Neutral Citation Number: [2016] EWHC 1989 (Comm)

Case No: CL-2015-000687

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
The Rolls Building
7 Rolls Buildings
London, EC4A 1NL

Date: 21/07/2016

Before:

MR JUSTICE BURTON

- -

Between:

Sheikh Mohamed Bin Issa Al Jaber	**First Claimant**
MBI & Partners UK Limited	**Second Claimant**
- and -	
Sheikh Walid Bin Ibrahim Al Ibrahim	**First Defendant**
Sheikh Majid Bin Ibrahim Al Ibrahim	**Second Defendant**

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Michael Beloff QC, Stephen Nathan QC & Daniel Cashman (instructed by **Herbert Smith Freehills LLP**) for the **Claimants**
Steven Thompson QC & Matthew Watson (instructed by **Enyo Law**) for the **First Defendant**
Neil Calver QC (instructed by **Macfarlanes LLP**) for the **Second Defendant**

- -

Approved Judgment

Transcript of the Shorthand Notes of Marten Walsh Cherer Ltd.,
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MR JUSTICE BURTON:

1. The underlying dispute in the proceedings now before me is as to whether there was an oral agreement made in London in the last week of December 2001 between the First Claimant (Sheikh Mohamed) and the First Defendant (Sheikh Walid) and the Second Defendant (Sheikh Majid). Sheikh Mohamed claims that he thereby agreed to lend to both Defendants the sum of $30 million, whereafter, pursuant to instructions given by him on 3rd January 2002 to his London banker, Mr. John Collier-Wright of HSBC Republic, that sum was paid by HSBC Republic Geneva to a bank account with Credit Suisse Geneva in the name of Durango Ltd. This account was specified in a fax requesting such payment, sent by Mr. Osman Ali, an employee of ARA Group International Co Ltd. (AGI), a company established by Sheikh Walid, of which Sheikh Majid was at that time Vice-Chairman. Demand was made for the repayment of such loan by letter of demand addressed to both Sheikh Walid and Sheikh Majid, dated 16th June 2015.

2. The Defendants accept that such sum was paid, but deny that it was a loan. The Defendants assert that the sum of $30 million was so paid in satisfaction of an earlier obligation to pay that sum, which was owed by a Saudi company owned or controlled by Sheikh Mohamed called Jadawel International Company (Jadawel), pursuant to an oral agreement for services rendered by Sheikh Majid: such services being the utilising of his business connections with the Saudi Ministry of Defence and Ministry of Finance so as to facilitate completion of the assignment of leases of two residential compounds in Saudi Arabia.

3. This is a straight up and down dispute, described by Mr. Michael Beloff QC, leading Mr. Stephen Nathan QC and Mr. Cashman for the Claimants, as entailing that *"either there is a fictitious and fraudulent claim or there is a fictitious and fraudulent defence"*.

4. The issue before me is at this stage limited to questions of jurisdiction. The Claimants (as I shall call them, there being a claim pleaded in the alternative in the Particulars of Claim, in case it be found, contrary to the Claimants' primary case, that the loan was by Sheikh Mohamed's company, the Second Claimant) rely on service within the jurisdiction as against Sheikh Walid, but no longer pursue a similar case in respect of service within the jurisdiction upon Sheikh Majid.

5. I shall resolve this issue of service first. If such service was good service, then Sheikh Walid has an application for a stay on grounds of forum conveniens, asserting that the clearly more appropriate forum for the trial of these proceedings is Saudi Arabia. As against Sheikh Majid, service within the jurisdiction is no longer pursued. The Claimants have therefore, in order to serve out of the jurisdiction, the burden of establishing the threefold test as against Sheikh Majid of a serious issue to be tried, a good arguable case for one of the gateways justifying permission to serve the claim form out of the jurisdiction under CPR 6.36 and Practice Direction 6B, paragraph 3.1, and that, in all the circumstances, England is clearly or distinctly the appropriate forum for the trial of the dispute.

6. The Particulars of Claim plead, in material respects, the following:

"3. The First and Second Defendants are brothers. In 2001 and early 2002 (and thereafter) they resided in London and operated a business based in London which was called Middle East Broadcasting Center (MBC) and which carried on the business of operating a radio and satellite television service from London transmitting to Arabic listeners and viewers. Between 1998 and 2001, the First Claimant had given substantial support to the said broadcasting business by causing one of his companies to extensively on MB's radio and TV channels. By the end of 2001, the cost of such advertising had been several million dollars. Further in June 2001, the First Claimant, had invested US $8 million in an investment company, The Portugal Property Fund Limited (a Guernsey-registered company) by purchasing the First Defendant's shares.

4. In about mid-2001, discussions began in London between the First Claimant and the First and Second Defendants about their business plan to create an Arabic language 24-hour satellite news broadcasting service to compete with Al Jazeera which would be called 'AL-ARABIYA'.

5. In August and September 2001, the First and Second Defendants made a request to the First Claimant for initial funding of US $30 million for the planned AL-ARABIYA broadcasting service. This request was repeated from time to time throughout late 2001 in discussions between them.

6. In the last week of December 2001, the Second Defendant, on behalf of the First and Second Defendants, spoke to the First Claimant by telephone at the Claimants' London office at 78-80 Wigmore Street, London W1U 2SJ. The Second Defendant asked that, in order to help them move the 'AL-ARABIYA; project forward, the First Claimant should give his brother and him immediate funding for the project by means of a personal loan of US $30 million. The First Claimant orally agreed to lend them US $30 million and to have that sum transferred to the bank account nominated by the two brothers, the First and Second Defendants ('the Loan Agreement').

7. The First and Second Defendants thereupon sent details of their bank account to the First Claimant, namely an account no. 813320-42, at Credit Suisse, Geneva, Switzerland (SWIFT code CRESCHZZ 12A).

…

9. At the time that the Loan Agreement was made:

a. the place of business of the First Claimant was 78-80 Wigmore Street, London W1U 2SJ at which he received the Second Defendant's said telephone call;

b. London was a habitual residence and a place of business of the First and Second Defendants.

Performance of the Loan Agreement

10. Later that same week, the First Claimant received a fax with the details of the bank to which the First and Second Defendants wished the sums loaned to be transferred (as set out above). The First Claimant gave the fax containing the bank details to Mr. Richard Brook his CFO at the First Claimant's office, in order to prepare transfer instructions to HSBC Republic Bank in London for the First Claimant's signature. The relevant letter of instruction was sent to HSBC Republic Bank on 3 January 2002.

11. The said letter of instruction was addressed to Mr. John Collier-Wright of HSBC Republic, 47 Berkeley Square, London W1J 6AU and copied to Ms. Karen Broecker of HSBC Geneva. It read:

'Dear John,

Re: MBI US Dollar Account with HSBC Republic Geneva

Please transfer the sum of US $30,000,000 (US Dollars Thirty Million Only)

Value Date: January 4th 2002

Bank Client Reference: Sheikh Walid and Majed Al Ibrahim

Bank: Credit Suisse

Bank Address: Geneva

Swift Code: CRESCHZZ 12A

Bank Account No: 813320-42

Reference: Durango Management Limited.'

12. The said letter of instruction was signed by the First claimant and typed on the letterhead of the Second Claimant."

Service within the jurisdiction

7. The Claimants rely, as against Sheikh Walid, upon service on him at Grovelands, Shrubs Hill Lane, Ascot, Berkshire (Grovelands), which the Claimants assert to justify service upon him in accordance with CPR 6.9 (2) as his usual address. Unlike the matters to which I turn later, where the issue is as to the residence of the parties in 2001 when the alleged agreement for the loan was made, this issue concerns the residence of Sheikh Walid as at the time of service, namely 26th September 2015, by a process server.

8. There is no dispute about the relevant tests for a *usual residence,* and it is inevitably fact based. Both Mr. Beloff and Mr. Steven Thompson QC (with Mr. Matthew Watson) for Sheikh Walid guided me to the decisions in **Relfo v Bhimji Veliji JadvaVarsani** [2009] EWHC 2297 (Ch) at first instance per Mr. Jules Sher QC and [2010] EWHC Civ 560 CA, and **Moloobhoy v Kanani** [2012] EWHC 1670 (Comm) per Mr. Stephen Males QC.

9. The test for jurisdiction is that they must have a *"good arguable case"* (see **Relfo** at first instance at paragraph 20 and on appeal at paragraph 16 per Etherton C, and **Moloobhoy** at paragraph 52). I shall return to the meaning of those words later in the judgment when it becomes considerably more significant to tease out what they mean, but I am content, although it is common ground that this amounts to less than the balance of probabilities (i.e. the Claimants do not have to prove their case by 51% to 49%), to address this question as if it were to be decided on the balance of probabilities.

