Neutral Citation Number: [2021] EWHC 2956 (Comm)

Case No: CL-2019-000603
& CL-2019-000727

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

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

Date: 05/11/2021

Before :

THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

CL-2019-000603

MR FLAVIO DE CARVALHO PINTO VIEGAS and 1,516 others
Claimants/Respondents

- and -

(1) MR JOSÉ LUIS CUTRALE
(2) MR JOSÉ LUIS CUTRALE (Jnr)
(3) SUCOCÍTRICO CUTRALE LTDA (a company incorporated in Brazil)
Defendants/Applicants

CL-2019-000727

AND BETWEEN:

MR JOSÉ ANTONIO RUIZ SANCHES and 30 others
Claimants/Respondents

- and -

(1) MR JOSÉ LUIS CUTRALE
(2) MR JOSÉ LUIS CUTRALE (Jnr)
(3) SUCOCÍTRICO CUTRALE LTDA (a company incorporated in Brazil)
Defendants/Applicants

- -
- -

James Flynn QC, James Ramsden QC, David Went, Russell Hopkins and **Anirudh Mathur** (instructed by **PGMBM, a trading name of Excello Law Limited**) for the **Claimants**
Brian Kennelly QC, Paul Luckhurst and **Gayatri Sarathy** (instructed by **Linklaters LLP**) for the **Defendants**

Hearing dates: 21-23 June 2021
Draft judgment circulated 19 October 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 5 November 2021 at 10:30 am

Mr Justice Henshaw:

(A) INTRODUCTION

1. The Defendants apply, under CPR Part 11, to challenge:

   i) the validity of service and jurisdiction in respect of the Third Defendant ("***Sucocítrico Cutrale***"); and

   ii) jurisdiction in respect of the First Defendant ("***Cutrale Snr***") and the Second Defendant ("***Cutrale Jnr***").

2. Sucocítrico Cutrale is a Brazilian company. Its principal business is producing orange juice in Brazil for export. Cutrale Snr and Cutrale Jnr are Brazilian citizens. They are shareholders in Sucocítrico Cutrale and sit on its 'Family Board', to which I refer in more detail below.

3. There are two claims before the court. Claim CL-2019-000603 (***the "Viegas claim"***), originally issued on 27 September 2019, is pursued on behalf of 1495 individuals, 21 companies, and one foundation. Claim CL-2019-000727 (***the "Sanches claim"***), issued on 22 November 2019, is pursued on behalf of 30 individuals and one company.

4. The claims concern an alleged cartel between several Brazilian companies which produce orange juice, including Sucocítrico Cutrale. The Brazilian Association of Citrus Exporters (ABECITRUS) is also alleged to have been involved. The Claimants are orange farmers who are all domiciled in Brazil. The claim relates to alleged antitrust infringements committed in Brazil and said to have restricted competition in markets in Brazil, causing harm to the Claimants there. There are a number of sets of extant proceedings in Brazil relating to the same alleged cartel. However, the Claimants claim to be entitled to maintain these proceedings in England and Wales on the bases that:

   i) although Sucocítrico Cutrale is a Brazilian company, it has its central administration in London and is therefore domiciled in the UK pursuant to Article 63(1)(b) of Regulation 1215/2012 ("***Brussels Recast***");

   ii) alternatively, the Claimants were entitled to serve Sucocítrico Cutrale, pursuant to CPR 6.3(c)/6.9(2) at a "place within the jurisdiction where [it] carries on its activities; or any place of business of the company within the jurisdiction".

   iii) Cutrale Snr is domiciled in England; and

   iv) Cutrale Jnr is domiciled in Switzerland and the claims against him are so closely connected with the claims against Sucocítrico Cutrale and Cutrale Snr that it is expedient to hear and determine them together so as to avoid the risk of irreconcilable judgments, pursuant to Article 6 of the Lugano Convention.

5. The Defendants' position is in outline as follows:

   <u>Sucocítrico Cutrale</u>

   i) Sucocítrico Cutrale has its "*central administration*" in Brazil and is therefore not domiciled in the UK for the purpose of Article 63(1)(b) of Brussels Recast. There is therefore no right to bring proceedings against the company in England

under Article 4(1). The court must apply common law principles to determine jurisdiction (see Article 6(1)).

ii) Alternatively, the claims against Sucocítrico Cutrale should be stayed under Articles 33 and/or 34 of Brussels Recast because of the ongoing proceedings in Brazil concerning the alleged cartel.

iii) The Claimants were not entitled to serve Sucocítrico Cutrale at an address within the jurisdiction, and so the company has not been validly served.

iv) Alternatively, applying common law *forum non conveniens* principles, Brazil is the proper place for the claims against Sucocítrico Cutrale and the court should not exercise jurisdiction against it. The claims against Sucocítrico Cutrale should be stayed even if (contrary to the Defendants' primary case) Cutrale Snr is domiciled in England. Cutrale Snr has confirmed that he would submit to the jurisdiction of the Brazilian court. The risk of inconsistent judgments in England and Brazil therefore carries little weight because it would be caused by the Claimants' unnecessary pursuit of litigation in England. In such circumstances, the court may stay the claims against the foreign defendant notwithstanding the presence of a UK domiciled anchor defendant (*Vedanta Resources plc v Lungowe* [2020] AC 1045 at §§40, 67, 75, 83-85, 87).

Cutrale Snr

v) Cutrale Snr is not domiciled in the UK. There is therefore no right to bring proceedings against him under Article 4(1) of Brussels Recast.

vi) Further or alternatively, the court should stay the claims against Cutrale Snr pursuant to Article 34 of Brussels Recast because of the ongoing proceedings in Brazil.

vii) Although Cutrale Snr was served in the jurisdiction, applying common law *forum non conveniens* principles Brazil is the proper place for the claim. Accordingly, the court should decline jurisdiction.

Cutrale Jnr

viii) If neither Sucocítrico Cutrale nor Cutrale Snr is English domiciled there is no basis to assume jurisdiction against Cutrale Jnr.

ix) If Cutrale Snr is English domiciled but the claims against Sucocítrico Cutrale are to proceed in Brazil, the criteria under Article 6 of the Lugano Convention are not met because it would be more expedient for the claims against Cutrale Jnr to be heard in Brazil alongside the claims against Sucocítrico Cutrale.

x) Further or alternatively, the court should stay the claims pursuant to a reflexive application of Article 28 of the Lugano Convention because of the ongoing proceedings in Brazil.

6. For the reasons set out below, I have come to the conclusion that the Defendants' application succeeds in part. The court lacks jurisdiction over Sucocítrico Cutrale.

However, the court does have jurisdiction over Cutrale Snr and Cutrale Jnr and there is no proper basis on which to stay the claims against them.

(B) BACKGROUND

7. The Claimants allege a cartel between several Brazilian orange juice production companies in the period January 1999 to January 2006. They reserve the right to allege infringement of Brazilian competition law in respect of a longer period (Particulars of Claim §45, suggesting in particular that the alleged cartel may have commenced in 1993). The Claimants describe it as having been a long-running, secretive, and hard-core cartel involving powerful and wealthy individuals and companies involved in the international orange juice export market, which had profound consequences for thousands of independent Brazilian orange farmers, including more than 1,500 who are claimants in these proceedings.

8. The companies alleged to have participated in the cartel are: (1) Sucocítrico Cutrale; (2) Bascitrus Agroindustry S.A.; (3) Cargill Agrícola S.A.; (4) Fischer S.A. Agroindústria (formerly Citrosuco Paulista S.A.); (5) Citrovita Agroindustrial Ltda; and (6) Louis Dreyfus Commodities Agroindustrial Coinbra-Frutesp S.A (draft Particulars of Claim §41). ABECITRUS is also alleged to have been involved (e.g. §§41, 60.1(d)).

9. The great majority of Sucocítrico Cutrale's Brazilian orange business is for export to international markets, principally in the form of concentrate for orange juice. 98% of all the oranges grown in Brazil are for export.

10. The pleaded particulars of breach include the following:

    i) Agreements to divide orange farmers between the companies in the alleged cartel by purchasing only from allocated farmers and/or offering uneconomic prices to farmers allocated to other alleged cartel members (Particulars of Claim §60.1). ABECITRUS is alleged to have carried out an auditing role (§60.1(d)).

    ii) Fixing the prices at which the alleged cartel members purchased oranges (§60.2).

    iii) Requiring farmers to harvest and transport oranges and not compensating them sufficiently for doing so (§60.3).

    iv) Delaying negotiations of contracts with orange farmers, sometimes until oranges were ready for harvest (§60.4).

    v) Purchasing oranges "*on the spot market at the 'farm gate' at distress prices*" (§60.7).

    vi) Engaging in various conduct which damaged the businesses of orange famers and/or exerted a negative effect on prices, including reducing the volume of oranges purchased from orange farmers (§60.5), delaying entry of orange deliveries into alleged cartel members' processing plants (§60.6), wrongly refusing to accept harvested oranges on the pretext that they were overripe

(§60.8), breaching contracts with farmers (§60.9) and procuring breach of contract by employees of farmers (§60.10).

vii) A general allegation that the above breaches were "*underpinned by the practice of exchanging competitively sensitive information at frequent meetings among senior executives of the Cartel members and through their trade association ABECITRUS*" (§60).

The alleged conduct is said to have violated the following provisions of Brazilian law: Articles 170 and 173(4) of the Federal Constitution, Articles 20 and 21 of Law No. 8.884/1994 (***the*** "***Former Antitrust Law***"), Article 36 of Law No. 12529/201 (***the "Current Antitrust Law"***) and Articles 186 and 187 of the Civil Code (§§61-62). The Claimants claim compensation for various heads of loss pursuant to Articles 186 and 402 of the Civil Code (§§70-72).

11. The Defendants criticise the original particulars of the claims against Cutrale Snr and Cutrale Jnr, suggesting that the provisions of Brazilian company law and antitrust law on which the Claimants rely do not found causes of action against shareholders or directors. Shortly before the hearing before me, the Claimants supplied 'Re-Draft' Particulars alleging that Cutrale Snr and Cutrale Jnr "*participated in… the unlawful practices and conduct*" and are therefore liable under Articles 186-187 of the Civil Code (§§65 and 68). The Defendants contend that these contain no adequate particulars of the asserted participation of these individuals in the alleged breaches, and that the claims are a thinly disguised attempt to identify an 'anchor defendant' in England.

12. Brazil's competition authority, CADE, started an investigation into the alleged cartel in September 1999 on the basis of reported anti-competitive conduct, according to its published document *"consisting of a) establishing or practicing an agreement with a competitor; b) split the market; c) impose hindrances to the operations of a competing company or supplier; d) discriminate supplier through differentiated price fixing"*.

13. On 12 January 2006, Paulo Machado, former Commercial Director of Coinbra-Frutesp, a competitor of Sucocítrico Cutrale, signed a Leniency Agreement with the Federal Government. According to CADE, the information that Machado provided "*constituted undeniable evidence of breach of the economic order*". CADE documents indicate that the Machado Leniency Agreement provided "*new and compelling facts*" about "*the existence of a series of meetings and exchanges of information between the [d]efendants, in which important competitive issues and variables would be discussed, such as: price, production, sales volume, as well as understandings about the division of suppliers (orange growers), with a view to standardizing market practices and artificially appropriating profits, to the detriment of orange growers*". The Agreement also included "*names of individuals who would have participated in the alleged illicit agreements, which are the subject of the investigation*".

14. On 24 February 2006, CADE added Cutrale Snr and Cutrale Jnr to CADE's administrative cases "*due to the presence of evidence of conduct in breach of the economic order*".

15. CADE raided an office of Sucocítrico Cutrale in 2006 in an operation codenamed "*Fanta*", during which materials relating to the alleged cartel were discovered and seized. In addition, on 5 September 2006 an indictment was filed against Cutrale Snr

in the 9th Criminal Court of São Paulo (Proceeding no 1.270/06) by the Ministério Público do Estado de São Paulo (State of São Paulo Prosecutor's Office). The indictment accused him of criminal participation in a cartel and price fixing. Cutrale Snr had been Commercial Director of Sucocítrico Cutrale until 2003, and General Manager (Chief Executive) from 2003 until 2008.

16. All three Defendants eventually entered into negotiated 'cease and desist' regulatory settlements (known as Termos de Compromisso de Cessação or "***TCCs***") in 2016 and 2017, pursuant to which substantial administrative fines were paid. Article 184 of CADE's Internal Rules states that *"In case of an investigation referring to a deal, collusion, manipulation, or arrangement among competitors, the Terms of Commitment for Termination of Conduct shall necessarily contain the recognition of involvement in the conduct under investigation by the committed party."* A consent decree was entered into by CADE, Sucocítrico Cutrale and Cutrale Jnr in November 2016, to which Cutrale Snr subsequently acceded in 2017. The TCC includes the following:

> "I. Summary Description of Conduct
>
> The APPLICANTS acknowledge that information raised by their commercial team in Brazil on the citrus market, in particular with independent oranges producers and traders, may have been shared with competitors in the context of sectoral discussions about this market, as well as equivalent information obtained from the market by its competitors during the period investigated.
>
> […]
>
> IV. Association
>
> The conduct referred to in Clause I may have occurred at sectoral meetings at the Associação Brasileira de Exportadores de Cítricos (ABECITRUS) or any other occasional contacts in Brazil.
>
> V. Duration of Conduct
>
> It is understood that this conduct lasted in sporadic moments during the period from January 7, 1999 to January 24, 2006."

Clause 2.1 states that the signatories acknowledge the facts described in the "*History of Conduct*". The 'voting decision' report by one of CADE's commissioners, in effect acting as rapporteur, after quoting the text set out above, said:

> "86. Thus, I understand that the existence of collusive conduct has been proven. In the case of a cartel, that is, an offense per object, proven the materiality of the conduct, it is not necessary to analyze additional elements such as the effects, since the harmful potentiality is presumed of the anticompetitive object itself, as already stated by the CADE's Tribunal.

> 87. According to art. 85, paragraph 9, of Law 12.529/11, the administrative proceedings are suspended in relation to the Applicants, so that I will individualize the conduct only of the Defendants who have not executed TCC with CADE and who were not excluded from the defendants list." (footnotes omitted)

17. CADE recorded that "*the evidence obtained in the case file unequivocally proved the participation of the Defendants listed below and their executives in the cartel in the national market for frozen concentrated orange juice*". As to "*conduct conclusions*", CADE stated that violations of the economic order were "*confirmed by the parties which committed to the Terms of Commitment for Termination, combined with the other evidence in the case file*s". In its analysis of the material in the case file, CADE described this as "*the typical case of classic hard-core cartels considered to be the most serious breaches of the economic order*".

18. For parties that entered into Cease and Desist Agreements, CADE agreed not to further "*proceed with the individualization of their participation in the investigated conduct*".

19. There is a dispute between the parties as to whether the TCC is binding on, or of evidential value against, the Defendants in the present proceedings.

20. In 2006, at a time when he faced criminal charges in Brazil in relation to the alleged cartel, Cutrale Snr moved to an address in Taunton, Somerset (the "***Taunton home/address***"), before moving to Montpelier Street, Knightsbridge, London (the "***Knightsbridge house***"). His wife and daughter also moved to England. The Claimants allege that, since then, Sucocítrico Cutrale – a private company ultimately owned by the Cutrale family – has been run in terms of its entrepreneurial management from London, particularly from offices at 25 Park Lane (the "***Park Lane Office***"). This is strongly denied by the Defendants, as appears below.

(C) SUCOCÍTRICO CUTRALE: DOMICILE

21. The Claimants allege that Sucocítrico Cutrale has its "*centre of administration in England, notably carried out from premises at 3rd floor, 25 Park Lane, London, W1K 1RA*" i.e. the Park Lane Office (Re-Draft Particulars §13).

(1) Legal framework

22. The Claimants must satisfy the Court that they have a "*good arguable case*" — in the sense that they have *"the better of the argument"* on the materials available to the court (see, e.g., *Tugushev v Orlov* [2019] EWHC 645 (Comm) § 59 per Carr J) — that Sucocítrico Cutrale was domiciled in England when the claims were issued. If the court is so satisfied, no issue of *forum conveniens* arises, and the claims can proceed as of right under Article 4 of Brussels Recast subject to the possibility of a stay pursuant to Article 34.

23. As to what is meant by a 'good arguable case' and having 'the better of the argument', in *Goldman Sachs International v Novo Banco SA* [2018] UKSC 34, Lord Sumption (with whom the other members of the Supreme Court agreed) explained that, following *Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80 § 7, it means:

> "(i) that the claimant must supply a plausible evidential basis for the application of a relevant jurisdictional gateway; (ii) that if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so; but (iii) the nature of the issue and the limitations of the material available at the interlocutory stage may be such that no reliable assessment can be made, in which case there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it." (§ 9)

24. The Court of Appeal in *Kaefer Aislamientos SA v AMS Drilling Mexico SA* [2019] EWCA Civ 10 elucidated these three limbs, explaining as follows:

i) In applying limb (i) the question is whether the claimant has discharged the burden of showing a plausible evidential basis indicating that he has the better argument (but not 'much' the better argument); this does not require proof on the balance of probabilities and is a context specific and flexible test (*Kaefer* §§ 71-76).

ii) Limb (ii) ("*if there is an issue of fact about it, or some other reason for doubting whether it applies, the court must take a view on the material available if it can reliably do so"*) is:

> "… an instruction to the court to seek to overcome evidential difficulties and arrive at a conclusion if it "reliably" can. It recognises that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence. The Court is not compelled to perform the impossible but, as any Judge will know, not every evidential lacuna or dispute is material or cannot be overcome. Limb (ii) is an instruction to use judicial common sense and pragmatism, not least because the exercise is intended to be one conducted with "due despatch and without hearing oral evidence" …. It should be borne in mind that it is routine for claimants to seek extensive disclosure (as was done on the facts of the present case) from the defendant in the expectation (and hope) that the defendant will resist, thereby opening up the argument that the defendant has been uncooperative and is hiding relevant material for unacceptable forensic reasons and that this should be held against the defendant. Where there is a genuine dispute judges are well versed in working around the problem. For instance, it might be possible to decide an evidential dispute in favour of a defendant on an assumed basis and ask whether jurisdiction is nonetheless established. Equally, where there is a dispute between witnesses it might be possible to focus upon the documentary evidence alone and see if that provides a sufficient answer which then obviates the need to grapple with what might otherwise be intractable disputes between witnesses." (*Kaefer* § 78)

iii) Limb (iii) (if "*the nature of the issue and the limitations of the material available at the interlocutory stage [are] such that no reliable assessment can be made"* then "*there is a good arguable case for the application of the gateway if there is a plausible (albeit contested) evidential basis for it"*) arises where the court is unable to form a decided conclusion on the evidence before it and is therefore unable to say who has the better argument (*Kaefer* § 79). As to this situation:

> "… In [*WPP Holdings Italy Sarl v Benatti* [2007] EWCA Civ 263] Lord Justice Toulson stated that the Court could still assume jurisdiction if there were "*factors which exist which would allow the court to take jurisdiction*" … and in [*Antonio Gramsci Shipping Corp v Recoletos Ltd* [2012] EWHC 1887 (Comm)] Teare J asked whether the claimant's case had "*sufficient strength*" to allow the court to take jurisdiction (ibid paragraph [48]). The solution encapsulated in limb (iii) addresses this situation. To an extent it moves away from a relative test and, in its place, introduces a test combining good arguable case and plausibility of evidence. Whilst no doubt there is room for debate as to what this implies for the standard of proof it can be stated that this is a more flexible test which is not necessarily conditional upon relative merits." (*Kaefer* § 80)

25. Article 63 of Brussels Recast provides:

> *"1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:*
>
> *(a) statutory seat;*
>
> *(b) central administration; or*
>
> *(c) principal place of business."*

26. The test under Article 63(1)(b) was considered by Andrew Smith J at first instance in *Vava & Ors v Anglo American South Africa Ltd (No 2)* [2013] Bus. L.R. D65, [2013] EWHC 2131 (QB) *(*"***Vava No. 2***")*, and then, on appeal, by the Court of Appeal in *Young v Anglo American South Africa Ltd & Ors (No 2)* [2014] EWCA Civ 1130, [2014] Bus LR 1434 ("***Young***"). Andrew Smith J's judgment included the following significant passages about where a company, AASA, had its central administration:

> "61. Such administrative services as AASA requires are provided under a Master Services Agreement dated 4 April 2011 by AOL, whose employees are based in South Africa. It covers company secretarial services, finance and performance management services, tax services, treasury services, corporate communications services and corporate finance services. It also covers Executive Director Services, which comprise … "*leadership, advice and support which may include but not be limited to: Regulatory affairs; transformation; corporate communications; government relations; strategic implementation; and protection of shareholder interests ie*

attending Board meetings, Strategy sessions". However, AASA does not rely in support of its case about where it had its central administration on the fact that these secondary services were provided by AOL in South Africa.

62. Mr Layton submitted that, on a proper autonomous interpretation of article 60 in light of the European jurisprudence, the place where a company has its "*central administration*" is "*the place where in reality a company's major decisions are taken*" or where "*the main entrepreneurial decisions are taken which determine the activity of the company*"; that therefore the place of central administration is not simply where a company's board and general meetings are held; that it is where "*the people who devise the company's strategy, who take the big picture decisions are located and do their strategising and decision-making*"; and that it is "*most probably not ... where formal rubber-stamping of decisions is undertaken of entrepreneurial decisions which are handed down from above, or where second-order decisions are taken which merely implement the big picture decisions handed down from above*". The decisions that determine where a company has its central administration are not, Mr Layton submitted, necessarily taken by the company itself, and might be taken by others for various reasons: because decision-making might be "*usurped*" by a parent company or other entity; because it might be delegated by the company; or simply because of "*the circumstances of a company within a group*". ...

63. In order to illustrate the point, Mr Layton invited consideration of hypothetical situations: if, for example, it were decided to dispose of the shares in a subsidiary such as AOL. It is unrealistic to suppose, he argued, that such a decision would in reality be taken by AASA: the effective decision would be taken by AA plc in London and any part played by AASA in South Africa would be "*formal rubber stamping*" and executing documents to implement the decision. Mr Philipps did not dispute that AASA would not make a decision of this kind otherwise than in accordance with AA plc's wishes, but submitted that this does not mean that AASA does not control its own decisions. But he had a second submission that to my mind also answers the point: Mr Layton's example is speculative, and does not assist in ascertaining the place where AASA in fact had its central administration at the times when these proceedings were brought. He recognised that, if at some time in the future AASA were to acquiesce in AA plc or another manifestation of the Group in England making decisions on its behalf, the place of AASA's central administration might then move to be in England. But I need not consider in what circumstances it would move: it is not part of the factual enquiry that article 60(1)(b) requires.

64. It is not entirely clear whether the claimants take issue with AASA about whether secondary management services such as those provided by AOL do or might bear upon where AASA has its central administration. At one point it appeared that they did not: Mr Layton cited in this context the judgment of Silber J, who referred (at para 30) to the case of the German Supreme Court of 23 January 2008, [2008] NJW 2797, in which it said that "*mere secondary management tasks such as accounting and settlement of tax matters are irrelevant for determining the seat of the head office*", and who said (at para 58) that the services provided by AOL "*although important for AASA, do not appear to relate to managerial or entrepreneurial issues*", adding that "*This interpretation is derived not from domestic law but independently from European law*" and that it was "*so obvious as to leave no room for reasonable doubt*". ...

…

66. Mr Layton did not argue, and it could not cogently be argued, that the central administration of a wholly owned subsidiary is always located with its shareholder, but he contended that it is in this case, or rather that the claimants have a sufficient argument that it is. There are circumstances in which the English court has recognised that a subsidiary has renounced all control over its affairs to a parent company and the parent has "usurped" the functions of control over the subsidiary. The leading such case that shows that a company can be resident in a country without holding directors' meetings there is *Unit Construction v Bullock*, [1960] AC 351 …

…

70. In the end Mr Layton did not submit that in this case AASA's functions were usurped by AA plc or that the position here is comparable to that in the *Unit Construction* case. He was right not to do so: …

71. However, as I have said, the claimants put their main argument on a broader basis: that while a parent might make the decisions comprising the central administration of a company because it has usurped them or because the subsidiary has delegated its decision making to a parent, this can come about simply because in reality the parent company takes the decisions which determine the activities of the subsidiary. Mr Layton submitted that the place where a company has its central administration does not necessarily depend on anything done by the company or any organ or agent of the company: the question is where the "*main entrepreneurial decisions … which determine the activity of the company*" are taken, whether they be taken by the company, its parent or anyone else. I am unable to accept this proposition: to my mind the question where a company has its

> central administration clearly depends upon where the company itself carries out its functions, and unless the company can properly be said to act through another person or entity because of agency or delegation or on some other legally recognised basis, the actions of others do not determine the question. …"

27. The Court of Appeal upheld his decision:

> "34. The parties were correct to accept that the wording of Article 60 must be given an "autonomous" meaning, that is a meaning not based on the canons of construction of any particular Member State's system of law. In order to consider the correct interpretation of the wording it is necessary to look at the objectives of the Regulation as a whole, particularly as noted in the preambles to the Regulation, as well as the context of Article 60 within the Regulation and any official commentary on the text that is relevant.
>
> 35. Paragraph 11 of the preamble of the Regulation states that the "*rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile…*". The same paragraph also stipulates that:
>
> > "…The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction".
>
> …
>
> 37. It is clear that Article 60(1) is drafted so that a company … may have three different locations of domicile for the purposes of the Regulation, because, for that purpose, the domicile of a company may be the place of its "statutory seat" or its "central administration" or its "principal place of business". Thus it is intended to give a claimant a wider choice of where he can sue a company using the general rule in Article 2(1) of the Regulation that *"...persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State*." This analysis accords with the commentary in paragraph 28 of the official Explanatory Report of Professor Fausto Pocar on the revised Lugano Convention of October 2007. The revised Lugano Convention used the same wording as that of Article 60 of the Regulation. Professor Pocar also points out, at paragraph 30, that the choice of a "broad definition" was made to allow a company to be brought before a court in a state bound by the Convention (or, I would say, the Regulation) "*with which [the company] has a significant connection, in the shape of its central administration, its principal place of business or its statutory seat". ...*

…

40. Given the need to differentiate between the three attributes of a company contemplated by the three phrases used in Article 60(1) , I would give the phrase "*central administration*" the same meaning as that which was given by commentators to the same phrase in what is now Article 48 TFEU, which grants the same right of freedom of establishment to companies and other legal persons and associations as to natural persons who are nationals of Member States of what is now the EU. Thus I agree with the interpretation given by Dr Ulrich Everling in 1964 to the "*central administration*" of a company in that context as being the place where "*the company organs take the decisions that are essential for the company's operation*". In my view his emphasis that it is only the organs of that company that counted and it was irrelevant "*whether the company depends upon the decisions of a parent company which has its domicile outside the Community*" is correct. His interpretation is, effectively, the same as that used in the commentary of Dr Hans von der Groeben and Dr Jürgen Schwarze on Article 48 TFEU, 43 although they also refer to the place where "*entrepreneurial management effectively takes place*". …

41. Even more persuasively, the German Federal Supreme Court (Bundesgerichtshof) adopted this line of interpretation, citing the work of Professor Dr Kropholler, when it considered Article 60(1)(b) in the context of a jurisdiction dispute concerning a company in its Ruling XII ZB 114/06 of 27 June 2007. The analysis of the German Federal Supreme Court was followed by the German Federal Employment Tribunal (Bundesarbeitsgericht) in its decision 5 AZR 60/07 of 23 January 2008, which also concerned Article 60. The court drew a distinction between "*essential business decisions*" and "*mere secondary management tasks such as accounting and settling of tax matters*", which were irrelevant for the purposes of determining the seat of the "*head office*". That analysis was in turn followed by the District Court (Landgericht) for Frankfurt am Main in its decision 2–08 S 25/09 of 3 March 2010.

42. The phrase "*central administration*" in what is now Article 48 TFEU (then Article 58 of the EEC Treaty) was also considered by the CJEU in *R v HM Treasury ex parte Daily Mail and General Trust PLC*. Advocate General Darmon referred with approval to Dr Everling's interpretation of "*central administration*". The judgment of the Court itself does not directly comment on those words.

43. As already noted, the interpretation of "*central administration*" has been the subject of decisions in the English courts. The most recent to which we were referred was that of Tomlinson J in *Alberta Inc v Katanga Mining*. One of the issues

in the case was whether the first defendant, which was a company incorporated in Bermuda, resident in Canada for tax purposes and which had its principal office in London and had a 75% interest in a valuable copper and cobalt mine in the Democratic Republic of Congo, was domiciled in England for the purposes of Article 60(1). Tomlinson J held that the company had its "*central administration*" in London because "*those who have the serious responsibilities in the company have their place of work*" in London. With respect to Tomlinson J, who did not have the benefit of the German commentaries or case law for his consideration, I think it does not necessarily follow that the place where those who have serious responsibility in the company work is the place where the "*central administration*" of the company will be. The correct interpretation of Article 60(1)(b) is to find the place where the essential decisions are taken by the company through its organs for that company's operation and where the company takes its "*entrepreneurial*" decisions. The place of work of those who have "*serious responsibility*" for decisions and the place where the essential decisions of the company are made could be different. It is always going to be a question of fact.

44. … The suggestion of HHJ Chambers QC at paragraph 12 of his judgment in *King v Crown Energy Trading AG* that "*administration*" has something of the "*back office*" about it and the statement in paragraph 13 of the judgment that the place of a company's "*central administration*" can be determined by "*a simple listing of those with important responsibilities in the company*" is equally unhelpful and, in my view, should be disregarded. …

45. Overall, then, I conclude that the correct interpretation of "*central administration*" in Article 60(1)(b), when applied to a company, is that it is the place where the company concerned, through its relevant organs according to its own constitutional provisions, takes the decisions that are essential for that company's operations. That is, to my mind, the same thing as saying it is the place where the company, through its relevant organs, conducts its entrepreneurial management; for that management must involve making decisions that are essential for that company's operations. As Andrew Smith J pointed out at [71] of his judgment, that location will be where the company (or other entity) has its "*central administration*" for the purposes of Article 60 and that will therefore be a jurisdiction where, for the purposes of the Regulation, the company has its domicile and so can be sued under the jurisdictional rule of Article 2. Therefore I agree with Andrew Smith J's conclusion on the issue of the interpretation of Article 60(1)(b)."

28. I agree with the Defendants that a company can only have one place of "*central administration*". The ordinary meaning of "*central administration*" connotes a single place and not multiple places; and the Court of Appeal in *Young* referred to the need to "*find the place …*" (§43).

29. *Young* also indicates that:

    i) the relevant date is the date proceedings were issued (§§1, 7);

    ii) the analysis must be directed at the company in question, regardless of whether it depends on the decisions of a parent company domiciled elsewhere (§40); and

    iii) secondary management tasks such as accounting and settling of tax matters are not relevant (§41)

30. I am not persuaded by the Claimants' submission that a key distinction needs to be drawn between (a) the making of high-level strategic decisions and (b) managerial decisions which implement strategy, with only (a) forming part of the company's "*central administration*". The Claimants relied, at least in part, on the references to implementation in the submissions recorded in §§ 61, 62 and 63 of Andrew Smith J's decision. However, the judge did not accept those submissions as reflecting the test, nor himself express the test in terms of a distinction between strategic and implementation decisions. Nor does the Court of Appeal's formulation, referring to "*the decisions that are essential for that company's operations*", that being the same as the conduct of its "*entrepreneurial management*", necessarily exclude all managerial decisions falling short of the setting, as opposed to the implementation, of corporate strategy.

