Neutral Citation Number: [2022] EWHC 2742 (CH)

Case No: BL-2020-001543

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

The Rolls Building
Fetter Lane,
London EC4A 1NL

Date: 31/10/2022

Before :

MR JUSTICE FREEDMAN

- -

Between :

(1) TRANSWORLD PAYMENT SOLUTIONS U.K. LIMITED (IN LIQUIDATION)

(2) STEPHEN JOHN HUNT (IN HIS CAPACITY AS LIQUIDATOR OF TRANSWORLD PAYMENT SOLUTIONS U.K. LIMITED)

Claimants/ Respondents

- and –

(1) FIRST CURAÇAO INTERNATIONAL BANK N.V.

(2) JOHANNES ('JOHN') CHRISTIAAN MARTINUS AUGUSTINUS MARIA DEUSS

Defendants/ Applicants

- -

Christopher Parker KC, Caley Wright and Charles King (instructed by Gowling WLG (UK) LLP) for the **Claimant/Respondents**

Andrew Scott KC and Barnaby Lowe (instructed by Jones Day) for the **First Applicant/First Defendant**

Tom Smith KC and Paul Fradley (instructed by Quinn Emmanuel Urquhart & Sullivan UK LLP) for the **Second Applicant/Second Defendant**

Hearing dates: 28 and 29 April 2022

Further letters and written submissions up to 20 May 2022

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Approved Judgment

This judgment was handed down remotely at 4.00pm on 31 October 2022 by circulation to the parties or their representatives by e-mail and by release to the National Archives

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MR JUSTICE FREEDMAN

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I Introduction

1. There are before the Court applications in respect of the proceedings in this Court. The proceedings in this court, the Court of England and Wales, will be called "the EWHC Proceedings". There are related proceedings commenced in Curaçao which will be called the "Curaçao Proceedings". The applications are by:

    (1) The First Defendant ("FCIB")**:** (i) to set aside an order granting permission to serve out of the jurisdiction all claims in these proceedings on it; (ii) save for the claim for having allegedly caused or allowed the First Claimant ("TWPS") to participate knowingly in the fraudulent trading (the section 213 Claims below referred to) in respect of which this Court has jurisdiction pending the determination of the Curaçao Proceedings; and

    (2) The Second Defendant ("Mr Deuss"), a stay of these proceedings pending determination of the Curaçao Proceedings.

2. The Claimants' case is that the EWHC Proceedings arise out of an alleged "Missing Trader Intra-Community fraud" or "VAT carousel fraud", carried out in England and Wales, by English and Welsh companies (referred to as a shorthand only as "English companies") to defraud HMRC of substantial amounts of VAT. The fraud was facilitated by FCIB, which provided banking services to the companies involved in the fraud (described in these proceedings as the "MTIC Companies", referring to Missing Trader Intra-Community, used to refer to companies participating in such a fraud) and by TWPS, which was responsible for onboarding new clients to FCIB. The allegation is that TWPS, FCIB and Mr Deuss dishonestly assisted in a UK tax fraud and knowingly participated in the fraudulent trading of UK companies.

3. A letter before action ("the Original LBA") was sent by Blake Morgan on behalf of the Claimants to the Defendants on 5 February 2016 on behalf of the Second Claimant ("Mr Hunt") as liquidator of TWPS threatening proceedings in the EWHC. There then ensued on 9 March 2016 proceedings in Curaçao. FCIB issued a petition in the Court of First Instance in Curaçao against 96 defendants, including Mr Hunt in his personal capacity and as liquidator of a number of companies (but not as liquidator of TWPS). On 22 June 2016, FCIB subsequently initiated additional proceedings against Mr Hunt in his capacity as liquidator of TWPS. In the Curaçao Proceedings, there were sought negative declarations relating to the threatened EWHC Proceedings.

4. In the course of the last 6 years, there have been numerous hearings in the Curaçao Proceedings at all levels up to the Supreme Court of the Netherlands.

5. The EWHC claims were filed on 21 September 2020 in the form of a part 7 claim form and an Insolvency Act Application Notice which were consolidated and the subject of an order to be managed and heard together. On 28 April 2021 Mr Lance Ashworth QC sitting as a Deputy Judge of the High Court granted permission without notice (the "Permission Order") for the claims to be served out of the jurisdiction.