10. The authorities are collected together in **Moloobhoy** at paragraph 53 and following, after referring as the first proposition to the need for a good arguable case:

> *"53. Second, a person can have more than one residence, and indeed more than one 'usual residence', at any given time. Thus the fact that the defendant's principal residence is agreed to be in Dubai is not determinative.*
>
> *54. Third, in determining whether a place constitutes a defendant's residence, what matters is the "quality" of the defendant's use and occupation of the property as a home, this being described as a question of fact and degree. Thus in the 'oligarch' cases (Cherney v. Deripaska [2007] EWHC 965 (Comm), [2007] 2 All ER (Comm) 785 and OJSC Oil Co Yugraneft v. Abramovich [2008] EWHC 2613 (Comm)) the defendants owned houses in several countries and their visits to their London houses were sporadic, usually for single nights and for the purpose of business meetings and football matches respectively. The houses in question were in no sense a home. In contrast, in Relfo, the defendant's family lived permanently at the house owned by the defendant and his wife in Edgware, the defendant visited it every year to see his family, staying for considerable periods of time, and he had described it as his home in court proceedings in Singapore. It is not surprising, therefore, that in the oligarch cases the properties in question were held not to constitute the defendants' residences, let alone usual residences, while in Relfo the opposite conclusion was*

> *reached. While the parties' submissions in the present case focused to some extent on whether the facts here are closer to those of the oligarch cases or the Relfo case, that is not the relevant question. There is no doubt that the facts are materially different from both Relfo and the oligarch cases. The relevant question is whether the quality of the defendant's use and occupation of the Pinner property is such that it can properly be regarded as his home, while recognising that his principal home is in Dubai.*
>
> *55. Fourth, in the event that this question is answered affirmatively, so that the property constitutes the defendant's residence, it must also qualify as his 'usual' residence. For this purpose the critical consideration is the defendant's settled pattern of life, meaning the way in which his life is usually ordered, and in particular whether the defendant's use of the property has a degree of continuity and permanence."*

11. The reference to *"a degree of continuity and permanence"* is no doubt drawn, as Mr. Thompson submitted, from **Levine v The Commissioners of Inland Revenue** [1928] AC 217, in which there was a review of the tax cases and of the meaning of the word *"reside"* in the Oxford English Dictionary, and Viscount Cave LC pointed with approval to the decision of **Cooper v Cadwalader** 5 Tax Cas 101, where an American resident in New York, who had taken a house in Scotland, which was at any time available for his occupation, was held to be resident there, although in fact he had only occupied the house for two months during the year.

12. Mr. Males QC continued in **Moloobhoy**:

> *"56. Fifth, in considering both the question of 'residence' and 'usual residence', it is not relevant merely to compare the duration of periods of occupation, without taking proper account of the nature or quality of use of the premises. Accordingly the fact that the defendant spends only a limited amount of time at the Pinner property, and spends much more time at his home in Dubai, does not necessarily mean that the Pinner property is not his 'usual residence'."*

13. In assessing the *"question of fact and degree"*, and bearing in mind that a person, particularly a wealthy person with international connections, such as Sheikh Walid, can have more than one *usual residence*, such evidence as there is must be considered. Grovelands is a substantial property, part of a compound containing two other residences, in which staff are housed, and protected by security guards. At paragraph 21 of Sheikh Walid's first witness statement he asserted:

> *"As set out at paragraphs 48 to 54 below, the property in England to which the claim form and Particulars of Claim were delivered is not my usual residence, it is not where any of my family is based and none of my children consider it to be a home. It is merely a place where staff can be based to look after my children when they are at private school in England*

> *and where those children that are not boarding can stay during term time."*

14. He explains in paragraph 48 that he has five children, of which the eldest three are now at school in England and he continues:

> *"49. So that my children at school in England would have staff nearby should they need anything and somewhere to stay when either on exeat from boarding school or for my children at day school at the end of the school day and overnight during the term time, I decided to find properties nearby to where the eldest was then at school and in the area in which I intended my other children would also go to school."*

15. He explains at paragraph 51 that during the school holidays, including half-term holidays, the children at school in England return home to Dubai. He states as follows in paragraph 57:

> *"My visits to the United Kingdom remain irregular and relate to my visiting my children when at school in England. I have been advised that I must limit my time in the United Kingdom to avoid becoming potentially liable to UK taxes. In the tax years 2013 to 2014 and 2014 to 2015 I spent an average of 70 days in the UK during each tax year, with my longer visit being for about a month in mid-September 2013."*

16. Finally, in answer to evidence from the Claimants' then solicitor, who had referred to another set of properties, discovered as a result of enquiries made on their behalf to have involved the making of planning applications which provided for family rooms and bedrooms for Sheikh Walid's children, he said as follows in his second witness statement:

> *"24.2. As regards the properties in Holland Green, my intention is that these premises should be available for me and my family to use as and when we stay in London, as an alternative to, and better investment, than a hotel. Although there are also two apartments for domestic staff, the property itself is not large enough to be a permanent residence or support all my domestic staff.*
>
> *24.3. I understand from the head of my private office that completion on the acquisition of the Holland Green properties is not due to take place until next week and it is anticipated that it will be a further three or four months before they are suitable for use as accommodation. As it is still under development I have never used the Holland Green apartment.*
>
> *25. There has been no attempt on my part to obscure the fact that I own Silverdene or the Holland Green properties. I set out in my first statement that I owned other investment property in the UK. I have also been open about the fact that I have*

> *recently spent time in England visiting my children while they are at school there and that I have spent that time at Grovelands. Had I spent it at any other property I would have stated that in my first witness statement. If I decide to spend time at the Holland Green property when I am over in London visiting my children, it will be in place of staying at Grovelands. It will not add to the amount of time I spend in the UK, as there are strict limitations on this for tax purposes and it is not my intention to reside in the UK."*

17. In the light of that evidence the following seems to me clear:

    i) The children occupy Grovelands in order to attend English schools, but return to Dubai for the school and half-term holidays, and yet

    ii) Sheikh Walid spends up to 70 days a year staying at Grovelands.

    iii) He has five children, all intended to go to school in England, so that there is plainly a substantial element of continuity and permanence to the occupation of the property by him and his family.

    iv) Holland Green is, when completed, to be occupied by him when he is in London *"in place of staying at Grovelands"*.

18. I am satisfied that the average of 70 days in the UK spent by Sheikh Walid staying at Grovelands in those circumstances, constitutes a sufficient degree of continuity and permanence, such that Grovelands can be regarded as a *usual residence*, so that service upon him there in September last year was good service within the jurisdiction.

19. Consequently, Sheikh Walid's application for a stay must be considered, but before I do so I address the issue of the application by the Claimants to serve out of the jurisdiction on Sheikh Majid, for whom Mr. Neil Calver QC has appeared.

Service out of the jurisdiction

20. The *"threefold test"* referred to above, recently articulated in **Altimo Holdings and Investment Ltd. v Kyrgyz Mobile Tel Ltd.** [2012] 1 WLR 1804 (PC) at paragraph 71 is too well known to require repeating at any length - the *'merits test'*, the *'gateway requirement'* and forum conveniens, upon all of which the Claimants bear the burden of proof - but it is necessary to address these issues in general terms before turning to consider them by reference to the facts of this case.

Muscular presumption

21. There are many dicta in the authorities, going back to **Société Génerale de Paris v Dreyfus Brothers** [1885] 29 Ch D 239, emphasising that the jurisdiction to allow service out of English proceedings against a foreign resident is *"exorbitant"* (per Lord Diplock in **Amin Rashid** [1984) AC 50 at 65), or simply *"extraordinary"* (per Lord Goff in **Spiliada Maritime Corp v Cansulex Ltd.** [1987] AC 460 at 481), suggesting that extra caution must be exercised over and above the need to ensure that the tests

are satisfied. This does not however accord with the proper modern approach as now laid down per curiam by the Supreme Court in **Abela v Baadarani** [2013] 1 WLR 2043 (SC) by a combined statement by Lord Neuberger BSC and Lords Sumption, Reed and Carnwath JJSC:

> *"In his judgment in the Court of Appeal, Longmore LJ described the service of the English court's process out of the jurisdiction as an 'exorbitant jurisdiction, which would be made even more exorbitant by retrospectively authorising the mode of service adopted in this case. This characterisation of the jurisdiction to allow service out is traditional, and was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served. This is no longer a realistic view of the situation. The adoption in English law of the doctrine of forum non conveniens and the accession by the United Kingdom to a number of conventions regulating the international jurisdiction of national courts, means that in the overwhelming majority of cases where service out is authorised there will have been either a contractual submission to the jurisdiction of the English court or else a substantial connection between the dispute and this country. Moreover, there is now a far greater measure of practical reciprocity than there once was. Litigation between residents of different states is a routine incident of modern commercial life. A jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries. The basic principles on which the jurisdiction is exercisable by the English courts are similar to those underlying a number of international jurisdictional conventions, notably the Brussels Convention (of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters (OJ 1978 L304, p 36) (and corresponding Regulation (EC) No. 44/2001 (OJ 2001 L12, p 1)) and the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007 (OJ 2009 L147, p 5). The characterisation of the service of process abroad as an assertion of sovereignty may have been superficially plausible under the old form of writ '(We command you …'). But it is, and probably always was, in reality no more than notice of the commencement of proceedings which was necessary to enable the defendant to decide whether and if so how to respond in his own interest. It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like 'exorbitant'. The decision is generally a pragmatic one in the interests of the efficient conduct of litigation in an appropriate forum."*

Assessment of facts

22. The Court can only approach a case in which service out of the jurisdiction is applied for by reference to the evidence available at this stage, of course including evidence in opposition once the application becomes inter partes, but, as it is at present, untested. It cannot therefore involve findings of fact, although naturally it will involve a common sense approach to the evidence adduced, which will include careful consideration of any inconsistencies and will inevitably involve greater concentration upon contemporaneous or original documentation, rather than upon oral explication, but always on the basis that such evidence, albeit challenged, remains untested. Thus, in these applications, inevitably because of their importance to the parties, moving ever further away from Lord Templeman's suggestion that the matter could be approached in a matter of hours in a Judge's room, more evidence is inevitably adduced to add to the pile, and not simply producing fresh and previously undiscovered evidence, but also seeking to fill perceived loopholes or safeguarding against perceived weaknesses. I admitted some such evidence during the course of the hearing, largely from the Claimants, bearing in mind any prejudice to the Defendants, but on the basis that (1) if such evidence is not admitted at this stage it may be too late, on the one hand, to prevent a claimant from failing at the first hurdle or, on the other hand, leaving a defendant subject to a jurisdiction which it might have escaped but (2) that such belated evidence may be looked at with the greater scepticism.