31. I asked during the hearing where the *"central administration"* test had originated, and the Claimants on the third day of the hearing provided a helpful note on that topic. Very briefly, the Brussels Convention of 1968 used the concept of the 'seat' of a company, to be determined by Member States' own rules of private international law. The UK provided for a definition of that term in section 42 of the Civil Jurisdiction and Judgments Act 1982 using the concept of central management and control. (The Court of Appeal in *Young* later found the case law relating to this provision to be unhelpful when considering the new rule under the Brussels Regulation.) National laws took different approaches, and so Article 60(1) of the Brussels Regulation 44/2001 introduced a new autonomous rule using the three-part test which now applies.

32. Andrew Smith J in *Vava (No. 2)* noted that the central administration concept had previously been used in the context of freedom of establishment under EU law, and that the German Federal Court of Justice had held case law developed in that context to inform the proper application of Article 60 (§ 12). Similarly, the Court of Appeal in *Young* noted that the concept had appeared in Article 58 of the EEC Treaty, later Article 48 EU and Article 54 TFEU and equated its meaning in the two contexts. The Pocar report on the Lugano Convention noted at § 31 that although the need addressed was different, it was thought appropriate to use the same connecting factors for civil jurisdiction purposes as applied in the freedom of establishment context. In the latter context, Advocate General Darmon in Case 81/87 *R v HM Treasury ex p. Daily Mail and General Trust PLC* [1989] 1 QB 446 (cited in *Young* § 42) said:

> "7. In my view, the problem should be expressed in different terms. The concept of central management is difficult to pin down. Even where it designates the place at which the board of directors meets, it is not sufficient to provide a satisfactory connecting factor. As has been noted (J.-M. Rivier, "*General Report: The Fiscal Residence of Companies*," Studies on International Fiscal Law, vol. LXXIIa (1987), pp. 47, 75):
>
> > "Owing to the progress made by means of communication, it is no longer necessary to arrange formal board meetings. The telephone, telex and telecopier enable each director to state his point of view and to take part in the decision-making without being physically present in a given place. The board meetings each director will attend via television will soon form part of [a company's] everyday life. The board of directors can meet in a place chosen arbitrarily, which bears no real relation with the decision centre of the company."
>
> The place in which the board of directors meets cannot therefore constitute the sole criterion making it possible to designate with certainty in each case the place in which the central management is located. That designation cannot be arrived at by means of a formal legal assessment which does not take account of a number of factual elements the respective scope of which may vary according to the type of company involved.
>
> 8. In order to determine whether the transfer of the central management and control of a company constitutes establishment within the meaning of the E.E.C. Treaty it is therefore necessary to take into consideration a range of factors. The place at which the management of the company meets is undoubtedly one of the foremost of those factors, as is the place, normally the same, at which general policy decisions are made. However, in certain circumstances those factors may be neither exclusive nor even decisive. It might be necessary to take account of the residence of the principal managers, the place at which general meetings are held, the place at which administrative and accounting documents are kept and the place at which the company's principal financial activities are carried on, in particular, the place at which it operates a bank account. That list cannot be regarded as exhaustive. Moreover, those factors may have to be given different weight according to whether, for example, the company is engaged in production or investment. In the latter case, it may be perfectly legitimate to take account of the market on which the company's commercial or stock exchange transactions are mainly carried out and the scale of those transactions."

The European Court of Justice did not itself address this issue. However, the Advocate General's Opinion in these paragraphs expresses the view, which with respect I find logical, that particularly in cases where a particular location cannot readily be identified

for a given decision-making body (there, the board of directors) it may be necessary to consider a range of relevant factors when deciding the place of the company's central administration.

33. In Case C-208/00 *Uberseering BV v Nordic Construction Co Baumanagement GmbH (NCC)* [2005] 1 WLR 315, again in the freedom of establishment context, Advocate General Ruiz-Jarabo Colomer used the expressions "*actual head office*", "*actual centre of administration*" and "*centre of management*" to mean *"the place where the running of the company takes place and where it concludes a substantial proportion of its dealings with third parties: see G Kegel, Internationales Privatrecht (1995), p 416)"* (§ 2).

34. The Claimants cited one of the German cases decided under Article 60 itself referred to by the Court of Appeal in *Young*, namely the Bundesarbeitsgericht's judgment of 23 January 2008 5 AZR 60/07 (lexetius.com/2008,895). The court considered the place of central administration of a defendant association whose purpose was to provide its members with long-term secured holiday rental rights to vacation homes and to look after them. The court found that the decision-making process required to fulfil the association's purpose was primarily carried out by annual general meetings in Austria, during which the fundamental decisions were made. The general assembly decided, among other things, on the election of the board members, the accounts, the annual contribution and the business plan. The court stated that *"[t]his is followed by the definitive will formation and entrepreneurial management of the defendant in Austria"* (§ 21). The court went on to say that this conclusion was confirmed if one focused on the activities of the board of directors, which consisted of two members based in Austria and only one in Germany. The claimant had not presented any facts to show the latter director *"is working independently to develop the will for the association or that it makes entrepreneurial decisions that go beyond the ordinary course of business. [His] mere participation in the board, the majority of which acts in Austria, is not sufficient to establish responsibility in Germany"* (§ 22). The court added that dealing with bookkeeping and correspondence, sales, keeping the membership directory and dealing with tax issues were secondary administrative tasks with no significant influence on the will and entrepreneurial management of the association and could also be transferred to other contractors. I regard this decision as an illustration of the application of the 'central administration' on particular facts – relating to an atypical company somewhat different from an ordinary trading enterprise – and not, for example, as making any general suggestion that a company's members in general meeting should ordinarily be regarded as constituting its central administration.

(2) Facts

(a) Constitutional documents

35. The starting point is Sucocítrico Cutrale's constitutional documents, which set out the division of functions between the Partners, the Family Board and the Executive Board.

36. The 17th Amendment of Sucocítrico Cutrale's Articles was in force when the claims were issued, and its provisions were broadly similar to those in the 16th and 15th Amendments. It includes the following provisions.

37. Article 6 provides that the company's bodies are:

i) "*The Members' Meeting, in an assembly*" (referred to in the present application as the "*Partners*");

ii) *"The Board of Directors"* (also referred to as the "*Family Board*"); and

iii) *"The Executive Board"*

38. The Members' Meeting or Partners comprised Cutrale Snr, his wife Rosana Cutrale, and their children Cutrale Jnr, José Henrique Cutrale and Graziela Cutrale.

39. The Board of Directors or Family Board comprised the same individuals.

40. Article 7.1 provides that the Members Meeting, i.e. the Partners, is *"the highest and ruling body in the company"*, with responsibilities to:

> "a) Appoint an attorney or attorneys' to receive the powers to open and close bank accounts;
>
> b) Appoint an attorney or attorneys to receive the powers to negotiate suretyship bonds or any other banking guarantees;
>
> c) Appoint an attorney or attorneys to represent the company in its institutional relations with Brazilian governments;
>
> d) Appoint an attorney or attorneys to represent the company in relation to other companies, be them controlled or affiliates;
>
> e) Deliberate the Articles of Organization and their changes (Article 1,071, V – Brazilian Civil Code);
>
> f) Discuss the merging, consolidation and dissolution of the company or the discontinuation of its liquidation;
>
> g) Discuss the appointment or destitution of liquidators and review their accounts;
>
> h) Discuss the approval of the management accounts and how to use income of the period (Article 1,078, I – Brazilian Civil Code)." (in translation)

Article 7.2 provides for the partners to hold general meetings at least once a year. By Article 14.1:

> "The partners reserve the right to decide and regulate on any matter of interest of the Company and its businesses, to the extent permitted by law and these Articles of Incorporation. …"

(I have quoted all documents written in Portuguese using the English translations provided for the hearing.)

41. Clause 8 ("*Management*") provides in subparagraph (1) that the Family Board's duties shall be to:

> "a) establish the company's regulations and goals;
>
> b) establish the corporate governance relations;
>
> c) approve and ensure the execution of the company's yearly budget proposal, as well as changes to it, and declare it fulfilled at the end of the fiscal year;
>
> d) establish the institutional guidelines for the company's management;
>
> e) elect Executive Officers and any of their substitutes who will be part of the Executive Board, which will manage the company for the members, according to the Board of Directors' institutional regulations;
>
> f) authorize, as per each case, the grant of suretyships, indorsements or any other guarantees for third parties, as per Clause 11 below."

42. As to the Executive Board, clause 8(2) and (3) state:

> "8.2. The Executive Board, composed of managers, members or non-members elected by the Board of Directors, with representation powers found in the respective designation acts, in this case with the designation of Executive Officer, to whom it will fall the duty of using the corporate name as per Article 1,064 of the Brazilian Civil Code.
>
> 8.3. The actions of the managers who will compose the Executive Board will be carried out within the limits of their authority, as determined by the Articles of Organization and obligate the company, as per the exact terms of Article 47 of the Brazilian Civil Code."

43. Clause 8.6 provides that:

> "No manager, regardless of level or degree or competence, may exceed the value limits established in budgets, plans or schedules determined by the Board of Directors.
>
> 8.6.1. In these budgets, plans or schedules, for each expense item, there will be the supervision of the Officer exercising the financial duties and approval by the respective Officer of each company department. If, at any moment, the respective Officer of the department notices that the expenses may exceed their financially expected amounts, the aforementioned Officer will be notified and the expenses will be submitted to the Board of Directors for approval. 8.6.2. If, eventually, in order to exceed this restriction, an officer formalizes the same negotiation in several instruments in amounts lower than the limit, but whose

> sums exceed it, the company may deem the negotiations invalid, terminating the contracts, as this act may be considered a serious employee error within the terms of the law and as established in item 8.5 above. …"

44. Clause 9 deals with the Family Board (Board of Directors), which clause 9.1 states is "*the collegiate decision-making body of the Company*". Clause 9.5 provides that the Family Board is responsible for:

> "a) Determining the company's institutional and strategic policies and guidelines;
>
> b) Determining the company's investment policies, deciding on the Executive Board's proposals;
>
> c) Calling for and presiding over members' meetings;
>
> d) Propose changes in the Articles of Organization to the Members' Meeting;
>
> e) Electing and removing any officers that will make up the Executive Board and any other company manager;
>
> f) Proposing an increase in capital by issuing new membership shares, due to either investments or profit appropriation;
>
> g) Deciding on the acquisition and sale of real estate, mortgage or any other charges on company properties; and on granting suretyships, always for the benefit of the company, appointing officers to take the appropriate acts;
>
> h) Deciding on the amount and form of the Directors' pay;
>
> i) Deciding the amount and form of the Officers' pay and their materials as per Article 1,071 and its paragraphs;
>
> j) Authorizing the opening and closing of bank accounts by an attorney designated in the Members' Meeting, and their usage may be attributed to attorneys specially appointed by the Board of Directors, being granted special and specific authority to do so and always acting in pairs;
>
> k) The Board of Directors may establish that specific accounts or negotiations with banks and/or financial institutions may only be used or implemented as per prior statement by a Director, according to each case;
>
> l) Deliberating on taking Executive Board accounts, proposing the usage of the results to the Members' Meeting;

> m) Approving or executing the company's yearly budget proposal, or the budget corresponding to another period, and its changes;
>
> n) Determining that the budget was met at the end of the fiscal year;
>
> o) Proposing the merger, consolidation and dissolution of the company, or the termination of its state of liquidation;
>
> p) Authorizing the request for court-supervised reorganization or out-of-court reorganization;
>
> q) Authorizing the company to issue monthly, quarterly, or semi annual budget sheets and use them as basis to determine the distribution of then-existing profits, or in anticipation of eventual profits;
>
> r) Choosing or removing independent auditors (Article 142, paragraph IX, Law 6,404/76)."

45. Clause 9.6(a) provides that the Family Board will hold regular meetings once a year, within four months after the end of the fiscal year, with special meetings held when called by the Chairman.

46. The Claimants note that each member of the Family Board is described as a member, director and manager ('administratrador') of Sucocítrico Cutrale in filings with the Brazilian Commercial Registry, JUCESP.

47. Clause 10 deals with the Executive Board, composed of individuals elected by the Family Board (clause 10.1). Clauses 10.2 and 10.5 provide that:

> "10.2 The company' ordinary management is incumbent upon the Executive Board, by Executive Officers, who are responsible for implementing the Board of Directors' deliberations.
>
> 10.3. The Executive Board will meet on a quarterly basis, regardless of convocation. Its meetings will be recorded in minutes that will properly reproduce its decisions and that will be submitted to the appraisal of the Board of Directors. The Board of Directors may, at any time, convene an extraordinary meeting of the Board of Directors, establishing the agenda for this meeting.
>
> 10.4. Execution of deliberations of the Executive Board will be the responsibility of the Executive Officers, with each one acting within the scope of his area of activity and, according to the acts of his designation …
>
> 10.5. The Executive Board, by a joint act of the Executive Officer who is exercising the financial attributions and the Executive Officer who is exercising the powers of legal defense,

> will grant the term of office to the attorneys-in-fact appointed at the Partners' Meeting, as established in Clause 7, item 7.1, letters "a," "b, "c," and "d", above."

48. Clause 10.6 then states:

> "10.6. In this regard, it will be the responsibility of the Executive Officers:
>
> a) To proceed in accordance and in strict compliance with legality and demand that everyone in the company: managers, employees, contracted third parties, fulfill, and require the fulfillment of the legality and juridicity of all acts, enforcing the laws, regulations, contracts, conventions, and agreements;
>
> b) To follow the institutional guidelines given by the Board of Directors;
>
> c) To ensure strict compliance with the rules for the defense of competition, accounting for the consequences of non-compliance in the areas of their responsibility;
>
> d) To ensure strict compliance with labor standards; safety, medicine, hygiene, and health at work standards; accounting for the consequences of non-strict observance in the areas of their responsibility,
>
> e) To ensure strict compliance with fiscal, tax and social security rules, accounting for the consequences of non-strict compliance in the areas of their responsibility;
>
> f) To ensure strict compliance with legislation for the protection, preservation, and use of soil and natural resources and the environment, accounting for the consequences of non- strict observance in the areas of their responsibility;
>
> g) To establish the organizational and functional structure for staff under their supervision, in the area of their Board and submit it to the Board of Directors for approval so that it becomes effective;
>
> h) To appoint Managers, Supervisors, and Coordinators to carry out assignments in the area of operation of their Board, determining their functions;
>
> i) To admit and dismiss personnel employed by the company in the area of responsibility of their Board, always following the plans, projects and policies of labor relations approved by the Board of Directors, being responsible for the good standing and legality of these acts;

> j) To hire service providers, individuals, or legal entities, for activities in the area of responsibility of their Board, always following the plans, projects, and policies of labor relations and service provision approved by the Board of Directors, being responsible for the good standing and legality of these acts;
>
> k) To by themselves, or by a proxy appointed, always respecting indications formulated at the Partners' Meeting (Clause 7, item 7.1., letters "a" to "d") and the private powers of the Board of Directors, represent the company, actively and passively before any of the powers of the Republic, States, and Municipalities, in any of their agencies, ministries, departments, secretariats, offices and sub-offices, including before, local governments, public and mixed economy companies, public service concessionaires, institutes, including social security, administrative courts, and similar bodies;
>
> l) To appoint attorneys-in-fact, always respecting indications formulated at the Partners' Meeting (Clause 7, item 7.1., letters "a" to "d") and representatives, for acts related to or arising from their field of activity in the company, granting them and establishing the powers and scope of representation;
>
> m) No administrator, of any level, may hire or authorize contracting with providers or suppliers of goods or services with individuals who are relatives up to the third degree of employees of the company, or, in case of legal entity provider, who are administrators of it, with the Officers, Managers, Supervisors or Coordinators knowing of the existence of any such hiring being obliged to suspend the execution of that contract, if it is in the area of responsibility or administration, and immediately report the fact to the Board of Directors. …
>
> n) The acts of creation, alteration, modification, and extinction of establishments, branches, offices, and representations will be decided in a joint meeting between Officers, one being the Officer of the area where the establishment in question is inserted, the Officer who is exercising the financial attributions, and the Officer who is exercising the legal defense attributions, who will be responsible for implementing the decision taken, which will be appropriately recorded in the minutes of this Officers' meeting and registered in the trade registry bodies. ...
>
> 10.7. The Officers are, individually, responsible for those who are included in the act of their election and their Instrument of Investiture."

49. There are also relevant provisions in Deeds of Appointment of key officers of Sucocítrico Cutrale. In particular:

i) The Deed for the Fruit Procurement Director, after setting out the directors' general responsibilities in common with all directors (which include acting in accordance with the law), states the Fruit Procurement Department's Purpose ("*To acquire oranges under competitive market conditions, aiming to meet the needs and schedules of the company's industrial units"*), values and organizational priorities (starting with "*Quantitative and qualitative fulfilment of goals, price and measures implemented by company policy*" and "*Respect and seriousness in the relationship with orange producers, whether suppliers of the company or otherwise*"). The Deed states that the Department will be managed by one Director and two Commercial Supervisors, who will work together at the same level. They will have joint liability for all acts performed on behalf of the company, especially in relation to payments made, meeting targets and compliance with guidelines set by the company. The guidelines will be determined by the Family Board, to whom the Managers must report on any clarifications. The Deed also includes these particular reporting requirements:

> "(e) Information will be provided as follows:
>
> (i) Managers, including those in the field, will record their messages and observations, etc., in the voice channel each morning;
>
> (ii) At the end of each working day, the Director will make a written report of all conversations and information received throughout the day, and will also add to those topics recorded in the morning, and will pass this report on the Board of Directors.
>
> (iii) Also daily, even after the report has been completed, the Operational Supervisors will inform the Board of Directors the position of orange purchases for the day."

ii) The Import and Export Deed includes operational details about the company-wide Sales Plan, which is to be prepared and submitted to the Family Board who are then to decide on it. Paragraph 14 states that 'conditions', including prices (§ 13), cannot be deviated from without Family Board approval.

iii) The Deeds contain similar provisions about the company-wide Harvest Plan and its associated budget. The Harvest Plan must be submitted to the Family Board for their decision and strictly executed; with Family Board permission for any deviation and *immediate* reporting of any non-compliance.

iv) Five Deeds have provisions that are identical to each other, requiring the respective Department to submit an annual budget and monthly cash flow statement of operating expenses for approval to the Family Board, alongside detailed calculations; with permission to be obtained from the Family Board for any deviation and immediate reporting to them of any non-compliance.

v) The Financial Director Deed gives the director (then Mr Cervato) a range of responsibilities, subject to high level oversight by the Family Board, which include (for example) appointing managers in his department and fixing their duties, appointing and dismissing staff in accordance with the labour relations

policies and plans approved by the Family Board, contracting service providers in accordance with the labour relations and service provision plans and policies approved by the Family Board, and (whilst observing the exclusive powers of the Family Board) representing the company before a wide range of types of governmental authorities and tribunals. Clause 14 of the Deed gives the director various specific powers, including as follows:

> 1. The Fiscal and Tax Department shall be assigned the financial management and control of the Company's finances, the information system, the accounts, finance and taxation, execution of the annual budget and monitoring of execution by the other Departments of the budgets, programmes and plans approved by the Board of Directors [i.e. the Family Board].
>
> 2. Provide for and check the adequate level of reserves for contingencies in legal and administrative proceedings. He shall be assisted by the Legal and Administrative Director for that purpose.
>
> 3. Represent the Company before the Department of Federal Revenue, in all its departments, delegations and sub-delegations, assuming responsibility in respect of the National Legal Persons Register (CNPJ) for the relevant purposes.
>
> 4. Represent the Company before banks and financial institutions, either in person or through representatives appointed in the manner laid down by Clause Nine, section 9.5, letter "j" of the Articles of Association.
>
> 5. Manage and allocate the Company's economic and financial liquid assets.
>
> …
>
> 9. Draw up and submit to the Board on an annual basis, together with the other Company departments, the general expense and income budget comprising the Annual Plan, the Harvest Plan, stocks of products, purchasing plan, selling plan and calculations and prepare the consolidated annual balance sheet/income statement and respective cash flow statement. Once approved by the Board of Directors, the Departments shall operate within the premises established, the Financial, Fiscal and Tax Department being responsible for checking the expenses and income in accordance therewith, having to warn any of the Departments in the event of non-compliance and inform the Board of Directors thereof immediately.
>
> 10. If it proves necessary to amend the Budgets and Plans approved by the Board of Directors during execution thereof, they shall be immediately submitted to the Board of Directors and, once approved, shall be forwarded immediately to the

> Financial, Fiscal and Tax Department. Such submission for approval by the Board of Directors and the response thereof may take place by email.
>
> 11. This Department shall keep the Board informed on a monthly basis by means of two reports forming the financial file in addition to the other forms to be established on the development of implementation of the Annual Plan in force.
>
> …
>
> 14. Ensure that the transfer of resources to be deposited in the bank accounts and the release of "normal" payments only take place following the approval of one of the members of the Board of Directors using the electronic tool provided by the MCS (Menu Cutrale System) Portal known as TEA – Authorized Electronic Transfer. In exceptional situations, the Chairman of the Board or a Member thereof may authorize the Financial Director or the Financial Manager to give such approval by instructing the IT Manager."

(b) Evidence of the position in practice

50. Some broad context is provided by the evidence of Mr Cervato, the former Financial Director, that:

i) Sucocítrico Cutrale's headquarters are at its registered office in Araraquara in the state of São Paulo, and its management team is based there;

ii) the company has significant farming operations in Brazil: a substantial proportion of its oranges come from the company's own farms in the states of São Paulo and Minas Gerais. It owns and operates five industrial juicing plants in Brazil. It has port facilities in Santos in the state of São Paulo. In addition to the Araraquara headquarters, Sucocítrico Cutrale has six further offices, all in Brazil;

iii) Sucocítrico Cutrale employs over 20,000 people in Brazil and had a turnover of over US$ 1 billion in 2019;

iv) the company does not own or lease any premises or employ any staff outside of Brazil; and

v) Sucocítrico Cutrale ceases to be responsible for almost all of the exported juice when it is loaded onto ships at Santos, Brazil. Sale and distribution are handled by three separate companies (which source primarily, but not exclusively, from Sucocítrico Cutrale).

51. Only a limited number of documents have been produced showing how the company is managed in practice. Indeed, this is a source of complaint by the Claimants. The Defendants' evidence indicates that the Family Board only minutes decisions where there is a requirement for them to do so under Brazilian law: for example, real estate

transactions, delegations of authority and amendments to the Articles of Association. Other discussions and decisions are not minuted. None of the notes of meetings of the Partners are described as minutes. The only minutes taken and filed at JUCESP for the Executive Board are on matters required to be minuted pursuant to Article 10.6(o) (on the creation, alteration, modification and extinction of establishments, branches etc). The Claimants make the point that this apparent limited minuting of decisions is inconsistent with the requirement in Article 10.3 for the Executive Board to record its meetings in minutes which properly record its decisions and will be submitted to the Family Board. The Defendants produced a set of sample minutes from a meeting of the Family Board with the Executive Board, in which the substance of the discussions was redacted, though the headings indicate that there were discussions of new investments, and issues relating to the fruit supplies, sales, agricultural, finance, labour relations and legal divisions. The Defendants also produced redacted minutes of one Family Board meeting in 2008.

52. Of the documents that have been produced, the Claimants draw attention to the following examples of decisions taken at Family Board or Partners' meetings:

i) minutes of a Special Meeting of the Board of Directors on 9 August 2019, which indicate that it was decided to sell a property in the State of São Paulo (the sale of property being part of Sucocítrico Cutrale's corporate purpose pursuant to Article 3);

ii) a Members' Resolution Act Authorisation for the acquisition of equity and real estate on 29 November 2018, which appointed Cutrale Jnr and Henrique Cutrale to represent Sucocítrico Cutrale in all acts related to the acquisition of equity and real estate;

iii) a Private Instrument of Resolution of the Board of Directors on 22 February 2017 and Minutes of the Forty-Fifth Meeting of the Board of Directors on 6 March 2015, by which the Family Board appointed various Executive Directors to their relevant Departments; and

iv) as to Partners' meetings, a Deliberation Act in Members Meeting on 1 June 2019 and an Act of Resolution in Members Meeting on 1 October 2019, by which payments of dividends out of the company to the shareholders were approved.

53. The Claimants refer to the following documentary examples of Executive Board activities:

i) a meeting of the Executive Board on 15 April 2015 which included a decision to do with regulatory compliance, including express mention that one activity in one branch involved repair and maintenance of machinery in use;

ii) a meeting of the Executive Board on 3 August 2015, where a decision was taken to establish a branch of the company in a place in São Paulo state; and

iii) a meeting of 23 January 2017 where the location of a branch was changed; and

iv) a meeting on 24 January 2017 at which the activities of certain branches were extinguished.

54. The Defendants' witness evidence includes the following points about the management of Sucocítrico Cutrale:

i) Sucocítrico Cutrale's management team is based in Araraquara and totals around 60 employees.

ii) The Executive Board is comprised of the Finance Director, Agricultural Director, Industrial Director, Legal Director, Director of Import and Export, Director of Labour Relations, and the Fruit Procurement Director.

iii) The Executive Board has weekly meetings in Araraquara (although its members speak to each other on a daily basis).

iv) The Family Board meets periodically with the Executive Board. In the four years from January 2016 to December 2019 a total of 12 meetings took place, i.e. three per year. In the same period there were seven further meetings of the Family Board without the Executive Board i.e. fewer than two a year on average.

v) Meetings of the Family Board (Board of Directors) have been led by Cutrale Jnr since Cutrale Snr suffered health complications in November 2018.

vi) The Executive Board, supported by Sucocítrico Cutrale's broader management team in Brazil, is responsible for the overwhelming majority of the decision-making in respect of the company; and it would not be realistic or practical for the Family Board or its members (who meet relatively infrequently, are spread around the world and have extensive other business interests) to have the level of involvement in decision-making that the Claimants suggest.

55. Cutrale Snr states in his first witness statement that:

> "Throughout my life, Sucocítrico Cutrale has always been and remains a family business, created, built and run strategically, firstly by my father and later by the family, which today incorporates my wife, my two sons and my daughter. Since the beginning, the company was formally and effectively directed by my father, who established the broad corporate strategy; and by the directors and employees of each individual business, who managed the operational and commercial day to day decisions."

> "My responsibility since 2008 has been chairing meetings of the company's Family Board. The Family Board typically meets three or four times per year and consists of myself, my wife and my sons and daughter."

He provides further detail in this second witness statement. Here, as well as in other instances below, it is necessary to set out an extract at some length in order to convey the full flavour:

> "10. On a day to day basis, Sucocítrico Cutrale is run by a team of senior executives (the "Executive Board") and, below them, a senior management team. They are all full-time, highly qualified

and highly experienced senior professional managers with a lot of experience working for Sucocítrico Cutrale – they are experts in their respective areas of responsibility

11. The Executive Board is of course ultimately responsible to the Family Board, whose role it is to oversee the business in the interests of its shareholders.

12. As a member of the Family Board, I am one of five family members responsible for formal governance and oversight. Since becoming unwell in late 2018, I have been much less involved in such matters but before that, I would consult with some members of the Executive Board from time to time – particularly when I was in Brazil – and, together with the other Family Board members, set the broad strategy and direction of Sucocítrico Cutrale's business. Since late 2018, my role has been almost entirely confined to attending Family Board meetings a few times a year.

13. The Family Board usually formally meets about 3 or 4 times a year with the Executive Board and on fewer occasions without the Executive Board. At the meetings involving the Executive Board, we consult with the executives on key strategic issues and their issues and their views as to how we tackle them. When the executives do not join, one or more of the Family Board will usually have spoken to them beforehand. It is then for us as the Family Board to discuss any proposals – for example, setting budgets or business objectives for the coming quarter. There are also some matters that require formal board approval for legal reasons, and we deal with those matters and minute them at our meetings (for example, real estate transactions, delegations of authority and amendments to the Articles of Association).

14. I have attended Family Board meetings in person in Orlando, London, Sao Paulo and Araraquara over the past two years. We are, however, often not all in the same place at Family Board meetings and we often do them by phone or by video conference. Sometimes we don't all join a meeting, because of other commitments, and when that happens authority is sometimes delegated to particular members of the Family Board if necessary.

15. Outside of formal meetings with the executives, conversations also take place between members of the Family Board and some of the executives. These discussions are to make sure the Family Board is aware of what is happening on the ground so the Family Board can exercise proper governance and oversight. While members of the Family Board may express views in these discussions for the relevant executives to take into account, the general purpose is not for the Family Board to

participate in day-to-day decision making, which is the responsibility of the executives and their teams.

16. Before I fell ill in November 2018, I would speak to different people at different levels of frequency:

a. Before late 2018, I was the family member most focused on the finances, and I would speak to Mr José Luiz Cervato, the Finance Director (now retired), to talk about the financial performance of Sucocítrico Cutrale against the budget, every week or so; and

b. I would also sometimes speak to other members of the Executive Board, but usually less frequently and not with any predictable regularity. How often we had these discussions depended on their individual role and the issues I wanted to talk about, and sometimes simply whether we happened to cross paths with Sucocítrico Cutrale premises (although discussions that took place when we simply crossed paths tended to be more social that professional).

17. Since falling ill in November 2018, I have had only a handful of conversations with executives, and my sons José Luis Júnior and José Henrique have stepped into my shoes on this.

18. Whilst my sons will sometimes be updated on Sucocítrico Cutrale's day-to-day performance by way of discussion with the executives, increasingly, automated software tools are being used to make it easier for the management team in Brazil to keep the Family Board and Executive Board members updated on the company's performance. It is not the job of the Family Board to analyse all such information, but it is made available to enable the Family board to exercise oversight.

19. I turn now to address some remarks that Mr Evans makes … about matters he says I undertake from Burlingtown's offices in London:

a. I do not manage Sucocítrico Cutrale's bank accounts. This is the responsibility of Sucocítrico Cutrale's Finance Director and his team, who are based in Brazil; and

b. I do not negotiate contracts with buyers or producers, or conduct business with the other enterprises on behalf of Sucocítrico Cutrale. This is the responsibility of Sucocítrico Cutrale's Executive Directors and their teams, who are based in Brazil.

20. I see Mr Evans presumes that my daughter, Graziela Cutrale, carries out certain activities related to Sucocítrico Cutrale, including the handling of the companies current account and

> making business decisions relating to Sucocítrico Cutrale …, from Burlingtown's offices in London. This is not correct, Graziela has no role in the daily operations of Sucocítrico Cutrale. As I note above, the Finance Director and his team manage the company's banks accounts, from which over 60,000 payments are made by Sucocítrico Cutrale every month.
>
> 21. Sucocítrico Cutrale has over 20,000 employees and had an annual turnover of more than one billion US dollars in 2019. The suggestion that I single-handedly control a business of that size and am primarily responsible for making the key decisions is ludicrous – I don't know how one person could perform such a role, especially at 74 years of age with health issues.
>
> 22. My family also has many other businesses around the world, as was indicated in my previous statement; it simply would not be possible for the family (let alone one individual) single-handedly to make the key decisions necessary for the running of each one of those businesses. To run these businesses well and successfully, with more than 40,000 employees in 24 countries, we have to have high quality local executives and managers who are experts in their fields and have the power and responsibility to make the decisions. In the ordinary way, those executives and managers are subject to the board oversight and governance that exists in any normal business of this scale."

56. Cutrale Snr describes the basic roles and locations of his family members as follows:

> "30. In overseeing my portfolio of business interests, I rely heavily on my wife Rosana, and my sons and daughter, José Luis Cutrale Jnr, José Henrique and Graziela.
>
> 31. José Henrique started working at Sucocítrico Cutrale in Brazil in 1988. He remains a member of the Family Board. He is predominantly based in the United States of America, where he manages the family's business interests there (including Citrus Products Inc).
>
> 32. Graziela became a part of the family business in 2006, when she moved to the United Kingdom and started running the Burlingtown UK Limited distribution business where she is Managing Director. Like José Henrique, Graziela remains a member of the Family Board.
>
> 33. José Luis Júnior began working at Sucocítrico Cutrale in Brazil in 1987. He was initially Junior Assistant of the Executive Board. My wife Rosana, José Henrique, Graziela, José Luis Júnior and myself are now the members of the Sucocítrico Cutrale Family Board. José Luis Júnior is based in Switzerland.

