. The Application Notice also contains applications (i) by the First Defendant for a stay under s.9 of the Arbitration Act 1996 of claims against him by the First to Third Claimants and (ii) by all the Defendants, for a case management stay in the alternative. These two applications are to be heard at a separate hearing on 08 October 2024. The parties agreed for the purposes of this Application that the Court will need to assume that the Chilean Courts are not "unavailable" on the grounds that the First to Third Claimants' claims against the First Defendant are subject to arbitration.

3. The Defendants submit that the present claims are overwhelmingly connected with Chile and have no real connection with England and say that the Chilean courts are clearly and distinctly the more appropriate forum. The Defendants further say that the Chilean courts are available and the Court is presented with a classic case in which this Court can and should decline jurisdiction in favour of the natural forum. The Claimants dispute that the Chilean courts are available and also dispute whether the Chilean courts are clearly and distinctly the more

appropriate forum. The Claimants say that they have served the Defendants within this jurisdiction and are entitled to have their claims heard by the English courts.

Background

4. The background facts which are relevant for the purposes of this Application were largely common ground.

5. The Fourth Claimant, Australis, is a substantial Chilean company engaged in salmon farming, which was sold in 2019 ("the Sale") pursuant to a Chilean law-governed stock purchase agreement ("the SPA"). The Fourth Claimant had a number of subsidiaries, which included the Fifth to Ninth Claimants (collectively, with the Fourth Claimant, "the Australis Claimants").

6. At the relevant times prior to the Sale, the Australis business was owned and controlled by the Quiroga family (including Mr. Isidoro Ernesto Quiroga Moreno, the First Defendant), through various corporate vehicles ("the Sellers"). The Second and Third Defendants are both sons of the First Defendant and were directors of the Fourth Claimant (the Second Defendant was also a director of the Ninth Claimant) whilst the Fourth Defendant is the long-time manager of the Quiroga family office and was a director and (from 2016) Chairman of the Fourth Claimant.

7. Prior to the Sale, the Fourth Claimant owned nearly 90 salmonid concessions (known by their Spanish acronym "CES") in Chile and employed more than 1600 people. Australis was a Chilean business in every sense; apart from a tiny marketing operation in Florida, the entirety of its business took place in Chile,

whilst all decision making at board and management level took place in Santiago or in Puerto Varas (where Australis has its headquarters).

8. Chilean law relating to salmon farming requires each CES to submit a concession application containing a "technical project" or "PT" to the regulator which details the physical structures to be installed and the production programme to be implemented at that CES. The latter includes an annual stocking limit (i.e. the maximum number of juvenile salmon, known as smolts, stocked within the CES) and an annual projected harvest (being an estimated production figure by reference to mature salmon weight). Each CES must also obtain an RCA (an environmental qualification resolution) which replicates the estimated maximum production figure requested in the PT. Both the PTs and the RCAs are publicly available documents.

Events leading up to and including the Sale

9. During 2017 and 2018, the representatives of Australis and its owners were approached by third parties to consider possible business opportunities. One of those interested was Legend Holdings Corporation ("Legend"), a major Chinese investment group, acting through its food and agribusiness subsidiary, Joyvio, the First Claimant. The First and Second Claimants, both Chinese companies, and the Third Claimant, a Chilean company and indirect and wholly owned subsidiary of the Second Claimant, are referred to collectively as "the Joyvio Claimants".

10. For the purposes of this Application, the key milestones relating to the Sale were as follows:

i) On 04 April 2018 Legend entered into a Chilean law NDA with Australis, following which various confidential information concerning its business was provided, including harvest projections and related information.

ii) On 18 November 2018 the Sellers and the First Claimant entered into a Chilean law "purchase promise agreement" ("PPA") pursuant to which the First Claimant could acquire up to 100% of the shares in the Fourth Claimant, through a public takeover bid (the Fourth Claimant being a public company at that time). The price was USD 880 million, subject to adjustments.

iii) A formal due diligence process took place between 23 November 2018 and 17 January 2019. Joyvio was represented during this process by *inter alia* Chilean lawyers, PwC (as financial advisor), and by experienced Chilean salmon-industry professionals, including Mr José Gago (as negotiator and technical advisor). Between 08 and 14 December a team of around 10 representatives of Joyvio (including lawyers, financial advisors and accountants) visited Chile for the purpose of conducting interviews and site visits. Further, more than 10,000 documents were uploaded into a virtual data room ("VDR"). This included information concerning production limits, historic and projected harvest numbers, and various notifications received from regulators.

iv) Following due diligence satisfactory to Joyvio, the SPA (which superseded and replaced the PPA) was executed on 28 February 2019 in Santiago, Chile. Pursuant to the SPA the Sellers agreed to sell, and the

Second Claimant agreed to acquire, up to 100% of the shares in the Fourth Claimant, with the First Claimant acting as guarantor of the Second Claimant's obligations. As is usual, the SPA contained various representations and warranties. The SPA also contained a widely drawn arbitration agreement.

11. Before completion, the Second Claimant assigned its rights and obligations under the SPA to the Third Claimant, a Chilean company and indirect (and wholly owned) subsidiary of the Second Claimant. Completion of the Sale took place on 01 July 2019, with the Third Claimant paying the purchase price to the Sellers.

Legal proceedings

12. Since the Sale, the Claimants have initiated various legal proceedings, against the Defendants and others, including:

    i) arbitral proceedings commenced in Chile in January 2023 against the First Defendant and others pursuant to the arbitration agreement in the SPA ("the Arbitration"); and

    ii) two criminal complaints ("the Criminal Complaints") made against the Defendants (and others) in April 2023 and June 2023 by various of the Claimants, alleging "disloyal administration" of Australis ("the Disloyalty Complaint") and fraud in respect of allegedly deliberate circumvention of Chilean environmental law ("the Fraud Complaint").

13. There are also other proceedings including proceedings commenced by some of the Claimants in Florida and Delaware.

14. It is not in issue that both the Arbitration and the Criminal Complaints are born out of the same underlying facts as the present claims. Essentially, the Claimants allege that the Sellers and the Defendants engaged in a fraudulent scheme to breach Chilean environmental regulations through overproduction and by making false representations or concealing the same in connection with the Sale. Those allegations are denied by the Defendants who say that extensive disclosure *was* given of both the relevant production forecasts *and* the RCAs (which figures could therefore be compared with ease).

15. In the Arbitration, claims are brought by the First to Third Claimants against the Sellers and the First Defendant in contract, with damages and rescission in excess of USD 1 billion being sought. The Arbitration is already well progressed, with thousands of pages of memorials (including a Statement of Claim, Defence, Reply and Rejoinder), documentary, witness and expert evidence having been exchanged. A final hearing is expected in the second half of 2024.

16. As for the Criminal Complaints (which have since been consolidated), they remain in the investigative phase; various witnesses have been deposed and information sought by the prosecutor but no decision has yet been taken as to whether to file charges.

The present proceedings

17. The original Claim Form was issued on 29 June 2023. There was no pre-action correspondence and the Defendants say that this is despite the fact that some or all of the Defendants had been defending the Arbitration and responding to the Criminal Complaints for several months prior.

18. Each of the First to Third Defendants were served personally on 30 June 2023 in England, whilst the Fourth Defendant was served by post. On 17 July 2023, the Defendants acknowledged service and indicated their intention to dispute jurisdiction.

19. Since then, the Claimants have by consent amended the Claim Form to correct various errors and have sought the Defendants' consent to amend it yet further to add alternative claims (by the Joyvio Claimants only) in Chinese law. The Defendants have not consented to those latter amendments, but have agreed that, for the purposes of the Application, the Court can proceed, *de bene esse*, on the assumption that the proposed amendments have been made.

The claims

20. The claims are set out in general terms in the 'Brief Details of Claim' section of the (draft) Re-Amended Claim Form. The Claimants have not so far served Particulars of Claim.