The tests

23. The facts here, as is regularly but not always so in these cases, are such that the *"merits"* and *"gateway"* tests largely depend upon interlocutory assessment of the same facts. Although there are subsidiary gateways sought to be relied upon, the major two, contract made within the jurisdiction by both Defendants (*"the first gateway"*) and the Second Defendant being a proper and necessary party now that I have found that the First Defendant was duly served within the jurisdiction (*"the second gateway"*), depend, just as does the merits test, upon there being, as alleged by the Claimants, an oral agreement for a loan made by Sheikh Mohamed with the First and Second Defendants in London. Yet, on the face of it, the same question - whether there was such an agreement - falls to be considered by me by reference to different standards in order to comply with the two different tests.

24. For the merits test, the question is whether there is a *'serious issue to be tried'*, the test described by Clarke LJ in **Carvill America Incorporated v Camperdown UK Ltd** [2015] 2 Lloyd's Law Reports 457 at paragraph 24 as *"in substance no different from the test of a real prospect of success under CPR 3.4 or 24.2*". When there is a reference to Part 24, this of course means the standard that must be achieved by a party seeking to avoid summary judgment under Part 24 - is the claim/defence more than fanciful, has it a real prospect of success: obviously less than 51-49, perhaps a 25% chance of success?

25. For the test applicable to the first and second gateways there must be a *"good arguable case"*, defined by reference to **Canada Trust Co v Stolzenberg (No 2)** (primarily in the Court of Appeal) [1998] 1 WLC 547, and other cases following what has been called the "*Canada Trust gloss*". This requires the claimant to have *"much the better of the argument"* and yet again not up to the balance of probabilities, not

51-49; and thus, as Clarke LJ described it in paragraph 45 of **Carvill**, "*somewhat higher than the test under CPR 24 but less stringent than a balance of probabilities"*.

26. Teare J addressed these questions in **Antonio Gramsci Shipping Corp v Recoletos Ltd** [2012) I.L. Pr 36, where he was, as here, addressing the same set of challenged facts as against the two different tests. He said as follows:

> *"39. I am, with respect, not sure that concentrating on arguments avoids the difficulty in applying the 'Canada Trust gloss' where the arguments depend upon consideration of rival evidence (albeit written not oral). The court is still at risk of appearing to conduct a trial prior to the trial itself. However, as was pointed out by Hamblen J. in Cecil v Bayat this approach has been adopted and applied by the Court of Appeal in Sharab v Prince Al-Waleed Bin Tala Bin Abdal-Aziz[2009] EWCA Civ 353; [2009] 2 Lloyd's Rep. 160 and accordingly I am bound to apply the 'Canada Trust Gloss' whilst being careful not to prejudice the determination of the factual issue at trial. The 'Canada Trust gloss' does however advise the court to concentrate on whether the court is:*
>
> *'… satisfied or as satisfied as it can be having regard to the limitations which an interlocutory process imposes that factors exist which allow the court to take jurisdiction.'*
>
> *It seems to me that in a case where there is, in the main, a conflict of evidence which cannot be resolved without appearing to conduct a pre-trial it is particularly important that the court asks itself whether factors exist which allow the court to take jurisdiction. …*
>
> *44. In the result, whilst the claimants are able to adduce evidence from several individuals in support of their case, that evidence is contradicted by Mr. Lembergs. That dispute will only be resolved by reference to the contemporaneous documents (which have not yet been produced) and/or by the testing of the evidence on both sides by cross-examination (which will not take place until trial). I am *682 unable to say that either party has the better of the argument on the material presently available.*
>
> *…..*
>
> *45. If the 'Canada Trust gloss' required the claimants to have the better of the argument at the interlocutory stage in all cases then Mr. Lembergs' jurisdictional challenge would succeed. But I am not persuaded that that test must be satisfied in a case where there is a stark dispute between opposing witnesses. To seek to judge who has the better of the argument on such evidence risks a pre-trial at the interlocutory stage. In order to avoid doing so it is preferable, in my judgment, to concentrate*

> *on whether factors exist which allow the court to take jurisdiction. That will oblige the court to consider whether the evidence relied upon by the claimant has sufficient strength to allow the court [to] take jurisdiction. Such an approach is, it seems to me, consistent with the 'Canada Trust gloss'.*
>
> *46. This approach is supported by the following observation of Toulson J. in Petroleum Investment Co. Ltd. V Kantpan Holdings Co. Ltd [2002] 1 All E.R. (Comm) 124 at [38]:*
>
> *'When the subject matter involves questions of fact on which the evidence is incomplete or contradictory, it may be very difficult for a court to form even a preliminary view as to the parties' rival strengths. Reading Waller LJ's judgment as a whole, I do not understand him to be suggesting that in such a case the court has to be satisfied that the evidence on the claimant's side is stronger than the evidence on the defendant's side in order for the claimant to make out a good arguable case, for that would be in effect to apply the civil standard of proof, which he emphasised is not applicable at the interlocutory stage.'*
>
> *47. This approach is also consistent with the following observation of Toulson LJ in WPP Holdings Italy Srl v Benatti [2007] EWCA Civ. 263; [2007] 1 WLR 2316; [2007] ILPr at [44]:*
>
> *'There might be a case in which, because of the limitations imposed by the interlocutory process, the court found it impossible to form a positive view which side had the better argument … I would not exclude the possibility that application of the principle in the Bols case might lead a court to conclude that if the case for jurisdiction was as good as the case against jurisdiction, and that it was not possible to reach any firmer conclusion without conducting a min-trial, in those circumstances factors would exist which would allow the court to take jurisdiction.'*
>
> *48. In the present case the evidence relied upon by the claimants appears to me to have sufficient strength (assuming the claimants' argument on the law is correct which I have yet to consider) to allow the court to take jurisdiction notwithstanding that, by reason of the conflict of evidence and the limitations imposed by the interlocutory process. I am unable to conclude that the claimants have the better of the argument."*

27. This was approved, or at any rate not disproved, by the Court of Appeal in [2014] Bus LR 239 at paragraph 17.

28. Arden LJ in **Brownlie v Four Seasons Holding Inc.** [2016] 1 WLR 1814 in her discussion of the *"Canada Trust gloss"* at paragraphs 17 and following, began by reference to **Dreyfus** and the 1885 emphasis on the need to *"scrutinise most jealously the factor which gives rise to jurisdiction"*. That does not appear to accord with the modern approach as laid down per curiam in *Abela* referred to above, which was not cited to her. She referred to Teare J's judgment without disapproval and continued:

> *"21 In my judgment, when applying the Canada Trust gloss, we are entitled to bear in mind that Waller LJ also held that: (1) the test was flexible (at p 555H); (2) the court should not be drawn into deciding issues of fact (at p 555F), and (3) the decision is to be made on the material available (at p 555F).*
>
> *22 Our conclusion will not be binding at trial. However, the issue (as in Issue 2 below) may simply not matter at trial, in which case this is the only chance the parties have to air it.*
>
> *23 As submitted on behalf of Lady Brownlie, when looking for 'the much better argument' the court is concerned with the question of relative plausibility. But there is also an absolute standard to be met. The words used by Waller LJ, namely a 'much better argument', mean more than that, on the material available, the case is arguable. There must be some substance to it: since we are deciding a question of jurisdiction, the evidence must achieve an acceptable level of quality and adequacy. However, the standard to be attained is not that of succeeding on a balance of probabilities because there is no trial: see per Flaux J in Erste Group Bank AG, London Branch v JSC 'VMZ Red October' [2013] EWHC 2926 (Comm)."*

29. In my approach to the evidence during this hearing, I sought to apply an approach to what Arden LJ called *"relative plausibility"*, which seemed helpful to me, and was not dissented from by counsel, and may or may not be of help to other judges in my position in relation to cases where there is a set of facts in which a claimant's case is challenged but there can be no resolution short of trial. As to what Arden LJ referred to as the *"absolute standard"*, it seems to me that a claimant's case must be based upon what Teare J describes as evidence of "*sufficient strength*". But then in terms of "*relative plausibility*", while the Court does not require or expect anywhere near 51-49, in the race towards 51-49, the claimant must, in my judgment be *'clearly in the lead'* - i.e. in the comparative assessment of two untested cases, one case must be preferable, with more than its nose in front, even if not, in Boat Race terms, with clear water between them.

30. This is the way in which I shall approach the respective cases for the Claimants and Defendants on the evidence. Given that, as I have said, the facts are the same for the merits test as for the first and second gateways, it must make sense to me to apply the higher test in order to see whether the facts, as alleged by the Claimants, comply with it. It makes no sense to consider the same facts by reference first to the lower merits test and then to the higher test. Thus if I am persuaded that the Claimants are *'clearly in the lead'*, then they will satisfy both the merits test and the test for the first gateway

- contract made within the jurisdiction - and the second gateway - that the Second Defendants are a necessary and proper party (as in **Carvill**).

31. As for the other two gateways relied upon by the Claimants, (3) breach of the contract in the jurisdiction and (4) contract governed by English law, they are plainly alternative and subsidiary, and will not be necessary if the Claimants succeed on the first and second gateways, but will also not arise if they fail, as there would be no contract to assess. The latter question, however, will need to be considered in the context of forum conveniens.