> 34. My sons and my daughter were born in and spent their childhoods in Brazil.
>
> 35. I have residential properties that I use in Araraquara and Sao Paulo (Brazil), Orlando (United States) and London (United Kingdom). In a typical year I probably spend around 100 days in the United States, 100 days in Brazil and 90 days in the United Kingdom, with the balance of my time being spent in other countries. ..."

57. Cutrale Snr explains elsewhere that Cutrale Jnr lives in Geneva and José Henrique Cutrale lives in Orlando, Florida. Rosana and Graziela Cutrale live in London. The Defendants' evidence also explains that Graziela works from the Park Lane Office most business days, and Cutrale Snr manages his business interests, in part, from the Park Lane Address when in London – which he was for half of 2019, and where he had secretarial assistance.

58. Mr Cervato, the former Financial Director, states:

> "45. Operational decisions relating to Sucocítrico Cutrale are made by the company's management, which is comprised of a senior management team and various area managers. In total, Sucocítrico Cutrale's management team consists of approximately 60 employees.
>
> 46. As at the final date of my role as Finance Director of Sucocítrico Cutrale, being 31 May 2020, in addition to myself, Sucocítrico Cutrale's senior management team consisted of:
>
> (a) Valdir Guessi (Agricultural Director);
>
> (b) Otavio Gottardi Abujamra (Industrial Director);
>
> (c) Marcio Ramos Soares de Queiroz (Legal Director);
>
> (d) Fernando Cardoso (Director of Import and Export);
>
> (e) Carlos Otero de Oliveira (Director of Labour Relations); and
>
> (f) José Roberto Ambrosio (Fruit Procurement Director).
>
> 47. Examples of operational decisions under the remit of the senior management team include:
>
> (a) the acquisition of raw-materials, agricultural inputs and services;
>
> (b) executing agreements for buying oranges;
>
> (c) decisions about salary increases and promotions;

(d) the issuance of powers of attorney for representation of the company in Court or before the Government;

(e) the issuance of insurance agreements and loan agreements; and

(f) commercialising products in the domestic market and in the international market (insofar as Sucocítrico Cutrale sells directly to final customers, as described above) and executing the related agreements.

48. Such decisions are almost exclusively made in Araraquara, where … Sucocítrico Cutrale's management team is based.

49. Sometimes, prior to pursuing a particular course of action, I or other members of the Sucocítrico Cutrale management team contacted a member of the Cutrale family and we operated within the general business plan agreed with the Family Board (Board of Directors) ... However, the vast majority of operational decisions were made without first consulting a member of the family.

50. In my role, I typically spoke with a member of the Cutrale family around once per week.

51. Members of the senior management team spoke with each other several times over the course of a typical day, both in meetings and on an ad hoc basis as required in the course of our work.

Strategic and/or entrepreneurial decisions52. Strategic and/or entrepreneurial decisions relating to Sucocítrico Cutrale are referred to the company's boards. Sucocítrico Cutrale has two boards, namely:

(a) The Family Board (also referred to as the Board of Directors of Sucocítrico Cutrale) – which consists of José Luis Cutrale, Rosana Falconi Cutrale, José Luis Cutrale Júnior, José Henrique Cutrale and Graziela Cutrale.

(b) The Executive Board – which, until my departure on 31 May 2020, consisted of me and the members of the company's senior management team listed at paragraph 46 above.

…

57. Meetings involving both the Family Board (Board of Directors) and the Executive Board have taken place approximately three or four times each year for the past three years. Of the 12 meetings held since 2016, four have been held in Brazil, four have been held in London, and four have been

> formally in Orlando (with the location chosen in each case depending on where was most convenient for the family members attending). ...
>
> 58. Meetings of the Executive Board are held weekly and are generally not minuted. As noted at paragraph 51 above, prior to my departure on 31 May 2020, I and the other members of the company's senior management team (who make up the Executive Board) also spoke with each other several times over the course of a typical day, both in meetings and on an ad hoc basis.
>
> 59. Examples of meetings that take place including members of the Executive Board include:
>
> > (a) the regular planning meeting of the management teams responsible for agricultural, procurement and processing issues. This meeting is attended by Executive Directors of Sucocítrico Cutrale and relevant members of their staff. The purpose of this meeting is to organize the flow of oranges according to the available volumes, quality and requirements of customers. These meetings take place once a week almost exclusively at the Sucocítrico Cutrale headquarters in Araraquara.
> >
> > (b) daily operational meetings among Executive Directors and managers regarding subjects such as finance, supply and legal issues.
>
> 60. On the whole, and with the above in mind, it is my view that the overwhelming majority of the decision-making in relation to Sucocítrico Cutrale takes place in Brazil. In the case of strategic and/or entrepreneurial issues that are referred to the Family Board (Board of Directors), decision-making may take place outside Brazil if it is more convenient for the members of the Family Board (Board of Directors) to meet elsewhere. As noted in paragraph 57 a minority of Sucocítrico Cutrale's Family Board (Board of Directors) meetings take place in London."

59. In his second witness statement, Mr Cervato said on this topic:

> "14. The operational decisions taken by Sucocítrico Cutrale's Executive Board in Brazil enable the company to function. They cover a broad range of activities necessary for the company's operations, and a few specific examples are as follows:
>
> > a. purchasing and coordinating the raw materials and industrial equipment required to run the processing plants (see, for example, the redacted purchase contract and service agreement in relation to underwater maintenance signed by Otavio Gottardi Abujambra, at JC2-[29]-[63];

b. the running of the complex logistics network (see, for example, the redacted contract for the supply of gas, signed by Otávio Gottardi Abujambra, at JC2-[64]-[73]);

c. the ongoing assessment of the business's facility requirements and, where necessary, the purchase and leasing of property and development of real estate (see, for example, the redacted contract for the purchase of rural property, signed by Valdir Guessi, at JC2- [74]-[93]);

d. the construction and maintenance of buildings (see, for example, the redacted construction service agreement, signed by Otávio Gottardi Abujambra, at JC2-[94]-[124]);

e. coordinating collective labour protection for employees (see, for example, the redacted collective labour agreement, signed by Carlos Otero de Oliveira, at JC2-[125]-[151]);

f. ensuring the wellbeing of employees and coordination of human resources matters (see, for example, the redacted contract for health insurance, signed by Carlos Otero de Oliveira, at JC2-[152]-[215]);

g. carrying out necessary financing activities (see, for example, the redacted guaranteed account contract, signed by me, at JC2-[216]- [244]); and

h. coordinating the internal audit function and engaging with external auditors (see, for example, the redacted external audit proposal, signed by me, at JC2-[245]-[264]).

15. All research, preparation, negotiation and execution associated with such activities is likewise the responsibility of the company's management team in Brazil. I describe these as "operational" matters but these activities are obviously essential to the commercial success of the company and involve decisions necessary for the company to develop, adapt and prosper in a competitive market.

16. As I explained in Cervato-1, in the vast majority of cases, operational decisions are made by Sucocítrico Cutrale's management team without any prior consultation with the Family Board ... For completeness, I noted in Cervato-1 that members of the Sucocítrico Cutrale management team would "sometimes" consult the Family Board prior to making decisions ... Mr Evans, however, asserts that members of the Family Board "were consulted in relation to the administration of Sucocítrico on a frequent basis"... This overstates and mischaracterises the involvement of the Family Board in the day-to-day running of the company. ...

17. There are several reasons why the executive board in Brazil do not consult the Family Board members as frequently as Mr Evans implies. The main reason is that it would be impractical to involve the Family Board members in such a manner given Sucocítrico Cutrale's scale. I provided a detailed description of the scope of Sucocítrico Cutrale's business and the scale of its operations in Brazil in Cervato-1 ... Another important reason is that the company's management team in Brazil is often confronted with the need to take decisions quickly. It would be impossible to operate the business successfully and efficiently if it was necessary to involve the Family Board in all such decision making, which in any event would not make sense, having an experienced, qualified executive board with the necessary powers to run the business.

Strategic and/or entrepreneurial decisions

18. In Cervato-1, I observed that certain decisions, which I described as "strategic and/or entrepreneurial decisions", are referred to the company's boards – i.e. the Executive Board and the Family Board ... I then proceeded to provide a summary of their respective functions, and a description of when, where and how they meet ...

19. The Executive Board, I noted, meets weekly and has a broad range of responsibilities under Sucocítrico Cutrale's Articles of Association, including responsibility for financial, supply of raw materials, orange juice production, labour, hygiene, health and safety, tax, social security, regulatory and legal matters ... It also has broad residual powers vested in it as the body responsible for the "ordinary administration of the company".

20. The Family Board, I noted, meets less regularly – around three or four times a year with the Executive Board also present … and once or twice a year for each of the last three years without the Executive Board present … I believe that at meetings without the Executive Board present the Family Board largely deal with matters where the Articles of Association or Brazilian law require approval from the Family Board.

21. The Family Board has a broad range of responsibilities under Sucocítrico Cutrale's Articles of Association …. In contrast to the Executive Board, however, the functions attributed to the Family Board are generally matters of governance and oversight, with its primary roles being to:

> a. set overall parameters within which the Executive Board and management team in Brazil may run the business (including objectives, policies and governance rules); and

> b. sign off on matters that require the approval of the Family Board for statutory and legal reasons (such as the opening and closing of bank accounts, the granting of guarantees, sureties and endorsements, mergers and acquisitions, amendments to the company's Articles of Association and certain real estate transactions).
>
> 22. While certain members of the Family Board are updated regularly regarding the business (as discussed further below), the Family Board's main involvement from a decision-making perspective concerns certain key strategic decisions. Moreover, the Family Board's involvement with respect to these decisions would usually be reserved for the final stages of the decision-making process, when information has already been collected and the feasibility of the proposed decision has been considered by the relevant members of the Executive Board, at which point the decision would be discussed with members of the Family Board and presented at a formal board meeting.
>
> 23. If I were to summarise the relationship between the Executive Board and the Family Board, I would describe the Executive Board as the body that actually makes decisions, and the Family Board as an oversight body that sets the overall parameters within which such decisions are made and authorises them where specifically necessary. That is not to say that members of the Family Board do not interact with members of the Executive Board and express views in the context of those discussions (as explained further below), but I reject any suggestion that decision-making is controlled by the Family Board more generally or that the business is in fact run by the Family Board."

60. Mr Cervato also notes, in relation to budgeting and finance that:

> "In line with [the Articles of Association], a budget is approved at meetings of both the Family Board and Executive Board. During these meetings, the Family Board may challenge aspects of the Executive Board's proposals, but not to the extent that it could be said that the Family Board is the body that drives the process or makes the underlying budgeting decisions. On the contrary, when I was Finance Director, overseeing the allocation of capital within the business was my responsibility." (§ 25)

61. Mr Cervato indicates that members of the Family Board are nonetheless kept regularly informed on a range of matters, as required by the Articles, adding:

> "In terms of how this is achieved in practice, members of the Family Board will often be updated on Sucocítrico Cutrale's performance by means of telephone calls or face-to-face discussions (almost always in Brazil). Increasingly, however, automated software tools are being used to make it easier for the

management team in Brazil to provide information on the company's performance to the Family Board members." (§ 34)

62. Mr Abujamra, the Industrial Director, states:

"14. In brief. … my role as Industrial Director of Sucocítrico Cutrale involves supervising the entire industrial process for the manufacturing of orange juice and orange by-products. This role includes:

a. supervision of product quality at all stages of the production process;

b. production planning and control;

c. planning and control of transport logistics from the juice processing plants to the shipping ports of Santos and Guarujá;

d. control of the maintenance of existing facilities and equipment;

e. proposal and implementation of improvement and expansion projects relating to the industrial process;

f. responsibility for any unforeseen restoration projects (for example, where damage is caused to a processing plant); and

g. responsibility for budgeting with respect to those areas falling within the industrial process (for example, budgeting for the maintenance of the processing plants).

15. As Industrial Director, I report to Sucocítrico Cutrale's Board of Directors, which I will refer to as the "Family Board" for the purposes of this statement. My role involves both formal reporting to, and consultation with, the Family Board.

16. José Henrique Cutrale is my primary contact within the Family Board. Since my appointment as Industrial Director, José Henrique Cutrale has always been the member of the Family Board who deals with matters relating to the industrial operations of the business.

…

18. In my role, decisions normally made by me may include, by way of example:

a. negotiating the purchase of industrial equipment;

b. determining the quantity of oranges to be processed at a given processing plant;

> c. determining the extent to which rail or road logistics should be used for transporting our products;
>
> d. resolving unforeseen events – for example, there was recently a fire at one of our processing plants, which resulted in the need to determine the appropriate adjustments to our industrial process in the short term and to ensure that appropriate remedial steps were taken immediately, such as restoration of the damaged plant;
>
> e. determining which processing plants should open and when for the season; and
>
> f. determining the staffing required for the factories and terminals.
>
> …
>
> 21. … I can confirm that for the area of the business for which I am responsible, the vast majority of operational decisions are made without first consulting a member of the Cutrale family."

Mr Abujamra adds that:

> "24. For clarity, these discussions are not the forum for making operational decisions (such as those described at paragraph 18 above), which it is my job to make or oversee independently, although José Henrique Cutrale will naturally express his views from time to time and, given his role as a Family Board member, it is my responsibility to take those views into account. These discussions are also not the forum for obtaining approvals; the Family Board provide approvals at meetings convened for that purpose following consultation with members of the Executive Board and others."

63. Finally, the Agricultural Director, Mr Guessi, states:

> "13. … my role as Agricultural Director involves the management of Sucocítrico Cutrale's farms. This role includes:
>
> a. Managing Sucocítrico Cutrale's own farms and those leased to Sucocítrico Cutrale (the "Farms") including, for example, overseeing the planting and growing of the orange trees, overseeing the purchase of all materials (fertiliser, insecticides, etc.) and the correct application thereof, the hiring of staff at the Farms and overseeing the work of the managers of those farms;
>
> b. Budgeting and planning with respect to the harvest;

> c. Responsibility for the logistics of transporting the oranges from the Farms to Sucocítrico Cutrale's processing plants; and
>
> d. Monitoring Sucocítrico Cutrale's agricultural real estate portfolio to ensure that it meets the needs of the business, which involves identifying and taking opportunities to purchase and/or sell agricultural land; and
>
> e. Responsibility for obtaining certificates of sustainability from organizations such as Rainforest Alliance, SAI Platform, Global Gap, etc..

14. In my role, I report to Sucocítrico Cutrale's Board of Directors, which I refer to here as the "Family Board" for convenience. This role involves both formal reporting to, and consultation with, the Family Board, and periodic discussions with José Luis Cutrale Júnior, who is the member of the Family Board who deals with matters concerning agricultural operations

…

19. … in order to meet the needs of the business, a proportion of the oranges used to produce orange juice are sourced from Sucocítrico Cutrale's own farms. As such, sometimes it makes commercial sense to acquire new farmland, and sometimes it makes sense to sell farmland …

20. As regards the involvement of the Family Board in the acquisition and/or disposal of real estate, all such transactions must be approved by the majority of shareholders pursuant to Sucocítrico Cutrale's Articles of Association. However, while the Family Board is required to formally approve real estate transactions, it is my responsibility to identify, recommend and execute them. This typically involves engaging with real estate brokers, who present potential opportunities to me. I then consider these opportunities in the context of the business of Sucocítrico Cutrale and, if I believe they make commercial sense, I propose them to José Luis Cutrale Júnior (as the member of the Family Board who deals with agricultural matters) along with proposed parameters for negotiating the transaction.

21. If José Luis Cutrale Júnior is comfortable with my proposals, I then proceed with the negotiation directly with the vendor. If the negotiation is successful, the transaction would then be formally presented to the Family Board for approval.

…

> 25. … I can confirm that for the area of business for which I am responsible, the vast majority of operational decisions are made without first consulting a member of the Cutrale family."

64. No evidence has been provided from other members of the Family Board, or from the Fruit Procurement Director. However, Mr Cervato in his second witness statement says, as regards reporting lines:

> "37. It is important to note that different Executive Board members typically interact with different members of the Family Board depending on the area of the business for which they are responsible. For example, the directors Fernando Cardoso (the Director of Import and Export), Carlos Otero de Oliveira (Director of Labour Relations) and Otávio Gottardi Abujamra, (the Industrial Director) speak primarily with José Henrique Cutrale, as the Family Board member who tends to have contact with the areas with which they are most closely related. The directors José Roberto Ambrósio (the Fruit Procurement Director) and Valdir Guessi (the Agricultural Director), meanwhile, primarily speak with José Luis Cutrale Júnior as the Family Board member who tends to exercise oversight of the areas for which they are responsible. The director Márcio Ramos Soares de Queiroz (Legal Director) and I, however, would historically speak with José Luis Cutrale. The reason for which both Márcio Ramos Soares de Queiroz and I had more direct contact with José Luis Cutrale than the other directors is because, prior to his illness, José Luis Cutrale was the member of the Family Board that was most closely engaged with our areas of responsibility within the company. After José Luis Cutrale became ill, however, José Luis Cutrale Júnior and José Henrique Cutrale succeeded him in this regard."

(c) Location of Family Board decisions

65. The Defendants have provided evidence of the location of meetings of the Family Board and meetings involving both the Family Board and the Executive Board.

66. Mr Cervato states that, of the 12 joint meetings held since 2016, four have been held in Brazil, four have been held in London, and four have been formally held in Orlando (with the location chosen in each case depending on where was most convenient for the family members attending). He sets the information about in tabular form as follows:

Meetings Executive Board and Family Board

Date	**Place**
15-16/02/16	Araraquara
23-24/05/16	Londres

17-18/10/16	Orlando
20-21/02/17	Araraquara
16-17/05/17	Londres
12-13/10/17	Londres
07-08/03/18	Araraquara
10-11/05/18	São Paulo
29-31/08/18	Orlando
17-18/01/19	Londres
21-22/05/19	Orlando
15-16/10/19	Orlando

67. As regards meetings of the Family Board, Mr Cervato explains that because its members are regularly dispersed around the world, they may attend the meetings via telephone or video conference from various locations. The minutes are generally taken by Sucocítrico Cutrale's General Counsel, and the meetings are therefore recorded at the company's headquarters in Araraquara. He exhibits a table reflecting records filed at JUCESP. This states the place of all meetings from 2008 to 2015 inclusive as being Araraquara or, in one case, Guarujá. For meetings since 2016 it records the following:

Meetings of Family Board alone

Date	**Place**
15/02/2016	Araraquara
24/02/2016	Araraquara
05/12/2016	Araraquara
14/02/2017	Araraquara
13/10/2017	Unknown
29/11/2018	London
09/08/2019	London

As the Claimants note, since there was a meeting of the Family Board and Executive Board in London on 13-14 October 2017, it is likely that the Family Board meeting on 13 October 2017 noted above as having an 'unknown' location took place in London.

68. The location of those meetings which occurred in London was the Park Lane Office. That office is the registered address and place of business of a different company Burlingtown UK Limited ("***Burlingtown***"), which holds the lease of the Park Lane Office. Burlingtown's business is the import, processing, and wholesale distribution of orange juice. It had a turnover of approximately US$ 140 million in 2018 and has 22 salaried employees. It owns and operates a juice distribution terminal at the port in Bristol. Both Cutrale Snr and Rosana are directors of the company. All the employees based at the Park Lane Office are employees of Burlingtown, and none of their salaries are charged to Sucocítrico Cutrale. The evidence indicates that Sucocítrico Cutrale and Burlingtown do not share accounting, treasury, cash management, HR or other back office functions. At the time the claim forms were issued, Sucocítrico Cutrale and Burlingtown did not form part of the same corporate group. However, after the present claims were issued, Sucocítrico Cutrale became a subsidiary of Burlingtown (and ultimately of Burlingtown International BV, of which Cutrale Snr and Rosana are also directors). Five other companies have their registered offices at the Park Lane Office, but none of these is Sucocítrico Cutrale.

(3) Discussion

69. The Claimants' essential contention is that:

i) the place of Sucocítrico Cutrale's *"central administration"* is the place where Cutrale Snr, the Partners and the Family Board take their decisions, and

ii) that place is London, where Cutrale Snr lives and where half of the ten Family Board meetings in the two years prior to when the claims were issued have been held.

70. The Claimants say Sucocítrico Cutrale is a patriarchal business with Cutrale Snr at its heart, and that entrepreneurial control of this privately owned family business is by the controlling mind Cutrale Snr, leading his family. That is constitutionally reflected in Sucocítrico Cutrale's "*relevant organs*": both the Family Board and the Partners comprised the Cutrale family at all material times. Cutrale Snr had a 99% shareholding and corollary 99% vote on the Family Board until well into 2019. Cutrale Snr leading his family, qua those relevant organs, makes the strategic decisions regarding Sucocítrico Cutrale, as one would expect given that his and their business and money are at stake.

71. The Claimants also highlight what they describe as the highly centralised arrangements reflected in (a) the reporting requirements imposed on the Fruit Procurement Director, referred to above, and (b) the evidence that the Cutrale family's businesses operate a bespoke "*enterprise resource planning system*" developed by Sucocitrico. Mr Warner of Burlingtown states that *"[a]mongst other things, sharing the ERP system in this way facilitates the traceability of the orange juice supplied by the Cutrale family's distribution businesses from source to sale, which is in customers' best interests"*. The Claimants say these factors indicate the family's control, and reflect the fact that none

of the key decision-makers (the family) are resident in Sucocítrico Cutrale's place of business, Brazil.

72. The Claimants submit that the types of decisions made by the Executive Board and its members fall short of the entrepreneurial decisions which, under the case law discussed above, comprise a company's "*central administration*". They highlight the references in Articles 8 and 9 to the Family Board's role in setting strategy, policies, regulations, goals, guidelines and budgets; and in electing the members of the Executive Board; and the high level powers conferred on the Partners under Articles 7 and 14. The Claimants make the point that many of the Executive Board responsibilities set out in Article 10.6 concern formal, internal and compliance matters falling short of entrepreneurial management, with nearly one third concerning compliance with 'formalities', and others requiring the Executive Board to follow guidelines set by, or seek approval from, the Family Board.

73. Similarly, the Claimants cite the references in the Defendants' witness evidence to the family running the company strategically, as distinct from the operational and day to day decisions taken by the Executive Board and its officers. They submit that the witness statements provided by the officers who have given evidence indicate that the ultimate decisions on major matters rest with the Family Board. The Claimants point out that, unlike a typical European company, Sucocítrico Cutrale (a) has no clear separation between ownership and governance or management and (b) has no Chief Executive Officer or Managing Director: instead, Cutrale Snr is the *de facto* chief executive. It is not possible, they say, to identify any other person with power to take autonomous decisions in relation to the company as a whole.

74. The Claimants also suggest that the restructuring in 2019, by which Sucocítrico Cutrale became a Burlingtown subsidiary, reflected the long-standing centrality of London to the Cutrale global operation. The shares in Sucocítrico Cutrale were originally owned directly by members of the family. In April 2019 they were redistributed between family members and then (as to 99%) transferred to Burlington International BV, with a further transfer to Burlingtown UK Limited occurring in December 2019. At the same time, amendments to the Articles of Association (the 17th Amendment) had the effect that executive officers' duties were constrained by the Deeds of Appointment referred to later, underlying (the Claimants say) the centrality of the control exercised from London by the Family Board.

75. Persuasively as these submissions were advanced, I am unable to accept them.

76. To begin with, I consider that they take too narrow a view of the concept of "*central administration*", as elucidated in *Young* and the decisions which it cites. As a starting point, I note that the Court of Appeal in *Young* § 41 cited decisions of courts in Germany drawing a distinction between essential business decisions, on the one hand, and mere secondary management tasks such as accounting and settling of tax matters on the other. The Claimants suggest that, over and above such secondary matters, day to day decisions in general are unlikely to form part of central administration, otherwise in companies carrying on business in different countries it may be impossible to identify the place of central administration. They suggest the real focus must be on identifying where strategic and other high-level decisions are taken.

77. I would accept that there may very well be day to day management activities that go beyond secondary matters of the kind mentioned above, but which do not rise to the level of essential business decisions (or 'entrepreneurial management'). However, *Young*, and the decisions it cites, do not in my view confine the latter concept to questions of high level strategy. The "*ordinary management*" of Sucocítrico Cutrale, conferred by Articles 8(e) and 10.2 on the Executive Board and its officers, is capable of forming at least part of the company's "*central administration*". The activities of the Executive Board referred to in Articles 10.2 and 10.6, the Deeds of Appointment and the evidence referred to in §§ 58, 59, 62 and 63 above taken as whole, involving managing the company on a day to day, week to week and month to month basis (by contrast with the very infrequent meetings of the Family Board), do in my view include the making of decisions essential to the company's business, i.e. entrepreneurial management. I do not accept the Claimants' characterisation of the roles played by the Executive Board and its individual officers as confined to ordinary day to day decisions with a large focus on purely administrative and personnel matters. Notwithstanding the evidence of Sucocítrico Cutrale's electronic reporting systems, it is clear from the evidence of the company's officers that there was no day to day reporting to the Family Board for decision-making purposes, still less to Cutrale Snr (or Rosana or Graziela) in London. One would expect any company of the size of Sucocítrico Cutrale to have a sophisticated reporting system, and the existence of an information system which Cutrale Snr and other Family Board members can access does not mean that they were taking all or most of the company's essential business decisions.

78. The functions of the Family Board (and probably the Partners as such) also form part of the central administration of Sucocítrico Cutrale. In other words, both the Partners/Family Board and the Executive Board are engaged in the making of essential business decisions/entrepreneurial management.

79. The question then becomes whether it is possible to identify a location where these activities are carried on.

80. There is no doubt on the evidence that the Executive Board manages Sucocítrico Cutrale in and from Araraquara, Brazil.

81. The situation in relation to the Family Board and Partners is more complex. The evidence and pattern of meeting locations referred to in §§ 66-67 above indicates that the Family Board in reality meets on an itinerant basis, in no fixed or usual location. In 2018, for example, the Family Board is stated to have met (with or without the Executive Board) twice in Brazil, once in London and once in Florida. In 2019, it is stated to have met twice in London and twice in Florida. The Claimants stress that, as noted earlier, the locations listed reflect where the meetings were minuted, whereas the meetings may actually have occurred remotely with participants joining from various locations. However, to my mind that merely serves to underline the difficulty in identifying any particular location at which the Family Board can be said to operate. The emphasis placed on predictability in recital 15 to Brussels Recast *("The rules of jurisdiction should be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile")* suggests that jurisdiction should not readily be found to exist based on where particular board members happen to be located at various times. The comments of Advocate General Darmon in Case 81/87 *R v HM Treasury ex p. Daily Mail and General Trust PLC*, quoted in § 32 above, are also apposite here.

82. Further, it does not appear to me critical that three members of the Family Board live in London, even on the footing that (as the Claimants note) the majority of the voting power is held by individuals resident in London. If the focus is where the Family Board meets, as such, then the position is as indicated above. If one instead focusses on the Family Board's managerial activities outside meetings, then the evidence summarised in §§ 62 (quoted paragraph 16), 63 (quoted paragraph 14) and 64 above indicates that, at least by the time the claim was issued, the key reporting lines by Executive Board officers were not to Cutrale Snr, Rosana or Graziela but, rather, to Cutrale Jnr (based in Switzerland) or Jose Henriques (based in Florida). I do not accept the Claimants' suggestion that Cutrale Jnr and Jose Henriques are in turn bound to report and refer to London (particularly to Cutrale Snr) for decisions. There is no evidence to that effect, and it seems to me implausible: the size and complexity of the business make it unlikely that all or most important decisions were at the relevant time ultimately made by Cutrale Snr, and much more likely that both other family members and the Executive Board and its officers themselves exercise significant decision-making powers.

83. In these circumstances, I do not consider it accurate to suggest that the place where the Family Board takes part in the central administration of Sucocitrico Cutrale is London. *A fortiori*, when one considers that both the Family Board/Partners and the Executive Board carry out the central administration of the company, London cannot realistically be said to be the place where that occurs.

84. The Claimants make the point that the law, as summarised in *Young*, does not permit a conclusion that there is no place of central administration and control, adding that they need only show the better of the argument. However, on the facts of the present case, if there is a single place of central administration for Sucocitrico Cutrale it is in my judgment Araraquara, Brazil for the reasons given above.

85. I have borne in mind the guidance given in *Kaefer* about how such matters should be resolved where relatively limited documentation is available, and whether there would be any scope for drawing inferences against Sucocitrico Cutrale in this regard. The court there noted that jurisdiction challenges are invariably interim and will be characterised by gaps in the evidence, and judges should exercise pragmatism including in the ways identified in *Kaefer* § 78. In the present case, although the court has not been provided with many minutes of meetings of the relevant corporate organs, the combination of the provisions of the Articles, such minutes as have been provided, the other documents which have been exhibited as part of the evidence (e.g. those exhibited to Sr Cervato's second witness statement) do provide a broad flavour of the operations, and in my view are consistent with the evidence set out in the Defendants' witness statements. That evidence also seems to me consistent with the inherent probabilities, given the nature and scale of the company's operations as indicated below.

86. Viewing the matter more broadly, I also agree with the Defendants that it is counterintuitive to suggest that Cutrale Snr, in London, has the has primary responsibility for making the key decisions in a business with 20,000 employees, an annual turnover of over US§ 1 billion (comprising, I was told, some 25% of the world's orange juice production), a 60-person management team in the headquarters in Araraquara, overseeing operations including dealings with thousands of suppliers and very substantial processing plant, and an Executive Board meeting weekly: particularly following the reduction in Cutrale Snr's role after his health problems from November 2018. Moreover, the fact that essential business decisions must have continued to take

place during the five-month period when Cutrale Snr was wholly off work for health reasons tends to confirm the view that he did not have the personal conduct of its "*central administration*". It is true that Cutrale Snr retained the chairmanship of the Family Board, and attended board meetings, during 2019, as well as the restructuring meetings in April 2019. However, viewed in the context of the governance and management of Sucocitrico Cutrale as a whole, I do not consider that these limited matters indicate that the company's central administration was in London.

87. In relation to the restructuring specifically, I note that this essentially concerned the ownership structure of the group rather than the management of Sucocitrico's business, and Mr Cervato's evidence is that it was a matter of practical convenience that Cutrale Snr should represent Sucocítrico Cutrale at these meetings since he had to attend in any event as a shareholder in his own right; and the Defendants' Part 18 response indicates that the meetings were formal with no commercial discussion taking place. I do not agree with the Claimants' characterisation of the 2019 restructuring as reflecting the high level of control from London over Sucocítrico Cutrale's business. The restructuring took place in April 2019, with Cutrale Snr only recently out of hospital, taking a reduced role, and reduced his stake in the company to 35%, albeit it appears that it took effect only in December 2019 when stamped by JUCESP. I also do not consider the amendments to the Articles of Association made in April 2019 are material in the present context. Substantially similar clauses, including in relation to executive officers' deeds of appointment (e.g. §§ 8.2 and 10.4) had already been present in the Articles of Association since at least the 15th amendment in 2013. Moreover, as the Defendants point out, the delineation of directors' responsibilities is explicable simply on the basis that Brazilian law requires it: Article 143 of the Brazilian Corporations Law (Law 6404/1976) requires bylaws to establish, among other things, "*the assignments and powers of each director"*.

88. For all these reasons, I conclude that the Claimants do not have the better of the argument that Sucocítrico Cutrale is domiciled in England & Wales.

(D) SUCOCÍTRICO CUTRALE: SERVICE

89. The Claimants alternatively submit that Sucocítrico Cutrale has been validly served in London, even if not domiciled there, and the court is entitled to assume jurisdiction over it on that basis.

(1) Legal framework

90. A company, such as Sucocítrico Cutrale, which is not incorporated or registered in England, may be served pursuant to CPR r. 6.3(c)/6.9(2) (subpoint 7) at:

> "Any place within the jurisdiction where the corporation carries on its activities; or any place of business of the company within the jurisdiction."