21. The Claim Form contains two sets of claims: one by the First to Third Claimants ("the Joyvio Claims"), and one by the Fourth to Ninth Claimants ("the Australis Claims"). Although often jumbled together in the Claimants' evidence, distinct considerations arise for each set of claims.

22. As to the Australis Claims (which are advanced only under Chilean law):

    i) These are for breaches of contract and breach of fiduciary duty, fraud, breaches of duty of care, failure to exercise their functions on an informed basis, failure to exercise proper diligence and care, failure to act in good faith, breach of duty of care, failure of diligent

administration, failure properly to disclose material to shareholders and failure to act in the best interests of the company, allegedly sounding in damages under various provisions of the Chilean Civil Code and Companies Law ("the LSA"): see Claim Form [9].

ii) All these claims are said to arise from the allegation that together with others, between 2017 and 2022 the Defendants fraudulently planned to execute a "*scheme*" which involved overproduction of salmon in violation of Chilean law.

23. As to the Joyvio Claims (advanced as a matter of Chilean or possibly Chinese law):

i) Under Chilean law, the claims in fraud are framed as a matter of "tort/delict/quasi delict" including "but not limited to" claims under Articles 2314 and 2316 and (apparently also) 44, 1458 and 1556 of the Chilean Civil Code. By way of its (draft) re-amendments to the Claim Form, Joyvio also relies on Article 1165 of the Chinese Civil Code.

ii) Alternatively, the Joyvio Claimants seek restitution (and/or damages) in respect of the benefits accrued by each Defendant "whether directly or indirectly" from the above actions under Article 2316 of the Chilean Civil Code and (apparently) Articles 2314, 1458 of the Chilean Civil Code, plus Article 42 LSA. Although initially the proposed Chinese law claims did not include a claim for restitution, the Claimants have since sought to add one.

iii) It is claimed that the Defendants (without distinguishing between them) misrepresented and/or concealed: (a) the facts and matters underlying the Australis Claims; (b) the true size, scale, profitability, activities and outlook of the Australis Claimants (including their production volume, growth projections, regulatory compliance and exposure to sanction/claims); and (c) the true nature of the production plan which could only be achieved by infringing the respective RCA of each Companies' CES.

iv) The Defendants are correct to say that the Claim Form does not identify: (a) any specific representations or concealment; (b) which of the matters referred to were misrepresented and which were concealed; (c) who allegedly made the representations and (if not made directly) how any of the First to Fourth Defendants are said to be responsible for their making; (d) who individually allegedly concealed the matters, when and how they did so, nor how the Defendants are responsible for the same; (e) any act of reliance by any of the First to Third Claimants; or (f) any specifics of damage or loss, including in particular how the First Claimant and the Second Claimant (neither of whom paid any money under the SPA, unlike the Third Claimant) can have suffered any loss independent from any loss suffered by the Third Claimant.

24. The Defendants say that the absence of proper particulars in respect of the matters described above does not assist the Court in adjudicating on the Application. For example, the Defendants say, how can the Court take into account the place a misrepresentation was allegedly made or relied upon if no

such representation or reliance is identified? The Defendants further say that, in effect, the Claimants are asking the Court not merely to assume the truth of what they have pleaded, but to make assumptions as to matters which they could have (but chose not to) plead. In the absence of proper particulars, the Court should resolve any ambiguity or absence of evidence against the Claimants, on the assumption that if the details supported their position, they would have been pleaded out. In the end, it has not been necessary to resolve any ambiguities or absence of evidence of the type identified by the Defendants against the Claimants but I agree with the Defendants that the absence of particulars has not assisted in determining this Application.

Forum Non Conveniens

Legal Principles

25. The legal principles governing when the English Court will decline to exercise its jurisdiction over defendants are well established and were common ground. The classic statement of the principles remains Lord Goff's speech in Spiliada Maritime Corp v Cansulex [1987] AC 460, which laid down a two-stage test, the purpose of which is identify the form in which the case can be suitably tried for the interests of all the parties and for the ends of justice (at pp. 476 – 478):

    i) Stage 1*:* the burden is on the defendant to establish that there is another forum which is "*clearly or distinctly more appropriate than the English forum*".

    ii) Stage 2: if the defendant discharges the burden at Stage 1, then the burden of proof shifts to the claimant to show by way of "*cogent evidence*" that justice requires that a stay should *not* be granted.

26. As for Stage 1, this encompasses:

i) the defendant establishing that the alternative foreign forum is *available* – i.e. that the foreign court would have personal and subject matter jurisdiction over the defendant: see Unwired Planet International v Huawei [2020] UKSC 37 at [96]. This is however a question of whether there is an alternative forum with competent jurisdiction to try the claim. The question of whether that forum is, in practice, available to and accessible by the claimant due to their particular circumstances is a question for stage 2; see per Cockerill J. in Al-Aggad v Al-Aggad [2024] EWHC 673 (Comm) at [24] and the authorities referred to therein.

ii) an "*evaluative judgment*" involving consideration of various factors which point to whether the case has a closer connection to the foreign forum including: (a) the personal connections between the parties and the countries in question; (b) the factual connections between the events relevant to the claim and those countries; (c) factors affecting convenience or expense such as location of documents or witnesses; and (d) the applicable law: see Arnold J at first instance in VTB v Nutritek [2011] EWHC 3107 (Ch) at [186] (cited with approval by the Supreme Court at [2013] UKSC 5 at [54]; and in Al-Aggad at [24]).

27. In relation to the evaluative judgment to be undertaken by the Court, the Defendants urge three points on the Court:

i) The factors should not be weighed in isolation but rather with an eye to what will likely be the real issues at trial; *Dicey, Morris & Collins on the Conflict of Laws*, 16th ed (2022) at §12.033.

ii) The Court will not lightly disturb jurisdiction established as of right so the alternative available forum must clearly and distinctly be more appropriate than England; Spiliada at pp. 476 – 477.

iii) In the context of a cross-border transaction and fraud, as here, it may be futile to look for the proper place for the dispute or to try and divide up the fraud into siloed parts and a realistic approach is required that recognises that there would never be one jurisdiction which would emerge as the only candidate for the hearing of this claim; Manek v IIFL Wealth (UK) Ltd [2021] EWCA Civ 625 at [65] per Coulson LJ.

28. As for Stage 2:

i) As Lord Goff explained in Connelly v RTZ Corp [1998] AC 854, 872:

> *"[The] general principle . . . is that, if a clearly more appropriate forum overseas has been identified, generally speaking the plaintiff will have to take that forum as he finds it, even if it is in certain respects less advantageous to him than the English forum. He may, for example, have to accept lower damages, or do without the more generous English system of discovery. . . Only if the plaintiff can establish that substantial justice cannot be done in the appropriate forum, will the court refuse to grant a stay. . ."*

ii) A threat to substantial justice includes, for example, a "*real risk*" of an unfair trial through corruption or lack of judicial independence in the foreign forum.

iii) Procedural characteristics of the competing jurisdiction are potentially relevant at *this* stage. However, given the high bar (discussed below), it will not be sufficient merely to point to differences with English procedure (whether it be in relation to cross-examination of witnesses or

documentary disclosure); see *A. Briggs, Civil Jurisdiction and Judgments* (7th ed. 2021) at §22.20.

iv) Stage 2 considerations may also include an argument by the claimant that its claim would "undoubtedly be defeated" in the foreign forum on the grounds of limitation, such that it would be unjust to grant a stay. In such a case, a stay will not be granted provided "the claimant acted reasonably in commencing proceedings in England, and did not act unreasonably in not commencing proceedings in the foreign country": see Lord Collins in Altimo Holdings v Kyrgyz Mobil [2012] 1 WLR 1804 at [88].

v) So far as the burden on the Claimants at Stage 2 is concerned, the Claimants are required to prove objectively by cogent evidence the circumstances which require the English court to proceed with the claim, notwithstanding that it is not the appropriate forum to hear the case; Spiliada at p.478D. It is not sufficient for the Claimants' evidence to simply raise grave doubts about such circumstances as this will not cross the threshold of cogency that the jurisprudence requires; see Pacific International Sports Clubs Ltd v Soccer Marketing International Ltd [2009] EWHC 1839 (Ch) at [92] – [93] (upheld in [2010] EWCA Civ 753) and Al-Aggad at [23].