The main evidence supportive of the Claimants

32. (1) Sheikh Mohamed gives his explanation of the making of the loan, in accordance with the Particulars of Claim, from which I have recited (subject to two inconsistencies, to which I shall refer later) in his first and second witness statements:

> *"30. At some point in mid-2001, I had discussions with both Defendants about their proposal to establish an Arabic language 24-hour satellite news channel. These discussions were primarily face to face with Sheikh Walid, and I recall that there were two such meetings in London, and one in Paris.*
>
> *31. In August and September 2001, both Defendants requested that I assist them with a loan of $30 million for this project. These requests were made by them on the telephone. I recall that I told them that I was thinking about myself establishing a satellite broadcasting channel, but the Defendants were keen to persuade and convince me of the benefits of their existing MBC platform for such a project. I recall that the request for a loan was repeated by them several times over the ensuing months in late 2001, although I cannot specifically recall each and every such discussion.*
>
> …..
>
> *33. During December 2001, I recall very clearly that I received a number of telephone calls from the Defendants about me making a loan to them for their Al Arabiya project. The tone of urgency in these calls and requests seemed to intensify over the period, culminating in calls from Sheik Walid followed by a call from Sheikh Majid that I received in my office on Wigmore Street in late December 2001. Although I do not remember the exact day, it was I believe in the last week of December. I had the clear impression at the time that, and from the outset, that although they acted together, Sheikh Walid took the lead in substantive discussions, whereas his brother, Sheikh Majid, dealt with follow up points and points of detail. It was plain that their calls were made on behalf of both of them.*
>
> *34. The purpose of Sheikh Majid's call was to stress urgency and to request that I now make an immediate loan of US $30*

> *million to both the Defendants for their 24-hour news channel project. I agreed to lend them this money, and requested that the Defendants send to me the banking details for the remittance of funds.*
>
> *35. Later, a fax arrived from a Mr. Ali, who I understood to be the Financial Controller of the MBC Group. I recall that the fax had a large 'MBC' logo on it. I and my companies had some dealings with the Defendants in relation to media advertising (about which I will expand further below), so I or my staff would have known who Mr. Ali was, and his connection to the First Defendant.*
>
> *36. The fax served as the basis for the completion of instructions to my bank, HSBC Republic in London on 3 January 2002 for a transfer from my personal bank account [Exhibit MBIAJ1, page 3]. This payment instruction was prepared by the MBI Group's Chief Financial officer, Mr. Richard Brook, and signed by me. It clearly states as the client reference of the receiving bank was 'Sheikh Walid and sheikh Majed (sic)'. This was some months after 9.11 and, as a result, banks were very sensitive about the transfer of large cash sums, and it had been made very clear to me by my bankers that it was necessary to give the names of the beneficiaries, and not just the name of a private company. It was for this reason that the instructions to my bank specifically stated the recipient beneficiaries to be Sheikh Walid and Sheikh Majid, the two Defendants."*

33. In his second witness statement, at paragraph 23 he said this:

> *"The discussions that I had with Sheikh Walid on behalf of the Defendants about investing in Al Arabiya spanned a number of months, over the course of which we spoke both in person and over the telephone. The initial discussions were conducted at a number of face-to-face meetings in London and once in Paris and subsequent discussions took place over the telephone. In these discussions Sheikh Walid sought to persuade me to invest in the Defendants' enterprise and I frequently expressed my interest in so doing, but even by October 2001 I was still entertaining the notion of establishing my own news channel rather than investing in their business. It was not until the telephone call in December 2001, which I received at my offices on Wigmore Street, that his proposal for a loan was accepted and from my perspective the loan agreement was finally concluded."*

34. (2) The contemporaneous evidence, upon which the Claimants rely, is the Bank Instruction, signed on 3rd January 2002 by Sheikh Mohamed, to Mr. Collier-Wright of HSBC Republic, prepared by Mr. Richard Brook, then Sheikh Mohamed's administrator, the content of which is set out in paragraph 11 of the Particulars of

Claim, which I have already recited. Mr. Brook describes that the content of the Bank Instruction was taken by him from the fax sent to the Claimants by Mr. Osman Ali. This fax has not been found, but Osman Ali accepts that he sent a fax, albeit not in the terms described by the Claimants. He says this at paragraph 5 of his witness statement:

> *"The fax that is being mentioned, which is from many years ago, from recollection was sent to provide the bank remittance details. It would have been sent by either myself or by others in the private office, under the direction of Mr. Majid. I am quite certain that this fax did not have any MBC logo/letterhead on it and it is likely on the letterhead of AGI Co Ltd. I was never the financial controller of MBC and so far as I am aware AGI Co Ltd. was never a shareholder of MBC during this time. To the best of recollection, the fax specified the wiring details and the recipient of the payment to be an offshore entity (Durango Co Ltd.) and did not name as the account beneficiary either Mr. Majid or Mr. Walid. I was not aware this transfer was a loan and I believe that this payment does not constitute a loan."*

35. Heavy reliance is placed upon this contemporaneous document by the Claimants, in that the Bank Instruction, passed on by Mr. Brook to Mr. Collier-Wright of HSBC Republic, specifically describes the *"Bank Client Reference"* as *"Sheikh Walid and Sheikh Majed Al Ibrahim"*, which Mr. Beloff submits can only have derived from the fax which "*provided the bank remittance details"*, from Osman Ali.

36. (3) While Osman Ali gives the evidence on behalf of the Defendants to which I have referred, there are witness statements corroborative of the Claimants' account from both Mr. Brook and (belatedly) from Mr. Collier-Wright, the then bank account manager for HSBC Republic, and now founder and managing director of JR Capital Group.

37. (4) The Claimants' account is that the loan was requested to assist the Defendants with the establishment of Al Arabiya. Sheikh Mohamed said this at paragraph 11 of his first witness statement:

> *"I made this loan to them for the purpose of their plan to establish a 24 hour Arabic language satellite news channel, to compete with Al Jazeera, then the only such channel in the region after the BBC Arabic language ceased broadcasting. The Defendants ultimately succeeded, no doubt with the assistance of my loan, in establishing what is today known as Al Arabiya and which operates as a subsidiary of MBC."*

38. As to this:

> (i) The payment was made in January 2002. On 20th January 2003 the Claimant was sent an e-mail dated 20th January 2003 from a Mr. Khizar Hayat, then apparently working for Financial Transaction House (previously Arthur Andersen), which was at various times engaged on behalf of both Claimants and Defendants, and sent on behalf of a Faisal Al-Sayrafi, under cover of which,

wholly unexplained and unaccompanied by any context or explanation, there was a proposed prospectus for Al Arabiya, recording that the *"Founding Shareholder's Contribution"* in the first year was to be $30 million.

(ii) Particularly relied upon by the Claimants is the fact, only disclosed in the course of these proceedings, that by a bank transfer instruction dated that 25th March 2003 (originally drafted as February 2003) Sheikh Walid transferred from his *"US dollar Sub-Account 8 Al Arabia ... maintained with Credit Suisse"*, the sum of $30 million to an account in New York as *"payment of subscription of share capital in Al Arabiya"*. The Claimants assert that it is too much of a coincidence that this was the very sum which the Defendants had on his case solicited from Sheikh Mohamed for such very purpose.

39. (5) The Claimants' case is that the $30 million so solicited was intended to be used for that purpose, and they refer to some evidence of the unavailability at that time of similar sums to MBC, the Defendants' then media company: there are MBC minutes indicating a concern about the costs of running MBC such as to justify a move from London to Dubai, and the Claimants exhibit MBC Limited's accounts for the relevant period, showing very substantial losses and net liabilities and a very substantial deficit on the profit and loss account.

40. (6) The explanation put forward by the Second Defendant of the making of the $30 million payment to Durango is that it was paid in satisfaction of the obligations of Jadawel to the Second Defendant (referred to above). The Claimants submit:

(i) that no such explanation was given, namely that the payment of $30 million was indeed made but could be so explained, in response to the Claimants' demand letter of 16th June 2015; neither in the detailed first response by Sheikh Majid dated 8th July 2015 nor, in response to a follow-up letter dated 27th July 2015, giving further particulars, in Sheikh Majid's further response dated 3rd August 2015. Only in Sheikh Majid's first witness statement of 10th November 2015 was the account given. If it was true, it would have been the obvious and immediate answer.

(ii) that there are no documents whatsoever to evidence or corroborate the existence of such agreement or such entitlement in respect of $30 million for services to Jadawel, or what those services were.

(iii) the description of the services by the Second Defendant is submitted by the Claimants to be very vague and generalised – effectively said to be smoothing the relationship between Sheikh Mohamed's company and the Saudi Ministry of Finance and/or Ministry of Defence, as described in paragraphs 44 to 49 of Sheikh Majid's witness statement. He explains that Sheikh Mohamed was involved in transferring the leases of residential compounds to the Saudi Ministry of Defence and Aviation, which required the agreement of the Saudi Ministry of Finance: Sheikh Majid had good business connections with both Ministries and worked to assist Sheikh Mohamed to effect the proposed transfer of the leases and how best to present his proposals. He estimates that they met about 20 times in total over a period of about four years, but he no longer has any paperwork, and at the second or third meeting he suggested a fee of US $30 million, to which Sheikh Mohamed agreed. While denying any such agreement or involvement

with Sheikh Majid, the Claimants point out that this very general account of Jadawel's engagement with the Saudi Ministries can have been obtained from publicly available documents, namely spelt out in great detail in the Petition, which Sheikh Mohamed and his company brought against the Bank of New York Mellon Corporation in the Courts of New York in September 2013, from which he suggests Sheikh Majid's generalised account has been drawn.