91. The relevant time is the date of purported service of the claim forms (e.g. *Chopra v Bank of Singapore Ltd* [2015] EWHC 1549 (Ch) at §101). The Claimants bear the burden of proof (see, e.g., *SSL International plc v TTK LIG Ltd* [2011] EWCA Civ 1170, [2012] 1 WLR 1842 (CA) at §68).

92. In *Actiesselskabet Dampsksib "Hercules" v Grand Trunk Pacific Railway Company* [1912] 1 KB 222, the Court of Appeal held that a Canadian company which raised loan capital through an office in England, in order to fund its activities in Canada, was carrying on business here:

> "Undoubtedly the defendants have officers here who act on their behalf at a fixed residence and who circulate advertisements of the defendants in their name; but it is contended that we ought to hold that they are not carrying on the business of the company, because the business carried on here is not that of running or managing the railway, but of raising money by means of the issue of bonds and debentures, which money is to be used by the company in Canada. In my judgment it is impossible to draw any such distinction. I think that in doing what it did the London board was carrying on the business of the company, and that it makes no difference that they pay no rent for the office in which they carry it on. The office is the office of the company; the business is advertised in every way as being carried on at the office. (p227 *per* Vaughan Williams LJ)

> "We have only to see whether the corporation is "here"; if it is, it can be served. There are authorities as to the circumstances in which a foreign corporation can and cannot be said to be "here"; the best test is to ascertain whether the business is carried on here and at a defined place. In the present case the company has a paramount, and also a subsidiary, object: its paramount object is to make and run a railway in Canada, to do which a great many things must first happen: it has a subsidiary object, namely, the raising of money to carry out its paramount object. Is this company so carrying on here that subsidiary object as that the company is carrying on business here? I am of opinion that it is. This company makes contracts in this country for the purpose of raising loan capital; it is here by its agents who make such contracts on its behalf and at a fixed place. The cardinal factors are that the company does acts within the jurisdiction which are part of its business as a company, and does them at a fixed place within the jurisdiction. The raising of this loan capital is part of the company's business, and it is done here by a London committee constituted of the directors resident in England. They are the company's agents in this country for that purpose. The result is that the defendant company is resident here and is carrying on business here so as to be capable of being served with a writ." (*ibid., per* Buckley LJ)

93. In *Adams v Cape Industries* [1990] Ch 433 the Court of Appeal stated the relevant principles as follows:

> "(1) The English courts will be likely to treat a trading corporation incorporated under the law of one country ("an overseas corporation") as present within the jurisdiction of the courts of another country only if either

(i) it has established and maintained at its own expense (whether as owner or lessee) a fixed place of business of its own in the other country and for more than a minimal period of time has carried on its own business at or from such premises by its servants or agents (a "branch office" case), or

(ii) a representative of the overseas corporation has for more than a minimal period of time been carrying on the overseas corporation's business in the other country at or from some fixed place of business.

(2) In either of these two cases presence can only be established if it can fairly be said that the overseas corporation's business (whether or not together with the representative's own business) has been transacted at or from the fixed place of business. In the first case, this condition is likely to present few problems. In the second, the question whether the representative has been carrying on the overseas corporation's business or has been doing no more than carry on his own business will necessitate an investigation of the functions which he has been performing and all aspects of the relationship between him and the overseas corporation.

(3) In particular, but without prejudice to the generality of the foregoing, the following questions are likely to be relevant on such investigation:

(a) whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling him to act on behalf of the overseas corporation;

(b) whether the overseas corporation has directly reimbursed him for (i) the cost of his accommodation at the fixed place of business; (ii) the cost of his staff;

(c) what other contributions, if any, the overseas corporation makes to the financing of the business carried on by the representative;

(d) whether the representative is remunerated by reference to transactions, e.g. by commission, or by fixed regular payments or in some other way;

(e) what degree of control the overseas corporation exercises over the running of the business conducted by the representative;

(f) whether the representative reserves (i) part of his accommodation, (ii) part of his staff for conducting business related to the overseas corporation;

> (g) whether the representative displays the overseas corporation's name at his premises or on his stationery, and if so, whether he does so in such a way as to indicate that he is a representative of the overseas corporation;
>
> (h) what business, if any, the representative transacts as principal exclusively on his own behalf;
>
> (i) whether the representative makes contracts with customers or other third parties in the name of the overseas corporation, or otherwise in such manner as to bind it;
>
> (j) if so, whether the representative requires specific authority in advance before binding the overseas corporation to contractual obligations.
>
> This list of questions is not exhaustive, and the answer to none of them is necessarily conclusive. …Every case of this character is likely to involve "*a nice examination of all the facts, and inferences must be drawn from a number of facts adjusted together and contrasted*:" *La Bourgogne* [1899] P. 1, 18, per Collins L.J.
>
> Nevertheless, we agree with the general principle stated thus by Pearson J. in *F. & K. Jabbour v. Custodian of Israeli Absentee Property* [1954] 1 W.L.R. 139, 146:
>
> > "A corporation resides in a country if it carries on business there at a fixed place of business, and, in the case of an agency, the principal test to be applied in determining whether the corporation is carrying on business at the agency is to ascertain whether the agent has authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval . . ."
>
> On the authorities, the presence or absence of such authority is clearly regarded as being of great importance one way or the other. A fortiori the fact that a representative, whether with or without prior approval, never makes contracts in the name of the overseas corporation or otherwise in such manner as to bind it must be a powerful factor pointing against the presence of the overseas corporation."
>
> (pp530-531, subparagraph breaks interpolated)

94. It has been held that the court may have regard to the criteria identified in *Adams* when applying CPR r.6.9(2) (see *Chopra* at §§96, 99; *Noble Caledonia Ltd v Air Niugini Ltd* [2017] EWHC 1095 (QB) at §§32-35, 44, 49-52; White Book note 6.9.3).

95. The Court of Appeal in *SSL International*¸ after citing *Adams*, said:

> "I do not consider that the holding of occasional board meetings in this country can satisfy this requirement. … The fact that approvals were given here for expenditure to be incurred by TTK in India is not the carrying on business in this country. I add that, if it were, most holding companies would be held to be carrying on business in every country in which they had established a subsidiary." (§ 66, *per* Stanley Burnton LJ, with whom the other members of the court agreed)

96. In *Teekay Tankers Ltd v STX Offshore & Shipping Co*. [2015] Bus. L.R. 731, [2014] EWHC 3612 (Comm) §51 Hamblen J concluded that an overseas company, STX, which had been registered with Companies House as "*having established a UK establishment in the United Kingdom*" pursuant to s. 1046 of the Companies Act 2006 had thereby established a place of business here for CPR 6.9(2) purposes, even if no business activities had yet been carried out (§ 48). Hamblen J also made the following alternative findings:

> "50. If, contrary to my finding, registering and opening a UK establishment is insufficient then the next question is whether STX has a place of business in the UK as a matter of fact having regard to all the evidence.
>
> 51. The authorities show that "*any place of business*" is to be construed broadly. It extends to a place where the overseas company conducts business activities, even if incidental. For example, in *South Sea India Shipping Corp Ltd v Export-Import Bank of Korea* [1985] 1 WLR 585 a Korean bank established an office in London for the purposes of gathering information on the United Kingdom, providing information on the activities of the bank for the purpose of promoting economic relations, and conducting other liaison activities. The Court of Appeal concluded that the company had established a place of business in the United Kingdom, even though it did not conclude any banking transactions in London. On the other hand, "*an address with which the company has no more than a transient or irregular connection*" will not be sufficient. See the *Lakah Group* case at [41] per Gray J as endorsed by the Court of Appeal at [8] (of the subsequent judgment).
>
> …
>
> 53. In my judgment the evidence as a whole does establish that STX was carrying out business activity and had a place of business at the material time. In particular: (1) In its OS IN01 form STX declared that it had opened a UK establishment as from 12 February 2014 which was conducting the business of a "liaising office". This is at least prima facie evidence that STX did carry out such business activities from its London address. Mr Kang describes this as a "notional date", but it is not. It is a formal statement of fact made as a matter of public record.

> (2) Mr Kang states that he has authority on behalf of STX "to negotiate the leasing of the Office premises, manage the expenses of the Office, and otherwise deal with its accounts and enter into contracts for accommodation and cars".
>
> (3) Mr Kang also states that since October 2013 the only STX entity which wished to have and was prepared to pay for an office in London was STX.
>
> (4) STX held itself out, on its website, as having a "London Office" at Saint Magnus House. Mr Kang, his colleague Mr Bae (Deputy President and Europe Offshore & Shipbuilding Marketing Chief) and a secretary work at that office.
>
> (5) Mr Kang accepts that STX's London address is identified on the website "to facilitate contact for anyone wishing to get in touch with these companies". STX has established an office, with which it has more than a transient connection, at which people wishing to do business with STX are able to make contact. Providing a local point of contact is itself a business activity for a company which seeks to win contracts internationally.
>
> (6) STX's London Office has entered into contractual arrangements relating to its activities in London, including opening a bank account and agreeing to take over the lease of its office. These are business activities.
>
> (7) STX's case relies on form rather than substance. It acknowledges that STX's London address will be a place of business, but contends that this will not occur until the lease is fully signed off and visas have been transferred. This timing issue arises because the lease and visas were held by STX Corporation, a holding company. These were in the process of being transferred over to STX at the material time, but it was already the fact that STX was the only STX company interested in operating the London office.
>
> 54. For all of those reasons, I find, if necessary, that as a matter of fact the London address is a "place of business", at which STX was validly served pursuant to s.1139(2)(b) of the Companies Act 2006 and/or CPR r. 6.9(2) para 7."

97. As to the 'more than a minimal period of time' criterion, in the earlier case *Dunlop Pneumatic Tyre Company, Limited v Actien-Gesellschaft Fur Motor Und Motorfahrzeugbau Vorm. Cudell & Co.* [1902] 1 KB 342 (CA), the exhibition of tyres on a temporary stand for a mere nine days was a sufficient period. Collins MR said:

> "… It was argued by the counsel for the defendants that, in determining the question of residence or no residence, length of time is an essential element. I agree that it is an element to be

> considered; but it was, as I understood, admitted that, if a foreign corporation were to announce their intention of carrying on their own business, and were to carry it on, at a certain place in this country for a limited period, the mere fact that they so carried it on only for a limited period would not prevent the company from being considered as resident within the jurisdiction for that period. The period of nine days is not necessarily a negligible quantity; it may in many cases be a very substantial period. In the case of an exhibition, such as the show in the present case, which is largely resorted to by manufacturers for the purpose of exhibiting a particular class of goods, and by customers desirous of purchasing such goods, as much business in the kind of goods exhibited might probably be done in nine days as in as many months in an ordinary town. …" (pp.347-348)

(2) Facts

98. The Claimants say the evidence shows Sucocítrico Cutrale's business has been transacted at the Park Lane Address for more than a minimal period up to and including the date of service; it is a place where Sucocítrico Cutrale carries on its activities, by representatives (Cutrale Snr and Graziela) and indeed Sucocítrico Cutrale's own organs (*a fortiori* other 'carrying on activity' cases)

99. The Claimants submit that numerous meetings were held at the Park Lane Office at which business was carried on, including the entering into contracts with third parties (cf *Actiesselskabet Dampsksib "Hercules"* referred to above). They make the following points.

i) At least twelve meetings took place at the Park Lane Office in the approximately two years prior to the date of service:

a) five Family Board meetings, as noted earlier;

b) four meetings of the Partners, on 2 April, 20 April, 1 July and 1 October 2019: the first and second regarding amendments to Sucocítrico Cutrale's Articles, and the third and fourth involving decisions concerning shareholder payments; and

c) three meetings on 1, 2 and 20 April 2019 in relation to Sucocítrico Cutrale subsidiaries, which Sucocítrico Cutrale attended as a shareholder, with Cutrale Snr attending on behalf of Sucocítrico Cutrale.

ii) In the April 2019 shareholder meetings, Cutrale Snr was authorised to and did in fact sign the amendments to the Articles of Association of two subsidiaries (Cutrale Empreendimentos and Santalice), on Sucocítrico Cutrale's behalf. The amendments involved the acquisition of shares by Sucocítrico Cutrale and otherwise significantly affected Sucocítrico Cutrale's interests in the subsidiaries. They were a binding contract between Sucocítrico Cutrale and the other shareholders. The meetings were many years in the making.

iii) Family Board meetings held at the Park Lane Address involved decisions about business relating to third parties. For example, the sale of Sucocítrico Cutrale properties, a matter forming part of the purpose of Sucocítrico Cutrale pursuant to Article 3 of its Articles, was decided upon and organised at the 9 August 2019 meeting of the Family Board. The Claimants submit that where meetings relate to company organs, the situation is *a fortiori* a case in which activity is carried on by an agent, as such meetings unambiguously show Sucocítrico Cutrale carrying on its activities.

100. Further and in any event, the Claimants submit that Cutrale Snr and Graziela were Sucocítrico Cutrale representatives who made contracts in the name of the company with third parties and had authority to carry out business without reference to the company. This followed from their Powers of Attorney which made them representatives of the company pursuant to Article 9.1 of the Articles.

i) Following the transfer of ownership on 18 December 2019 (more than one month before date of service), Cutrale Snr was granted Power of Attorney to represent Sucocítrico Cutrale before its subsidiaries and before other companies. The Claimants say this reflected a continuation of Cutrale Snr's ability in fact to bind Sucocítrico Cutrale with subsidiaries and other companies; as occurred when he was authorised to represent Sucocítrico Cutrale at the April 2019 meetings with subsidiaries.

ii) Cutrale Snr and Graziela both had long-standing Powers of Attorney to operate Sucocítrico Cutrale's bank accounts (an activity that involves dealings with and entering into contracts with third parties, without need for prior specific authority). Cutrale Snr was granted Power of Attorney to do so by the Board of Directors on 24 August 2010. Graziela was granted similar powers by the Board of Directors on 4 December 2015, 5 December 2016 and 13 October 2017.

iii) The Claimants say the fact Cutrale Snr and Graziela are also servants of Sucocítrico Cutrale makes the situation *a fortiori* other 'carrying on activity' cases: the business being conducted was unambiguously Sucocítrico Cutrale's.

101. The Claimants submit that this business was carried on from the Park Lane Office, being a fixed place of business. The meetings referred to above clearly took place there. As regards activities by Cutrale Snr and Graziela, including pursuant to powers of attorney, the Claimants submit that:

i) Cutrale Snr played an active role in the management of Sucocítrico Cutrale, a flagship company in his source to sale orange juice empire. Cutrale Snr is domiciled in London, and Burlingtown's Chief Financial Officer, Mr Warner, states:

> "…. when Mr Cutrale is in London, he manages his business interests, in part, from the Park Lane Address. Cutrale suffered health complications in 2018 and now works restricted hours, so I see him less than I used to. When Cutrale is at the Park Lane Address, I predominantly speak to him about Burlingtown, including Chiquita, general economic matters and sometimes his personal affairs, as this is all I have sight of …"

The Claimants note that Cutrale Snr has the benefit of secretarial assistance whilst at the Park Lane Office, and suggest that as Cutrale Snr is domiciled in London (as to which I conclude below the Claimants have the better of the argument) with a family home nearby, it is inconceivable he would not have managed Sucocítrico Cutrale's business at the Park Lane Address, including pursuant to the Powers of Attorney he held continuously since 24 August 2010. This applies *a fortiori* to Graziela as she worked at the Park Lane Address most working days.

ii) The Claimants also invite the inference that Cutrale Snr transacted business on behalf of Sucocítrico Cutrale with related (but still distinct third party) companies at the Park Lane Office. In addition to the business transacted with subsidiaries in April 2019 referred to above, the Park Lane Office was the obvious location for Sucocítrico Cutrale's activities in relation to Burlingtown UK Ltd. The ERP System there contained all the relevant information needed for such engagements. Further, the Park Lane Office is Burlingtown UK Ltd's headquarters and the obvious place to meet to transact. Cutrale Snr's and Graziela's work patterns are also consistent with this.

102. As to the 'more than a minimal period of time' requirement, the Claimants submit that this is satisfied having regard to:

i) the April 2019 meetings alone (numerous meetings spread over a month, shortly prior to the date of service), and

ii) the full scope of the evidence, including the twelve meetings at the Park Lane Office in the approximately two years prior to the date of service, the length of time Cutrale Snr and Graziela held Powers of Attorney, the likelihood of them conducting business pursuant to those powers, and their patterns of work at the Park Lane Office whilst domiciled in England with homes nearby.

103. The Defendants' evidence includes the following points in relation to the Park Lane Office, relevant to factors set out in *Adams*:

i) It is not a fixed place of business established and maintained by Sucocítrico Cutrale at its own expense: see § 68 above.

ii) The office is leased by Burlingtown and used for Burlingtown's business.

iii) Sucocítrico Cutrale does not pay for the lease of the Park Lane Office or the cost of the staff.

iv) Sucocítrico Cutrale does not make any other contributions to the financing of the business at the Park Lane Office.

v) There are no persons based at the Park Lane Office who are remunerated by Sucocítrico Cutrale, by reference to transactions, by commission, by fixed payments, or at all.

vi) Sucocítrico Cutrale exercises no control over Burlingtown. Prior to the corporate restructuring in December 2019 they were not part of the same

corporate structure. After December 2019, it is Sucocítrico Cutrale which became the subsidiary company.

vii) No space at the Park Lane Office is "reserved" for Sucocítrico Cutrale, and none of the permanent staff employed at the Park Lane Office conducts business for Sucocítrico Cutrale.

viii) The signage at the Park Lane Office is that of Burlingtown and Chiquita Holdings Ltd and staff email addresses, business cards, and stationary use Burlingtown branding. As an exception, for practical reasons, the Head of Sustainability and CSR has an @cutrale.com email address because his job is to liaise with customers of Burlingtown in relation to the whole juice supply and distribution process, and with the family's own businesses in Continental Europe and North America. He does not work for or contract on behalf of Sucocítrico Cutrale. The Chief Information Officer has (along with a Burlingtown email address) an @cutralegroup.com email address, but that suffix relates to the group as a whole rather than specifically to Sucocítrico Cutrale.

ix) The Park Lane Office is used by Burlingtown to operate its own business. None of the Burlingtown employees is involved in negotiating or authorised to enter into contracts on behalf of Sucocítrico Cutrale. Cutrale Snr does not negotiate contracts with buyers or producers or conduct business with other enterprises on behalf of Sucocítrico Cutrale.

x) In April 2019, Cutrale Snr signed certain transactional documents on behalf of Sucocítrico Cutrale necessary to effect a one-off corporate restructuring: this was exceptional, and took place in London for convenience because Cutrale Snr was still in the early phases of recovery following his urgent hospitalisation in London.

(3) Discussion

104. I do not consider the Claimants to have the better of the argument that Sucocítrico Cutrale has a place of business falling within CPR 6.9(2).

105. First, the Park Lane Office is not a place which Sucocítrico Cutrale has established and maintained at its own expense as a fixed place of business of its own. Sucocítrico Cutrale has neither established nor maintained the Park Lane Office at all, still less as a place of business of its own. The office has been established and maintained by Burlingtown, at its own expense, as a fixed place of business for Burlingtown. The facts that the office also serves as the head office for another family company (Chiquita Holdings Limited) and the registered office of four further companies, and that members of the Cutrale occasionally use the office for purposes connected with Sucocítrico Cutrale, do not convert it into an office established or maintained by Sucocitrico.

106. Although in the present case the Claimants rely on activities of Sucocítrico Cutrale's own organs and officers, as opposed to those of mere representatives, the fact that none or virtually none of the ten indicia listed in *Adams* (§§ (3)(a) to (j) of the summary of principles) applies is nonetheless a strong pointer against the Park Lane Office being a

place of business of Sucocítrico Cutrale. Although those indicia are pre CPR and largely directed at instances of representative or agency offices, they are nonetheless of some assistance in assessing the contention that the Park Lane Office was a Sucocítrico Cutrale place of business. The Claimants note that Burlingtown received financing from Sucocítrico Cutrale through share dividends and interest payments; and, further, that since Sucocítrico Cutrale permitted Burlingtown to use the ERP system at its office in London, Sucocítrico Cutrale may also have shared other resources with Burlingtown. Those points do not in my view change the fundamental nature of the Park Lane Office.

107. Secondly, I do not consider that representatives or organs of Sucocítrico Cutrale, whether the Family Board or individual members of it (including Cutrale Snr), have been carrying on Sucocítrico Cutrale's business at the Park Lane Office as a fixed place of business, or transacting Sucocítrico Cutrale's business at or from the Park Lane Office.

108. Insofar as the Claimants rely on the few Family Board and Partners' meetings which occurred there during the years leading up to when the claims were issued, these amount to no more than occasional board meetings, particularly when set in the context of the location of those bodies' other meetings. Moreover, most of those meetings, as well as the meetings in which Cutrale Snr represented Sucocítrico Cutrale as a shareholder in subsidiaries' meetings, related essentially to internal Cutrale group matters that could only in the most tenuous sense be regarded as part of the carrying on of Sucocítrico Cutrale's business. The position does not in my view resemble even the incidental business carried on in England in *South Sea India Shipping Corp Ltd*, cited by Hamblen J in *Teekay Tankers*. The company there had established a UK office of its own specifically in order to carry on activities which could realistically be regarded as forming part of its business. Occasional meetings to discuss matters such as payments to shareholders, and amendments to the company's own and its subsidiaries' Articles, do not seem to me to constitute the establishment of a fixed place of business.

109. Equally, there is no evidence or indication that Cutrale Snr or Graziela in practice exercised their powers of attorney by operating Sucocítrico Cutrale's bank accounts or otherwise negotiating or transacting Sucocítrico Cutrale's business from the Park Lane Office, either habitually or at all: and Cutrale Snr's evidence quoted in § 55 (quoted paragraphs 19-20) above is to the contrary. A Part 18 response from the Defendants indicates that they are not aware of any payments made or authorised by Cutrale Snr or Graziela Cutrale for Sucocítrico Cutrale at the Park Lane Address between 27 September 2017 and 27 January 2020, and that the bank accounts were managed by Mr Cervato and related employees to whom he granted a Power of Attorney with this specific purpose. Given the clear evidence considered in section (C) above about how Sucocítrico Cutrale's business is in fact run, I do not consider it appropriate to draw any inference that Cutrale Snr or Graziela have themselves been involved in transacting business on Sucocítrico's behalf from the Park Lane address.

110. The Claimants further invite the inference that Cutrale Snr and Graziela received remuneration from Sucocítrico Cutrale for their role as directors, and note that the Defendants accept that those two individuals benefitted from dividends as shareholders while in London and working at the Park Lane Office. Even if they were remunerated as directors (of which there was no specific evidence), the nature of their activities in London did not in my view result in the Park Lane Office being a place of business of Sucocítrico Cutrale in London. Equally, no real conclusion can be drawn from Cutrale

Snr having the assistance of a secretary when working at the Park Lane Office. Cutrale Snr had a wide range of business interests, of which Sucocítrico Cutrale was only one, and his use of a secretary does not give rise to the inference that the office was a place of business of Sucocítrico Cutrale.

111. Accordingly, I conclude that the Claimants do not have the better of the argument that the court has jurisdiction over Sucocítrico Cutrale by virtue of service pursuant to CPR 6.3(c)/6.9(2).

(E) CUTRALE SR: DOMICILE

112. The Claimants submit that there is overwhelming evidence that Cutrale Snr was domiciled in England when the claims were issued. The Defendants deny this.

(1) Legal framework

113. Pursuant to Article 62(1) of Brussels Recast, the question of Cutrale Snr's domicile is to be determined by the application of English law.

114. For the purposes of civil and commercial matters in England, domicile is defined in paragraph 9 of Schedule 1 of the Civil Jurisdiction and Judgments Order 2001 ("***CJJO 2001***"). This provides, so far as relevant:

> "(2) An individual is domiciled in the United Kingdom if and only if –
>
> (a) he is resident in the United Kingdom; and
>
> (b) the nature and circumstances of his residence indicate that he has a substantial connection with the United Kingdom.
>
> […]
>
> (6) In the case of an individual who –
>
> (a) is resident in the United Kingdom, or in a particular part of the United Kingdom; and
>
> (b) has been so resident for the last three months or more,
>
> the requirements of sub-paragraph (2)(b) … shall be presumed to be fulfilled unless the contrary is proved.
>
> (7) An individual is domiciled in a state other than a Regulation State if and only if—
>
> (a) he is resident in that state; and
>
> (b) the nature and circumstances of his residence indicate that he has a substantial connection with that state."

115. The two limbs of paragraph 9(2) – *"residence"* and *"substantial connection"* – are cumulative. It is not necessary to address *"substantial connection"* unless *"residence"* has been established (*Bestolov v Povarenkin* [2017] EWHC 1968 (Comm) at §24). The relevant date for consideration of whether Cutrale Snr is domiciled in the UK is the date of issue of the claim forms (*ibid* §25).

116. The key principles for determining 'residence' were more recently set out in *Bestolov v Povarenkin* [2017] EWHC 1968 (Comm) and *Tugushev v Orlov* [2019] EWHC 645 (Comm). In *Bestolov*, Simon Bryan QC (sitting as a Judge of the High Court) stated:

> "(1) It is possible for a defendant to reside in more than one jurisdiction at the same time.
>
> (2) It is possible for England to be a jurisdiction in which a defendant resides even if it is not his principal place of residence (i.e. even if he spends most of the year in another jurisdiction).
>
> (3) A person will be resident in England if England is for him a settled or usual place of abode. A settled or usual place of abode connotes some degree of permanence or continuity.
>
> (4) Residence is not to be judged according to a "numbers game" and it is appropriate to address the quality and nature of a defendant's visits to the jurisdiction.
>
> (5) Whether a defendant's use of a property characterises it as his or her "residence", that is to say the defendant can fairly be described as residing there, is a question of fact and degree.
>
> (6) In deciding whether a defendant is resident here, regard should be had to any settled pattern of the defendant's life in terms of his presence in England and the reasons for the same.
>
> (7) If a defendant visits a property in England on a regular basis for not inconsiderable periods of time, where his wife and children live, in order to see his wife and children (including where the centre of the defendant's relationship with his children is England), such property has the potential to be regarded as the family home or his home when in England, which itself is evidence which may go towards supporting the conclusion that England is for him a settled or usual place of abode, and that he is resident in England, albeit that ultimately it is a question of fact and degree whether he is resident here or not, having regard to all the facts of the case including any discernible settled pattern of the defendant's life or as it has also been put according to the way in which a man's life is usually ordered." (§ 44)

117. In *Tugushev*, Carr J cited with approval the above summary from *Bestolov*, and also cited *inter alia* the decision of the Court of Appeal in *Varsani v Relfo Ltd* [2010] EWCA Civ 560. The court there considered the question of residence where a defendant claimed to be domiciled in Kenya (the location of his business) but came to stay for

four to eight weeks a year at a London address where his wife, children, parents and sister lived. Etherton LJ stated:

> "27. Whether a defendant's use of a property characterises it as his or her "residence", that is to say the defendant can fairly be described as residing there, is a question of fact and degree…. In the present case, the Edgware house is owned by the defendant and his wife, and is the place where his wife, children, mother, father and sister permanently live. It is the place which the defendant has affirmed in court proceedings is not only his "residence" but his "home". While such affirmation is not conclusive, it is plainly highly material. The defendant visits that home every year to see his family, staying for not inconsiderable periods of time, as and when his work in Kenya permits him to do so. It is, in an obvious and very real sense, his "family home". Taking those facts together, it seems to me quite impossible to contend that the defendant does not reside at the Edgware house at all…….
>
> 28. The deputy judge was also entitled, and indeed correct, to conclude that the Edgware house was the defendant's "usual" residence for the purposes of CPR r 6.9. As I have said, Mr Jacob conceded that it is possible to have more than one "usual" residence. That is also borne out by the distinction between "usual residence" and "principal" place of business and "principal" office in CPR r 6.9 which, contrary to Mr Jacob's submission, I consider the deputy judge was right to take into account.
>
> 29. I do not accept Mr Jacob's submission that, in determining whether a residence is a "usual" residence within CPR r 6.9 , the test to be applied is essentially one of merely comparing the duration of periods of occupation, taking little account of the nature or "quality" of use of the premises, and ignoring altogether that the premises are occupied permanently by the defendant's family and that the premises can fairly be described as the family home. Mr Jacob's suggested approach is too narrow and artificial. I agree with Mr Peter Shaw, counsel for Relfo, that the critical test is the defendant's pattern of life. …"

118. *Tugushev* may be said to illustrate the point that the issue is not merely one of numbers of days spent. As noted in §§ 145-147 of Carr J's judgment, Mr Orlov spent the majority of his time in Russia, but the numbers needed to be considered alongside the nature and quality of the visits in question. On the facts as a whole, Carr J concluded that Tugushev had the better of the argument that Mr Orlov was domiciled in England.

119. The following further points emerge from the authorities:

i) Where a defendant has spent certain periods of time in hospital in England for treatment, his presence during that period may not have the necessary quality to satisfy the residence test: it depends on how the hospital stay fits in with he or

her overall pattern of life. In *Panagaki v Apostolopoulos* [2015] EWHC 2700 (QB) §§41-49, a hospital stay in England was held not to tend to establish residence here, in circumstances where the individual had never lived in England and Wales previously and, but for an accident, would not have done so. She had chosen to be treated at a particular hospital in England as being, in her view, the most appropriate one in Europe for her condition. Singh LJ added:

> "I accept Miss Deal's submission that the claimant has not been staying in hospital as a substitute for her home as might be the case if, for example, a person is detained under the Mental Health Act 1983. In my view the fact that the transfer to hospital took place across national borders is in some ways liable to distract attention away from the natural way of looking at things. Take, for example, a person who lives in England, who is badly injured in an accident in England and has to spend a long time in hospital for treatment in England. The natural way of looking at their residence would be to say that it was still their home, not that the hospital had become their home. That is where he or she was living and that is where he or she would move back to as soon as the need for treatment in hospital has come to an end. In the present context too in my view the claimant was not resident at the hospitals concerned and therefore was not resident at the material date in England and Wales."

ii) When considering the meaning of 'ordinary residence', Lord Scarman in *R v Barnet LBC, Ex p Shah* [1983] AC 309 (cited in *Tugushev* at § 123) noted that:

> "All that the law requires is that there is a settled purpose. This is not to say that the "propositus" intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education, business or profession, employment, health, family, or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled." (p.344)

iii) Ownership of property in England or responsibility for council tax or utility bills does not necessarily indicate residence: again, it depends on the facts – see *Bestolov* § 34:

> "In *High Tech International v Oleg Vladimirovich Deripaska* [2006] EWHC 3276 (QB) reliance was placed upon the above passage in relation to the visits of Mr Deripaska, an extremely wealthy Russian citizen domiciled in Russia who was also alleged to be domiciled in England. Although he owned two valuable homes in England (one in Weybridge and one in Belgrave Square), his visits were almost always for business purposes and were described as "flying visits". The days totalled together between two and three months a year, although as Eady J noted at [16], the pattern of his visits was "*much more*

fragmented than that which emerged from the evidence in Cadwalder, Foote Cone or Lysaght." Eady J identified, rightly in my view, that residence is not to be judged according to a "numbers game" and that "it is appropriate to address the quality and nature of the visits in question" (para 24) (my emphasis). At paragraph [25] he stated,

> "Although Mr Deripaska owns two very substantial properties in England, is responsible for the council tax and utility bills, and keeps them "ready for use" through staff employed for the purpose, it would not be right, in the case of a man so wealthy, to make the leap from property owning to "residence". There is undoubtedly permanence and continuity in ownership and (indirect) occupation, but not necessarily when one comes to address "residence" or "abode". There is certainly no regular pattern comparable to the situation in the earlier cases cited to me. Although Mr Hunter appeared to be suggesting that a presumption of residence arises from the mere fact of ownership, I find no authoritative support for this proposition. It seems to me that it must be a question of fact and degree in each case, according to the appropriate standard of proof. No doubt in many cases it would be relatively easy to draw an inference of residence from the possession of a substantial house in this jurisdiction. Here, however, the total picture permits no such inference. There are footholds in several jurisdictions which are there for convenience when it is necessary to hold business meetings. They may perhaps also have some incidental value as investments, but the uses to which they are put suggest to me that they are "stopovers" rather than homes in any conventional sense. Mr Deripaska's visits to England can generally be classified as merely ancillary to the conduct of his Russian businesses." (my emphasis)"

iv) As to the meaning of *"substantial connection"*, Briggs, *Civil Jurisdiction and Judgments* (7th ed, 2021) at §13.04 states:

> "In the final analysis, the true meaning of 'substantial' is gathered from its consequences. A connection to the United Kingdom is 'substantial' if it suffices to make it appropriate that the courts of the United Kingdom exercise general jurisdiction, without the possibility of being able to stay proceedings in favour of a forum conveniens elsewhere, in any and all civil and commercial proceedings brought against the defendant. Bearing in mind the formidable consequences of finding that an individual has a domicile in the United Kingdom, the word 'substantial' is not to be interpreted as though it means 'not a lot more than minimal'."