29. In relation to sub-paragraph 28(iv) above, there was a dispute between the parties as to whether the test for determining whether a claimant had acted unreasonably or improperly by not commencing proceedings in the other jurisdiction was a threshold of negligence or whether there was in fact a higher

threshold. The Claimants argued by reference to the judgment of Slade LJ in Metall & Rohstoff AG v Donaldson Lufkin & Jenrette Inc [1990] 1 QB 391 at 488, that the test was a higher threshold and required at least that a claimant's failure was manifestly unreasonable. The Claimants supported their position by reference to the judgment of Rix LJ in Star Reefers Pool Inc v JFC Group Co. Ltd [2012] 2 All ER (Comm) 225 at [36]. Neither case, however, provides definitive support for the higher test suggested by the Claimants. In Metall & Rohstoff, the Court of Appeal decided that the courts of England & Wales were the more appropriate forum. The passages from Slade LJ's judgment which might be read as suggesting that a higher test than mere negligence was the correct test are therefore obiter. Further, those passages do not explain why, if the Court's intention was to impose a higher level of test than that laid down in Spiliada, the Court considered that it should depart from the threshold test of negligence laid down in Spiliada at p. 484. As for the passage from the judgment of Rix LJ in Star Reefers Pool, that case was concerned with whether the judge at first instance was right to have continued an anti-suit injunction preventing the defendant from carrying on with proceedings which they had started in Russia. The judge at first instance found that the proceedings were vexatious, a finding with which the Court of Appeal disagreed. Further, the Court of Appeal in that case were considering whether the test for the grant of an anti-suit injunction was met, a different question to whether the proceedings should be stayed on the grounds of forum non conveniens. It does not provide a basis for departing from the test of negligence laid down in Spiliada in the context of applications for a stay on the grounds of forum non conveniens.

30. There was also a dispute between the parties as to whether I should answer the question of whether the courts in Chile would treat the claims as being time-barred on the basis of the balance of probabilities or whether the test is one of is there a 'real risk' that the courts in Chile will treat the claims as being time-barred. As to this, I accept the Claimants' submissions that the test is one of 'real risk'; see AK Investment v Kyrgyz Mobil Tel Ltd [2011] UKPC 7 at [88] and [151] as well as Al-Aggad at [32].

31. It was common ground between the parties that in circumstances where the Claimants were able to establish jurisdiction as of right and did not require permission to serve out, I was entitled to consider evidence about the availability of Chile as an appropriate forum at the date of the hearing rather than at the date on which the Application was made; see Al-Aggad at [34] and Lubbe v Cape plc [2000] 1 WLR 1545 at 1556 – 1558.

32. This is a case where I have to decide between the competing views of two experts on Chilean law both in relation to the question of whether the Chilean courts will accept jurisdiction over the claims made in this action and in relation to the question of whether there is a risk that the claims, or some of them, may be time-barred. In assessing this evidence, I adopt the guidance given by Cockerill J. in Al-Aggad at [26]:

> *"Further, where there is a "divergence of opinion" between the experts on a question of foreign law or practice at Stage 2, such that the "answer is not clear" to the court, "considerations of comity and caution" preclude the court from concluding that the foreign forum would not deliver justice to the claimant; Al Assam v Tsouvelekatis [2022] EWHC 451 (Ch) at [67]. As it was put in submissions: a score draw is not enough. Instead, "the court will start with the working assumption, for which comity calls, that courts in other judicial systems will seek to do justice in accordance with applicable laws, and will be free from improper interference or restriction": Cherney v Deripaska (No. 2) [2008]*

EWHC 1530 (Comm); [2009] 1 All ER (Comm) 333, para 238 (upheld in [2009] EWCA Civ 849; [2010] 2 All ER (Comm) 456).”

33. Finally, it was common ground between the parties that if I were to grant a stay, I could do so on terms, for example as to waiver of any time-bar; see Baghlaf Al Zafer v PNSC (No. 1) [1998] 2 Lloyd’s Rep. 229 (CA).

Overview of the Points in Issue between the Parties

34. In summary, the dispute between the parties as to whether Chile is a more appropriate forum than England breaks down as follows:

i) The Claimants dispute that Chile is an available forum on the basis that the Chilean Court could not or would not exercise jurisdiction over the Defendants (“the Jurisdiction Issue”).

ii) There is a dispute as to whether, even if Chile is an available forum, it is clearly and distinctly a more appropriate forum than England on various grounds (“the Connecting Factors”).

iii) The Claimants say that there is a real risk that their claims, if issued now in Chile, are time-barred (“the Limitation Issue”).

35. There is no dispute that the Claimants have established jurisdiction in England against each of the Defendants as of right; the First to Third Defendants being served personally and the Fourth Defendant being served by post. Accordingly, in considering whether to grant the Application, I have kept in mind that the Claimants are not lightly to be deprived of the jurisdiction, which they have established as of right.

36. Although there is a dispute between the parties as to whether the First Defendant's move back to Chile was a tactical measure at least in part for the purposes of this litigation, it is common ground that as at the date of the hearing, he was domiciled in Chile and I have determined the Application on that basis.

37. No party suggests that this action should be stayed in favour of proceedings in China.

The Expert Evidence

38. For the purposes of this application, I have been provided with expert reports from Mr. Felipe Bulnes Serrano and from Professor José Pedro Silva Prado. Both experts are clearly qualified and suitably experienced to provide expert evidence on Chilean law. I have been assisted by the evidence of both experts. To the extent that each party criticised the other party's expert as lacking cogency, I do not accept those criticisms. Inevitably, I have preferred the views of one expert over the other on each of the points of Chilean law in dispute which I have been asked to decide but both experts have provided helpful and informed evidence.

The Jurisdiction Issue

39. It seems to me that the question of whether the Chilean courts have jurisdiction logically falls to be considered before the connecting factors. If I were to conclude that the Chilean courts were not available to hear the claims, then it would not be necessary to consider whether the connecting factors point clearly and distinctly to either the English courts or the Chilean courts.

40. The Defendants submit that it would be surprising if Chile were not somehow available. They submit that Chile is available for the following cumulative reasons:

    i) As a matter of Chilean law, jurisdiction can be founded either on (i) domicile or (ii) other connecting factors;

    ii) In relation to domicile, it is common ground that it is sufficient for one defendant to be domiciled in Chile. The First and Fourth Defendants are domiciled in Chile;

    iii) There are other strong connecting factors sufficient to found jurisdiction in Chile; and

    iv) The Defendants have in any event agreed to submit to the jurisdiction of the Chilean court, which is effective to ensure that the Chilean court can hear the claims.

41. The Claimants:

    i) Accept that jurisdiction can be founded on domicile but dispute the proposition that jurisdiction can be founded on the basis of other connecting factors.

    ii) Accept that the First Defendant is now domiciled in Chile but dispute whether the Fourth Defendant is domiciled in Chile.

    iii) Dispute whether the Defendants can agree to submit to the jurisdiction of the Chilean courts.

42. The Claimants' principal challenge to whether the Chilean courts are available to them is based on their submission that because the English courts were first seised, this has the consequence that the Chilean courts no longer have jurisdiction to hear these disputes. This argument is based on the application in the international sphere of two provisions of Chilean domestic law, Articles 109 and 112 of the Organic Code of Courts ("OCC"). Those provisions provide:

> *"Art. 109: Once a matter has been brought before a competent court in accordance with the law, this jurisdiction shall not be altered by supervening cause.*
>
> *…*
>
> *Art. 112: Whenever according to the law, two or more courts have jurisdiction to hear the same case, none of them may excuse itself [sic] from hearing the same case on the pretext that there are other courts which can hear the same case; but the one which has taken jurisdiction excludes the other courts, which thereupon cease to have jurisdiction."*[1]

43. In order to understand the respective arguments in relation to the application of Articles 109 and 112, it is necessary to understand certain relevant concepts under Chilean law:

i) Chilean law distinguishes between concepts of "jurisdiction", "absolute competence" and "relative competence".

ii) Jurisdiction refers to the power or duty to decide cases brought within the territory of the Republic of Chile, which is exclusively vested in the courts.