(iv) There is also no corroborative evidence adduced from any witness as to what it is that Sheikh Majid is said to have done in return for the $30 million fee. The only witness adduced by the Defendants is Osman Ali, resident in London, who said (in paragraph 2 of his witness statement) that:

> "*Work on Jadawel company began sometime in early 1998. I attended 1 to 3 related meetings, at some of which the Chairman of Jadawel was present in Saudi Arabia. I was aware that Mr. Majid was having several confidential meetings and discussions in Saudi Arabia with the Chairman of Jadawel on Jadawel Company* (sic)."

Although it is Osman Ali who then recounts, as set out above, his sending of the fax, he does not suggest to what it was that the $30 million related, save for saying that he was *"not aware this transfer was a loan"*.

(v) There is no evidence of any demand by Sheikh Majid (or even from Osman Ali on his behalf) for payment of the $30 million fee said to have been earned as a result of the assistance given by Sheikh Majid with regard to the transfer of leases in 1999, although Sheikh Majid explained that he waited for the restructuring of Sheikh Mohamed's finances, and that Sheikh Mohamed kept him regularly updated, and reassured him that matters were progressing, and called him in late 2001 to confirm that he was now in receipt of funds and asked him to send the account details into which the payment of the fee should be made.

<u>The main evidence supportive of the Defendants.</u>

41. (1) There was no claim for repayment of the alleged loan for 13 and a half years. This in itself suggests that the $30 million was not to be repaid.

42. (2) Sheikh Mohamed gives an explanation of this delay by reference to the *"cultural consideration… among Middle Eastern businessmen"*, and he also explains (corroborated by Mr. Brook) that it was only when Mr. Brook returned to his employment in 2015 that he revisited, with Sheikh Mohamed, various transactions, particularly those with which he had been involved in his previous period of employment and discovered the Bank Instruction (although the fax from Osman Ali has not been capable of being found) (paragraph 17 of his third witness statement). However, what Sheikh Mohamed said in paragraph 34 of his second witness statement was as follows:

> *"However, by the time I considered it appropriate to call in the loan, in or around 2009, I could no longer recall what if any documentary record of the agreement existed. Mr. Brook, on whom I relied for such matters, had left MBI by that time*

> *and my historic financial affairs were in some disarray in his absence. Shortly thereafter I was drawn into a major cross-border dispute with Standard Chartered Bank."*

43. Thus, although he explains that he did not retain any documents (Mr. Brook having gone), he does not say that he had forgotten about the loan. Yet in the proceedings brought by Standard Bank, to which he refers, he was subject to a Freezing Order, which required him to disclose all his assets, and he made no disclosure of his alleged entitlement to repayment of the loan of $30 million (plus interest). Further, in response to an application for summary judgment heard before me, [2011] EWHC 2866 (Comm) 8 November 2011, when the possibility of conditional leave to defend was raised, by reference to **Yorke Motors v Edwards** [1982] 1 WLR 44 (HL), he said *"if I was required to make a substantial payment into court I would need to make immediate steps to dispose of a number of assets ... I do not realistically think I could raise more than $50 million"*; and it is clear from the affidavits in that action, which have been produced, that he was referring to the assets which he had disclosed in his Schedule of Assets. Mr. Thompson and Mr. Calver submit that there can have been no loan, because it is wholly unlikely that he would have forgotten in 2010-2011 what he says he had remembered in 2009.

44. (3) Sheikh Mohamed has given inconsistent accounts in these proceedings in two material respects:

a) the first is as to who paid the monies to Durango. The Bank Instruction was signed by Sheikh Mohamed on headed notepaper of the Second Claimant company. He makes it quite clear in his witness statements that the money was paid from his own personal account with HSBC Republic, and not from that of the Second Claimant, and this is also corroborated by Mr. Brook, and there is some evidence that he did not have in the office personal headed notepaper. However, in the Particulars of Claim, which is subject to a Statement of Truth by Sheikh Mohamed, there is pleaded under the paragraph headed *"Governing law"*, and in support of the implication of English law into the contract of loan, at paragraph 14(e), that the *"sum of $30 million was in fact provided by the Second Claimant (see paragraphs 10-12 above), whose registered office and central administration and principal place of business are all in England"*. The Claimants have not produced the actual bank statements for the account from which the payment of $30 million was made, notwithstanding requests from the Defendants' solicitors in correspondence (and despite further efforts made by the Claimants during the hearing, resulting in a further witness statement from Mr. Brook). If the money came from the Second Claimant's account then the Defendants submit that it would support their case that it was in satisfaction of the obligation of Jadawel, which is a subsidiary of the Second Claimant.

(b) the second is as to who had the final telephone call in December 2001, which is relied upon by Sheikh Mohamed as to the making of the oral agreement, Sheikh Walid or Sheikh Majid. The starting point is that in the letter before action there was no mention of such telephone call, but only of a meeting with Sheikh Majid. Meetings, as more particularised, remain significant in the Particulars of Claim, as set out above, but the agreement was said to have been actually made in a final telephone call by Sheikh Majid. That was Sheikh Mohamed's case in his first witness statement. The Defendants rely upon what

was said in his second witness statement. At paragraph 23 he describes the discussions that he had with Sheikh Walid about investing in Al Arabiya over a number of months, during which they spoke both in person and over the telephone, with the initial discussions conducted at a number of face-to-face meetings in London and once in Paris, with subsequent discussions over the telephone. He then said this:

> *"I was still entertaining the notion of establishing my own news channel rather than investing in their business. It was not until the telephone call in December 2001, which I received in my offices in Wigmore Street, that his proposal for a loan was accepted."*

45. While it is unclear as to with whom he is there suggesting the telephone call took place, it appears from two matters that he was now saying that it was with Sheikh Walid. In paragraph 24 he says *"I had been on perfectly good terms with the Defendants at the relevant time, and Sheikh Walid had stressed in that last call the urgency of their need for funding. This urgency came in part from the fact that MBC was by this time struggling financially"*. It seems clear that by the "*last call"* he is not referring to the last call which he had with Sheikh Walid, but the last call of all, when he says the loan was agreed, and that this is the case upon which Mr. Brook is commenting when he says, at paragraph 8 of his second witness statement, that *"the reason that I did not refer to the conversation between Sheikh Mohamed and Sheikh Walid during which agreement was reached in relation to the loan agreement was because I was not present during that conversation"*. In a third witness statement, produced during the hearing, after this inconsistency was pointed out by Counsel for the Defendants, Sheikh Mohamed addresses it and says:

> *"7. As described at paragraph 34 of my first statement it was Sheikh Majid who then made a further and the last telephone call to me at my office in Wigmore Street in December 2001. In this call I told him that I was agreeable to making the loan to both of them and Sheikh Majid stressed the urgency of their (joint) need for the loan (reiterating what I have been told by Sheikh Walid). Sheikh Majid and I then settled the details of loan which I agreed that I would make to both of them. It was in this conversation that Sheikh Majid told me that he would arrange to send me the details of the bank account to which the loan money transferred. I subsequently received the fax to which I have referred, giving me those details.*
>
> *8. Where I referred in paragraph 24 of my second statement to "that last call" with Sheikh Walid, I had intended to refer to the last call that I had had with Sheikh Walid before my final conversation with Sheikh Majid. I confirm that Sheikh Majid was the one to speak to me last out of the two of them, as set out above."*

This change of case in relation to the important last telephone call is, the Defendants submit, indicative that the whole account has been made up.

46. (4) There is no mention in the 3rd January 2002 Banking Instruction to HSBC, dated 3rd January 2002, of the purpose of the transfer being a loan, whereas in Sheikh Walid's bank transfer instruction of 23rd March 2003 to Credit Suisse the purpose is expressed, namely *"Payment of Subscription of Share Capital in Al Arabiya"*.

47. (5) A year or so later, there was a significant dispute between a company in which Sheikh Mohamed had an interest, AJWA, in respect of indebtedness for the costs of advertising with MBC owed by AJWA to AMS, one of the AGI group of companies owned by Sheikh Walid and/or Sheikh Majid, to such an extent that AJWA defaulted in the sum of $3 million, and AMS had to enforce the debt in the Saudi courts to judgment. At no stage did Sheikh Mohamed raise the $30 million, or use it to seek to settle the debt, as the Defendants suggest he otherwise would have done.

48. (6) Sheikh Majid has exhibited the bank statement for Durango, showing that $30 million went in and then came straight out to another account at Credit Suisse, which was held jointly in the name of *"Sheikh Majid and/or Sheikh Saud"*, one of the other brothers. He further disclosed during the hearing further bank statements showing that, of the $30 million in that latter account, $20 million was invested in time deposits, where it remained until 2004, i.e. after the date when Sheikh Walid paid the $30 million to the Al Arabiya subscription account.

49. (7) Sheikh Majid, by reference to those sums and to other substantial assets, said as follows in his first witness statement:

> *"58. As at the end of 2001 I held cash assets in excess of $105 million and other investments in excess of a $120 million. A summary of my financial investments at that time is exhibited to this witness statement ...*
>
> *59. As such, I could easily have made an investment $30 million in Al Arabiya (or any other suitable opportunity) solely from my own funds. There would be no sense whatsoever in me agreeing to a loan (together with interest) with Sheikh Mohamed."*

Similarly, Sheikh Walid says he was *"more than sufficiently wealthy not to require credit"* (paragraph 67 of his first witness statement) and it was not MBC which invested in Al Arabiya. There was no *"urgency"* such as Sheikh Mohamed says he was being told of in December 2001, not least as the subscription was not needed for another 18 months.