Singh LJ in *Panagaki* at §51 considered that commentary to be of assistance in determining the meaning of 'substantial connection'.

120. The Defendants submit that where stays in the jurisdiction are intermittent and, on average, short lived (e.g. 67-110 full days per year), that is not sufficient to establish residence: see *OJSC Oil Company Yugraneft v Abramovich* [2008] EWHC 2613 (Comm) at §487. That in my view over-simplifies the position. In the cited paragraph, Christopher Clarke J said:

> "I am not persuaded that Yugraneft has much the better of the argument on whether at the date of the issue of the claim form Mr Abramovich was resident in England and Wales. On the contrary it appears to me that, despite his ownership of Chelsea and his property in Lowndes Square, he was resident in Russia and not in England. Purchases of expensive property in England which, in the case of a man of ordinary wealth, would suggest settlement here, may have no such significance to someone for whom money is no object. Mr Abramovich's use of the Lowndes Square property (intended to become a single property) does not indicate that in November 2007 it was his usual or settled place of abode. It was not then the place in which, even for limited periods, he habitually and normally resided for a settled purpose. It was a place to which he came when visiting London largely in order to indulge his extravagant hobby of owning a football club and watching it play football. Those visits were in 2007 limited in number and short in length. I do not ignore the position in 2005 and 2006 when the number of full days spent in England was higher (between 67 – 110), as was the average number of full days (1.40 – 2.68). But even then the stays were intermittent and, on average, short lived. Further the "numbers game", which disputants in this area decry and then play or find themselves forced to play, does not take into account the changing circumstances of Mr Abramovich's life and of his visits which, certainly by November 2007 were far from indicating sufficient permanence, continuity, or settlement to constitute residence."

In my view, this passage does not suggest any presumption that stays totalling 67-110 days a year either will or will not be indicative of residence: it makes clear that all depends on the facts, including the purpose and nature of the trips to England.

121. Christopher Clarke J also noted in *Yugraneft* that:

> "In High Tech [*High Tech International v Deripaska* [2006] EWHC 3276 (QB)] (para 30), Eady J noted that the independent actions of an individual's family should not be taken to affect the assessment as to whether that individual is resident in England. That must particularly be so, it is submitted, in the case of someone who, at the date at which residence is to be determined, was a former wife."

I do not, however, read that passage as suggesting that close family connections are irrelevant when considering an individual's place of residence or domicile. They have potential relevance to the question of settled purpose.

(2) Facts

122. Cutrale Snr's evidence includes the following points:

i) He holds Brazilian and Italian citizenship.

ii) He regards himself as domiciled in Brazil.

iii) He had not, prior to these proceedings, given much thought to where he was domiciled (or what that concept means), except for tax purposes, for which he is domiciled in Brazil.

iv) He is an international businessman and has for most of his recent working life spent much of the year in Brazil, the US, Switzerland and Italy.

v) His business interests in the UK only represent a small portion of his global portfolio. He provides a list of a broad portfolio of business interests, starting with a very large joint venture interest in Chiquita, a producer of bananas and pineapples in Honduras, Costa Rica, Ecuador, Guatemala, Panama and Mexico. The other interests include businesses in Brazil, Mexico, Portugal, the US, Canada and Scandinavia. The portfolio further includes three orange juice distribution companies: Burlingtown UK Limited (based in the UK), Continental Juice BV (based in Continental Europe) and Citrus Products Inc (based in the US). These companies oversee the bulk import and sale of Sucocítrico Cutrale juice in their respective markets.

vi) Cutrale Snr uses two residential properties in Brazil, one in the United States, and one in London.

123. On the other hand, Cutrale Snr and his wife have indicated in a significant number of official and/or formal documents that they are resident in the UK:

i) Cutrale Snr is currently stated as resident in England on the Companies House website for his directorship of four companies: Burlingtown International B.V., Burlingtown LLP, Burlingtown UK Ltd, and Chiquita Holdings Ltd.

ii) He declared his country of residence to be the United Kingdom in English corporate records as long ago as his appointment as director of Burlingtown UK Ltd in 2010.

iii) Rosana is stated to be resident in England on the Companies House website for the three Burlingtown companies of which she is a director.

iv) Following Cutrale Snr's move to England after the Operation Fanta raid, on 6 March 2006 he changed his stated residence to an address in Taunton in a filing for Sucocítrico Cutrale at JUCESP.

v) As at 8 March 2019, Cutrale Snr's and Rosana's 'country of origin' was listed as the 'United Kingdom', and they were stated as 'resident abroad', on the Brazilian Consultar Quadro de Sócios e Administradores (Information of Shareholders and Officers) for Sucocítrico Cutrale and Santalice Administração Ltda.

vi) The Claimants identify filings at JUCESP in Brazil in respect of 72 Board of Directors or Partners meetings, in relation to three different companies, in which Cutrale Snr listed his residency as either 'UK Resident' or as 'resident abroad.' Cutrale Snr has not suggested that he is resident 'abroad' in Florida or Switzerland.

vii) Cutrale Snr and Rosana provide the Knightsbridge address as their correspondence address in corporate filings for Nordic Sea Transport K/S, a company incorporated in Denmark, of which they are shareholders.

viii) Cutrale Snr and Rosana are listed as resident at the Knightsbridge address in (a) a Sucocítrico Cutrale meeting on 15 December 2011; (b) a Cutrale Empreendimentos Ltda meeting on 6 October 2011; and (c) another Cutrale Empreendimentos Ltda meeting dated 31 May 2014.

124. As to time spent the Defendants have produced, first, two pie charts giving percentage breakdowns of Cutrale Snr's time since November 2016. The first indicates that from 1 November 2016 to 31 October 2018, he spent 26% of his time in the UK, 24% in the US, 19% in Brazil (though the Defendants have indicated that this should read 20%), 10% in Italy, 9% in Switzerland and 12% elsewhere. The second indicates that from 1 November 2018 to 31 December 2019 he spent 30% of his time in the UK for "exceptional" reasons, 20% in the UK for "usual business", 20% in the US, 14% in Switzerland, 7% in Brazil, 6% in Italy and 3% elsewhere.

125. A Part 18 response from the Defendants lists dates on which Cutrale Snr entered and exited the UK from 1 November 2016 to 31 December 2019, including the total nights spent in the UK and elsewhere. In summary, this indicates that:

i) In November and December 2016, Cutrale Snr entered the UK 3 times, and spent 13 nights in the UK and 48 elsewhere, the longest UK stay being for 5 nights.

ii) In 2017, he entered the UK 24 times, and spent 106 nights in the UK and 259 elsewhere, the longest UK stay being for 12 nights.

iii) In 2018, Cutrale Snr entered the UK 16 times, and spent 64 nights in the UK for "*usual or part business*", 61 days for exceptional health reasons and 240 elsewhere, the longest UK stay (excluding a 61 night stay for exceptional health reasons) being for 11 nights.

iv) In 2019, Cutrale Snr began the year in hospital in the UK, re-entered the UK 12 times, and spent 85 nights in the UK for "*usual business*", 65 days for exceptional health reasons and 215 elsewhere, the longest UK stay (excluding a 65 night stay for exceptional health reasons) being for 20 nights.

v) Prior to the health problems which emerged in November 2018, the average length of stay in the UK was 4.3 days and the longest single stay 12 days.

126. Cutrale Snr indicates in his first witness statement that *"[i]n a typical year I probably spend around 100 days in the United States, 100 days in Brazil and 90 days in the United Kingdom, with the balance of my time being spent in other countries*", though a comparison with the first pie chart referred to above suggests that that recollection

probably slightly understated the time typically spent in the UK and overstated that spent in the US and Brazil. Cutrale Snr states that since November 2018 he has spent more time in the UK than he would have otherwise done, because of his ill-health: at the time of his life-threatening health complications in November 2018 he was admitted to the intensive care unit in hospital and treated by doctors in a UK hospital for around two months. He also undertook part of his rehabilitation in the UK (as well as in Brazil, the US and Switzerland). More generally, Cutrale Snr explains that his family reside in different countries, and he spends time with them in various locations around the world.

127. As to the Knightsbridge house, the evidence indicates that:

i) In addition to the corporate records noted above, Cutrale Snr's witness statements indicate he is habitually resident there when in London.

ii) Cutrale Snr and Rosana have co-owned the house since 16 August 2011.

iii) The telephone for the Knightsbridge address is registered in the name 'Cutrale'.

iv) The Cutrales have a car kept in the garage driven by the same unidentified man across a number of days.

v) Utility bills are registered at the Knightsbridge address in Cutrale Snr's and Rosana's names.

vi) The Knightsbridge home is near the residence of Cutrale Snr's daughter, Graziela, and his grandchildren.

128. The Claimants submit that the following evidence indicates reasons for Cutrale Snr to have a settled purpose of living in England:

i) As noted earlier, on 5 September 2006 a criminal indictment was filed against Cutrale Snr in Brazil. Cutrale Snr has since declared himself as 'resident abroad' and merely 'in transit' in Brazil in numerous Board of Directors and Partners meetings that have taken place in Brazil. It may be inferred that he fled Brazil to England. He did not return to Brazil permanently even after the investigations there ended in 2015/16.

ii) Cutrale Snr's daughter, Graziela, permanently lives in London with her three children (his grandchildren), and has done so since 2006, having accompanied her father after he left Brazil. She has naturalised into British citizenship, as appears from Companies House filings. By the time the claims were issued, she had lived in Bourne Street, near Sloane Square, for over seven years. As at 8 March 2019 Graziela stated in the Consultar Quadro de Sócios e Administradores (Information of Shareholders and Officers) for Sucocítrico Cutrale that her 'country of origin' was the United Kingdom. She also stated she was resident in England/the United Kingdom in Companies House filings in relation to Burlingtown LLP and Burlingtown UK Ltd.

iii) Rosana co-owned the Knightsbridge address, and had clear business interests tying her to London through her directorships of the Burlingtown companies.

iv) Cutrale Snr is a family man, who runs a family business, and tends to buy residential property in places with a crucial family link. He states that in overseeing his portfolio of business interests, he relies heavily on his wife Rosana, and his sons and daughter.

v) Cutrale Snr runs Burlingtown International BV and Burlingtown UK Ltd, both flagship companies, from the Park Lane Address. These are very substantial businesses, with a turnover in 2018 of some US$140 million.

vi) By the time of his ill health, Cutrale Snr had already spent 64 days in the UK from January to October 2018. His case, the Claimants say, is in that respect unlike that of a fleeting visitor coincidentally in an English hospital. Against that, Cutrale Snr says in his second witness statement:

> "At a time when I happened to be in London in November 2018, I was subject to a medical emergency, which involved major surgery in a London hospital. I am here providing this statement only because of the high quality of the NHS and its doctors. I also have doctors in Brazil, both in Araraquara and in Sao Paolo, who I visit when necessary. One of my doctors from Brazil even travelled to the United Kingdom when I was in intensive care to consult on my treatment."

vii) After Cutrale Snr was found fit to travel in March 2019 he chose to continue receiving medical care in England throughout 2019, up to and including when the claims were issued, by which point he was long past being incapacitated. He states that he visited the UK for follow-up appointments with his doctors. The fact that a Brazilian doctor came to London to consult on his treatment gives some reason to believe that Cutrale Snr could, had he so chosen, have received excellent healthcare in Brazil. He may, the Claimants suggest, have chosen to pursue his rehabilitation and receive medical care in England because he benefited from family support and pre-existing residence here. (I quote Cutrale Snr's evidence on this point above.)

viii) The Defendants adduced very little evidence about Cutrale Snr's homes outside the UK (e.g. in Brazil and Switzerland) or the nature and quality of his residence there.

(3) Discussion

129. I consider the Claimants to have the better of the argument that Cutrale Snr is domiciled in England.

130. First of all, he has declared himself resident here in a variety of official/formal documents over a period of many years. Cutrale Snr does not explain how this came about if those declarations were inaccurate. One might speculate that, following events in Brazil in 2006, it was considered convenient to claim to be resident abroad. However, that would merely beg the question of whether the reasons for so declaring had also led Cutrale Snr actually to become resident in England.

131. In oral submissions, counsel for the Defendants cited *Charlton v Funding Circle Trustee* [2019] EWHC 2701 (Ch), where there was detailed evidence that the appellant and his family had emigrated to Australia in 2012, and that his co-director had run the company from then until 2015. Nonetheless, two filings with Companies House in 2013 and 2014 stated the appellant's residence to be in the UK. Barling J noted that nothing in the evidence suggested that the appellant, rather than the co-director (who was running the company at the time) or an employee or contractor, had actually made the filing in question. Barling J stated that the evidence of permanent emigration by the appellant, his wife and children was detailed and unchallenged, and that there was no evidence of the appellant having a place of residence at any particular location in England and Wales. In those circumstances he affirmed the decision below that the appellant was not resident in England. I do not consider *Charlton* to assist the Defendants. It merely illustrates the point that documents may not be conclusive if all the other evidence is to the contrary, particularly if the likelihood is that the individual in question had no involvement in the filing of the documents. In *Charlton* there were two filed documents, almost certainly filed by third parties, which flew in the face of clear unchallenged evidence of emigration. In the present case, there are many documents indicating that Cutrale Snr is resident in the UK, and he makes no attempt in his evidence to disown or explain them. Moreover, as indicated below, there is other substantial evidence pointing towards Cutrale Snr being resident in the UK.

132. Secondly, the evidence of time actually spent in the UK is consistent with residence here, though I of course accept that it is not a 'numbers game' and the reasons for time spent are at least as important as the amount of time. It is nonetheless notable that during both the periods indicated by the Defendants' pie charts, whilst the average length of stay was fairly short prior to Cutrale Snr's hospitalisation, the UK is the single country where Cutrale Snr spent the most time.

133. Thirdly, it is relevant that the Knightsbridge house is not only owned by and run in the name of Cutrale Snr and his wife, but is also close to the long-time residence of their daughter Graziela, with whom Cutrale Snr left Brazil in 2006, and Cutrale Snr's grandchildren. Further, albeit Cutrale Snr also has business activities in several other countries too, he, Rosana and Graziela all have links to the Burlingtown business run from the Park Lane Office.

134. Fourthly, in view of Cutrale Snr's evidence that he was subject to a medical emergency while in England in November 2018, I do not consider that much importance can be attached to the fact that he was hospitalised here for several months in late 2018/early 2019. At the same time, I consider it likely there is some connection between the fact that he chose to spend time here after he became fit to travel again at the end of March 2019, and his existing house, family and business links in London; and that that is at least consistent with him being resident in England.

135. These various considerations, taken together, indicate in my view that when the claims were issued Cutrale Snr both (a) had been resident in England for a substantial time (well over 3 months) and (b) had, as a matter of fact, a substantial connection with England. It follows, pursuant to the CJJO 2001 Schedule 1 § 9, that he was domiciled here for the purposes of civil and commercial matters. The presumption based on 3 months' residence in § 9(6) reinforces the conclusion as to domicile but is not necessary in the present case.

(F) CUTRALE JR: ARTICLE 6(1) LUGANO CONVENTION

136. On the basis of my conclusion that Cutrale Snr is domiciled in England, and subject to any stay of the proceedings (see section (G) below), the question arises whether the Claimants are also entitled to sue Cutrale Jnr (who is Swiss domiciled) in England and Wales pursuant to Article 6(1) of the Lugano Convention:

> "A person domiciled in a State bound by this Convention may also be sued:
>
> 1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings"

137. For the purposes of the present jurisdiction application, the Defendants do not contest that there is a serious issue to be tried as between the Claimants and Cutrale Snr. It is therefore not necessary to set out or consider the points which the Claimants have made about the merits of their claims, including the claims advanced against Cutrale Snr.

138. The Defendants do, however, submit that if Cutrale Snr is UK-domiciled but the claims against Sucocítrico Cutrale are stayed by this court and must therefore be pursued in Brazil (where they will be one of a number of claims against Sucocítrico Cutrale in respect of the alleged cartel), then it is not expedient to hear the claims against Cutrale Jnr in England. The claims against Cutrale Jnr should instead be pursued alongside the claims against Sucocítrico Cutrale in Brazil.

139. The Defendants submit that in *Public Institution for Social Security v Al Rajaan* [2020] EWHC 2979 (Comm) ("***Al Rajaan***") I set out the following principles relevant to whether it is expedient to hear the claims in the UK where there is an inevitable bifurcation of proceedings between the UK and another State:

i) The burden is on the claimant seeking to rely on Article 6(1) to demonstrate a good arguable case that the test is satisfied, and thus that it has the better of the argument on the available material (§411).

ii) Article 6(1) could apply where the assumption of jurisdiction under it would reduce, even if it would not eliminate, the risk of irreconcilable judgments flowing from separate proceedings. However, when considering whether or not it is correct to assume jurisdiction under Article 6(1), it is correct to consider whether doing so would be likely materially to increase or decrease such risks (§420).

iii) What is "*expedient*" is not to be judged solely by reference to the nature or degree of the connection with the claims against the anchor defendant (§432). The requirement to "*take account of all the necessary factors in the case file*" (Case C-98/06 *Freeport v Arnoldsson* [2008] QB 634 at §41) is also not restricted solely to assessing the degree of connection between the claims against the anchor defendant and those against the proposed Article 6 defendants (§442). The court should apply Article 6 without any "*rigid preconceptions as*

to the relevance or otherwise of closely connected claims that must be pursued in an overseas forum…" (§446).

iv) Article 6 is not to be applied in a mechanistic fashion without regard to "*the broader aspects of the dispute as a whole or the policy aims which it seeks to promote*" (§434).

v) The decision of *JSC Aeroflot v Berezovsky & Ors* [2013] 2 CLC 206 (CA), where the Court of Appeal held that the claimant was entitled to rely on Article 6(1), was distinguishable because the relevant defendant in that case was domiciled in Luxembourg – which was not a place where proceedings would have to be brought against any of the other defendants – so to require the claimants to have sued that defendant in Luxembourg would have involved further fragmentation of proceedings by involving an additional forum (on the facts, a fourth forum). However, where the alternative to the English court assuming jurisdiction under Article 6 is the pursuit of the claims in the same overseas forum as the claims against other defendants to which it is closely connected "*the position may well be different*" (§§439(ii), 445).

140. I held that it was not expedient for the purposes of Article 6(1) for two of the defendants, M. Argand and M. Amouzegar, to be sued in the UK where there was an existing bifurcation of proceedings between the UK (where there was an anchor defendant) and Switzerland (due to Swiss exclusive jurisdiction clauses to the benefit of certain corporate defendants and an agreement on the part of a further corporate defendant to submit to the jurisdiction of the Swiss court). I concluded that the claims against M. Argand and M. Amouzegar were more closely linked to the Swiss proceedings and it was therefore more expedient for them to be brought in Switzerland (§§464-479).

141. The Defendants submit that if the claims against Sucocítrico Cutrale must be pursued in Brazil, it is more expedient for the claims against Cutrale Jnr to be pursued in that jurisdiction, even if the Claimants are entitled to sue Cutrale Snr as of right in England:

i) The clear centre of gravity of the claims is the allegations against Sucocítrico Cutrale. It is alleged that loss was caused to the Claimants by various unlawful collusive conduct perpetrated in Brazil by Sucocítrico Cutrale acting through its employees.

ii) The Claimants' claim for damages against Cutrale Jnr would require them to prove that he personally participated in unlawful collusive conduct that caused actionable loss. This is now effectively acknowledged by the Claimants in the Re-Draft Particulars, which assert that he "*participated in… the unlawful practices and conduct*" (§68). The case against Cutrale Jnr is therefore inherently intertwined with the wide-ranging allegations against Sucocítrico Cutrale. The court hearing the claims would need to determine which of these allegations against Sucocítrico Cutrale is made out and which of those Cutrale Jnr "*participated in*".

iii) There are no pleaded allegations that Cutrale Jnr "*participated*" in exactly the same alleged acts as Cutrale Snr in the period January 1999 to January 2006. The Claimants also draw attention to the Defendants' evidence on this application about officers' reporting lines to Cutrale Jnr specifically. There is

therefore no basis for the Claimants to argue that a trial of the individual liability of Cutrale Jnr would have greater factual overlap with a trial of the individual liability of Cutrale Snr (as compared with a trial of the primary claim against Sucocítrico Cutrale).

iv) Alternatively, even if the Claimants are correct that they can establish Cutrale Jnr's liability purely on the basis that he is a shareholder and/or director of Sucocítrico Cutrale, it is still critical to the Claimants' case against Cutrale Jnr that they establish their claims against Sucocítrico Cutrale. The risk of inconsistency with the judgment of the Brazilian court against Sucocítrico Cutrale would therefore be a greater vice than the risk of inconsistency with the judgment of the English court against Cutrale Snr.

v) There is no suggestion in the Re-Draft Particulars that the claims against Cutrale Jnr have a closer connection with the claims against Cutrale Snr than Sucocítrico Cutrale: §4 gives equal weight to the closeness of connection between the two claims, alleging that the English court has jurisdiction over the claims against Cutrale Jnr because it is "*so closely connected with the claims against the First and Third Defendants that it is expedient to hear and determine them together so as to avoid the risk of irreconcilable judgments*". In light of the reformulated allegation of individual participation by Cutrale Jnr (in the Re-Draft Particulars), it is clear that it would be more expedient for the claims against Cutrale Jnr to be heard in Brazil alongside the claims against Sucocítrico Cutrale.

142. I do not, however, consider the position of Messrs Argand and Amouzegar in *Al Rajaan* to be sufficiently analogous to the present case. The situation there was whether Article 6 jurisdiction would exist in a situation where a claimant is required, by reason of an exclusive jurisdiction clause (EJC) to sue a defendant in an overseas jurisdiction under Article 23 of the Brussels Recast, but seeks to pursue in this jurisdiction connected claims against another defendant. The context was therefore the allocation of jurisdiction as between the courts of Regulation states (i.e. courts of a Brussels Recast or Lugano Convention state) in a case where an EJC required certain claims to be brought in a Regulation state other than the UK. In the present case, there is no relevant EJC, and any claims which the Claimants may choose to pursue against Sucocítrico Cutrale will not be claims brought in a Regulation state. I agree with the Claimants' point (made in a different context) that somewhat different policy considerations arise when considering the risk of inconsistent judgments within the European Union (or between Lugano States), compared to the position vis-à-vis so-called 'third States', and that the latter context does not involve the same particular impetus to remove obstacles to the single market and observe the principle of 'mutual trust' between the courts of different Member States. Thus in Case 406/92 *The Tatry* [1999] QB 555, the ECJ held that the interpretation of Article 30(3) (previously Article 22(3) of the Brussels Convention) "*must be broad and cover all cases where there is a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive*" (§ 53), and that the term 'irreconcilable judgment' is to be interpreted by reference to the objectives of the Brussels regime, namely "*to improve co-ordination of the exercise of judicial functions within the Community and to avoid conflicting contradictory decisions, even where the separate enforcement of each of them is not precluded*" (§ 55).

143. Moreover, the position of Messrs Argand and Amouzegar presented the problem in an acute form. The claims against them were intricately connected with those against defendants whom, by reason of EJCs, the claimant could not sue in England; and there was no English defendant against whom the claims paralleled those made against Messrs Argand and Amouzegar. In the present case, however, whilst the claims against Cutrale Jnr are of course connected with those against Sucocitrico, they are also bound to involve important issues in common with the claims against Cutrale Snr which (subject to the issue of stay) are to be pursued in England.

144. In these circumstances, I consider the Claimants to have the better of the argument that the expediency threshold under Article 6 is reached, and that, subject to any stay, the Claimants are entitled to sue Cutrale Jnr alongside Cutrale Snr in these proceedings.

(G) STAY

145. In this section I consider whether, notwithstanding the court's *prima facie* jurisdiction over Cutrale Snr based on domicile (Brussels Recast Article 4) and over Cutrale Jnr under Lugano Convention Article 6, the claims against them should be stayed pursuant to, respectively, Article 34 of Brussels Recast and Article 28 of the Lugano Convention.

146. I also consider whether the claim against Sucocítrico Cutrale should be stayed:

i) under Article 33 or 34 of Brussels Recast if, contrary to my earlier conclusion, Sucocítrico Cutrale is domiciled in England and Wales, and

ii) on *forum non conveniens* grounds if, contrary to my earlier conclusion, the Claimants have validly served Sucocítrico Cutrale here and are *prima facie* entitled to sue it here on that basis.

(1) Cutrale Snr: stay under Article 34 of Brussels Recast

(a) Applicable principles

147. Article 34 of Brussels Recast provides:

> "1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and an action is pending before a court of a third State at the time when a court in a Member State is seised of an action which is related to the action in the court of the third State, the court of the Member State may stay the proceedings if:
>
> (a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
>
> (b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
>
> (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice. …"

148. Recitals 23 and 24 state:

> "(23) This Regulation should provide for a flexible mechanism allowing the courts of the Member States to take into account proceedings pending before the courts of third States, considering in particular whether a judgment of a third State will be capable of recognition and enforcement in the Member State concerned under the law of that Member State and the proper administration of justice.
>
> (24) When taking into account the proper administration of justice, the court of the Member State concerned should assess all the circumstances of the case before it. Such circumstances may include connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time.
>
> That assessment may also include consideration of the question whether the court of the third State has exclusive jurisdiction in the particular case in circumstances where a court of a Member State would have exclusive jurisdiction."

149. The provisions confer a power on a 'second seised' court of a Member State to stay proceedings by reference to existing proceedings pending before the courts of a third state, i.e. a non-Member State: *Ness Global Services Ltd v Perform Content Services Ltd* [2021] 1 WLR 1643 at §6.

150. Under Article 34 Brussels Recast and Article 28 Lugano Convention, actions are considered to be related when they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments arising from separate proceedings. In *Municipio De Mariana v BHP Group Plc* [2020] EWHC 2930 (TCC), Turner J suggested that the issue of whether claims are "*related*" is "*inextricably bound up with the risk of irreconcilable judgments*" and "*may properly be subsumed into that concerning the risk of irreconcilable judgments*" (§§161 and 163).

151. In an intra-EU/Lugano setting, the authorities require a broad common-sense approach: see, e.g., *Sarrio SA v Kuwait Investment Authority* [1991] 1 AC 32 (a case concerning Article 22 of the Brussels Convention, now Article 30 Brussels Recast), where Lord Saville rejected the distinction drawn by the Court of Appeal between primary issues of fact and issues of fact which the court in the pending proceedings may or may not decide but which are not essential to its conclusion. He said:

> "… it seems to me that the words of the article itself militate against the suggested limitation. The actions, to be related, must be 'so closely connected that it is expedient to hear and determine them together' to avoid the risk of irreconcilable judgments resulting from separate proceedings. To my mind these wide words are designed to cover a range of circumstances,

> from cases where the matters before the courts are virtually identical … to cases where although this is not the position, the connection is close enough to make it expedient for them to be heard and determined together to avoid the risk in question. … I am of the view that there should be a broad commonsense approach to the question whether the actions in question are related, bearing in mind the objective of the article, applying the simple wide test set out in article 22 and refraining from an over-sophisticated analysis of the matter." (p.41F)

152. The hypothetical overseas judgment does not have to be binding on an English court in order for it to be irreconcilable: *Jalla v Royal Dutch Shell Plc* [2020] EWHC 459 at §241; *Municipio de Mariana* at §183.

153. Although an action can be said to be "*related*" even if there is no overlap between parties, the court must assess the degree of connection and make a value judgement (*Research in Motion UK v Visto* [2008] 2 All E.R. (Comm) 560, [2008] EWCA Civ 153 § 37). The court can assess the degree of risk of there being findings or observations that could lead to irreconcilable judgments (*Rahman v GMAC Commercial Finance Ltd* [2013] IL Pr 56 §19). For example, in *Jalla*, a case under the Recast Regulation, Stuart-Smith J declined a stay pending proceedings in Nigeria where "[*a*]*lthough there is a significant overlap with the issues raised in the actions now before the Nigerian courts, it is far from complete*" (§ 246), noting that the English court could take account of Nigerian judgments in due course.

154. The Court of Appeal in *PJSC Commercial Bank v Kolomoisky* [2020] Ch. 783, [2019] EWCA 1708 (a Lugano and Brussels Recast case) considered the existing authorities on the meaning of 'expedient'. The court noted that, after reviewing the existing authorities, Eder J in *Nomura International Plc v Banca Monte Dei Paschi Di Siena SpA* [2013] EWHC 3187 (Comm), [2014] 1 WLR 1584 had concluded that *"... the focus of that wording is in my view what in principle is expedient which I read in the sense of genuinely desirable, not what is "capable" or "possible".*" (*Nomura* § 57, quoted in *Kolomoisky* § 190). The Court of Appeal concluded that

> "191. …The word 'expedient' is more akin to 'desirable'…that the actions 'should' be heard together, than to 'practicable' or 'possible', that the actions 'can' be heard together. … [I]f what had been intended was that actions would only be 'related' if they could be consolidated in one jurisdiction, then the Convention would have made express reference to the requirement of consolidation, as was the case in article 30(2) of the Recast Brussels Regulation.
>
> 192. Accordingly, on this threshold issue, we consider that the judge was right to conclude that the actions were related, even if they could not be consolidated, so that the judge did have jurisdiction to grant a stay in the present case. However, the fact that the actions could not be consolidated was relevant to the exercise of discretion … to which we now turn."

In the context of the exercise of discretion, the Court of Appeal said:

> "210. Whilst Ms Tolaney is no doubt correct that neither Rix J [in *Centro Internationale Handelsbank AG v Morgan Grenfell Trade Finance Limited* [1997] CLC 870] nor Eder J [in *Nomura*] was laying down a rule of law, what Eder J's judgment demonstrates is that, absent some strong countervailing factor, the fact that proceedings cannot be consolidated and heard together will be a compelling reason for refusing a stay. The problem here is that the judge seems to have considered the exercise of discretion from the wrong end of the telescope: he concluded that the availability of consolidation would be a strong reason to grant a stay, but its unavailability would not in itself be a reason not to grant a stay. He thus erroneously failed to consider that, as Eder J had held, unavailability of consolidation will usually be a compelling reason to refuse a stay. There was certainly no strong countervailing factor in this case pointing in favour of a stay.
>
> 211. In our judgment, although the appeal of Mr Kolomoisky in Ukraine has been allowed and the matter remitted to the court of first instance, so that this court should proceed on the basis that the proceedings in Ukraine will continue and be pursued to judgment, the unavailability in the Ukrainian court of consolidation of the Bank's current claim with Mr Kolomoisky's defamation claim remains a compelling reason for refusing to grant a stay. In particular, the fact that the Bank's claim would have to be brought before the Ukrainian commercial court rather than before the Pechersky District Court in which the defamation proceedings are being heard means that if a stay were granted, the risk of inconsistent findings in these different courts would remain. Furthermore, we accept Lord Pannick's overall submission that, standing back in this case, it would be entirely inappropriate to stay an English fraud claim in favour of Ukrainian defamation claims, in circumstances where the fraud claim involves what the judge found was fraud and money laundering on an "epic scale" and where, as we have concluded, the Bank has a good arguable case to recover the pleaded sum of US$1.9 billion. We consider that for those reasons, in exercising the relevant discretion afresh, this court should refuse to grant a stay."