[1] I note that I was provided with a number of different translations of Articles 109 and 112 in the bundles for the hearing but the parties agreed that there were no material differences in wording for the purposes of the issues I have to decide. I have used the translation provided in the bundle of core Chilean law extracts provided by the Claimants in the course of the hearing.

iii) Competence refers to the jurisdiction assigned to each Court and encompasses both absolute and relative competence. The former primarily concerns the subject matter of the dispute (for example, civil courts do not have competence to hear criminal cases) whilst the latter is concerned with identifying the court location within Chile which has competence to hear the case.

44. There is a dispute between the Claimants and the Defendants as to whether Articles 109 and 112 concern matters of jurisdiction or absolute competence or whether they concern matters of relative competence. This matters because if the articles are ones of relative competence, then it was common ground that the rules in the articles do not have public policy status and are capable of being varied by the parties either expressly or tacitly.

45. The evidence of Professor Silva is that the effect of these provisions is that when two or more courts are competent to hear the same case, the competence of the other will cease when one of them seises the case, since the one which has first heard the case excludes the other. It appears to be common ground between the experts that in a domestic context if there are two or more courts equally competent to hear a certain matter, the one first seised will hear the matter to the exclusion of the others and the other must refrain from continuing to hear the case. The Claimants submit that in the domestic context, this means that when a claimant selects a competent court that selection becomes final. Although, Professor Silva accepts that if proceedings before a competent court are terminated then the competence of any other courts to hear the matter is restored.

46. It is common ground between the parties that the law of Chile does not provide any specific rules expressly dealing with cross-border jurisdiction, at least in so far as may be relevant to the present Application. The mechanism which the Chilean courts have developed to address this issue is set out in Ernesto Holzmann v Jose Gainsborg, a decision of the Supreme Court of Chile dated 21 November 1950. In that case, the Supreme Court identified in the seventh recital the following approach as being appropriate for the purposes of resolving any dispute over the international competence of the Chilean courts:

    i) Identify first whether there are any treaties in force between Chile and the Country of the other courts said to have competence.

    ii) If not, consider whether there is any domestic legislation which addresses the situation.

    iii) If not, resort to the general principles of International Law in accordance, naturally to the criteria of domestic legislation.

47. In the present case, it is common ground that there is no relevant treaty in force between Chile and the United Kingdom and that there is no applicable domestic legislation which expressly addresses the allocation of competence between the courts of Chile and the English courts. It is on this basis that the Claimants say that under the third limb of the test the domestic provisions on jurisprudence and competence can be applied in the international context. I admit to some hesitation as to whether this is in fact what the Supreme Court in Holzmann was saying given that the third limb as described by the court takes as a first step the identification of general principles of international law, which are then to be tested for whether they accord with domestic law.

48. However, the evidence before me from both Professor Silva and Mr. Bulnes was that the courts of Chile will apply the default test of domicile found in Articles 134 and 138 of the OCC as a basis for the allocation of jurisdiction or competence in a cross-border situation. There is also academic support for the proposition that because Chile does not have a system of international competence rules, the courts will project internal competence rules to the international cases; see *Canelo F, Carola International Procedural Law (2014)*.

49. Professor Silva, accordingly, concludes that the Chilean courts would apply Article 112 OCC and find that the courts of Chile ceased to be competent in respect of the claims herein when the English court became seised of the matter (when the Defendants were served) thereby preventing multiple proceedings internationally between the same parties. He goes on to say that the Chilean court should, and it is highly probable that it would, declare of its own motion that it lacks jurisdiction or absolute competence even if all the Defendants were treated as domiciled in Chile and did not contest its jurisdiction. When I asked during the hearing whether this would be the position even if the English court stayed the present action in favour of proceedings before a competent court in Chile, I was informed by the Claimants that this was the case; no authority or academic commentary was cited specifically supporting this position.

50. Underpinning Professor Silva's conclusions are said to be the following policy considerations:

    i) To avoid the waste of courts' resources and placing a further costs burden on taxpayers in Chile; and

ii) To ensure a constitutional right of access to the court giving a litigant certainty that once a claim has been filed before a competent court, this cannot be overturned.

51. The Claimants challenge Mr. Bulnes' evidence because:

i) They say his approach is internally inconsistent in so far as he agrees that the Chilean courts would apply provisions in the OCC determining jurisdiction based on domicile and anchor defendants to transnational matters but says that Articles 109 and 112 cannot easily be extrapolated to international matters.

ii) They say he is wrong to say that Chilean law has no concept of international *lis alibi pendens* and rely in this regard on the case of Salazar v Banco de Chile, 29th Civil Court of Santiago dated 22 September 2005 upheld by the Santiago Court of Appeal dated 11 June 2009.

iii) They challenge his argument that adopting Professor Silva's viewpoint could lead to a situation where the claim would not be heard in England as the result of a stay but also could not be heard in Chile because of Article 112.

iv) They say that the English Court has begun to deal with the matter because the critical moment for the purposes of Articles 109 and 112 is when is the competent court seised (or 'radicada') and that occurs on service.

52. The Defendants, relying on the evidence of Mr. Bulnes, say that Professor Silva is mistaken for a number of reasons:

i) He has not been able to identify any case applying the priority rules in Articles 109 and 112 to a transnational context. Nor does he identify a single academic commentary which states that these priority rules apply to international disputes.

ii) They submit that the Chilean courts cannot decline jurisdiction on the grounds that a foreign court is already seised and refer to a decision of the Civil Court of Puerto Varas in 2018 in Tompkins v Tompkins where the court declined to accept that the Chilean court lacked jurisdiction because of proceedings issued first in the United States.

iii) They explain the decision in Salazar v Bank of Chile on the basis that the case was one where the defendant made an application based on a *lis pendens* objection whereas in this case the Defendants have undertaken not to make any such objection. Critically, they say, nothing in Salazar supports the proposition that the court must take the objection of its own motion and moreover that it makes no reference to either Article 109 or 112 OCC.

iv) They submit that Professor Silva's views are based on a misunderstanding of English court procedures because the English Court has not begun to hear or deal with the case but is still determining whether to exercise jurisdiction.

53. Having considered the evidence of both Mr. Bulnes and Professor Silva including reviewing the academic commentary and Chilean case law to which I have been referred, I do not consider that Articles 109 and 112 OCC have the effect for which the Claimants contend. I reach this conclusion for a number of reasons:

i) I have not been referred to any Chilean cases or academic commentary which treat Articles 109 and 112 OCC as going to matters of jurisdiction or absolute competence as those concepts are understood in Chilean law. I consider that on the evidence before me they are properly categorised as matters of relative competence with the consequence that they are not matters of public policy. It follows that the Defendants can waive any challenge to the jurisdiction of the Chilean courts even if Articles 109 and 112 OCC are applied on the international plane.

ii) I have, likewise, not been referred to any case law of the Chilean courts or academic commentary which has applied Articles 109 and 112 to a cross-border situation.

iii) While I acknowledge that I am considering the text of Articles 109 and 112 in translation, I do not consider that the language of either Article requires me to conclude that their effect is that a Chilean court must decline jurisdiction even if a foreign court cedes jurisdiction to that court and stays rather than terminates its own proceedings.

iv) As I understand the approach of the Chilean courts to questions of international competence as set out in Holzmann v Gainsborg, the approach for the third limb of the test is to extrapolate principles of

international law in harmony with domestic legislation. It seems to me that applying this approach to a situation where there are potential competing international jurisdictions, would not lead one inevitably to conclude that a Chilean court would decline jurisdiction in circumstances where a foreign court first seised cedes substantive jurisdiction for a claim to the Chilean courts. Rather, the analogy with Article 112, would suggest that a Chilean court in this circumstance would accept that it has competence in place of the court first seised.