50. (8) The $30 million was paid to Sheikh Majid in respect of services he had rendered in respect of Jadawel, as I have summarised above from paragraph 44 to 49 of his witness statement. Contrary to the Claimants' case, the Ministry of Finance did have to give its agreement, as appears from the New York Petition itself, from which it actually seems that after the transfer the Ministry of Finance defaulted on payment to Jadawel in May 2002. Again it can be seen from the New York Petition that the Claimants' restructuring as a result of securitisation did not take place until December 2001 which is, as Mr. Calver submits, consistent with the date of payment of the $30 million.

The Claimants' reply

51. (1) The catalyst for the claim for repayment of the loan after so long was the return of Mr. Brook, as he describes in paragraph 17 of his third witness statement, finding the documents without which Sheikh Mohamed could take no steps.

52. (2) As to the alleged lack of urgency and as to the alleged availability to the Defendants of other assets, leaving aside the financial difficulties in which the Claimants allege that MBC was in at that time, which appears to be clear from its accounts, the Claimants submit that the money would have indeed been needed in December 2001, albeit that the subscription was not actually paid up until a year later, and they point out that, in circumstances which are not explained, the Defendants in fact were seeking (as is apparent from the prospectus) external subscription of a substantial amount, albeit they decided in the end not to proceed with external funding but to fund Al Arabiya themselves (but, as Sheikh Mohamed submits, with the benefit of his $30 million).

53. (3) As far as concerns Sheikh Mohamed's failure to disclose the loan in the Standard Bank proceedings, he explained that his affairs were hit by a *"firestorm"*, causing it to fall from his mind, and by reference to the affidavits in those proceedings, now disclosed, Mr. Beloff submits that the schedule of assets was clearly compiled by reference to documents, and that it contains no other loans. As for not seeking to make use of the outstanding loan at the time of the financial dispute between AJWA and AMS, this was, Sheikh Mohamed says, an entirely separate matter in which his own personal affairs were not involved.

54. (4) There was no mention of a loan being the purpose in the Bank Instruction, but then there is similarly no mention of the purpose being payment for services rendered. What there is is corroborative evidence from Mr. Brook and, now, Mr. Collier-Wright (paragraph 6 of his witness statement).

55. (5) With regard to the two inconsistencies relied upon in Sheikh Mohamed's statements, so far as concerns the second, Mr. Beloff did not accept that there was any inconsistency, and asserted that the third witness statement simply clarified previous ambiguities. I find that difficult to accept, but what is clear is that, bar all save who made the final call, Sheikh Mohamed's account in the Particulars of Claim and the witness statements as to the discussions with both First and Second Defendants has remained unaltered. As for the second inconsistency, Mr. Beloff accepts that there is what he calls an error in paragraph 14 of the Particulars of Claim, but he submits that it is inconsistent with the general thrust of the pleading, which is that the loan was made by the First Claimant, and only if it should be found that it was made by the Second Claimant is the Second Claimant joined as an alternative claimant. It was obviously regrettable that efforts to chase down the HSBC bank statement for the bank account from which the payment was made did not start much earlier than during the hearing, as described by Mr. Brook. However, it does seem to me, on the evidence that I have seen, unlikely that the payment was from the Second Claimant. As Mr. Calver very fairly pointed out, the First Defendant's solicitor Mr. Marino has exhibited the accounts of the Second Claimant for 2001 and 2002, and Mr Beloff submits that the figures in the balance sheet and the profit and loss account are wholly out of line with there having been any indebtedness or any payment of a sum of anywhere near $30 million.

56. (6) The Second Defendant's account of what he did in return for his $30 million fee is submitted by Mr. Beloff to be hazy and generalised in the extreme, and Sheikh Mohamed believes that it has all been drawn from the New York Petition. There is no documentation and no evidence to support the doing of any such work for the fostering of any relationship between Jadawel and the Ministry of Finance.

57. I turn to what seemed to me to be powerful points by Mr. Beloff, to put in the balance against Sheikh Mohamed's delay, his non-disclosure of the $30 million loan in the Standard Bank case notwithstanding his apparently having recollected it in 2009 and his inconsistent account of the December 2001 telephone call.

58. (7) Of the two documents which were relied upon by the Claimants in the original letters of demand, the first and foremost was the Bank Instruction. Not only of course did it show the payment of $30 million (now sought to be explained by Sheikh Majid as the payment of his fees) but, as Mr. Beloff points out, there is the significant fact of the *"bank client reference"* being (and in this order) *"Sheikh Walid and Sheikh Majed"*. Not only is there no contrary suggestion as to why that should be so, particularly given the acceptance that there was a prior fax for the purposes of giving the bank details sent by Osman Ali, but Mr. Brook does give the explanation, consistent with the Claimant's case. This is a contemporaneous document, a matter which must always be of significance in a case such as this, which is going to depend upon oral evidence and recollection of events 14 years ago. As to the other document, namely the Al Arabiya prospectus, simply provided to Sheikh Mohamed without explanation under cover of an e-mail, whereas Mr. Calver points out that Financial Transaction House do seem to have advised both sides at some stage, it does at present seem more likely, as Mr. Beloff submitted, that this was sent to Sheikh Mohamed for information as to what was happening to his $30 million, rather than being some kind of unexplained attempt to interest him in subscribing.

59. (8) There remains the *"coincidence"* of the payment in March 2003 by Sheikh Walid, as his Al Arabiya subscription, of the very sum, $30 million, which was paid to Durango by Sheikh Mohamed 14 months earlier. Sheikh Majid has produced the continuing Credit Suisse accounts, referred to above, but;

> (i) As Mr. Beloff points out, it is clear that there were at any rate two payments out of that account for the benefit of Sheikh Walid, in respect of *"zakat"*, being payments to charity, in March and December 2002.
>
> (ii) Whereas there has been disclosure by Sheikh Majid of the ongoing accounts in respect of that payment into Durango, there has been no disclosure from Sheikh Walid showing where the $30 million which did indeed come from Credit Suisse had derived.
>
> (iii) In that regard, Mr. Beloff points out that all the accounts, Durango, Sheikh Majid's account (and/or Sheikh Saud's) and Sheikh Walid's, were with Credit Suisse, and all of them, as appears from the bank statements produced by Sheikh Majid and the bank transfer document produced by Sheikh Walid, record the same manager at Credit Suisse, Mr. Bruno Meier.

60. (9) Mr. Beloff asks why, if indeed $30 million was payment for Sheikh Majid's services, Sheikh Mohamed would have taken the risk of making up and pursuing a

case that that payment was by way of a loan, when he could not have known whether Sheikh Majid had any documents supporting or evidencing the services he allegedly provided.

61. (10) Finally Mr. Beloff asks what Sheikh Mohamed's motive would be for making up this case. There is no evidence of any bad blood or vendetta as between the two families, or indeed of falling out. In a video exhibited by the Defendants, and played to me in court, Sheikh Mohamed is described as being the 19th richest Arab in the world, with his businesses owning 55 hotels. Although there were the Freezing Orders against him and his companies some seven years ago, Arabian Business in 2012 described him as being *"back with a bang"*, and he describes the honours he has received in his witness statements from the United Nations and also from SOAS, Corpus Christi College, Oxford and University College London. The only matter upon which the Defendants have at least at this stage relied is to produce during the hearing, so that he had no opportunity to deal with it, an entry showing that Sheikh Mohamed has very recently taken out a charge on his substantial home in Hampstead Garden Suburb at 2 Winnington Road, which he describes as his principal home in London, where he has lived for 23 years since 1992. This does not seem to me to cast any reliable doubt upon his substantial wealth or to suggest a motive.

62. I have weighed all this in the balance, and I conclude that, in relation to the Claimants' case that there was an oral agreement in London to loan the First and Second Defendants $30 million, which he then paid to Durango pursuant to that agreement, and the Bank Instruction sent by Mr. Brook based upon information from Osman Ali, the Claimants have a good arguable case (and hence there is also a serious issue to be tried). I conclude that on the face of the as yet untested evidence, which will, as I shall discuss below, depend very much on cross-examination, the Claimants' evidence has *"sufficient strength"* and the Claimants are at this stage *"clearly in the lead"*. I also consider that they have the same case that Sheikh Walid is a necessary and proper party to the claim against the First Defendant. As I have said above, in the circumstances I do not need to address the other gateways.

Interest

63. There is, however, before I leave the position of the Second Defendant, a separate issue to be considered. By paragraph 8 of the Particulars of Claim it is pleaded that:

> *"There were implied terms of the loan agreement that:*
>
> *(a) In consideration of the First Claimant's promise to lend the sum requested, the First and Second Defendants would repay the loan on demand, or alternatively upon reasonable notice.*
> *(b) The loan would bear interest at a reasonable business rate."*

64. The prayer is thus in paragraph (1) for the sum of $30 million (being the claim in debt) and in (2) there is claimed *"interest pursuant to the said implied term set out in paragraph 8(b) above and/or s.35A of the Senior Courts Act 1981 ... alternatively interest at such rate and such period as the court sees fit"*. So far as concerns the claim pursuant to the Senior Courts Act, that will obviously only run since the date of the demand for repayment, unless of course there is the implied term alleged. The

implied term provides a claim for interest as damages for breach of that implied term. In my judgment, contrary to Mr. Beloff's submissions, which were not supported by any authority, the Particulars of Claim includes, leaving aside the Senior Courts Act claim, two claims, one in debt and one in damages for breach of the alleged implied term, but which, if successful, would give the Claimants what they are asking for by way of interest (although at a rate which is inevitably due to be challenged) back to the date of the advance of the loan.