155. In *Euroeco Fuels Poland Ltd v Szsecin* [2019] 4 W.L.R. 156, [2019] EWCA Civ 1932, the Court of Appeal cited *Kolomoisky* with apparent concurrence, but stated that "*I do not think that it can be said that two actions are 'heard and determined together' if one takes place before Judge A, who gives a decision in (say) March, and the other takes place later before Judge B, who gives judgment in October*" (§ 48). On the facts, the Court of Appeal held that, because there was no real prospect of the two actions being "*heard and determined together*" by the same judge in the same court with judgments given in both at the same time, there was no discretion to order a stay (§§ 52-53 per Bean LJ, § 64 per Baker LJ; § 66 per Lewison LJ).

156. Subsequent judgments at first instance have identified a tension between *Kolomoisky* and *EuroEco Fuels (Poland)* as to whether the power to stay depends on there being a procedural means by which the two actions could, in fact, be tried together. These judgments have treated *Kolomoisky* as representing binding authority on that point (see, e.g., *Federal Republic of Nigeria v Royal Dutch Shell Plc* [2020] EWHC 1315 (Comm) at §§76-77; *Lopesan Touristik SA v Apollo European Principal Finance Fund III (Dollar A) LP* [2020] I.L.Pr. 45 at §47; *Scor SE v Barclays Bank Plc* [2020] 1 CLC 193 at §§15, 31; *Municipio de Mariana* at §§190-199; *TRW Ltd v Panasonic Industry Europe GmbH* [2021] I.L.Pr. 13 at §94). For example, Turner J stated in *Municipio de Mariana* that the requirement that it would be "*expedient*" to hear and determine matters together requires "*only that it is established that such a solution would be theoretically desirable regardless as to whether it would be achievable in practice*" (§189).

157. As to the interests of justice, and the court's exercise of discretion, the unavailability of consolidation is not of course conclusive against the grant of a stay under Article 34. The circumstances as a whole may nonetheless justify a stay: see e.g. *Federal Republic of Nigeria v Royal Dutch Shell Plc* § 77(4) *per* Butcher J (cited in *Mariana* § 219):

> "While I recognise that the impossibility of these proceedings being consolidated with the Italian proceedings is a factor militating against a stay under Article 30, I consider that in the present case it is outweighed by other considerations, and in particular by: (i) the degree of relatedness of the two proceedings; (ii) the reality of the risk of inconsistent decisions; (iii) the fact that the Italian proceedings are now considerably more advanced than the English proceedings; and (iv), which is connected with (iii), the fact that the Italian Courts and Italian legal teams are now immersed in the facts of the matter."

At the same time, as Stuart-Smith J pointed out in *Jalla* (§ 225), the unavailability of consolidation or other means of the cases being heard together will be a compelling reason against a stay absent some strong countervailing factor, not least because it will mean the risk of irreconcilable judgments will remain: i.e. the fundamental purpose of an Article 34 stay will likely not be achieved.

158. Recital 24 to Brussels Recast, quoted earlier, requires "*all the circumstances of the case*" to be considered and identifies particular matters including:

> "connections between the facts of the case and the parties and the third State concerned, the stage to which the proceedings in the third State have progressed by the time proceedings are initiated in the court of the Member State and whether or not the court of the third State can be expected to give a judgment within a reasonable time."

159. The Defendants point out that the courts may thus consider circumstances which would overlap with factors relevant to a *forum non conveniens* analysis or a discretionary stay at common law, citing statements at *Gulf International Bank BSC v Aldwood* [2020] 1 All ER (Comm) 334 at §§47, 89; *Município de Mariana* at §§204-207. As explained in the Explanatory Report by Dr Pocar on the Lugano Convention, *"the doctrine of forum non conveniens … is alien to the legal tradition of most of the States bound by*

the Convention"; and to seek to reintroduce it, as such, via Article 34 would be inconsistent with Case 281/02 *Owusu v Jackson* [2005] QB 801. However, I did not understand the Defendants to suggest that reliance on *forum non conveniens* considerations would by themselves be sufficient to justify a stay under Article 34. Clearly the court must be satisfied that the requirements of Article 34 are made out; if so, recital 24 makes clear that it is entitled to have regard to the circumstances as a whole when deciding whether it would be in the interests of justice to order a stay, including the particular matters listed in recital 24.

160. As part of considering the proper administration of justice, in *Easygroup Ltd v Easy Rent a Car Ltd* [2019] 1 WLR 4630, the Court of Appeal indicated that the degree of overlap between the two sets of proceedings is a factor of great importance, but that even if the overlap is complete it may be outweighed by other factors (§ 67). The court considered that a delay of 3-4 years in the third country resulting from an appeal, together with the fact that unless the appeal succeeded there would be no proceedings there, would have been overwhelming factors *against* granting a stay (§ 70-71). In *Jalla,* Stuart Smith J considered that any stay was likely to be measured in years which would render the claims "*almost intolerably stale*" (§ 245), though it is fair to point out that there was a suggestion of up to 24 years' delay in that particular case (§ 242(iii)).

161. Even if all threshold conditions are satisfied, the court retains a discretion (implied by the word "*may*") not to grant a stay (see also Dicey at §12-073 referring to "*the power, but not the duty, to stay*" proceedings; and §12-076 (in respect of Article 28 Lugano): the judge in the court seised second has "*a power to stay the proceedings, and a power to dismiss the action to allow it to be brought in, and consolidated with the proceedings brought in, the action in the first court, but it imposes no duty to do either*"). This discretion allows the court, for example, to decline to allow a tangentially related action in a third state to undermine the certainty *prima facie* afforded by the mandatory ground of jurisdiction, based on domicile, in Brussels Recast Article 4.

162. The discretion falls to be exercised by reference to the nature and purpose of the stay sought. In *Starlight Shipping Co v Allianz Marine & Aviation Versicherungs AG ('The Alexandros T')* [2014] 1 All ER 590 (UKSC) §92, Lord Clarke set out the proper approach to the exercise of discretion under Article 28 of the Brussels Convention (which is in similar terms to Article 34 of Brussels Recast):

> "In *Owens Bank Ltd v Bracco* (Case C-129/92) [1994] QB 509, at paras 74-79, Advocate General Lenz identified a number of factors which he thought were relevant to the exercise of the discretion. They can I think briefly be summarised in this way. The circumstances of each case are of particular importance but the aim of Article 28 is to avoid parallel proceedings and conflicting decisions. In a case of doubt it would be appropriate to grant a stay. Indeed, he appears to have approved the proposition that there is a strong presumption in favour of a stay. However, he identified three particular factors as being of importance: (1) the extent of the relatedness between the actions and the risk of mutually irreconcilable decisions; (2) the stage reached in each set of proceedings; and (3) the proximity of the courts to the subject matter of the case. In conclusion the Advocate General said at para 79 that it goes without saying that

> in the exercise of the discretion regard may be had to the question of which court is in the best position to decide a given question."

163. I would observe, however, in disagreement with the Defendants, that despite the similarity of language it may well make a difference whether a stay is sought (a) under Article 28 as such or (b) under Article 34 or under Article 28 as applied reflexively vis a vis proceedings in a third country (see § 238 below). The observation quoted above that there might be a presumption in favour of a stay seems considerably easier to justify in a case where the intra-EU internal market considerations referred to in § 142 above apply than where the overseas proceedings are in a non-Member State. On the contrary, a presumption of a stay in favour of a third country state of proceedings *prima facie* brought as a right against a defendant in his place of domicile may well be hard to square with the fundamental principles underlying the Brussels and Lugano regimes.

(b) The proceedings in Brazil

164. Since January 2007 claims by citrus growers allegedly harmed by Sucocítrico Cutrale and/or other participants in the alleged cartel between 1999 and 2006 have been ongoing in various courts in the State of São Paulo. The current state of the litigation is summarised below.

(1) Favero claim

165. On 23 January 2007, Antonio Carlos Favero and 50 other producers filed a claim against Louis Dreyfus Company Sucos S.A. ("***Louis Dreyfus***") in São Paulo, in the state of São Paulo (the "***Favero claim***"). Louis Dreyfus is one of the companies alleged by the Claimants to have participated in the cartel with Sucocítrico Cutrale. The claimants in the Favero claim include three who are also Claimants in the Sanches claim (José Antonio Ardengue, the estate of Norival Candido Ferreira and José Antonio Ruiz Sanches).

166. The Favero claim seeks "*the annulment of the purchase and sale contracts signed between the parties and already expired, as well as the termination of the contracts that are in force, due to their abuse and illegality*" (§7). The claimants claim that "*the defendant, Citrosuco, [Sucocitrico] Cutrale, Coinbra and Citrovita*" formed and participated in "*citrus market oligopoly*" (§§9, 11). They allege that the defendants' conduct violated (amongst others) Article 186 of the Civil Code, Articles 170 and 173(4) of the Federal Constitution and the Former Antitrust Law (§§54-55). The Favero claimants allege that *"since 1995, when the market dominance by the industries, among them the Defendants, gained dramatic contours to the Plaintiffs and all the citrus growers the compliance with such covenants, resulted in enormous damage to the Plaintiffs, with its total loss of goods and total financial fragility"* (§31). They seek compensatory damages, loss of profit and moral damages pursuant to Articles 186 and 402 of the Civil Code (§§30-53).

167. On 30 January 2007, the Monte Azul Paulista Court granted a preliminary order compelling Louis Dreyfus to increase the purchase prices of boxes of oranges for the 2006/2007 harvest. This was appealed by Louis Dreyfus and on 4 June 2007, the 26th Chamber of Private Law of São Paulo allowed the appeal and overturned the lower court's order.

168. Louis Dreyfus filed a Defence on 11 June 2008, pleading among other things that the claim was opportunistic, that the lack of competition in the industry was due to the nature of the activity rather than unfair practices, denying the existence of a cartel, and saying the contracts were advantageous to the claimants.

169. On 31 August 2009, the first instance court made an interlocutory decision (referred to in the translation provided as a "*summary judgment*") dismissing the Favero claim. The central part of the reasoning was expressed as follows:

> "III. It is important to bear in mind that, for several years, the claimants have signed contracts for the sale of oranges, always with the object of future harvests. Contracts signed between 2001 and 2005 are in force, covering subsequent years, including this one in progress.
>
> As a consequence, they have secured the acquisition by the claimant of all annual production, according to the price established in the adjustment, regardless of the variations verified in the national and international market. It is evident that the price fixed in legal transactions of that nature takes into account the guarantee that sellers enjoy, protected from any fall in the price of the product on the market. That is to say, the claimants do not run the risks, which naturally the rural producers are subject to, of suffering with the reduction of the price due to the variations of the market and, still more, of not being able to buy for the harvest and to see it totally lost. It is a natural consequence of this situation - as well as in all those in which the risk is reduced or removed - that the profit obtained from the business is lower than that obtained, should they choose to sell the production each year.
>
> That is why, except for situations of extreme disparity in values and evident imbalance between the contracting parties, linked to unpredictable events, the revision of the values originally set is not allowed, under the risk of unbalancing the parameters of the executed deal. In other words, with the exception of an unpredictable and extraordinary event, sellers cannot have in their favour both the guarantee of purchase of the harvest and the contractually fixed price, and the possibility of revising the price, if higher than that practiced in the market.
>
> In this case, the event pointed out by the claimants as extraordinary, to justify the nullity of some and the termination of other contracts, would be the practice, by the defendant, of illicit adjustments with other industries producing concentrated juices, in order to direct, the favour of them, the price of oranges, preventing free competition in the market.
>
> Even before 1995, the effective date of the claim for the annulment of adjustments, similar events occurred, which is why the defendant was faced with accusations of forming a cartel

> with the other industries in the sector. The issue, therefore, is not a new one and was previously resolved in favour of the defendant, by government agencies charged with ensuring the good practices of national and international trade.
>
> Now, once again, there are complaints made by a director of the defendant, who withdrew from it, in the sense that, for a long time, the concentrated juice industries have been manipulating the orange-producing market, directing the formation of prices, always, obviously, to the disadvantage of farmers.
>
> If, for the purposes of market control and inspection, within the remit of CADE and SDE, the charges may lead to the adoption of punitive measures to the defendant, I have several considerations that apply with respect to the claimants. Since 1995, they have signed contracts with the defendant, aware that it was accused of manipulating and directing fruit prices.
>
> Obviously, they could choose to sell oranges according to different types, without targeting them to the concentrated juice industry. But no! They chose to have an annual sale guarantee for the harvest, even though it was less than what they could get on the market at the time of the harvest, because, evidently, they did not want to take any risks. The subsequent conduct of, after having ensured the destination of consecutive harvests, not wanting to obtain a higher price for the fruit, as if they had taken the typical risk of selling according to different modality, should not be worthy of judicial support."

The judgment goes on to cite case law about the difficulty in alleging that a contract imposes an excessive burden, where a future crop has been purchased at a fixed price and external events result in adverse movement in the market price.

170. Following a motion for clarification in 2010, the 2009 decision was successfully appealed in 2012. In this context, the claimants appear to have put in issue the effect of the TCCs, which postdate the pleadings in the Favero claim. As part of Special Appeal No. 541/169/SP the claimants stated that the signatories of the TCCs "*admit responsibility for the acts that are under investigation*" (§7) and that the TCCs would "*decisively influence the outcome of this case, which is why proving the cartel depends on such documents. It is worth mentioning that the TCCs signed only show the practice of the cartel, since the fault of the industries in these agreements is obligatorily recognized*" (§11).

171. The subsequent history of the Favero claim is summarised in the witness statement of Mr Fabio Carneiro Bueno Oliveira, a partner in the Brazilian law firm Mendes Advogados Associados, who has no direct involvement in the Brazilian litigation but has accessed relevant materials from public sources:

> "59. On 15 February 2012, i.e. almost two years later, the 26th Chamber of Private Law of the Court of Appeals of the State of São Paulo found that the decision of 31 August 2009 had been

rendered without sufficient evidence and vacated the order. It allowed for the introduction of additional evidence.

60. On 31 May 2012, the 20th Civil Court selected an accountancy expert to assess whether there was evidence of the existence of a cartel. However, on 15 June 2012, Louis Dreyfus filed a motion for clarification submitting that the accountant would not have the necessary expertise and requested that an economist be instructed.

61. On 22 June 2012, the Claimants filed a motion for clarification to the 20th Civil Court against the decision of 15 February 2012 requesting that they be permitted to adduce additional evidence. This was accepted by the 20th Civil Court on 26 June 2012. It held that the parties could present evidence regarding a criminal proceeding before the 9th Criminal Court of São Paulo and the CADE administrative proceedings.

62. On 21 June 2012, the 20th Civil Court rejected an application by Louis Dreyfus that requested the production of two types of technical evidence; one to analyse the sales receipts from the Claimants in respect of the preliminary relief granted on [30] January 2007 and the other to ascertain whether the Claimants were selling fruit to its competitors from 1996 onwards.

63. On 6 July 2012, Louis Dreyfus filed a motion for clarification submitting that the documents from the criminal and CADE proceedings were confidential and that the CADE proceedings were independent and should not have any influence on this Civil Claim. On the same date, Louis Dreyfus also filed an interlocutory appeal against the decision of 21 June 2012 that rejected the production of technical evidence and requested that it have suspensive effect.

64. On 20 July 2012, the 20th Civil Court rejected the motion for clarification filed by Louis Dreyfus on 6 July 2012. On 22 August 2012, the 26th Chamber of Private Law of the Court of Appeals of the State of São Paulo rejected the interlocutory appeal filed by Louis Dreyfus on the same day seeking evidence from the two experts. Louis Dreyfus filed a Special Appeal to the STJ [Superior Court of Justice] against that decision, which was denied on 19 February 2014, i.e. nearly two years later.

65. On 31 March 2014, Louis Dreyfus filed an interlocutory appeal against the decision that denied the Special Appeal. On 10 July 2014, the interlocutory appeal filed by Louis Dreyfus was formally received by the STJ. On 11 May 2017, more than three years after the filing of the interlocutory appeal, it was dismissed by the STJ.

> 66. However, on 8 June 2017, Louis Dreyfus filed an internal interlocutory appeal to the STJ against the decision dismissing the interlocutory appeal. The filing of this internal appeal had the effect of staying the whole Favero Claim.
>
> 67. On 25 July 2017, the 20th Civil Court ordered that the stay of the Favero Claim be maintained, extending the suspension order that had been rendered pending a final decision on the internal appeal filed by Louis Dreyfus to the STJ.
>
> 68. On 1 August 2017, the Claimants filed their objection to the internal appeal.
>
> 69. On 19 February 2019, the 20th Civil Court ordered that the stay be maintained for another 180 days for a possible decision on the internal appeal to the STJ. The 180 days period has now lapsed, and no decision on the internal appeal has been rendered. There is no specific maximum time period for rendering decisions in this type of appeal. The Favero Claim remains stayed and there is no indication as to when it will be reactivated.
>
> 70. It has now been thirteen and a half years since the Favero Claim was issued and it remains awaiting a decision from the STJ on an appeal lodged by Louis Dreyfus concerning the production on two narrow pieces of evidence, one of which relates to a preliminary order, which was itself overturned 13 years ago."
>
> (citations to court file omitted)

172. Mr Oliveira's account is confirmed by Ms Maria Tereza Tilé Ferreira, who in addition to being an orange farmer (though not a claimant in the present proceedings) is a lawyer of record in the Favero case.

(2) Costa claim

173. On 23 January 2007, Adelia Virginia Fioreze Costa and 45 other producers filed a claim against Cargill Agrícola S.A. and Citrosuco Fischer S.A. – Agroindústria in Matão, São Paulo (the "***Costa claim***"). These defendants are two of the undertakings alleged by the Claimants to have participated in the cartel with Sucocítrico Cutrale. 21 claimants in the Costa claim are also Claimants in the Sanches claim.

174. The pleadings in the Costa claim are apparently subject to 'judicial secrecy' in Brazil, which means that the pleadings are strictly confidential. However, some parts of the pleadings are referred to in the claimants' petition to the Federal Court against CADE, which appears to be an ancillary claim for disclosure by CADE of certain documents, to which the defendants to the Costa claim are named as interested parties. The petition provides some information about the Costa claim. It states that:

i) the claimants allege that the *"defending companies, together with others, act on the market forming a cartel for acquiring oranges and producing concentrated*

> *juice*" and that their conduct violated "*the Constitutional rule, the specific legislation of CADE, [the Former Antitrust Law] as well as art.186 of the Civil Code*";
>
> ii) the claim seeks to "*annul the purchase and sale agreements signed between the parties and that are already expired, as well as the termination of contracts that are in force, due to their abusiveness and illegality*"; and
>
> iii) the claimants seek compensatory damages, loss of profits and moral damages.

175. In their petition, the Claimants allege that the TCCs constitute an "*admission of guilt of the investigated facts*" (§9) and that disclosure of a full copy of two TCCs and evidence in CADE's possession is necessary to "*release [the claimants] of their burden of proving the facts stated in [the Costa claim]*" (§25).

176. A final judgment in the Costa claim has not been delivered, so the claim remains pending: 14½ years after it was commenced. The chronology to date of the Costa claim is explained by Ms Ferreira, who is a lawyer on record and also a claimant in the Costa claim, as follows:

> "19. To begin, the court might wonder why only certain companies were sued in each of the Favero Claim and the Costa Claim. The answer to that is it was decided that claimants should bring claims against the orange juice producer they were contracted to rather than against a larger group of producers (as they would have been entitled to do under the Brazilian Anti-Trust Law). The Costa Claim is brought against Citrosuco and Cargill because Citrosuco succeeded Cargill after Cargill ceased operations in Brazil (and assumed its liabilities).
>
> 20. In respect of the Costa Claim, the proceedings have been equally as tortuous as the Favero Claim.
>
> 21. The claimants in the Costa Claim make allegations and pleas similar to those made in the Favero Claim.
>
> 22. Like the Favero Claim, there were disputes over which court had jurisdiction over the claim. Having originally been filed in the Monte Azul Paulista Court, it was transferred to the 1st Civil Court of Matão.
>
> 23. Also like the Favero Claim, preliminary relief was granted compelling the defendants to increase the purchase prices of boxes of oranges for the 2006/2007 harvest. Also, like the Favero Claim, the defendants appealed that ruling and the 26th Chamber of Private Law of São Paulo allowed the appeals and overturned the lower court's order.
>
> 24. It took nearly two years for both defendants to file their defences.

> 25. For the following three years the only developments were the parties informing the court as to what evidence they intended to produce.
>
> 26. Attempts to involve CADE in the proceedings took up a significant amount of the court's time and delayed the Costa Claim for a considerable number of years. In 2011, CADE was joined as a party to the proceedings on the basis of the relevance of certain documents before the CADE Court (the "CADE Documents"). However, the defendants successfully appealed CADE's joinder. Three years later, in 2014, the 1st Civil Court of Matão ordered that CADE join the Costa Claim as the defendants' "assistant" (which allows CADE to participate without being a party), which both defendants appealed without success. Two years later, in 2016, the claimants petitioned for a stay of the proceedings until the conclusion of the CADE administrative proceedings. The 1st Civil Court of Matão granted the claimants' request and suspended the Costa Claim for one year or until the CADE Documents were publicised (whichever was the earlier). The defendants successfully appealed against this order, the 26th Chamber of Private Law of São Paulo finding that the CADE proceedings and the CADE Documents are not valid reasons to stay the Costa Claim. In 2017, the claimants made further efforts to gain access to the CADE Documents. They were unsuccessful.
>
> 27. In February of this year, the 1st Civil Court of Matão ordered the parties to file their closing arguments regarding the last round of evidence within 15 days.
>
> 28. Despite the order made in February, it is my belief that a final judgment in the Costa Claim is a long way off. The protracted history of the claim is testament to how long everything takes in Brazil. Discrete issues take years and serve to halt all main aspects of claims. That is not to mention the inevitable appeals that will be filed by the defendants against any ruling in favour of the claimants.
>
> 29. Moreover, as both a legal representative on record in the Favero Claim and the Costa Claim, and a party to the Costa Claim, I believe that there is no prospect of an award in either claim, and even less of a chance of either proceeding becoming res judicata. This is why it was and remains my opinion that the English proceedings should be brought and continued."

(3) Teles claim

177. On 22 November 2019, Antonio Claudemir Teles filed a claim against Sucocítrico Cutrale in Araraquara, São Paulo (the "***Teles claim***"). This is the first in time of the claims in Brazil brought against Sucocitrico. It was commenced after the claim forms

in the present proceedings in England and Wales were issued and (I assume) served on Cutrale Snr.

178. Mr Teles alleges that Sucocítrico Cutrale "in collusion with other companies of the citrus industry" violated Brazilian competition law "in the orange box purchase market through controlled prices, imposing on the plaintiff enormous losses and his exclusion from the citrus industry, with the eradication of his entire orchard" (§6). He contends that the alleged conduct constituted a breach of (amongst other things) Article 186 of the Civil Code, Articles 170 and 173(4) of the Federal Constitution, and the Former Antitrust Law and the Current Antitrust Law (§§7, 64-65). Mr Teles relies on the TCCs, alleging that in those documents "the companies CONFESSED the tort since year 1995 to year 2006" (§§24-25). The relief sought includes compensatory damages, loss of profit and moral damages pursuant to Articles 186 and 402 of the Civil Code (§§6, 42-68).

179. On 14 August 2020, the first instance court held that the Teles claim was time-barred pursuant to Article 487 CPC because it found that the claimant had knowledge of the facts which gave rise to the claim when the relevant contractual agreements were signed in 2001 and 2003. It rejected the argument that time only began to run on 28 February 2018, the date on which administrative proceedings were concluded by CADE.

180. Mr Teles appealed against that decision on 8 October 2020. On 18 May 2021, the São Paulo State Appeals Court upheld the first instance decision and dismissed the claimant's appeal. It held that the acknowledgement that information sharing may possibly have occurred in the TCC "*without supplementary data*" and "*without the existence of a context established in the [TCC] or, in any case, without the express statement that there was an assumption of guilt about facts that constitute the core of the act defined as forming a cartel, cannot serve the purposes intended by the plaintiff*." It concluded that "*there was no decision from CADE on the practice of fact narrated in the complaint (cartel formation)*".

181. The Defendants understand that the claimant filed a motion for clarification of the judgment on 1 June 2021, such a motion being a precursor to bringing an appeal. Mr Teles's appeal from the São Paulo State Appeals Court would lie as a special appeal to the Superior Court of Justice in Brasilia.

(4) Ardengue claim

182. On 29 November 2019, José Antonio Ardengue and Leoclecio Ardengue filed a claim against Sucocítrico Cutrale in Araraquara, São Paulo (the "***Ardengue claim***"). José Antonio Ardengue is one of the claimants in the Sanches claim. The Ardengue claim is subject to judicial secrecy in Brazil.

(5) Neto claim

183. On 16 December 2019, Egydio Boscheti Neto filed a claim against Sucocítrico Cutrale in Tanabi, São Paulo (the "***Neto claim***").

184. Mr Neto claims that Sucocítrico Cutrale and other Brazilian companies formed a cartel in relation to the purchase of oranges and remunerated citrus growers at levels close to their opportunity costs (pp.2, 8). He alleges that Sucocítrico Cutrale breached Article

186 of the Civil Code, Law No. 8.137/90, Article 21 of the Former Antitrust Law and Article 36 of the Current Antitrust Law (p.10) by "*price-fixing agreements and conditions of sale; market division between competitors; limiting the access of new companies to the market; creation of difficulties in the formation, operation and development of a competing company and buyers; preventing competitors from accessing raw material sources; market regulation to control the production of goods and their distribution; discrimination against purchasers of goods through differentiated pricing and operational sales conditions; and influence on the adoption of uniform commercial conduct.*" (p.9).

185. Mr Neto states that the "*mere fact that the defendant concluded a [TCC] with CADE is enough to assume confession of guilt*" (p.7, emphasis in original) and that *"[t]he formalized confession before [CADE] through the … TCC(s) and other elements reveal that there was a cartel formation among the frozen concentrated orange juice processors, a negative conduct which contradicts the legal norm giving rise to the reparatory claim due to the damages caused to orange growers"* (p.8). He claims (amongst other things) compensatory damages, loss of profits and moral damages under Article 186 of the Civil Code (pp.11-13).

186. On 8 August 2020, the first instance court held that the Neto claim was time-barred pursuant to Article 487 of the CPC. It found that the claimant must have been aware of the relevant facts by 24 January 2006, the date on which CADE's investigation into the alleged cartel was disclosed in the media. The court rejected Mr Neto's submission that time only began to run from 6 August 2018, the date of CADE's decision to ratify the TCC, stating that the TCC only involved an acknowledgement that "*information sharing could possibly have occurred*" and was not "*a conclusive acknowledgement on the performance of the acts mentioned therein*" (emphasis in original). The court held that "*Such information sharing, without complementary data, without the existence of context in the TCC or, in any hypothesis whatsoever, without express affirmation that there was assumption of guilt on the facts constituting the core of the act defined as cartel organization, cannot be used for the ends intended by the party claimant.*"

187. Mr Neto appealed against that decision on 10 September 2020.

(6) Jotto claim

188. On 31 January 2020, Maria de Lourdes Bandini Jotto and others filed a claim against Sucocítrico Cutrale in Araraquara, São Paulo (the "***Jotto claim***").

189. The claimants there allege that Sucocítrico Cutrale and other Brazilian companies operating in citrus fruit growing formed a cartel and "*offered the market the lowest possible price per box of oranges*" (p.2) and "*fix[ed] prices, quantities of orange cases purchased and the regional division of the market with other companies in the sector*" (p.7). They assert that Sucocítrico Cutrale breached Article 186 of the Civil Code and Article 36 of the Current Antitrust Law (pp.6-7).

190. The claimants allege that, by the TCC, Sucocítrico Cutrale "confirmed the formation of the cartel between years 1996 and 2006, admitting the operation of a cartel for purchasing fruit" (p.2); that the TCC was "sufficient to establish the civil liability (fault) of the defendant" (p.7); and that "the confession of the cartel in itself leads to the inevitable conclusion that the prices paid to the rural farmers, and also paid to the

claimant in this case, were lower than the prices that could possibly be obtained in a scenario of free competition" (p.11).

191. They seek material and non-material (i.e. moral) damages for the period between 1999 and 2006 under Article 47 of the Current Antitrust Law and Articles 186 and 927 of the Civil Code (pp.6, 8-9).

192. On 31 July 2020, the first instance court held that the Jotto claim was time-barred pursuant to Article 487 of the CPC. It found that, even assuming that the limitation period ran from when the claimant knew or could have known the material facts, the claimants had or could have had such knowledge by 2006, in the light of:

i) the claimants' own statement that (in informal translation) *"many were the evidences that the crises established in the citriculture resulted from the formation of cartel by the companies that operated in the segment"*;

ii) the claimants lived in the same small municipality as Mr Biazoti, the person who denounced the existence of the cartel, and are bound to have known about the unfair practice;

iii) when Operation Fanta was initiated in 2006, which investigated the practice of the cartel in the purchase of fruits by industries of the segment, it was possible for the claimants to know possible damage, particularly as they are domiciled in Itápolis, known in Brazil and abroad as the capital of the orange, and a place in which Operation Fanta generated major repercussions; and

iv) on 24 February 2006, a decision of CADE was published in the Official Gazette about the reopening of the administrative proceeding that investigated the existence of the cartel, which rendered it fully public to third parties, including the claimants.

193. The claimants appealed against the decision on 15 September 2020.

(c) Whether the Brazilian courts were first seised, and pendency of claims

194. Article 32(1)(a) of Brussels Recast provides:

> "1. For the purposes of this Section, a court shall be deemed to be seised:
>
> (a) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the claimant has not subsequently failed to take the steps he was required to take to have service effected on the defendant …"

195. The domestic law of the relevant Member State determines what steps an applicant is required to take to have service effected. If there is a failure to comply with a specific step imposed by national law to effect service of the proceedings, the court is not seised: *Debt Collect London Ltd v SK Slavia Praha-Fotbal AS* [2011] 1 WLR 866 (CA) at §§24-25, 27, 43-50, 59; *Dicey, Morris & Collins on the Conflict of Laws* (15th ed, 2012) at §12-067. *Briggs, Civil Jurisdiction and Judgments* (7th ed, 2021) at §18.10 summarises the approach to determining whether a court is seised as follows:

> "In cases decided in connection with the Brussels II Regulation, but which seem suitable for generalisation, the approach has been to ask whether national law imposes any specific conditions upon service, or simply provides that service must take place without further specification of time. In the former, failure to comply with conditions would sacrifice priority; in the latter, late, or even very late, service would not amount to breach of a specific rule regulating service, and would not lead to the loss of priority."

196. No issue is raised as regards to service on Cutrale Snr. In relation to him, the Sanches claim was issued, and the Viegas claim was originally issued, before the Teles, Ardengue, Neto, and Jotto claims. Special considerations arise in relation to the 109 Claimants added to the Viegas claim by purported amendments under CPR r.17.1 on 23 January 2020: I consider the position in relation to those claims in section (G)(1)(h) below.

197. As regards the large majority of the present Claimants, only the Favero and Costa claims pre-date the present proceedings against Cutrale Snr. Both of those claims remain pending: an action is pending whilst it remains subject to appeal or where there remains a right of appeal: *Kolomoisky* §158 (and, at first instance, [2019] 1 All ER (Comm) 971 §137).