v) The cases of the Chilean courts on *lis alibi pendens* to which I have referred suggest that in appropriate circumstances, the Chilean courts will not insist on taking jurisdiction but are prepared to cede jurisdiction or competence to a foreign court. It would be surprising if Chilean law prevented a foreign court taking the same step in reverse.

vi) The Claimants' own justification at paragraph 45 of their skeleton argument is that the approach put forward by Professor Silva reflects "a logical extrapolation of the procedural principles developed by the Chilean courts to avoid what European conflict of laws practitioners would characterise as being *lis alibi pendens* issues". However, if this is the justification for the approach put forward by Professor Silva, this, in my view, speaks for an approach to cross-border jurisdiction or competence which allows for a court first seised being able to stay its proceedings in favour of the Chilean courts.

vii) I agree with the proposition that if the approach to Articles 109 and 112 OCC put forward by Professor Silva were to be correct, this would

suggest the courts of Chile were adopting an insular and domestically-focused approach which failed to take account of the modern commercial world. In the absence of authority or academic commentary clearly pointing to this result, I would be reluctant to conclude that this approach correctly represents the law of Chile. This is particularly the case in circumstances where the evidence otherwise before me is that the courts of Chile are increasingly faced with cross-border litigation and both parties agree that the claims in this action can be properly litigated before a court of Chile.

viii) None of the reasons put forward by Professor Silva to explain the purpose of Articles 109 and 112 OCC summarised at paragraph 50 above are a bar to a foreign court being able to cede jurisdiction (or competence) to a court in Chile.

54. For all the above reasons and bearing in mind that the test I have to apply is what would the Chilean Supreme Court decide if the point were to come before it, I conclude that Articles 109 and 112 OCC do not mean that Chile is not an available forum because the English courts were first seised. Rather, I consider that the Chilean Supreme Court would either conclude that Articles 109 and 112 do not apply and are not impediment to the Chilean court accepting jurisdiction the claims. Alternatively, if they concluded that they did apply, they did so on terms which did not prevent the English court staying its proceedings in favour of a Chilean court. Either conclusion is consistent with the findings of the Supreme Court in Holzmann v Gainsborg.

55. I have set out above the long answer to why I consider that Articles 109 and 112 OCC do not prevent Chile being an available forum for the Claimants' claims. The Defendants suggest that there is also a short answer, namely that I could strike out the present claims (if necessary subject to appropriate undertakings to protect the Claimants' position if the Chilean court later declined jurisdiction). It is for this reason that the Defendants sought to amend the relief claimed by the Application to include the striking out or dismissal of the Claim.

56. The Defendants accept that the usual or orthodox order on an application such as the Application is an order for a stay (either unqualified or on terms) but say that the Court nevertheless has jurisdiction in an appropriate case to strike out or dismiss a claim. In this regard, they point to s.49 of the Civil Jurisdiction and Judgments Act 1982, which provides that nothing in the Act shall prevent any court in the United Kingdom from "staying, sisting, striking out or dismissing any proceedings before it on the ground of *forum non conveniens* or otherwise ...". They also point to Cook v Virgin Media Ltd [2016] 1 WLR 1672 at [40] in which the Court of Appeal held that the court has power to make an order striking out a claim on jurisdictional grounds even after a Defendant has admitted liability. The Court, however, went on to say that the better course would be to stay the proceedings.

57. The present case is another case where in my view striking out is not an appropriate remedy. As Professor Briggs explains in *Private Law in English Courts*, 2nd ed (2023) at pp. 169 – 171, the fact that the procedural remedy is a stay and not a dismissal has a historic root and a practical significance, namely that if the foreign court declines jurisdiction or issues of limitation arise before

the foreign court then the proceedings before the English court can be revived without the need for a fresh Claim Form and any undertakings given can be more easily policed.

58. Accordingly, if I were not otherwise persuaded that Chile was an available forum without the need to terminate this action, I would not have been persuaded to strike out the present claim as a means of giving the Chilean court jurisdiction. In this, I agree with the Claimants that they have established jurisdiction as of right and ought not to be deprived of their claims here as a means of making Chile an available forum.

Relative Competence - Domicile

59. It is common ground that the First Defendant is now domiciled in Chile. Further the First to Fourth Defendants have offered to submit to the jurisdiction of the Chilean Courts (although in the First Defendant's case subject to his position that some or possibly all of the claims are subject to arbitration). Accordingly, the Claimants accept that if the Chilean courts are otherwise available, they have relative competence. It is common ground between Professor Silva and Mr. Bulnes that the Chilean courts will have jurisdiction over a claim where a defendant is domiciled in Chile. It is also common ground that it is enough if one of several defendants is domiciled there.

60. However, for the purposes of limitation, it is necessary to consider whether either the First or Fourth Defendants were domiciled in Chile at the time when the Claim Form was issued.

61. So far as the First Defendant is concerned, it is common ground that he was domiciled in England when the Claim Form was served and at the time of

making the Application. It also appears to be common ground that it would be open to the First Defendant to apply in Chile under Article 8 of the International Commercial Arbitration Act of the Republic of Chile ("LACI") to stay at least the Joyvio Claims made against him. In this regard, I accept the Claimants' submission that the First Defendant was not available as an anchor defendant under Article 141 of the OCC at the time when the Claim Form was issued. However, so far as the position now is concerned, while the First Defendant may be able to seek a stay before a court in Chile for a stay of some of the claims against him, he would still remain an anchor defendant provided that some of the claims against him (such as the Australis claims) remained before the court in Chile. Further, the risk is ameliorated by the agreement of the Defendants to submit to the jurisdiction of the Chilean court.

62. The position in relation to the Fourth Defendant at the time of the issue of the Claim Form is more complex. The evidence suggests that he was domiciled in Spain at the time of the issue of the Claim Form and remains so. He currently resides with his immediate family in Spain in rented accommodation and has done since February 2022. He is a director of a Spanish company called West Lake Global Investment SL (as well as being a director of an English company, which has an affiliate in Spain marketing agricultural products from Brazil and Columbia in Europe). Between 13 September 2020 and 13 September 2023, the Fourth Defendant spent 480 days in Spain and his electoral certificate which includes his personal electoral data from the Chilean Electoral Service states his domicile as Madrid, Spain. It would seem likely given that the Fourth Defendant moved to Spain in February 2022 that the majority of the 480 days he states that he was in Spain was after February 2022. The question is therefore whether he

has a dual domicile in Chile as well and did so at the time of the Claim Form. In this regard, he owns property in Chile, which is rented out. His evidence is that he intends to return to Chile in the near future and that between 13 September 2020 and 13 September 2023, he spent 515 days in Chile. The Fourth Defendant is the CEO of a Chilean company, which provides investment services to the Quiroga family office and pays health insurance in Chile. When the Claimants filed their criminal complaint against the Fourth Defendant before the Fourth Criminal Court in Santiago, they stated that the Fourth Defendant was domiciled at the apartment he owned in Chile. The Fourth Defendant's son celebrated his Bar Mitzvah in Chile in November 2023 and has prepared for his Bar Mitzvah with a rabbi in Chile. The Fourth Defendant states that his and his family's original intention was only to spend one year in Spain before returning to Chile but that as his sons are now settled in Spain they have decided to extend their stay.

63. It is common ground between the parties that domicile under Chilean law requires both residence and an intention to remain in the residence and that for dual domicile both criteria must be satisfied in both locations (and see Articles 62 – 65 of the Chilean Civil Code). In this regard, the evidence from both experts is that the factors which reveal a party's intentions are the place where an individual is settled, where they have their domestic home, where they habitually exercise their profession or trade and where they have their main seat of business. However, Mr. Bulnes accepts that in a situation where a person is said to have more than one domicile, then the jurisprudence of the Chilean Supreme Court requires a person to have both residence and the intent to remain in both territories; see Supreme Court Decision 345-2000 of 27 December 2000.