65. Mr. Thompson ably developed in his skeleton the argument in relation to interest, because of its potential relevance to the question of forum conveniens, to which I shall turn, and Mr. Calver adopted Mr. Thompson's submissions. In my judgment Mr. Beloff must show not only as he has done in relation to the repayment of the $30 million, but in addition in relation to the claim for breach of an implied term, that Sheikh Mohamed has a good arguable case (subsuming the serious issue to be tried). Mr. Thompson pointed to the clear picture given by the textbooks so far as recovery of interest is concerned. In Chitty on Contracts (32nd Edition), Vol 2 at 39-284 the following is stated:

> *"General rule at common law. At common law, the general rule was that interest was not payable on a debt or loan in the absence of an express agreement or some course of dealing or custom to that effect. Thus, in the absence of express stipulation, it has been held that interest was not payable on the price of goods sold, although the price was payable on a certain day; nor for money lent to, or paid for, the defendant ... This principle differs from the (now abolished) rule ... that interest could not formally be awarded by way of damages for non-payment of money. The former principle means that interest is not payable under the contract itself, in the absence of express agreement or custom; the latter rule meant that interest could not be awarded by way of damages for breach of contract. The former principle remains in force, though its scope has been reduced by both equitable and statutory developments* [not relevant for our purposes]."

66. In paragraph 39-285 Chitty continues that an agreement to pay interest "*may also be inferred from a course of dealing between the parties, e.g. if it has been frequently charged and paid without objection in similar accounts. Similarly, an obligation to pay interest may arise from the custom or usages of a particular trade or business.*"

67. In Halsbury's Laws at Volume 49, paragraph 92 it is said that:

> *"At common law interest is payable (1) where there is an express agreement to pay interest; (2) where an agreement to pay interest can be applied from the course of dealing between the parties or from the nature of the transaction or a custom or usage of the trade or profession concerned; and (3) in certain cases by way of damages for breach of a contract. Except in the cases mentioned, debts do not carry interest at common law."*

68. Both Halsbury and Chitty refer, as did both counsel, to **Calton v Bragg** (1812) 15 East 223. The headnote provides that *"interest is not allowable by law on money lent generally without a contract for it expressed, or to be implied from the usage or trade, or from a special circumstances, or from written securities for the payment of principal money at a given time"*.

69. Mr. Beloff does not accept that that is an accurate summary of the decision of the court, given by Lord Ellenborough Chief Justice and Grose and Bailey JJ. To an extent it does appear to be drawn from a summary of the submissions of counsel for the defendant. Counsel for the plaintiff was contending that *"interest ran upon money lent, though there was no contract express or implied for that purpose; because the lender would otherwise lose the benefit which he might make of his capital in the meantime, for the accommodation of the borrower."* Counsel for the defendant was allowing that interest could run, but in the limited circumstances summarised in the headnote. However, it does appear that Lord Ellenborough accepted his submissions, for he recited, by reference to Lord Mansfield and Lord Kenyon, that *"no case has occurred where, upon a mere simple contract of lending, without an agreement for payment of the principal at a certain time, of interest to run immediately, or under special circumstances from whence a contract of interest was to be inferred, has interest been ever given"*, and it does appear as though when Lord Ellenborough, and indeed Grose J, refer subsequently to an *"agreement for interest expressed or implied"*, *"special circumstances"*, such as custom and previous dealing, were said to be needed for such implication.

70. I was taken to cases such as **President of India v La Pintada** [1985] AC 104, **Matthew v TM Sutton Ltd** [1994] 1 WLR 1455, **Sempra Metals v IRC** [2007] UKHL 34 and **Sycamore Bidco Ltd v Breslin** [2013] EWHC 174 (Ch), but none of those decisions would support a claim for interest back to the date of the original loan. Mr. Beloff made a powerful case that all the authorities decide is that there is no implication in law of an entitlement to interest, but that they do not rule out the implication of a case in fact, or, put another way, do not limit such implications to previous dealings etc. He relied on the modern approach to the implication of terms, as recently enunciated by Lord Neuberger in **Marks and Spencer Plc v BNP Paribas Security Services** [2015] 3 WLR 1843 at para 23:

> *"… the notion that a term will be implied if a reasonable reader of the contract, knowing all its provisions and the surrounding circumstances, would understand it to be implied is quite acceptable, provided that (i) the reasonable reader is treated as reading the contract at the time it was made and (ii) he would consider the term to be so obvious as to go without saying or to be necessary for business efficacy"*.

71. This is of course not a written contract, but Mr. Beloff would no doubt submit that the same test must apply to an oral contract. The evidence presently given by Sheikh Mohamed is not particularly helpful to Mr. Beloff in establishing a common understanding, because he says that he expected that he would obtain some benefit from the loan. However, the way Mr. Beloff put this in argument, by reference to **Halsbury's** discussion of the *"nature of the transaction"*, is that this was a contract for the grant of a loan in order to assist with a commercial venture, and hence a term as to interest would be implied to give business efficacy to the agreement.

72. That may be so, and he may be able to establish such a case, despite there being no previous authority for the implication of an obligation to pay interest in such circumstances at English law. However, I do not consider that the making of such a new case can qualify as a good arguable case for the purpose of surmounting the hurdle to show that breach of such implied term is a cause of action satisfying the gateway of contract made within the jurisdiction or proper and necessary party to such a claim, as against Sheikh Majid.

Forum Conveniens

73. I address this question so far as concerns Sheikh Walid, on the basis that he bears the burden, having been duly served within the jurisdiction, to show that Saudi Arabia, the forum upon which he relies, is the clearly appropriate forum for trial of this action, rather than this Court. So far as concerns Sheikh Majid, the Claimant must establish that this jurisdiction is clearly the appropriate jurisdiction in which the matter should be tried. For reasons that will become clear, I propose to deal first with the question as between the Claimants and the First Defendant. I should say that there was a case adumbrated by the Claimants that they could not expect a fair trial of the issues between them and the Defendants in Saudi Arabia, but that is no longer pursued before me.

74. The first issue is as to the proper law of the agreement which I have found sufficiently established, made over the telephone in England by Sheikh Mohamed at his office in Wigmore Street. It is common ground that where there is a contract of loan the proper law is arrived at by reference to Article 4 of the Rome Convention, which provides so far as is material:

> *"1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.*
>
> *2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence...*
>
> *5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country."*

75. The applicability of Article 4 to a contract of loan was carefully addressed by Hamblen J in **Sax v Tchernoy** [2014] EWHC 795 (Comm) where he stated as follows:

> *"118. As stated in Chitty on Contracts (31st Ed) at 30-076: 'In a contract of loan, the characteristic performance is that of the lender (since he provides the 'service' for which repayment is due)' - see Surzur Overseas Ltd v Ocean Reliance Shipping Co Ltd [1997] C.L. 318; Atlantic Telecom GmbH, Noter 2004 S.L.T. 103."*
>
> *119. In considering the position under Article 4.5, the Court looks at all the circumstances of the case in order to determine whether "it appears from the circumstances as a whole that the contract is more closely connected with another country".*
>
> *120. The Giuliano-Lagarde Report comments:*
>
> > *"Article 4(5) obviously leaves the judge a margin of discretion as to whether a set of circumstances exists in each specific case justifying the non-application of the presumptions in paragraph 2, 3 and 4. But this is the inevitable counterparty of a general conflict rule intended to apply to almost all types of contract."*
>
> ….
>
> *122. The approach indicated by English court decisions as to how the presumption is rebutted is summarised in Chitty at 30-089 as follows:*
>
> *(1) "First, the presumption in art 4(2) must be given due weight".*
>
> *(2) "Secondly: "…unless art.4(2) is regarded as a rule of thumb which requires a preponderance of connecting factors to be established before the presumption can be disregarded, the intention of the Convention is likely to be subverted"." – Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd [2001] EWCA Civ 2019.*
>
> *(3) "Thirdly…the court will apply the presumptively applicable law unless satisfied on a balance of probabilities that the contract, having regard to the circumstances as a whole, is clearly more closely connected with another country and…the burden lies on the party who asserts it".*
>
> *(4) "Fourthly….the application of art.4 (5) will be very fact dependent and general statements are of limited value."*

76. In this case the Claimants' case is that Sheikh Mohamed was, at the material time, habitually resident in London: he gives detailed information in his first witness statement as to his residence at Winnington Road and his office in Wigmore Street (paragraphs 15-23). He expands upon this in his second witness statement at paragraphs 13-15. Mr. Thompson points out that the Claimants could easily have

obtained passport and visa details for the relevant time by making a subject access request of the UK Visa and Immigration Department, and he points to a string of Companies Registry documents showing Sheikh Mohamed giving addresses for himself in Saudi Arabia. However, there is the evidence of Mr. Brook and there is (although belated) the evidence of Ms. Sebesteny-King, who has worked for and with Sheikh Mohamed since 1993, and gives a very detailed picture, in paragraphs 5-9 of her witness statement, of Sheikh Mohamed's residence in the UK at the material time.

77. I am persuaded that it is more likely than not that by reference to Article 4(2) of the Rome Convention, the proper law would be English law.

78. However, the presumption could be overridden by Article 4(5) in the circumstances described above. If this Article is to be addressed, the factors do not all point one way, so far as connection with a jurisdiction is concerned:

(i) there are three Saudi Arabian nationals.

(ii) Sheikh Mohamed, on the above findings, resided in the UK but was certainly present there at the time the contract was made: he gave instructions in London to an English bank manager (after discussions including two meetings in London and one in France).

(iii) the payment was made to Geneva.

(iv) Sheikh Walid may have been in the UK, if the Claimant is right that at the time he was still with MBC at its London office - or in Dubai.