(d) Favero and Costa: 'related' and expediency tests

198. The Defendants submit that these two claims are related to the present proceedings, and that it would be expedient for the present proceedings to be stayed so that the claims can be heard and determined together. They suggest that potentially irreconcilable judgments are liable to arise in respect of the following issues, among others:

i) whether Sucocítrico Cutrale and the other signatories of the TCCs formed and participated in the alleged cartel (or other collusive practices in breach of Brazilian law);

ii) the period of time in which the alleged conduct occurred;

iii) the relevance of the administrative proceedings before CADE and the TCCs (which is raised in the Favero appeal and the Costa petition);

iv) whether the alleged conduct violated Articles 170 and 173(4) of the Federal Constitution, Articles 20 and 21 of the Former Antitrust Law, Article 36 of the Current Antitrust Law and/or Article 186 of the Civil Code;

v) whether the alleged conduct caused actionable loss; and

vi) whether the claimants are entitled to compensatory damages, loss of profits and moral damages pursuant to Articles 186 and 402 of the Civil Code.

199. Some of the later Brazilian claims also deal with whether the claims are time-barred under Brazilian law, but there is no indication that those issues arise in the Favero and Costa claims.

200. The Defendants make these further points by way of amplification of the list set out above:

i) the Favero claim involved the same cartel as the present claims, and the Favero claimants rely on the same regulatory proceedings as the present Claimants;

ii) the Favero claimants rely on similar facts and similar sophisticated analyses (e.g. the use of North American prices as a comparator) as the present Claimants;

iii) they rely on the same provisions of the Federal Constitution, the former competition law and the Civil Code;

iv) their claim focuses in part on damages, not merely the annulment of contracts; and

v) overall, the factual basis and causes of action are very similar.

201. Similarly, in relation to the Costa claim, the Defendants point out that 21 of the claimants there are Claimants in the present proceedings; Sucocítrico Cutrale are alleged to have been participants in the cartel; the facts alleged closely parallel the allegations in the present Particulars of Claim; and the relief sought includes compensation as well as annulment.

202. To the extent that it is relevant to consider the prospects of the claims in fact being heard together, the Defendants submit that the Brazilian courts would be able to consolidate existing actions or use other case management tools to avoid the risk of irreconcilable judgments. Their expert evidence from Justice Rezek, a retired Justice of the Supreme Court of Brazil, indicates the following:

i) Claimants can issue claims together (as occurred in the Favero claim and Costa claim). In addition, the Ministério Público, or the Public Defender's Office, or associations and unions, may bring claims by means of a class or collective action, and there is no limit on the number of claimants that can be named in class actions.

ii) The Incidental Proceeding to Resolve Repetitive Claims ("***IRDR***") mechanism under Articles 976 to 987 of the Civil Code of Procedure ("***CCP***") enables a request to be made to the Federal Circuit Court or a State Appellate Court to decide on a legal issue (not a factual one) when lower courts render conflicting decisions on the same matter that is the subject of numerous lawsuits. Once it has been initiated, the rapporteur in charge will suspend the cases, individual or collective, that are pending in the State Courts or in the Federal Regional Courts, and remit the common issues to the relevant court of appeals. The decision is binding on all existing individual or collective actions and future cases that deal with the same issue of law.

iii) The Brazilian court can consolidate existing actions under Article 55 of the Code of Civil Procedure. Article 55(1) provides that "*Two (2) or more actions are deemed to be connected when they have a common cause of action. The proceedings of connected actions are merged for a joint decision, unless judgment has already been entered for one of them.*" Article 55(3) states "*The*

> *set of actions that could create the risk of rendering conflicting or contradictory decisions if decided separately shall be merged even if there is no connexion between them*."

203. The Claimants' expert Justice Peluso, a former President of the Supreme Court of Brazil, suggests that it is inconceivable that the English and Brazilian claims would be consolidated, because (1) the Brazilian claims have not themselves been consolidated in the past thirteen years, (2) it is unlikely that a single judge in Brazil would adjudicate together upon 1,600 claims, and (3) *"no Brazilian judge would wish to consolidate a fresh set of proceedings with other proceedings which have been ongoing since 2007 (the Favero claim) as this would cause further inordinate delay to proceedings which already are evidently themselves excessively delayed"* (Peluso §§94-96).

204. Justice Rezek responds to this evidence as follows:

> "59. … the fact that the Brazilian courts have not so far consolidated the Brazilian actions does not of itself mean that they are not related claims or that they could not be consolidated at a later date (to date I understand that consolidation of the actions – at least those involving Sucocítrico Cutrale – has simply not been considered). Even if the cases are not consolidated in accordance with the discipline of article 55 of the CPC, it does not follow that they could not be case-managed together to avoid the risk of irreconcilable judgments between those actions.
>
> 60. As regards the overlap between the Brazilian claims and the London claims there are, similarly, obvious links. …
>
> 61. Annexed to this report is a table setting out various extracts from the pleadings in the Brazilian actions which demonstrate the extent to which the claimants bringing them are relying on almost identical causes of action to their counterparts in the London Claims. …
>
> 62. Taking this into account, it is definitely not "inconceivable" that the London Claims, if they were to be presented in Brazil, would be consolidated with the Brazilian proceedings (as Justice Peluso opines). The Brazilian Courts could ensure consistency of judgments through either a direct consolidation under article 55, or by ensuring that the claims are actively case managed alongside the other cases to promote consistent outcomes. The Brazilian courts in any event also have specific tools to co-ordinate decision making in the absence of the consolidation of cases more generally as noted above (including via the IRDR process and the consolidation of appeals).
>
> 63. Finally, I note, Justice Peluso did not mention that the rule at article 113 of the 2015 CPC which gives judges the ability to limit the number of claimants in a given action is not applicable to class actions. There is no doubt in my mind that the London

> Claims could, therefore, were they brought in Brazil, be heard as a single action."

205. The Defendants put forward a practical example, albeit it does not appear to involve the Favero or Costa claims. They note that in three of the later Brazilian actions, there are now three recent first instance decisions dismissing claims against Sucocítrico Cutrale on limitation grounds. One of these (in the Teles claim) has been upheld on appeal but the claimant has lodged a motion for clarification of that judgment, which is a precursor to bringing a further appeal. The other two (the Neto and Jotto claims) are subject to outstanding first appeals. The appellate courts in Brazil are going to be grappling with this mixed issue of law and fact for some time. They may consolidate the appeals, the Defendants suggest, and/or case manage them so that an authoritative judgment is given in a lead case. Whatever the procedural permutations in Brazil, the Defendants submit that it is plainly undesirable for the English court to be speculating in the near future on whether the Sanches claim or Viegas claim is time barred as a matter of Brazilian law, on the basis of conflicting expert evidence, as is likely to occur if the court assumes jurisdiction over these claims.

206. Against that, the Claimants point out that:

i) Only 24 of the 1,548 Claimants are party to these Brazilian proceedings: 21 in the Costa claim and 3 in the Favero claim. This small number of Claimants can be put to an election.

ii) Neither the Favero claim nor the Costa claim involves Cutrale Snr, or indeed any of the present Defendants.

iii) Neither the Favero claim nor the Costa claim involves the liability of controlling shareholders under Articles 116-117 of the Corporations Law. Neither of them would consider the liability of Cutrale Snr (or Cutrale Jnr), even if the alleged cartel involving Sucocítrico Cutrale were proven.

iv) The allegation against Cutrale Snr and Cutrale Jnr is that they participated in the alleged cartel and individually admitted guilt in the TCCs (as to which see § 16 above), making them jointly and severally liable: not merely that they are liable as accessories to wrongs committed by Sucocítrico Cutrale itself.

v) Justice Peluso's evidence is that civil law judges act on their own motion if consolidation is appropriate. No consolidation has occurred in relation to any of the six sets of Brazil proceedings. Nor has Sucocítrico Cutrale requested consolidation of any of the Brazilian proceedings in which it is involved, i.e. the later actions.

vi) The Favero and Costa actions (and indeed the later actions) are pending before different judges in different courts. The Costa claim is before the 1st Civil Court of Matão, and the Favero claim before the 20th Civil Court of the Central Court of São Paulo, albeit the appellate court in both cases is the 26th Chamber of Private Law. (For completeness, the Teles claim is before the 2nd Civil Court of Araraquara, the Neto claim before the 1st Civil Court of Tanabi, the Jotto claim before the 4th Civil Court of Araraquara, and the venue of the Ardengue claim is not in evidence. The appellate court for the Teles claim is the 31st

Chamber of Private Law and not in evidence for the other claims.) The Defendants have not identified with which of the Brazilian proceedings they propose the present claims should be consolidated.

vii) The practical difficulties of seeking to consolidate the present claims with the Favero or Costa claims would (in the Claimants' words) be legion: they involve different parties, different damages, different legal teams, different experts, and proceedings at vastly different stages.

viii) Use of the IRDR procedure is unlikely and/or inappropriate save in a case where there have been conflicting lower court decisions in numerous cases. As Justice Peluso states:

> "Nonetheless, Justice Rezek himself recognizes …that the practical effect of the IRDR procedure is limited, since it only allows a party to request either a Federal Circuit Court or a State Appellate Court to decide on questions of law (and not questions of fact). Thus, IRDR proceedings cannot be used to resolve thousands of cases which involve common issues of both fact and law because no generic findings of fact may be made. This is in contrast to the English Group Litigation Order mechanism in which common issues of fact and law, across many thousands of claims (both within and outside the Group Litigation Order), can be determined in one court, by one judge and lead to one single judgment creating *res judicata erga omnes*."

ix) Whatever the theoretical position in relation to class actions, no large scale competition law actions in Brazil have been identified.

The Claimants submit that consolidation is entirely improbable in any event, and that the real effect of the stay sought would simply be to deny the Claimants their mandatory right to sue Cutrale Snr in the place of his domicile.

207. At this stage of the analysis, I consider the first two aspects of the Article 34 test, i.e. whether (if the further requirements in Article 34(1)(b) and (c) were satisfied) the claim against Cutrale Snr in the present action is related to the Favero or Costa claims and it would be expedient to hear and determine it together with one of those claims to avoid the risk of irreconcilable judgments resulting from separate proceedings. I bear in mind that a 'related' action need not involve the same cause of action in the sense required under Article 33.

208. There is a material degree of overlap between the claims made in the Favero and Costa claims and those made in the present proceedings. They relate to the same alleged cartel, in which Sucocítrico Cutrale is said to have been a participant, and several of the same causes of action are relied on. On the other hand, none of the present Defendants is a defendant to the Favero claim or the Costa claim. It follows that neither of the courts hearing the Favero and Costa claims can be expected necessarily to make findings specifically relating to Sucocítrico's participation in the alleged cartel. Nor is there any prospect of their making findings relating to the involvement or culpability of Cutrale Snr in the alleged cartel, nor even the principles governing the liability of individuals in his position. Nor is there any indication that either the Favero or the

Costa claim raises the limitation issue that is expected to arise in the present case. Even if either case does raise limitation issues, such issues tend to turn on issues of fact as well as issues of law or general principle. The reasoning of the first instance decision summarily dismissing the Favero claimants' claim in substance addresses a single point which may or may not overlap with any of the numerous issues said to arise between the parties to the present proceedings with this court.

209. In addition, the tortuous course of the Favero and Costa claims to date, and the uncertainty as to whether any greater progress will be made in future (and, if so, when), to my mind do not make it expedient, in the sense of genuinely desirable as distinct from possible or practicable, for the Claimants' claims against Cutrale Snr to be stayed so that they can instead be pursued along with the *Favero* and/or *Costa* claims, or simply to await the outcome of those claims. However, the text of recital 24 suggests that that factor falls for consideration as part of the interests of justice portion of the Article 34 criteria, and so I consider it in that context below.

210. I conclude, so far, that the Favero and Costa claims are related in a broad sense to the present claims, but that degree of relationship would be insufficient to make it expedient to stay the present claims by reference to them.

(e) Whether a judgment of the Brazilian courts would be capable of recognition and enforcement by the English courts

211. In *Kolomoisky* at first instance, Fancourt J said:

> "[150] Under art 34, the next question is whether it is expected that the Ukrainian courts will give a judgment capable of recognition and – where applicable – enforcement in England and Wales. This criterion relates to the recognition and enforceability of a judgment of the third state in principle. The court of the member state cannot be expected to decide one way or the other whether the court in the third state will in fact give a judgment in future, though the apparent likelihood of its doing so or not doing so would be relevant to the exercise of discretion or the question of whether it was necessary in the interests of the proper administration of justice to grant a stay. At this stage of analysis, however, the question of recognition and enforcement is one of principle." (§ 150)

212. That approach was not disputed before me. No reason was suggested why a decision of the Brazil court in favour of or against the Claimants would not be enforced and/or recognised, as the case may be, and so I conclude that this requirement is satisfied.

(f) Whether a stay is necessary in the interests of justice

213. So far as relevant to the claims I am currently considering, the Defendants submit that a stay is necessary in the interests of justice having regard to the following factors.

i) The Brazilian court is already seised of the Favero claim, which is brought by (amongst others) three claimants in the Sanches claim, and the Costa claim, which is brought by (amongst others) 21 claimants in the Sanches claim. These

claims are brought against other Brazilian undertakings who are alleged by the Claimants to have participated in the cartel (Re-Draft Particulars §41) and who were subject to investigation by CADE. There is considerable overlap between the subject matter of these claims and the Viegas and Sanches claims; the claimants in the Favero claim and the Costa claim also rely on alleged violations of Article 186 of the Civil Code, the Former Antitrust Law, and the Federal Constitution; and the claimants seek (amongst other things) compensatory damages, loss of profits and moral damages.

ii) The Viegas and Sanches claims could be consolidated or otherwise case managed with the Brazilian claims, either generally or for the purpose of key issues.

iii) The Brazilian legal system is capable of delivering justice within a reasonable time.

iv) Factors which would also go to any issue of *forum non conveniens* make it more expedient for the claims to be heard in Brazil:

a) The claim "*relates to [alleged] antitrust infringements that were committed in Brazil and restricted competition in markets in Brazil, causing harm to the Claimants there*." Moreover, the events giving rise to alleged liability are said to involve numerous Brazilian companies and a Brazilian industry association.

b) The applicable law is Brazilian law. The expert evidence served for the purpose of this jurisdiction challenge is sufficient to show that: (a) the substantive law relevant to competition damages actions is different in Brazil to the UK; and (b) there are disputes between the parties as to the content of Brazilian law. These are powerful factors in favour of a Brazilian forum.

c) The vast majority of the witnesses will be based in Brazil. This includes the Claimants (who are all domiciled in Brazil) and Sucocítrico Cutrale's employees (who are all based in Brazil).

d) Relevant documents are likely to be in Portuguese and most witnesses are likely to have Brazilian Portuguese as their first (and perhaps only) language. Even this jurisdiction challenge has required translation of witness statements for both sides, expert reports, and numerous documents (e.g. meeting minutes, employment contracts/deeds of appointment, powers of attorney, etc.). Proceedings in England would be significantly lengthened and rendered more expensive by the need for the extensive translation (see, analogously, *Municipio De Mariana* at §§109-110) and there is a risk of mistranslation leading to error (*ibid*. §111).

e) The Claimants do not suggest that there are insufficient assets within Brazil for a judgment to be enforced.

f) Given that the Claimants rely heavily on regulatory proceedings, it is relevant that the responsible regulator and its records are based in Brazil.

g) There are various ongoing claims before the Brazilian courts concerning the alleged cartel, including proceedings issued in Brazil by a number of Claimants in this action.

h) The Brazilian court would likely consider that it has exclusive jurisdiction over the claims pursuant to Article 23 of the Code of Civil Procedure. If the Brazilian court finds that it has exclusive jurisdiction, it is likely to be impossible to compel, in support of the English proceedings: (i) the production of documents within the control of third parties that are located in Brazil (potentially including regulators); or (ii) individuals based in Brazil to give evidence.

214. I address these factors in turn.

215. As to factor (i), there is a degree of overlap between the present claims and the Favero and Costa claims. However, it is limited in the sense that there are key issues in the present claims that cannot be expected to be resolved in the Favero and Costa claims (see § 208 above). Further, any risk of irreconcilable judgments may be overstated and could be managed, with the result that other factors (such as delay) may assume greater prominence. The Supreme Court in *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC & Others* [2020] Bus. L.R. 1196, [2020] UKSC 24, another competition law case, indicated that each claim has to be determined on the pleadings and evidence adduced in it (§ 246). Following that approach, Vos J in *Office Depot International v Holdham SA* [2019] EWHC 2115 (Ch) declined to stay English proceedings pursuant to Article 30 of the original Brussels Regulation pending proceedings in Sweden, noting among other things that:

i) the risk of inconsistent decisions, in the case in hand, was low because the claims would be based on factual and expert evidence on the substantive questions, and although the Swedish court may decide some matters of legal principles that will be binding, the English court could follow the guidance in the recitals to the Damages Directive (2014/104/EU) (to the effect that national courts should take due account of any related actions and judgments), and

ii) the risk of delay was particularly important in the case before him:

> "48. The second factor seems to me however to be the most important one in this particular case, namely the stage reached in each set of proceedings. The stage in the Swedish proceedings is a long way behind these. It will be between one and two and a half years before jurisdiction is resolved there, two courts already having refused jurisdiction. It will be perhaps between three and five years before the substantive litigation in Sweden is resolved, if it ever gets off the ground.
>
> 49. Meanwhile, Office Depot's claims against the defendants here will be becalmed if the stay is granted. If instead they proceed, they will be completed in what is likely to be less than

> two years - with a three to four week trial that both sides agree will be required. It would indeed be justice denied for Office Depot to be required to start these proceedings again against the defendants three to five years down the line, many years after the cartel ended with all the evidential implications of that time lag. In my judgment, the exceptional circumstances of this case make it highly undesirable for the proceedings to be delayed here."

The Defendants point out that (a) in the present case there is no equivalent to the provisions in the Damages Directive for Member States' courts to have regard to each other's decisions, and (b) in *Office Depot* it was unclear whether the Swedish courts would assume jurisdiction at all, whereas the proceedings in England could be finished in two years, both in contrast to the present case. However, (aa) realistically, it is hard to envisage that an English court would not have regard to any findings made in the Costa or Favero case that were material to the present case, particularly on matters of law, and (bb) notwithstanding the factual differences, the general point remains that the practical likelihood of the overseas proceedings providing illumination on the proceedings here proposed to be stayed, within a reasonable time, is a factor to be taken into account. The history of the Costa and Favero actions to date holds out little reason to believe that that will occur here.

216. As to factor (ii), I assume for present purposes that the present claims could be consolidated or case managed with the Favero or Costa claims. (There is a potential issue as to whether consolidation under CPC Article 55 is possible where, as in the Favero claim, a case has already reached judgment but the judgment has been set aside on appeal). However, it is very doubtful that either of these circumstances will occur. The Favero claim involves 51 claimants and the Costa claim 46 claimants. Both have been going on for fourteen years. I accept Justice Peluso's evidence that the judges in charge of these cases are extremely unlikely to wish to consolidate them with claims brought by an additional 1,500 claimants or so that have barely started. Either consolidation or parallel case management would result in a huge addition in the complexity of the proceedings, and delay. The fact that none of the existing Brazil proceedings has been consolidated, including the various later claims to which Sucocítrico Cutrale is a common defendant, lends further support to the view that the Defendants' suggestions of consolidation or joint case management, whilst theoretically possible, are unrealistic in practice.

217. As to factor (iii), I consider in section (G)(4) whether the Brazilian legal system in general is currently able to provide justice within a reasonable time in this particular type of claim. However, the key question for present purposes is whether a stay by reference to the Favero or Costa claims would be in the interests of justice and help achieve justice, within a reasonable time, for the parties. The answer in my view is no. The course of those two actions to date does not suggest either of them is likely to reach a conclusion in the reasonably foreseeable future: on the contrary, both have been mired in procedural disputes for many years. The Defendants suggest that delay in both cases has arisen in part as a result of choices made by the claimants in them e.g. applications for preliminary relief, and a request for a stay in the Costa case. However, those factors provide only a limited explanation for the delays, and the fact remains that both actions are now some 14½ years old. More broadly, the information provided by Justice Peluso that there were 293,375 cases pending in the Superior Court of Justice and 20,258,140

claims pending in the State of Sao Paolo's courts in 2019 does not provide grounds for optimism that the position in these two cases is likely to improve in the near future.

218. The Defendants suggest (including in the context of *forum non conveniens*) that there is no merit in the Claimants' contention that they would face excessive delay litigating in Brazil. They make the following points:

i) delay in Brazil is not excessive and the Brazilian courts are equipped (indeed obliged) to case manage proceedings within reasonable timeframes;

ii) three of the recent claims against Sucocítrico Cutrale regarding the alleged cartel have resulted in first instance judgments in Brazil within 12 months of proceedings being issued (dismissing each claim on limitation grounds);

iii) the mean duration of analogous competition damages claims in the High Court in England is seven years and seven months (and this is generally the time from issue until settlement, not until a final judgment); and

iv) there is no merit in the Claimants' reliance on the fact that the Favero claim was filed on 23 January 2007 and is ongoing: the first instance judgment was delivered in 2009, and has since been subject to appeal by the claimants and interlocutory applications.

219. I deal with these points, particularly the general position in Brazil and England, in more detail in section (G)(4) below in the context of *forum non conveniens*. For present purposes it is necessary to focus on the Costa and Favero actions, those being only two candidate 'related actions' in respect of the claims I am currently considering i.e. the claims against Cutrale Snr by the Sanches Claimants and the Viegas Claimants other than those purportedly added on 23 January 2020. The course of the Favero and Costa proceedings to date does not support any suggestion that a stay by reference to them would lead to justice being delivered in a reasonable time. Further, the fact that the Favero claim has reached a decision at first instance provided cold comfort. As I have already noted, it appears to be a summary judgment on a single issue, and provides no reason to suppose that the range of issues which the present Defendants say arise both in Brazil and in the current English proceedings will be resolved in the course of the Favero claim, either at all or within a reasonable time.

220. *A fortiori*, it seems likely that, even if it were practicable to join the 1,548 current Claimants in England and Wales to either the Favero case or the Costa case, or to case manage their claims alongside either of those cases, the result would be to add very significant complexity and delay to proceedings which the evidence before me suggests are already not making much real progress. That in turn means that, even if consolidation or parallel case management in Brazil with or alongside the Costa or Favero claims might help reduce the risk of judgments which are inconsistent on certain issues, that would probably be at the expense of unacceptable delay. Even a stay simply to await the outcome of the Favero and/or Costa cases seems likely to result in substantial delay.

221. As to factor (iv), I have already concluded that, whilst recital 24 indicates that the court should consider all the circumstances of the case, it does not follow that the court can grant a stay pursuant to Article 34 which is in substance no more than a *forum non*

conveniens stay. It follows that the factors listed in § 213.iv) above are relevant only insofar as they support the granting of a stay based on the Favero and Costa claims as related claims.

222. In the present case, other things being equal, subfactors (a)-(d) would tend to favour the proceedings being brought in Brazil. Subfactor (e) must be a weak factor, in circumstances where claimants are willing to take the risk as to where any judgment may be enforceable, and where Cutrale Snr may well have significant assets outside Brazil. Subfactor (f) seems of limited force save insofar as it may be linked to subfactor (h) on the basis that a Brazil court might compel the regulator to disclose records for the purpose of Brazilian but not overseas proceedings. Subfactor (g) for present purposes merely reflects the starting point of the Article 34 analysis, namely that there are pre-existing proceedings in Brazil giving rise to the question of whether a stay should be granted. (For the avoidance of doubt, I do not see how the existence of the later Brazilian proceedings, none of which have been or are proposed to be consolidated with the Favero or Costa claims, can have a bearing on whether a stay should be granted by reference to either or both of those claims.)

223. As to subfactor (h), Justice Rezek in his first report referred to CPC Article 23, which provides for exclusive Brazilian jurisdiction in respect of specified types of claim, mainly concerning real estate in Brazil, but cited judicial and academic statements to the effect that the list is not exhaustive. For example, the STJ's Special Court held that a decree of bankruptcy falls within the exclusive jurisdiction of Brazilian courts, and in 1980 the STF held that a claim for damages involving an illegal act in Brazil could be judged only by the Brazil courts, which, Justice Rezek says, *"consecrates the rule of lex loco delicit commissi in Brazilian law"*. He notes that the STF in another 1980 case denied an international cooperation request in a case involving a claim for damages arising out of an illicit act allegedly performed in Brazil. Justice Rezek suggests that the State Court of Sao Paolo in the District of Araraquara would consider that it had "*necessary, if not exclusive jurisdiction"* over the citrus growers' claims.

224. Justice Peluso responds that the 2015 CPC clearly distinguishes between exclusive jurisdiction (Article 23), and relative or competing jurisdiction (Articles 21 and 22), where the Brazil court allows the granting of full effectiveness to decisions of foreign courts. The consistent jurisprudence of the STF is that <u>only</u> foreign judgments on claims involving Article 23 exclusive jurisdiction are refused exequatur (enforcement). He quotes Justice Rezek's own statement in a STF decision in 1996 about CPC Article 89, the direct predecessor to Article 23:

> "The Brazilian civil procedural law portrays a single hypothesis of exclusive or non-extendable jurisdiction of the Brazilian Justice. It is included in article 89 of the Code of Civil Procedure: it is incumbent upon our judicial authority, to the exclusion of any other authority, to decide on disputes related to a property located in Brazil, and also on the inventory or sharing of assets (not necessarily real estate) located in Brazil. In all other hypotheses of jurisdiction of the Brazilian courts, this court has already repeatedly established that such jurisdiction is concurrent. It does not exclude, as in the hypotheses of article 89, the jurisdiction of the foreign court." (STF, SEC n. 4415-EUA.)

Justice Peluso states that the 1980 decision to which Justice Rezek referred is

> "not only an isolated judgment out of kilter with the prevailing jurisprudence, but it has also been surpassed by subsequent case law. Moreover, that decision can also be criticised on the basis that no judge is entitled to use an abrogative reading of an express provision of law on international jurisdiction, under the pretext of the lex loci delicti by a matter of ordre public, or to be authorized by Art. 9 of Decree-Law No. 4,657, of 1941 (Law of Introduction to the Norms of Brazilian Law …, which only refers to material, or substantive, law, on the laws of obligations, not to procedural rules of jurisdiction."

225. In reply, Justice Rezek points out that his statement quoted above was made in a case where the relevant conduct in fact took place in New York, and the issue actually before the court was whether enforcement should be refused because the respondent was domiciled in Brazil. Justice Rezek does not, though, appear to contest Justice Peluso's statement that the STF has repeatedly decided that the Article 23 category of exclusive jurisdiction is exhaustive. Justice Rezek also notes the lack of consistent connection to England of the parties and events of the present case. He continues:

> "52. This is why I remain firmly convinced that a foreign judicial decision on the present matter, even emanating from such a venerable jurisdiction as England and Wales, would not obtain exequatur in Brazil; and that a foreign court would struggle to obtain the cooperation of the Brazilian authorities, even if such cooperation were solicited by means of letters rogatory. Any foreign proceedings would overlap with a number of claims that are already underway before the courts of São Paulo and could potentially result in judgments that conflict with decisions that have attained the status of res judicata in Brazil.
>
> 53. My view that the Brazilian courts would likely consider the present claims to fall within their exclusive jurisdiction is further affirmed by the fact that, I understand, when Sucocítrico Cutrale contracted with its growers during the claim period, it did so on terms that gave the courts of Brazil exclusive jurisdiction. An example contract is annexed to this report with the relevant jurisdiction clause highlighted.
>
> 54. … the difficulties identified in Rezek-1 regarding evidence taking concern cases where the Brazilian courts judge themselves to have exclusive jurisdiction, in view of a full, round, and absolutely complete assessment of the circumstances of connection, and where they are already exercising such jurisdiction, as is the case in the current proceedings ongoing in São Paulo, on the basis that permitting the collection of evidence to assist with a foreign suit may interfere with those proceedings. I cannot concur with Justice Peluso's understanding that the position has now changed owing to minor adjustments to the letters rogatory process." (footnotes omitted)

Justice Rezek accepts that there are no legal obstacles to Brazilian individuals choosing voluntarily to give evidence before a foreign court.

226. Justice Rezek's point about a contractual exclusive jurisdiction clause (quoted § 53 above) is based on an undated and anonymous document which is said to be an example of a contract between Sucocítrico Cutrale and a fruit grower, and which includes a provision purporting to confer exclusive jurisdiction on the District Court of Araraquara to settle any disputes arising from the contract. The Claimants point out, though, that neither the Favero nor the Costa claim is pending before the District Court of Araraquara (and nor are some of the later actions commenced against Sucocitrico). Overall, I accept the Claimants' submission that the evidence before me provides no basis on which I could properly conclude that the present claims in England are contrary to exclusive jurisdiction provisions. It is not possible definitively to resolve the dispute between Justices Rezek and Peluso about whether, in practice, the Brazilian courts might refuse to provide any cooperation this court might request, or to enforce an English judgment against Cutrale Snr, on the grounds that the claim is insufficiently connected with England or liable to interfere with proceedings in Brazil. However, I do not consider any risk to have been clearly demonstrated, nor that any such risk constitutes a weighty factor in favour of a stay by reference to the Favero or Costa claims.

227. Finally, and for completeness, I also see some force in the Claimants' general point that different outcomes may legitimately arise from separate claims in competition law contexts, even where they arise from a single alleged or proven cartel, given that each claim has to be assessed on the basis of its own pleadings and evidence. They cite as examples the trucks cartel litigation (one facet of which is *Royal Mail Group Limited v DAF Trucks Limited & Others* [2020] Bus. L.R. 1795, [2020] CAT 7), and the interchange fees cases. As the UK Supreme Court said in one of the latter set of cases, *Sainsbury's Supermarkets Ltd v Visa Europe Services LLC & Others* (cited in § 215 above), "*It may also be observed that, contrary to what the Court of Appeal seems to have thought it would achieve by ordering a combined hearing in the CAT in the three sets of proceedings at issue in this appeal, that combined hearing will not produce a single, comprehensive determination of liability in relation to the other interchange fee damages claims. Those other claims will have to be determined in each case on the basis of the pleadings and the evidence adduced in that case*" (§ 246). I accept that some caution is needed in seeking to make comparisons with these cases, bearing in mind that the trucks litigations flow from a single infringement decision by the EU Commission, and in the interchange fees litigation there is now a single Supreme Court authority setting out what is required in order to demonstrate infringement. On the other hand, individual claimants in, for examples, the trucks claims will still have to prove how the infringement impacted on the prices they paid, and so scope for logically inconsistent judicial findings remains.

228. My overall conclusion is that, even to the extent that some of the factors discussed in § 222 might when taken alone support the case for a stay, they are (to the extent relevant) clearly outweighed by the considerations referred to in §§ 215-220 above, which in my view point indicate that a stay by reference to the Favero or Costa claims would not promote the interests of justice.

(g) Overall conclusion and discretion

229. For the reasons set out above:

i) I do not consider that it is or would be expedient to hear and determine the claims against Cutrale Snr brought by the Sanches Claimants and the Viegas Claimants (leaving aside those purportedly added on 23 January 2020) together with the Favero or Costa claims to avoid the risk of irreconcilable judgments resulting from separate proceedings;

ii) I would expect that the courts of Brazil would, in principle, give judgments capable of recognition and, where applicable, of enforcement in England & Wales; and

iii) I am not satisfied that a stay is necessary for the proper administration of justice.

(h) Additional claimants in the Viegas claim

230. 109 Claimants were purportedly added to the Viegas claim by amendments under CPR r.17.1 on 23 January 2020. The Defendants submit that:

i) it was not permissible to add these Claimants by way of amendment under CPR r.17.1 and the Defendants reserve the right to apply to strike out these claims in the event that the present application under CPR Part 11 is unsuccessful (see *Various Claimants v G4S* [2021] 4 WLR 46); and

ii) without prejudice to (i) above, the earliest the English court could have been seised in respect of those 109 Claimants is 23 January 2020 (see *Starlight Shipping Co ('The Alexandros T')* §60). This is after the date of issue of all of the Brazilian claims, save for the Jotto claim.