Perhaps inevitably, while aligned on the legal test to be applied, Mr. Bulnes and Professor Silva disagree as to the conclusion a Chilean court would reach on the facts as to the domicile of the Fourth Defendant.

64. When one tests the evidence as to the Fourth Defendant's residence and intention to remain in Chile there is sufficient evidence of his connection to Chile that a Chilean court could find that now and at the time of the issue of the Claim Form he has and had dual domicile not least given his on-going business connections in Chile, his continuing family connections and the time he has spent in Chile between September 2020 and September 2023 and also the fact that the Claimants appear to have treated him as domiciled in Chile for the purposes of their criminal complaint. However, the test I have to apply is what the Chilean Supreme Court would decide if the question of the Fourth Defendant's domicile were to come before it; see Banca Intesa SanPaolo SpA v Commune di Venezia [2024] Bus LR 228 at [165]. Applying this test, I cannot be satisfied that the Chilean Supreme Court would decide that the Fourth Defendant is domiciled in Chile now or was so domiciled when the Claim Form was issued. It seems to me that there is evidence on which the Chilean Supreme Court could conclude that the Fourth Defendant is only domiciled in Spain. His property in Chile is rented out and he gives his domicile as being Spain for electoral purposes. His children are settled in schools in Spain and he has employment in Spain. Although he says that he intends to return to Chile in the near future, there is no certainty as to when that will be.

65. I therefore find that the Fourth Defendant was not available as an anchor defendant at the time the Claim Form was issued and is not available as an

anchor defendant now. In terms of the Claimants establishing the relative competence of the Chilean court for the purposes of proceedings in Chile, this is not an issue given the Fourth Defendant's agreement to submit to the jurisdiction of the Chilean court. However, again, I will return below to the significance of this finding in relation to the issue of limitation.

Relative Competence – Connecting Factors

66. In light of the common ground on the domicile of the First Defendant and the submissions to the jurisdiction of the Second to Fourth Defendants, it is not strictly necessary for me to consider whether the Defendants can establish the relative competence on the grounds of connecting factors for the purposes of determining availability. However, I will briefly set out my conclusions on this issue.

67. The Defendants submit that jurisdiction can be established on the basis of the place where the harmful event took place or by where the contract was made by reference to the following authorities:

i) Supreme Court case 5969/2011 (10 April 2013) in a case concerning defective cochlear implants manufactured in Austria and installed in Chile, jurisdiction was based on the place of commission of the wrongful act (Chile) and despite the foreign domicile of two of the defendants.

ii) Supreme Court case 2147/2013 (16 September 2013) in a case concerning a bus accident occurring in Bolivia, the Supreme Court found that the Chilean courts had jurisdiction based on the breach of contracts concluded in Chile.

iii) Supreme Court case 22198/2019 (23 April 2021) – The Supreme Court reiterated the procedure to determine the competent court to hear a cross-border case and stated that one of the relevant factors the court must take into account was "the place of commission of an act … in matters of civil liability".

68. The Claimants say in relation to each of these cases that they do not support the Defendants' case and are not binding in any event. They also say that where the reasoning of the Supreme Court is flawed, I should not take it to represent Chilean law; see Deutsche Bank v Commune di Busto at [108] per Cockerill J. In this regard, it is important to keep in mind what Cockerill J. did say:

> *"I conclude that it is open to me to diverge from even the highest authority, particularly in the context of a civilian law system. For example if, on the evidence, I can be satisfied that an authority, however eminent does not represent the law – if for example a foreign court had unwittingly diverged from a long established approach to a particular issue. However, I must be astute to give full weight to that judgment before concluding that that is the correct court and in future an Italian court confronted with this issue would diverge from that high authority."*

69. Bearing in mind that I am dealing with a Civil law system which does not have a doctrine of binding precedent but gives weight to authorities particularly of the highest courts and if there is a trend to the decisions of those courts, I should be cautious before concluding that decisions of the Supreme Court of Chile are wrong, especially if there is a trend to those authorities.

70. Taking each of the cases in turn, the Claimants say:

i) That in relation to Supreme Court case 5969/2011, the Court erred in its reasoning because one of the defendants was in fact a company domiciled in Chile and could accordingly act as an anchor defendant.

Secondly, they say that the Article 5 OCC could not found jurisdiction (which is common ground). They also say that the Court of Appeals was wrong to rely on Article 168 of the Bustamante Code as supporting the notion that competence is determined by the place of commission of a tort because the Code concerns the determination of the applicable law rather than the competent court.

ii) That in relation to Supreme Court case 2147-2013, the case does not assist the Defendants because the Claimants say that it was concerned with specific jurisdiction provisions of an inter-state treaty, namely the Agreement on International Land Transport of 01 January 1991 and that the Court found that the place of commission of a tort was irrelevant as a jurisdictional factor.

iii) That in relation to Supreme Court Case No. 22,198-2019, the case is concerned with a claim for damages arising from the termination of a contract rather than any non-contractual claims.

71. Largely for the reasons given by the Defendants in their oral submissions, I find that the three Supreme Court decisions do support the conclusion that the Chilean Supreme Court allows jurisdiction to be founded in claims for non-contractual liability based on either the place where the harmful event occurred or the place where a related contract was concluded. In this regard:

i) In relation to Supreme Court case 5969/2011, there was no reliance by the Supreme Court on Article 5 OCC. Further I do not read the Supreme Court's decision as being dependent on reliance on Article 168 of the Bussamente Code. To the extent that it was relied on by the Court of

Appeals (rather than the Supreme Court), it appears to have been relied on by analogy rather than directly.

ii) In relation to Supreme Court case 2147-2013, the Supreme Court accepted jurisdiction for the action generally (that is to say both the contractual and non-contractual claims) based on the place where the contracts in question were concluded, which was Chile (see the 15th and 16th recitals).

iii) In relation to Supreme Court case 22,198-2019, it is clear that the case is concerned with a claim for damages arising from the termination of a contract, but in the recitals to the case (see the 7th recital) the Supreme Court cites with approval academic commentary which suggests that jurisdiction can be founded on the basis of connecting factors such as the place where the act or contract was concluded or the place where obligations were to be performed or the place where the wrongful act was committed.

72. I accept that the Defendants have not been able to identify any legislative provision of Chilean law which provides for jurisdiction on the basis of connecting factors such as the place where the contract was concluded or the place where the wrongful act was committed. However, there is a trend of Supreme Court decisions which support the Defendants' position as to reliance on those connecting factors. I do not find the reasoning of those authorities to be so flawed that I should not follow them. In this regard, the Claimants have not identified a line of established authority which runs to the contrary. Accordingly, I do not accept the authorities relied on by the Defendants as being

authority which I can rely on to establish what the Supreme Court of Chile would find in relation to jurisdiction of the Chilean courts if the question of whether there were sufficient connecting factors to bring the claims before the Chilean courts was brought before it. I find that they would accept that a court in Chile would have relative competence if the claims against the Defendants were brought before them on one or both of the grounds that the claims relate to wrongful acts committed in Chile and to a contract concluded in Chile.

73. It follows that I consider that the connecting factors relied on by the Defendants are another basis for considering that Chile is an available forum. I will consider separately below what implications, if any, this has in relation to the issue of limitation.

The Connecting Factors

Personal Connection of the parties

74. It is common ground that none of the Claimants have any connection to England. Seven of the Claimants (the Third to Ninth) are Chilean companies, whose business is almost exclusively conducted in Chile. Only the First and Second Claimants are incorporated in China.