(v) Sheikh Majid was in Saudi Arabia.

(vi) The currency of the loan was US dollars.

(vii) The language the three parties spoke was Arabic, but they are all international businessmen and speak and write English.

(viii) On the Claimants' case this was a loan for an investment in Al Arabiya, based in Dubai.

79. It does not have, to my mind, a clear "*Saudi Arabian*" feel, as Mr. Thompson urged, referring to my words in paragraph 75 of **Alliance Bank JSC v Aquanta Corporation** [2011] EWHC 3281 (Comm).

80. If the proper law needs to be addressed, so far as concerns the question of forum conveniens, it is in my judgment more likely than not to be English law. The courts of Saudi Arabia would not apply English law, but would apparently address the question as to whether under Saudi Law, assuming it be found that the agreement of the loan was made, it fell within one of four possible categories of loans. The one thing that is clear is that the Saudi Arabian court would not consider the award of any interest. It is common ground that it would be a significant factor if the foreign forum would not apply English law and/or would not allow recovery of a sum or remedy available in English law (see **Banco Atlantico SA v British Bank of Middle East** [1990] 2 Lloyd's Law Reports 504 at 509, 511), but, as discussed above, there would be a question as to precisely what chance of recovery under its alleged implied term

the Claimants would thereby be losing. The fact that the proper law would be English would thus not, to my mind, be a significant factor.

81. Apart from proper law, Waller LJ referred to other connecting factors, which he sets out and approves at paragraph 20 of his judgment in **Deripaska v Cherney** [2009] EWCA Civ 849, the then passage in the White Book under *Forum Conveniens*. After referring to the question of onus he continues:

> *"(ii) The appropriate forum is that forum where the case may most suitably be tried for the interests of all the parties and the ends of justice.*
>
> *(iii) One must consider first what is the 'natural forum'; namely that with which the action has the most real and substantial connection. Connecting factors will include not only factors concerning convenience and expense (such as the availability of witnesses), but also factors such as the law governing the relevant transaction and the places where the parties reside and respectively carry on business.*
>
> *(iv) In considering where the case can be tried most 'suitably for the interests of all the parties and for the ends of justice' ordinary English procedural advantages such as a power to award interest, are normally irrelevant as are more generous English limitation periods where the claimant has failed to act prudently in respect of a shorter limitation period elsewhere."*

82. I deal first with what might be called the convenience of the parties and/or a fair and convenient trial:

i) <u>The witnesses</u>

The three main protagonists all have residences here or, in the case of Sheikh Majid, can certainly reside either in the compound of which Grovelands forms part or in Holland Green when it is completed. Osman Ali lives here, as do Mr. Brook, Mr. Collier-Wright and Ms. Sebesteny-King. No witnesses as to the services asserted to have been provided by Sheikh Majid in Saudi Arabia have been identified, but if there be any they can either attend in London or give evidence by video link. If at trial the issue of whether English law applies is to be reconsidered, then that can be expressly done by reference to experts in Saudi law, who have already given reports to the English court.

ii) <u>The documents</u>

Both the Claimants and the Defendants rely on oral agreements. Any documents there are in Saudi Arabia can be transferred, and if in Arabic translated. Any documents that can be obtained from HSBC or Credit Suisse can be admitted in evidence here (I deal below with process)

iii) <u>Language</u>

As discussed above, all the participants speak English. Of the Defendants, Sheikh Walid at any rate is familiar with English jurisdiction, having chosen it in at least one agreement in evidence (another provides for English law and arbitration).

83. I turn then to *"procedural advantages"*. There are the following:

i) Availability of costs orders and interest

ii) Procedures for obtaining documents

iii) Oral evidence and cross examination.

84. I can deal shortly with costs. This is one of the procedural advantages of the English forum which are identified in cases since the **Spiliada** [1987] AC 460 as not ordinarily or normally appropriate to take into account. However, it is plain from **The Vishva Ajay** [1989] 2 Lloyd's Rep 558, **Roneleigh Ltd v MII Export Inc** [1989] 1 WLR 619 and the discussion in **Dicey, Morris and Collins on the Conflicts of Laws** (15th Ed) Vol 1 at 12-038 that the circumstances in which the inability in the foreign forum to recover costs can be taken into account is where the consequence of it is to diminish substantially any success of the claimant in monetary terms or render any victory pyrrhic. It appears that there can be some possibility of recovery of costs in Saudi Arabia, but even if such were not the case, the situation here, where all parties are extremely wealthy and the sum in issue is very large even ignoring interest, it can hardly be said in my judgment that the recovery or otherwise of costs is a material factor. Similarly, so far as interest is concerned, the inability to recover statutory interest, or if the pleadings are amended, interest as damages for breach since the date of demand (in either case a relatively small sum) - as opposed to the chance of obtaining the contractual interest, which I have already addressed - would not be a material factor.

85. It is in relation to the other two significant matters, production of documents and oral evidence and cross-examination, that the real difference arises:

(i) It is common ground that there is no obligation on the parties to disclose documents in Saudi litigation. There are no provisions in the Saudi Legal Procedure Act which give claimants the right, through the court or otherwise, to compel defendants to disclose documents that are in their possession which might be relevant to the claim, or vice versa. However, it seems that in the course of the proceedings the judge may decide to direct the production of important documents by a party. Again, there do not seem to be any processes for obtaining production of documents from third parties, but an application may, it seems, be made to the judge by a requesting party if it can prove that a document exists in the possession of a third party, for the court to compel production of such document if the judge considers it relevant.

ii) There is ordinarily no oral evidence in a Saudi court, but oral evidence is accepted with the permission of the judge. If the judge is persuaded that such oral evidence should be taken, then any witness so called can be questioned by the judge. The parties, or their legal representatives, are permitted to suggest questions to the judge, who will decide whether to put them to the witness.

86. Mr. Edge, the Defendants' expert, drew attention to a decision in the Grand Court of the Cayman Islands of 25th June 2010, in which the ability to compel and cross examine witnesses in Saudi Arabia was described as "*doubtful*".

87. The jurisprudential background is described in **Dicey** at 12-036:

> *"In a number of cases the English court, in deciding whether to grant a stay, took into account differences between English law and the procedural law prevailing in the competing forum, such as the more extensive discovery available to litigants in the United States and the less extensive discovery available in civil law jurisdictions. But it is clear from the decision of the House of Lords in The Abidin Daver that in exercising the discretion it is not normally appropriate for the court to compare the quality of justice obtainable in a foreign forum which adopts a different procedural system (such as that of the civil law) with that obtainable in a similar case conducted in an English court."*

88. There is clearly a combination of two differing but complementary approaches: (i) the reluctance of the English Court to undertake a comparative exercise as against a different legal system (ii) the recognition that procedural advantages should not normally sway the argument.

89. In this case the loss of the right to require disclosure of Saudi documents may not be a very significant factor, at any rate from the Claimants' point of view. As to documents in Saudi Arabia, it is the Defendants who will be keen to obtain and produce any document they can in order to evidence Sheikh Majid's provision of services in relation to Jadawel. At any rate under the Saudi Arabian system, the Claimants would not be producing any documents, so the Defendants might be assisted by a procedure which enables them to compel production of documents by the Claimants, which might support their case in respect of Jadawel. Both parties will, however, be very anxious to obtain production of the others' bank statements from Credit Suisse and from HSBC, which, as I have indicated, may be very important. Swiss banking secrecy being such, compulsory orders may, in any event, be difficult, but the English system would require the parties to produce their own bank statements, and at least there are provisions in this Court for ordering evidence abroad by way of letters of request.

90. Further, I do consider that in this case oral evidence and cross-examination would be absolutely crucial. I have set out the battleground above, which is substantial, and relates to events up to fifteen years ago. I do not begin to see how the issues can be resolved other than by lengthy and careful oral examination and testing by experienced counsel.

91. The First Defendant has to show that Saudi Arabia is clearly the more appropriate court. Although I bear firmly in my mind the reluctance of the English court described above, the exercise must inevitably be a comparative one, and in my judgment the great difficulty of resolving this particular dispute by any other method than lengthy and detailed oral examination must in my judgment make this a case which is not one of those where *normally* or *ordinarily* such comparisons are not

appropriate, indeed they are inevitable. The availability of oral evidence and cross-examination must, in my judgment, be a heavy factor such as to lead me to the conclusion, taken together with the other matters to which I have referred, that the courts of Saudi Arabia are not clearly the most or more appropriate forum. The First Defendant does not satisfy the onus on him.

92. I turn then to consideration of the position as between the Claimants and the Second Defendant, where the onus is upon the Claimants to show that this court is the more appropriate forum. The factors above are all in play, but in addition there is a further factor which seems to me to be determinative. The trial will be continuing against the First Defendant in this jurisdiction in any event. If I granted a stay in favour of the Second Defendant, this would involve either (i) two trials, one in each jurisdiction or (ii) a trial only against the First Defendant, not the Second Defendant and/or (iii) the Second Defendant taking part in this court as a witness, in order to give evidence to support the First Defendant. By reference to any of these scenarios, justice in my judgment can only be done by having the claim brought by the Claimants against both Defendants in this forum, where the case against the First Defendant is to proceed. I am accordingly satisfied that in respect of forum conveniens the Claimants have satisfied the onus as against the Second Defendant.

93. Accordingly, I conclude that the Claimants have served the First Defendant within the jurisdiction, and have no need to consider the question of service out, I refuse the First Defendant's application for a stay and I grant the Claimant's application for permission to serve the Second Defendant out of the jurisdiction, but only in respect of the claim for $30 million.

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