231. The Defendants also do not accept that the Viegas claim is properly pursued on behalf of Claimants added or altered by purported amendments under CPR r.17.1 on 22 November 2019, and reserve the right to strike out such claims in the event that the present application is unsuccessful. However, they do not contend that this particular point affects the present application.

232. As to the 109 Claimants added on 23 January 2020, the Claimants do not dispute that the court cannot have become seised of their claims before that date, albeit they point out that 107 of the 109 were substituted as claimants, for example following death.

233. In principle, the Defendants could seek a stay of these Claimants' claims by reference to the proceedings commenced in Brazil later than the Favero and Costa actions. Further, the argument that the actions are related would be stronger to the extent that Sucocítrico Cutrale is a party to the later actions; and there might be lesser objection based on delays, simply by virtue of the fact that the later actions have been going on for much shorter times than the Favero and Costa actions.

234. Conversely, it is unclear whether, and if so when, any of the later actions will reach the merits of the claims, given that the Teles, Neto and Jotto have been dismissed on limitation grounds, subject to the outcome of appeals; and relatively little is known about the Ardengue claim as it is subject to judicial secrecy (albeit it may be reasonable

to infer that the essential claims made against Sucocítrico Cutrale are similar to those in the Teles, Neto and Jotto actions). In addition, none of these actions can be expected to involve findings about the liability of individuals in a position similar to Cutrale Snr.

235. Most importantly, in my view, it is difficult to see how it could be expedient to stay these 109 claims pending proceedings in Brazil in circumstances where they raise the same claims (brought in the same proceedings here) as the other 1,400 or so claims which are not to be so stayed. That would lead to yet further fragmentation and would be highly inexpedient. (For completeness, I do not consider this point to be one that could be made in reverse: Article 34 does not permit this court to stay the original claims in England by reference to (a) actions subsequently commenced in Brazil, still less (b) proceedings which the 109 Claimants might in future bring in Brazil if their claims in England were stayed.)

236. For these reasons, I do not consider that the 109 later claims in the Viegas action should be stayed pending any of the proceedings in Brazil.

(2) Cutrale Jnr: stay under Article 28 of the Lugano Convention

237. Cutrale Jnr has not provided a witness statement in this application. However, he submits that if the criteria under Article 6 of the Lugano Convention are met, the claims against him should be stayed pursuant to Article 28 because of the ongoing proceedings in Brazil. Article 28 provides:

> "1. Where related actions are pending in the courts of different States bound by this Convention, any court other than the court first seised may stay its proceedings.
>
> 2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
>
> 3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

238. Article 28 of the Lugano Convention can be given reflexive effect to apply to non-Lugano Convention states: *Kolomoisky* (CA) at §§161-181, a conclusion which the Court of Appeal explained on the basis that it would *"avoid the risk of inconsistent judgments"*. The concept of whether claims are related under Article 34 of Brussels Recast or Article 28 of the Lugano Convention is the same: *Kolomoisky* (CA) at §182. Cutrale Jnr accordingly adopts the submissions relating to Cutrale Snr, *mutatis mutandis*, which he submits apply equally to the claims advanced against him in England.

239. Article 28 Lugano does not expressly pose the question in Article 34(1)(c) Brussels Recast, i.e. whether a stay is necessary for the proper administration of justice. However, that is plainly a consideration to be taken into account when exercising the discretion which Article 28 confers.

240. The considerations set out in section (G)(1) above in relation to Cutrale Snr also apply in relation to Cutrale Jnr. For those reasons, I do not consider that the claims against Cutrale Jnr should be stayed in the light of the relevant proceedings in Brazil.

(3) Sucocitrico: stay under Article 33 or 34 Brussels Recast

241. I consider in this section whether, in the event that I were wrong in my earlier conclusions that Sucocítrico Cutrale is not domiciled and does not have a place of business in England and Wales, the court would nonetheless have granted a stay pursuant to Article 33 or 34 of the Recast Brussels Convention.

242. Article 33 of Brussels Recast provides:

> "1. Where jurisdiction is based on Article 4 or on Articles 7, 8 or 9 and proceedings are pending before a court of a third State at the time when a court in a Member State is seised of an action involving the same cause of action and between the same parties as the proceedings in the court of the third State, the court of the Member State may stay the proceedings if:
>
> (a) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State; and
>
> (b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice. …"

243. Article 34 is quoted in § 147 above.

244. As a preliminary point, the Defendants submitted in their skeleton argument that the Claimants failed to take steps necessary to effect service on Sucocitrico, because for the reasons considered earlier the Claimants were not entitled to serve it at an address within the jurisdiction under CPR r.6.9(2): instead, the Claimants required the permission of the court to serve out of the jurisdiction under CPR r.6.37; the claim forms were therefore not served within six months of the date of issue as required by CPR r.7.5; and accordingly the English court is not the court first seised for the purposes of Article 33 of Brussels Recast and Sucocítrico Cutrale is entitled to rely on all of the Brazilian claims for these purposes.

245. However, a submission of that nature would be relevant only if the Claimants had sought to found jurisdiction over Sucocítrico Cutrale on some basis other than having its domicile or a place of business in the jurisdiction. The Claimants have not done so, but have instead asserted jurisdiction only on those two alternative bases. As a result, the Claimants have not sought permission to serve the claims on Sucocítrico Cutrale out of the jurisdiction, since if they are right about the basis of jurisdiction no such permission is required: either they are entitled to serve proceedings out of the jurisdiction as of right based on Sucocítrico Cutrale being domiciled here, or they are entitled to serve within the jurisdiction at Sucocítrico's place of business here.

246. As a result, for present purposes only the Favero and Costa claims can be regarded as having been pending in Brazil at the time the present proceedings were commenced,

subject only to the point about the 109 claimants added later to the Viegas claim (whose position is discussed in section (G)(1)(h) above).

247. So far as Article 33 is concerned, the Defendants do not seek to argue that a stay should or could be granted by reference to the Favero or Costa claims. The present proceedings are not "*between the same parties*" as either of those claims (whether or not there are additional parties in either the English or the Brazil proceedings, which would not prevent the application of Article 33: see *Federal Republic of Nigeria* at §§43, 48-49). None of the Defendants to the present proceedings is a party to the Favero or Costa claims.

248. As to Article 34, many of the same considerations as I consider in section (G)(1) above would again apply. The main difference is that the objection that the Favero and Costa claims will not address the liability of individuals such as Cutrale Snr and Cutrale Jnr would not be relevant. However, the majority of the other matters I consider in that earlier section would still apply, including almost all of those summarised in §§ 207-210 and 215-220 above. For those reasons, I would not have granted a stay under Article 34 of the claims against Sucocítrico Cutrale.

(4) Sucocítrico Cutrale and Cutrale Snr: *forum non conveniens* stay

249. I consider here, again hypothetically, whether I would have stayed the claims against Sucocítrico Cutrale and/or Cutrale Snr on *forum non conveniens* grounds, if I had concluded that (1) Sucocítrico Cutrale was not domiciled here but did have a place of business here on which the Claimants had been entitled to serve the company pursuant to CPR 6.9(2), or (2) Cutrale Snr was not domiciled here and could be sued here only based on having been served in the jurisdiction, or (3) both (1) and (2) applied. The issue would potentially have arisen in relation to Cutrale Snr as well as Sucocitrico, absent my conclusion about Cutrale Snr's domicile. That is because although Cutrale Snr does not dispute having been served in the jurisdiction, he argued that the claim against him should be stayed on *forum non conveniens* grounds.

(a) Principles

250. The key principles were summarised by Lord Briggs in *Vedanta*:

> "The best known fleshed-out description of the concept is to be found in Lord Goff of Chieveley's famous speech in the *Spiliada* case [1987] AC 460, 475-484, summarised much more recently by Lord Collins JSC in the *Altimo* case [2012] 1 WLR 1804, para 88 as follows: '*the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice…*' That concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimise the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of

> law which will be applied to decide the issues, the place where the wrongful act or omission occurred and the place where the harm occurred." (§ 66)

251. The court typically approaches this in two stages in cases such as the present one where permission to serve out is not required:

i) the burden is on the applicant to show that there is another available forum which is clearly or distinctly more appropriate than the English forum (see, e.g., *Traxys Europe SA v Sodexmines Nigeria Ltd* [2020] EWHC 2195 (Comm) §11; *Satfinance Investment Ltd v Athena Art Finance Corp* [2020] EWHC 3527 (Ch) § 95); and

ii) if the applicant satisfies that burden, the respondent must satisfy the court that there is nevertheless some reason why it would be unjust for the English proceedings to be stayed in favour of the foreign forum (see, e.g., *Traxys* §§8 and 11).

252. An example of (ii) above arises where a claimant alleges an inability to obtain justice in the competent overseas forum:

> "The question whether there is a real risk that substantial justice will be unobtainable is generally treated as separate and distinct from the balancing of the connecting factors which lies at the heart of the issue as to proper place, but that is more because it calls for a separate and careful analysis of distinctly different evidence than because it is an inherently different question. If there is a real risk of the denial of substantial justice in a particular jurisdiction, then it seems to me obvious that it is unlikely to be a forum in which the case can be tried most suitably for the interests of the parties and the ends of justice." (*Vedanta* § 88)

253. Delays in the overseas forum appear to have been classified as going to the question of whether there is a real risk that substantial justice will be unobtainable, rather than the prior question of whether it is clearly or distinctly more appropriate than the English forum. (The position in that respect may be contrasted with recital 24 to Brussels Recast, which includes as one of the various 'proper administration of justice' considerations the question of whether the court of the third State can be expected to give a judgment "*within a reasonable time*".) Thus in *The "Vishva Ajay*" [1989] 2 Lloyds Law Report 558, 560 Sheen J referred to evidence that in the High Court of Bombay many actions did not reach trial in less than ten years and it would be wholly exceptional for an action to come on for trial in less than six years, stating that *"[d]elay of this magnitude seems to me to be a denial of justice"*. In *Konamaneni v Rolls-Royce International Industrial Power (India) Ltd* [2002] 1 WLR 1269 Lawrence Collins J said:

> "177. Delay has been a factor taken into account in cases involving applications to stay on the ground that India is the appropriate forum: see *The Jalakrishna* [1983] 2 Lloyd's Rep 628 and *The Vishva Ajay* [1989] 2 Lloyd's Rep 558 ; but contrast

> *Radhakrishna Hospitality Service Private Ltd v EIH Ltd* [1999] 2 Lloyd's Rep 249 . It is well known that in the past there were substantial delays in the Indian legal system, caused by the combination of an enormous population and an overworked and understaffed judiciary, but it is also well known that very great efforts have been made in recent years to reduce the backlog of cases. The evidence in this case goes nowhere near showing that it is so serious as to amount to a substantial injustice, and nowhere near showing that it is such as to deprive the claimants of any remedy at all. It is not seriously arguable that "*substantial justice cannot be done*" in India in relation to claims by Indian residents and NRIs (and their companies) in relation to an Indian company and its affairs, and it would be a substantial breach of comity to stigmatise the Indian legal system in that way. This is typically the situation in which the claimant will have to "*take [the appropriate] forum as he finds it*": see *Connelly v RTZ Corpn plc* [1998] AC 854 , 872." (§ 177)

More recently, in *Pike v Indian Hotels Co Ltd* [2013] EWHC 4096 (QB), Stewart J preferred the claimants' expert evidence (delay of 15 years for a trial) over the defendant's expert evidence (delay of 4 years for a trial), considered such delay to be a "*very significant factor*" (§ 60), and concluded that it would amount to a denial of justice (§ 71).

254. The court should consider whether to exercise jurisdiction in light of the circumstances existing at the time of the determination of the application (*Credit Agricole Indosuez v Unicof Ltd* [2004] 1 Lloyd's Rep 196 at §22; White Book at §11.1.3 (final sub-paragraph)).

255. The risk of irreconcilable judgments is a relevant factor. However, the presence of a UK-domiciled anchor defendant (i.e. a defendant who can be sued as of right under Article 4(1) of Brussels Recast) should not be treated as a 'trump card' if other factors point toward a different forum as the proper place for the dispute (see *Vedanta* at §§40, 67, 75, 83-85, 87). In particular, if the UK-domiciled anchor defendant offers to submit to the jurisdiction of the more appropriate forum, so that the whole case could be tried there, then the court is entitled to conclude that England is not the proper place for the trial of the claims and to stay the claims against the defendant who is not UK-domiciled (see *Vedanta* at §§40, 75, 87). As Lord Briggs stated at § 75:

> "75 I have however been much more troubled by the absence of any particular focus by the judge upon the fact that, in this case, the anchor defendant, Vedanta, had by the time of the hearing offered to submit to the jurisdiction of the Zambian courts, so that the whole case could be tried there. This did not, of course, prevent the claimants from continuing against Vedanta in England, nor could it give rise to any basis for displacing article 4 as conferring a right to do so upon the claimants. But it does lead to this consequence, namely that the reason why the parallel pursuit of a claim in England against Vedanta and in Zambia against KCM would give rise to a risk of irreconcilable judgments is because the claimants have chosen to exercise that

> right to continue against Vedanta in England, rather than because Zambia is not an available forum for the pursuit of the claim against both defendants. In this case it is the claimants rather than the defendants who claim that the risk of irreconcilable judgments would be prejudicial to them. Why (it may be asked) should that risk be a decisive factor in the identification of the proper place, when it is a factor which the claimants, having a choice, have brought upon themselves?"

256. It has been held to be generally preferable that a case should be tried in the country whose law applies. This factor is of particular force if issues of law are likely to be important and if there is evidence of relevant differences in the legal principles applicable to such issues in the alternative forum (*Satfinance* §98).

(b) Application

257. The Defendants submit that Brazil is the proper forum because:

i) The claim relates to alleged antitrust infringements that were committed in Brazil and restricted competition in markets in Brazil, causing harm to the Claimants there. The events giving rise to alleged liability are said to involve numerous Brazilian companies and a Brazilian industry association. Detailed questions are likely to arise about historic events in Brazil, such as dealings among a chain of persons ranging from lower level employees who dealt with individual fruit farmers, through junior managers and up to higher level managers, along with evidence about the alleged collusion with other companies. Evidence is also likely to be needed on questions such as why the Sucocítrico Cutrale group chose to grow some of its own fruit, the relevant labour markets in Brazil, the allegations about Sucocítrico Cutrale delaying entry of trucks into its premises, why individual farmers went out of business, what factors were affecting production volumes and prices at the relevant times, and numerous issues going to quantum. It would be unprecedented for the English court to hear a competition law case where the alleged infringement and effects occurred entirely outside the UK.

ii) The applicable law is Brazilian law. The expert evidence served for the purpose of this jurisdiction challenge is shows that (a) the substantive law relevant to competition damages actions is different in Brazil to the UK, and (b) there are disputes between the parties as to the content of Brazilian law. These are powerful factors in favour of a Brazilian forum.

iii) The vast majority of the witnesses will be based in Brazil. This includes the Claimants (who are all domiciled in Brazil) and Sucocítrico Cutrale's employees (who are all based in Brazil).

iv) Most of the relevant documents are likely to be in Brazil.

v) Relevant documents are likely to be in Portuguese and most witnesses are likely to have Brazilian Portuguese as their first (and perhaps only) language. Even this jurisdiction challenge has required translation of witness statements for both sides, expert reports and numerous other documents. Proceedings in England

would be significantly lengthened and rendered more expensive by the need for the extensive translation, and there is a risk of mistranslation leading to error.

vi) The Claimants do not suggest that there are insufficient assets within Brazil for a judgment to be enforced.

vii) Given that the Claimants rely heavily on regulatory proceedings, it is relevant that the responsible regulator and its records are based in Brazil (cf *Vedanta* at §85(vii)).

viii) There are various ongoing claims before the Brazilian courts concerning the alleged cartel, including proceedings issued in Brazil by a number of Claimants in this action. At the same time, the Claimants would not be obliged to seek to join any of them: it would be open to them to commence a singe action in Brazil against the Defendants.

ix) The Brazilian court would likely consider that it has exclusive jurisdiction over the claims pursuant to CPC Article 23. If the Brazilian court finds that it has exclusive jurisdiction, it is likely to be impossible to compel, in support of the English proceedings: (i) the production of documents within the control of third parties that are located in Brazil; or (ii) individuals based in Brazil to give evidence.

x) Even if the Brazil court would cooperate with requests for assistance from the English court, that process is much more cumbersome than for a Brazil court simply to subpoena a witness located in Brazil. CPC Article 401 contains a general power to obtain documents from third parties by such means.

258. The Defendants submit that the claims against Sucocítrico Cutrale should be stayed even if Cutrale Snr is domiciled in England. He has confirmed that he would submit to the jurisdiction of the Brazilian court. In those circumstances, the risk of inconsistent judgments in England and Brazil would be insufficient to outweigh the other factors which point to Brazil as the proper place. Furthermore, the Defendants submit that the claims against Cutrale Snr are unnecessary and amount to a thinly pleaded and legally defective attempt to identify an anchor defendant.

259. As to the prospects of obtaining substantial justice in Brazil, the Defendants submit that:

i) Brazil has a sophisticated legal system which affords access to justice. There are indications in the evidence that the Brazilian courts have dealt with major competition litigation and has a competition law bar: for example, the claim brought by Electrolux against Whirlpool relating to the compressors cartel.

ii) There is no merit in the Claimants' contention that they would face excessive delay litigating in Brazil. First, delay in Brazil is not excessive and the Brazilian courts are equipped (indeed obliged) to case manage proceedings within reasonable timeframes. Secondly, three recent claims against Sucocítrico Cutrale regarding the alleged cartel have resulted in first instance judgments in Brazil within 12 months of proceedings being issued (dismissing each claim on limitation grounds). Thirdly, according to the Defendants' data analysis the

mean duration of analogous competition damages claims in the High Court in England is seven years and seven months (and this is generally the time from issue until settlement, not until a final judgment). The Defendants point out in this context that the English courts have in practice sometimes aimed to manage cases together, with the result that cases commenced earlier can be delayed, citing as examples the trucks and air cargo litigations. There can also be preliminary issues and multiple appeals (e.g. in the interchange fees and LCD actions). Fourthly, there is no merit in the Claimants' reliance on the fact that the Favero claim was filed on 23 January 2007 and is ongoing: the first instance judgment was delivered in 2009, and has since been subject to appeal by the claimants and interlocutory applications.

iii) Turner J in *Municipio De Mariana* at §§244-259 rejected an argument by Brazilian claimants that for similar reasons they would not obtain substantial justice in Brazil. The Defendants accept that the court is not bound by any factual findings made by Turner J in that claim. Turner J stated *inter alia:*

> "255. In the context of delay in the Brazilian jurisdiction, I am entirely unpersuaded that proceedings in England would be more promptly concluded than would proceedings in Brazil. In particular:
>
> (i) It is by no means unusual for group litigation in England to continue for many years. By way of example only, the British Coal Coke Oven Workers' Group Litigation, which was commenced over five years ago, has not yet been fully concluded (although it is hoped that it will be fairly soon). That case involves far fewer claimants and far less complex issues than would be engaged in attempting to deal with the instant claims;
>
> (ii) It is difficult to overestimate the sheer enormity of the task which would face the English court. Even if it were to be assumed (contrary to my view) that such proceedings could be managed at all, they would be beset and delayed by chronic practical problems relating to difficulties in translation, constraints on witnesses accessing the court, and challenges involved in applying the law of an unfamiliar jurisdiction;
>
> (iii) The progress of the English proceedings would be likely to be hobbled at every turn by parallel developments in Brazil;
>
> (iv) Any claims in England would be required, probably by way of preliminary issue, to surmount the hurdle of demonstrating that the defendants owe the claimants the requisite duty as indirect polluters. This issue, which is likely to be contested, would inevitably involve a very complex and lengthy process and, even if it were to culminate in success for the claimants, would set back the consideration of issues of causation and quantum. No such fermata would impede proceedings in Brazil;

> (v) Notwithstanding the undoubtedly sinuous path which the litigation in Brazil has so far taken, there are strong indications that Judge Mario is injecting a strong sense of forward momentum into the proceedings. It is not surprising that his initiatives have not yet been fully worked out and may be (and indeed in some cases are) subject to appellate challenge. However, on any objective assessment, the prospects of matters henceforth progressing in Brazil so slowly that it would become a significant factor under stage two of *Spiliada* are remote;
>
> (vi) The complaint of delay is further undermined by the fact that so many claimants have already achieved at least some, if not full, redress in Brazil." (§ 255, footnotes omitted)

I note that the full Court of Appeal has granted permission to appeal from Turner J's decision (see the reasoned judgment at [2021] EWCA Civ 1156).

260. The claims undoubtedly have a number of strong connections with Brazil. There are also some cogent points to be made against the grant of a stay.

261. First, as to connecting factors:

i) Cutrale Snr, Cutrale Jnr and José Henrique Cutrale may be regarded as the most important witnesses in the case, and are certainly among the key witnesses. Two other members of the Family Board, Rosana and Graziela, may well also be witnesses. Three of the five are domiciled in England and none is domiciled in Brazil.

This factor is mitigated to a degree by the fact that Cutrale Snr and Cutrale Jnr have offered to submit to Brazilian jurisdiction and, presumably, would in that connection make themselves available to give evidence there.

ii) Cutrale Snr is understood to have substantial assets in England and Wales.

iii) The Defendants have shown themselves able to deploy factual and expert evidence in English, including from Sucocítrico Cutrale employees, rendering this a slightly less compelling factor in favour of a stay, though I would nonetheless not underestimate the burden which may arise from the need for translations.

262. Secondly, as regards evidence gathering in Brazil, Justice Peluso does not accept Justice Rezek's suggestion that the Brazilian court would refuse to comply with a request from the English court in this case because it would regard itself as having exclusive jurisdiction. Brazil is a signatory to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and Justice Peluso states that the taking of depositions of Brazil-based witnesses by way of international cooperation is not only provided for in Brazilian law, but constitutes a recurrent practice in Brazil. Justice Rezek's response is quoted in §225 above. As indicated in § 226 above, I do not consider it possible definitively to resolve the dispute between Justices Rezek and Peluso about whether, in practice, the Brazilian courts might refuse to provide any cooperation this court might request, or to enforce an English judgment against Cutrale

Snr, on the grounds that the claim is insufficiently connected with England or liable to interfere with proceedings in Brazil. However, I do not consider any such risk to have been clearly demonstrated.

263. Thirdly, as regards delays in Brazil, the Claimants provide evidence from Professor Frazão, a Professor of Competition Law, as well as from Justice Peluso. Professor Frazão states that although the Brazilian Antitrust Law permits private law damages actions for breaches of its provisions, one of the great challenges facing antitrust lawsuits in Brazil is the length of time that such cases take, and private law cases under the Brazilian Antitrust Act have taken as long as 18 years. The lower average figures for completed cases are skewed by fuel cartels, which Professor Frazão explains contain idiosyncratic features. Cases that are not yet *res judicata* already have an average length of 16.5 years.

264. Professor Frazão describes the enforcement of private law antitrust claims in Brazil as "*nascent and underdeveloped*" and the lack of success in enforcing antitrust claims as stark, even where (as here) the claim is preceded by a CADE enforcement action. Damages have been recovered in just six of 62 such cases. Professor Frazão believes one reason for this to be a reluctance by the Brazilian courts to recognise rulings of CADE adverse to those alleged to have breached the Antitrust Law. She adds that the problem is exacerbated by CADE's consistent resistance to disclosing and sharing evidence of conduct in breach of the Antitrust Law, even where it has ruled that breaches occurred: though she does state that according to Brazilian law once the CADE investigation is over there should in principle be no problem (subject to protecting trade secrets) in the Brazil courts obtaining copies of documents produced by leniency applicants. Attempted reforms have stalled or have been ineffective. Professor Frazão's evidence is supported by Justice Peluso, who refers to the "*notorious problems of judicial delay which have not improved over time",* leading to *"a tremendous backlog of cases*", and she refers to very serious delay in the conduct of private law competition claims in Brazil.

265. The Claimants criticise the Defendants' comparative data on the duration of private law competition claims in England on the basis that it groups individual actions together by reference to the underlying infringement (e.g. the, at the time, 26 claims relating to card interchange fees) and takes a single, overall time period *"[f]or convenience*" and because "*actions relating to the same or related alleged infringements of competition law are often case managed together, with issues relating to multiple actions determined at the same time*". The Defendants further suggest that where earlier actions are withdrawn, settled, struck out, or otherwise brought to a conclusion, parties to later actions will often 'pick up the baton' left by the parties to the earlier actions.

266. However, as the Claimants point out, this methodology (which across the dataset affects 16 groups of antitrust actions comprising 79 individual actions) means that the start date for groups of individual actions is the date of the first issued claim in the group, while the end date is the date of the last individual action in the group to have concluded, even though (a) the first issued claim may have concluded earlier and (b) the last action to conclude may have been issued significantly later than the first issued claim. A striking example is that the Defendants' analysis includes two follow-on claims relating to LCD screens as a single group despite the first claim having settled almost two years prior to the second claim commencing, leading to an overall length of 10 years and 3 months for the grouping when the individual actions respectively lasted 3 years 1 month

and 5 years 2 months. I accept the Claimants' point that the Defendants' approach is unilluminating to the extent that individual competition claims run their own course, as opposed to instances where actions are managed together as a group.

267. The Claimants' alternative analysis shows data based on the Defendants' approach alongside data arrived at by (a) treating all English competition law actions as individual actions notwithstanding that certain individual actions might be actively managed together by the courts and (b) separating out (i) individual actions not actively managed by the court in a group and (ii) groups of individual actions that are actively managed by the court as a single group, then combining the results in a single dataset. Applying this approach to all types of antitrust damages actions yields the following results:

Table 1: Duration of Concluded and Ongoing Antitrust Damages Actions (All Types) In England And Wales (Including CAT) and Brazil In Years (y) And Months (m)

		England and Wales			Brazil per Professor
		Defendants' approach	**No grouping of individual actions**	**Grouping individual actions actively managed by court as group**	**Frazão**
Concluded	Action with longest duration	11y, 5m	10y, 4m	11y, 5m	17y, 9m
	Action with shortest duration	6m	5m	5m	1y, 6m
	Average length to conclusion	3y, 4m	2y, 10m	2y, 10m	6y, 10m
Ongoing	Action with longest duration	9y, 6m	9y, 6m	9y, 6m	14y, 8m
	Action with shortest duration	5m	5m	5m	2y, 3m
	Average length to date	3y, 11m	3y, 9m	3y, 9m	7y, 2m
All actions	Average length	3y, 6m	3y, 2m	3y, 2m	7y, 1m

268. The Claimants provide a further table of data, excluding as being less directly comparable to the present case (a) antitrust damages actions involving only a single claimant (or group of claimants from the same corporate group) in respect of the antitrust infringement in question, (b) collective proceedings in the CAT, and (c) antitrust damages actions based on abuse of dominance claims. This table does not show comparable data for Brazil because there are no proper comparators in Brazil for High Court actions or follow-on antitrust actions with standalone elements:

Table 2: Duration of Concluded and Ongoing Antitrust Damages Actions (Excluding Single Claimant, Dominance, And Collective Proceedings Cases) In England and Wales (Including CAT)

		England and Wales		
		Defendants' approach	**No grouping of individual actions**	**Grouping individual actions actively managed by court as group**
Concluded	Average length High Court	7y, 7m	3y, 7m	3y, 11m
	Average length follow-on and standalone	8y, 11m	3y, 9m	4y, 2m

	Average length all actions	6y, 9m	3y, 6m	3y, 10m
Ongoing	Average length High Court	7y	3y, 2m	5y, 5m
	Average length follow-on and standalone	6y, 7m	1y, 10m	4y, 11m
	Average length all actions	5y, 6m	3y, 2m	4y, 2m

269. The Defendants point out that many cases settled and would have taken longer had they reached court. Moreover, the statistics for English claims relate in large part to cases where the main documents and witnesses were located in England, by contrast with cases such as the present one where their presence abroad would be bound to take considerably longer. Nonetheless, I agree with the Claimants that this data suggests that the duration of antitrust damages actions in Brazil is in general materially longer than in England and Wales. The most straightforward comparison is between the figures in Table 1 for average length of cases when claims are not grouped (or not grouped unless actively managed as a group), viz 2 years 10 months in England and Wales versus 6 years 10 months in Brazil for concluded actions, and 3 years 9 months in England and Wales versus 7 years 2 months for ongoing actions.

270. Drawing these various strands together, the conclusions I would have come to on the *forum non conveniens* issues may be summarised as follows.

i) The connecting factors summarised in § 257 above, taking account also of the countervailing or mitigating considerations referred to in §§ 261 and 262 above, would have led me to the *prima facie* view that Brazil is clearly and distinctly the appropriate forum for these claims.

ii) That *prima facie* view does not take account of the significant risks of increased delay in Brazil discussed in §§ 259 and 263-269 above. Had it been appropriate to take those risks into account when assessing whether Brazil was clearly or distinctly the appropriate forum, they may have tipped the balance the other way. By contrast with the apparent situation in *Município Mariana*, I see no indication either of a body of claimants who have already obtained redress in Brazil, nor of any particular court or judge *"inject[ing] a strong sense of forward momentum into the proceedings"*.

iii) However, I apprehend the relevant question in the context of *forum non conveniens* to be whether the delays or other features of the Brazilian system result in a real risk that substantial justice will be unobtainable. That involves having regard to the generality of the cases which have been commenced in Brazil, and the likely course of the proceedings the Claimants would have to bring there, rather than (for example) simply the course of events in the Favero and Costa claims. Although the evidence about the delays in the Brazilian system is concerning, I am not convinced that it rises to the level of a demonstrated real risk of denial of substantial justice.

iv) Accordingly, by a fine margin, had the issue arisen I would have concluded that the proceedings should be stayed in favour of proceedings in Brazil.

v) In the light of the statements in *Vedanta* § 75 quoted earlier, that conclusion would have applied vis a vis Sucocítrico Cutrale whether or not the Claimants were entitled to continue their claims against Cutrale Snr in England and Wales pursuant to Article 4 of Brussels Recast. It would also have applied to the claims against Cutrale Snr himself if (contrary to my earlier conclusion) the Claimants were not entitled to sue him pursuant to Brussels Recast Article 4.

(H) CONCLUSIONS

271. For all these reasons I conclude that:

i) the Claimants do not have the better of the argument that Sucocítrico Cutrale is domiciled in England and Wales, so as to entitle them to sue it here pursuant to Brussels Recast Article 4;

ii) the Claimants do not have the better of the argument that Sucocítrico Cutrale has a place of business or place where it carries on its activities in England and Wales, so as to entitle them to sue it here pursuant to CPR 6.3(c)/6.9(2);

iii) the Claimants have the better of the argument that Cutrale Snr is domiciled in England and Wales, so as to entitle them to sue him here pursuant to Brussels Recast Article 4;

iv) the proceedings against Cutrale Snr should not be stayed pursuant to Brussels Recast Article 34;

v) the Claimants have the better of the argument that their claims against Cutrale Jnr fall within Lugano Convention Article 6(1); and

vi) the proceedings against Cutrale Jnr should not be stayed pursuant to Lugano Convention Article 28.

272. This can scarcely hardly be regarded as a happy outcome, and it is not a tidy one. However, it is the conclusion which I consider I am bound to reach in all the circumstances. Those circumstances might be said to include, on the one hand, the obligatory nature of Brussels Recast Article 4 and the defined circumstances in which a stay can be justified pursuant to Article 34, and, conversely, the fact that jurisdiction was sought to be asserted against Sucocítrico Cutrale solely on the basis of domicile or place of business/activities. Thus, a situation where all proceedings against the present Defendants are brought in the same forum does not appear to me to be one which the court is able to ensure.