75. So far as the Defendants are concerned:

i) All of them are Chilean nationals and their unchallenged evidence is that they all retain strong links with Chile.

ii) It is accepted that the First Defendant is domiciled in Chile.

iii) All of them have indicated that they will travel as necessary to Chile for the purposes of any proceedings.

iv) The Third Defendant lives in London with his family in a rented property having moved from Chile in December 2021 and has no immediate plan to leave the United Kingdom but his evidence is that in the medium term, his intention is to return to Chile and he retains strong links there. The Defendants submit that the Third Defendant's temporary residence in London has little weight when assessing connecting factors; see PJSC Bank Finance and Credit v Zhevago [2021] EWHC 2522 (Ch) at [138].

v) As discussed above, the Fourth Defendant is a Chilean national who has spent most of his life there. He currently lives in Spain and his evidence is that he has spent only eight days in England in the last fifteen years and this was on holiday. His further evidence is that his move to Spain is temporary and he intends to return to Chile in due course. Chile is where he has spent more time than anywhere else in the three years preceding his witness statement.

vi) Each of the Second to Fourth Defendants have agreed to submit to the jurisdiction of the Chilean courts.

Factual connection between the events underlying the claims and jurisdictions

76. There was no dispute that there are no factual connections between the events underlying the claims and England. The factual connections are with Chile other than a small number of discrete issues which are partly linked to China.

77. The Joyvio Claims concern the sale by Chilean companies under a contract governed by the law of Chile of a group of Chilean companies operating a business almost exclusively in Chile. The sale was agreed with the Second Claimant (a Chinese company), which in turn assigned its rights and obligations

under the SPA to the Third Claimant (a Chilean company). That Chilean company completed the transaction and paid over the money. The evidence before me is that the negotiations took place either (i) via in-person meetings in Chile where the buyers were represented by Chilean lawyers, Mr. Gago and Mr. Jerome Chen (a Chinese national who was a representative of Joyvio based in Chile for the negotiations) and (ii) remotely via telephone or video calls with the sellers' and Australis' representatives attending from Chile.

78. The Claimants say that nevertheless the Joyvio Claims arise out of a cross-border transaction, which on their case amounted to the implementation of a cross-border fraud. They submit that there is a substantial Chinese element to the dispute not least in terms of the effect of any actionable misrepresentations or non-disclosure on the representatives of the First and Second Claimants. The Claimants further submit that the focus will be on what was crossing the line in English and what information the Joyvio Claimants had relied upon (focussed on what happened in China in Chinese). They also say that in practical terms, the issues of quantum will be China focussed. In the absence of particulars of the Claimants' case on misrepresentation and non-disclosure and in particular as to reliance as well as the absence of particulars on their alleged losses it is not possible to assess how extensive any connection to China will be. That connection does not, in any event, provide a connection to England as the natural forum.

79. The management of the Australis companies, which forms the basis of the Australis Claims took place in Chile. In this regard, Mr. Penny KC accepted in his oral submissions that the Australis claim is connected with Chile and that a

claim between a company for breach of fiduciary duty against its officer is more appropriate to be dealt with by the foreign court. He submitted, however, that the appropriate approach to avoid fragmenting the claims was nevertheless to bring the Australis Claims with the Joyvio Claims to the English courts.

80. The Defendants submitted, and it was not disputed by the Claimants, that it followed from the matters set out above that:

i) For the Joyvio Claims, any alleged representations were made in Chile and any non-disclosure or concealment occurred in Chile. Any representations were received in Chile or China. For any restitutionary claims, any enrichment was received in Chile.

ii) The alleged mismanagement and breaches of duty forming the basis of the Australis Claims occurred exclusively in Chile with all losses being suffered in Chile.

81. The Defendants also submitted that:

i) A central component of the subject matter of all of the claims is Chilean environmental law and the practical reality of its enforcement, including whether there was a substantial change in the regulatory environment after the Sale. This is an issue in the Arbitration as to which both parties are relying on expert evidence including 11 expert reports.

ii) The entirety of the Australis Claims and at least part of the Joyvio Claims turn on questions of internal governance and management of Chilean companies in Chile, that is to say the scope and nature of the duties of directors under Chilean law. These matters are ones, which the

Defendants correctly say, are ones for which the place of incorporation of the companies will be the natural forum; see Ceskoslovenska Obchodni Banka AS v Nomura International Plc [2003] 1 L.Pr 20 at [12] and PJSC Bank Finance & Credit v Zhevago [2021] EWHC 2522 (Ch) at [90] and [142]. As noted above, in relation to the Australis Claims, this was accepted by Mr. Penny KC.

82. So far as fragmentation of the Joyvio and Australis Claims are concerned, I accept that the two sets of claims should not be fragmented but that seems to me to be a factor which speaks in favour of Chile being the appropriate forum rather than England.

Convenience and expense: location of witnesses/experts

83. This is a factor described by Lord Mance in VTB Capital plc v Nutritek International Corpn [2013] 2 AC 337 at [62] as being at the core of the question of appropriate forum.

84. In the present case, the Defendants say that the evidence points to the majority of relevant witnesses being based in Chile and being Spanish speaking. They say this is evidenced by the fact that the parties have already served their witness evidence in the Arbitration, which is born out of the same underlying facts. The Claimants in turn say that the key witnesses will either be the Defendants (of whom only the Third Defendant is now resident in England) and relevant Joyvio Group executives who are based in China. They submit that their witnesses are predominantly located in China. However, the witness evidence served in the Arbitration consists of 29 factual witnesses of whom 26 are located in Chile and only three in China. All the witness statements are in Spanish save for three. I

accept that as the Claimants submit, the fact that the statements are in Spanish will be at least in part responsive to the fact that the language of the Arbitration is in Spanish.

85. In relation to experts, the Claimants have in the Arbitration relied upon expert reports from five non-legal experts and three legal experts. All of the reports are from experts based in Chile and are in Spanish. The position is the same for the Defendants.

86. I accept the Defendants' submission that the above points indicate strongly that Chile is the natural forum especially when one takes into account the cost and delay which would be inherent in interpretation being required for cross-examination and in bringing experts and witnesses to England for the trial (even if some of them attend remotely).

Convenience and Expense: Location of Documents and Language

87. The physical location of documents attracts less weight now given that documents are more easily stored, retrieved and transferred electronically; see per Lord Briggs JSC in Lungowe v Vedanta [2020] AC 1045 at [85(viii)]. However, the language of documents remains important. In this regard:

    i) While the inter partes communications may have been in English, I accept the Defendants' submission that wider and more extensive factual questions relating to falsity, concealment and fraud will turn on the actions and knowledge of Spanish-speaking individuals. Similarly, the entirety of the Australis Claims concern how Chilean businesses were run by Spanish-speaking individuals in Chile.

ii) It appears that some 82% of the 18,356 documents disclosed in the Arbitration are in Spanish.

88. There was a dispute between the parties as to the likely cost of the translation of documents. However, even if those costs can be reduced by using machine translation, I accept the more general point that it is likely to be more convenient and less expensive for a largely Spanish language dispute to take place in Chile rather than England. It also seems to me that inevitably a Spanish-speaking Judge looking at documents which are in the main in Spanish will be better able to understand and put those documents in context than a judge reading them in translation.

Convenience and Expense: The Cambridgeshire Factor

89. The Defendants also submit that a further pointer in favour of Chile is what the courts have described as *"the Cambridgeshire factor"* – i.e. the fact that the parties' lawyers have built up knowledge and experience in dealing with related proceedings. In this regard:

i) The Defendants are represented in the Arbitration, the Chilean Criminal Complaints and the related defamation claims by the Chilean law firm, Claro y Cia (the responsible partner being Mr. Eyzaguirre), who also acted for the Defendants in connection with the Sale.

ii) On the Claimants' side, Bofill Escobar Silva Abogados (the responsible partner being Mr. Bofill) have been engaged since 2022 on the same proceedings, conducting an internal investigation in 2023 and preparing the Chilean Criminal Complaints.

90. As to this, the Claimants submitted that these proceedings, the Arbitration and the Criminal Complaint have been dealt with in parallel. I accept that some of the knowledge acquired by those acting for the parties in Chile will be transferrable to the present proceedings and that there has been on both sides cooperation, even close cooperation, between the Chilean and English legal advisers acting for the parties. Nevertheless, it goes too far, it seems to me, to suggest that the proceedings have been effectively running in parallel in circumstances where the Arbitration is due for hearing in the second half of this year and these proceedings are at the stage of jurisdiction challenges.

91. I accept that when one takes into account the experience and knowledge already accumulated by the Chilean counsel instructed on behalf of both parties and the advanced state of the Arbitration, the Cambridgeshire Factor is a factor which points to Chile as the natural home of any proceedings.

Applicable Law

92. It is well-established that the governing law is an important factor because it is generally preferable that a case should be tried in the country whose law applies; see VTB Nutritek at [46] and Livingston Properties Equities v JSC MCC Eurochem [2020] UKPC 31 at [12].

93. The Claimants' original pleaded case in the Claim Form was that all the claims (both the Joyvio Claims and the Australis Claims) were governed by Chilean law, which would again be a further factor in favour of Chile over England. The Claimants have now sought permission to amend the Claim Form to add claims that the tortious and/or restitutionary claims by the Joyvio Claimants may be governed by Chinese law. The Defendants do not accept that it is properly

arguable that Chinese law is the applicable law but agreed to treat the postulated Chinese law claims as part of the claims *de bene esse* for the purposes of the Application.

94. There was dispute between the Defendants and the Claimants as to whether the Chinese law claims were to be properly categorised as secondary to the Claimants' claims under Chilean law. However the claims are categorised, I agree more generally that the proposed amendments do not add any connections to England. There is further no suggestion that this court can more easily determine claims advanced under Chinese law than a court in Chile.

95. Further, even if some elements of Chinese law will have to be considered for determination of the Joyvio Claims, the Australis Claims are exclusively a matter of Chilean law and there is no doubt that questions of Chilean law will arise for the Joyvio Claims.

96. In this regard, it is inevitable that a court in Chile will be better able to apply Chilean law than an English judge coming from a different legal tradition, untrained in the relevant law and, although guided by experts, also dealing with Chilean law materials which will have to be translated. This is notwithstanding the fact that judges in this court are often required to resolve issues of foreign law.

97. Again, I accept that when one considers questions of applicable law as a connecting factor, this points clearly and distinctly to Chile as the appropriate forum.

Overall

98. For the reasons discussed above, I consider that the natural forum for both the Joyvio Claims and the Australis Claims is clearly and distinctly Chile.

The Limitation Issue

99. The Claimants submit that there is a real risk that a court in Chile may declare itself not to have jurisdiction to hear subsequent Chilean proceedings. In this respect, they rely first of all on the matters they relied on to say that Chile was not an available forum and say that they there is a real risk that time and expense will be wasted pursuing Chilean proceedings which will later be found to be a nullity by the Supreme Court. They also say that the risk of expiry of a limitation period provides a compelling justification at Stage 2 of the Spiliada test for refusing a stay absent an undertaking not to rely upon the expiry of that limitation period.

100. As to whether a court in Chile is an available forum, I have already found that it is and that for the reasons given above, I consider that the Supreme Court of Chile will find that it is an available forum and that the Defendants are able to expressly submit to the jurisdiction of a court in Chile. Accordingly, I do not accept that there is a real risk that any proceedings in Chile will be declared a nullity.

101. I have separately considered whether the possibility it may take up to eight years for the Supreme Court in Chile to rule on the issue of jurisdiction if the point were taken by a lower court or by the Supreme Court of its own motion justifies a stay notwithstanding my conclusions on the issue of jurisdiction. I find that it does not for the following reasons:

i) The suggested period of eight years refers to the possibility that the substantive claims made by the Claimants may take this period of time to work their way through to the Supreme Court.

ii) The procedures of the Chilean courts allow any challenge to the Court's jurisdiction to be dealt with as an interlocutory application before determination of the substantive claims.

iii) In circumstances where I have rejected the possibility of striking out this action, if a lower court in Chile does refuse jurisdiction of its own motion, contrary to the conclusions I have reached above, then the Claimants will have the option of returning to the English court to seek the lifting of the stay if an appeal is not likely to be an effective remedy.

102. So far as the issue of limitation is concerned, there is a dispute between the parties as to whether there is a real risk that the claims would be time-barred in Chile. This is on the basis principally that there is uncertainty as a matter of the law of Chile as to whether the limitation period starts to run from the date of knowledge or the date of damage.

103. It was common ground between the parties that under Article 2332 Civil Code a four-year limitation period applies to claims pursued under Article 2314 of the Civil Code and all non-restitutionary claims. Professor Silva also considers that a four-year limitation period applies to the restitutionary claims brought under Article 2316. Mr. Bulnes raises the possibility that the limitation period for the restitutionary claims is five years rather than four but accepts that there is legal scholarship in favour of a four year period. For the purposes of stage 2 of the

Spiliada test, I will treat the limitation period for the restitutionary claims as being four years.

104. There is a debate as to when time starts to run under Article 2332 but both experts agree that the better view is that time starts to run from the date of knowledge although the case law is divided as to whether the date of knowledge or date of damage is the correct date. What Mr. Bulnes describes as the modern approach is that time starts to run from the date of knowledge.

105. In any event, it is the evidence of Professor Silva that while service is required to interrupt the running of time, the service of the English proceedings is capable of interrupting limitation for the purposes of the proceedings in Chile. Mr. Bulnes expresses a more cautious view but nevertheless favours the view that service of the English proceedings is sufficient to stop time running in Chile.

106. On the evidence before me, I am not persuaded that there is a real risk that the Claimants' claims are time-barred under Chilean law given the measure of agreement between the experts as to the likely approach of a Chilean court on the issue of limitation. I am also, therefore, not persuaded that the claims are undoubtedly time-barred (if, contrary to my findings, that were the relevant legal test).

107. It follows that I do not need to consider whether the Claimants acted unreasonably in not commencing proceedings in Chile rather than in England or at the same time as commencing in England. However, if it had been necessary for me to consider this issue, then I would not have found the Claimants had acted unreasonably given the uncertainty over the domicile of the Fourth Defendant and the fact that there was no other Defendant domiciled

in Chile at the time. I do not consider that this conclusion is altered by the evidence that the Defendants had entered powers of attorney permitting service in Chile or my conclusion that jurisdiction could also be founded by reliance on connecting factors.

108. This leaves open the question of whether I should require the Defendants as a condition of a stay to waive any limitation defence they might have arising between the issue of the present claim and any claim in Chile. I consider that I should. It is common ground between the parties that such a waiver offered now will remove the risk that a court in Chile would find that the claims are time-barred. In these circumstances and where the Defendants have offered such an undertaking (albeit only if I consider it necessary as a condition of granting the Application) it is appropriate to require such an undertaking as a condition of granting the stay and thereby depriving the Claimants of the jurisdiction they have established as of right.

Conclusion

109. For the reasons given above, I find that:

i) Chile is an available forum for the claims brought in this action.

ii) Chile is the natural forum for the claims brought in this action and the one with which the claims are clearly and distinctly connected.

iii) There is no other reason to refuse to stay this action in favour of the natural forum.

iv) Accordingly, I grant the Application to stay this action on the grounds that Chile is distinctly and clearly the more appropriate forum but on the

basis that the stay is subject to appropriate undertakings from the Defendants to submit to the jurisdiction of a court in Chile and to waive any limitation defence accruing between the issue of the present claim and any claim in Chile.

110. In relation to the First Defendant, any undertaking to submit to the jurisdiction of a court in Chile will clearly need to be qualified to protect his position that some claims are subject to arbitration pursuant to the arbitration agreement found in the SPA.

111. I would be grateful if the parties could liaise over the terms of a final order giving effect to this judgment including the terms of the undertakings to be incorporated into the order. If and to the extent that they are not able to reach agreement on the terms of that order or there is any disagreement as to the appropriate costs orders, the parties should either liaise with the listing office to arrange a hearing for consequential matters or provide me with their proposals for how any matters in dispute may be dealt with on paper.

112. I wish to express my gratitude to the parties and their representatives for the work done in preparation for and in presentation of the submissions for and against the Application.