6. The Claimants submit that the fraud claims only arise for decision in the EWHC Proceedings or that it is only in the EWHC that the full scope thereof can be determined. They claim that the EWHC is clearly the appropriate forum for the Claimants' claims. They also submit that the EWHC Proceedings are clearly the appropriate forum by reference to the following:

    (1) The location of the torts;

    (2) The applicable law; and

    (3) The location of witnesses and (to the extent relevant) documents.

7. The Claimants also submit that some claims can only be litigated in EWHC and in particular:

    (1) The claims under section 213 of the Insolvency Act 1986 (the "section 213 Claims" and "IA 1986") can only be litigated in EWHC (which the Defendants accept);

    (2) Only in these proceedings is Mr Deuss a party;

    (3) Only in these proceedings can the extent of the Defendants' liability be determined (which the Court will need to do if the claims were not compromised by the IP Settlement Agreements as defined below); and

    (4) Properly analysed, the scope of the Curaçao Proceedings is narrow and presents no barrier to the continuation of the EWHC Proceedings.

8. The Defendants submit that the Curaçao court is presently seised as to the issue as to whether the companies were effectively parties to a number of settlement agreements entered into in or around February 2015 (the "IP Settlement Agreements"), and the effect of the same. The IP Settlement Agreements are subject to Curaçao law and contain a Curaçao jurisdiction clause (which is not exclusive). They also submit that the fraud claims will be determined as part of the applications for negative declarations in the Curaçao Proceedings. The Claimants dispute that the fraud claims or the full scope of the fraud claims will be determined in the Curaçao Proceedings.

9. FCIB seeks to set aside the permission granted at the without notice stage on the grounds that the Assigned section 213 Claim referred to below is unsustainable in law and that England and Wales is not the proper forum for the Contribution Act and Dishonest Assistant Claim referred to below. FCIB submits that Curaçao, where the Curaçao Proceedings were already on foot, is the appropriate forum and/or that the Claimants are unable to show that EWHC is clearly the appropriate forum. Insofar as the section 213 Claim or other claims remain in England, these should be stayed on case management grounds pending the outcome of the Curaçao Proceedings.

II Summary of the claims against the Defendants

10. The Claimants say that TWPS participated in a VAT carousel fraud in the UK by facilitating the use of FCIB by marketing FCIB's services to companies which were being used for a fraud and onboarding such companies as account holders with FCIB. TWPS, FCIB and Mr Deuss thereby facilitated the fraud.

11. Companies which were clients of FCIB, onboarded by TWPS, were used to commit fraud, as a result of which HMRC was deprived of large amounts of VAT. In consequence of being left with undischarged VAT liabilities, those companies have made claims against TWPS which by these proceedings TWPS seeks to pass on to FCIB and Mr Deuss. TWPS also makes claims against FCIB and/or Mr Deuss in these proceedings as the assignees of those companies.

12. The Claimants allege that Mr Deuss directed FCIB and TWPS in these activities, exercising strategic control over both entities. He gave instructions to TWPS' marketers in respect of the marketing of FCIB's banking and financial services. It was Mr Deuss, and not the de jure directors, to whom Mr Vallerey, the company president, reported. TWPS also claims directly against Mr Deuss.

13. The Claimants' claims comprise:

    (1) The section 213 Claims. These fall into two categories:

        (1) Claims by TWPS and Mr Hunt against Mr Deuss and FCIB for a contribution to TWPS' assets on account of their participation in TWPS' fraudulent trading; and
        (2) Claims by the MTIC Companies themselves against Mr Deuss and FCIB for participation in their fraudulent trading. These claims have been assigned to TWPS (the "Assigned section 213 Claims");

    (2) Claims by TWPS for a contribution to losses under s.1 of the Civil Liability (Contribution) Act 1978 (the "Contribution Claims"). The Contribution Claims comprise claims by TWPS for a contribution from each of Mr Deuss and FCIB to TWPS' liabilities to the MTIC Companies which arise under claims in dishonest assistance;

    (3) Claims by TWPS against Mr Deuss for breach of his fiduciary duties to TWPS, in causing TWPS itself to trade fraudulently and to participate in or facilitate the fraudulent trading of the MTIC Companies (the "Breach of Fiduciary Duty Claims"); and

    (4) Claims by TWPS , as assignees of the MTIC Companies, in dishonest assistance against FCIB and Mr Deuss (the "Dishonest Assistance Claims"). FCIB and Mr Deuss assisted the directors of the MTIC Companies in breaching their fiduciary duties in causing the companies to participate in MTIC fraud.

14. The Defendants' challenge to the proceedings is, primarily, about whether this jurisdiction is the appropriate forum for the claims that the Claimants have brought; FCIB also submits that the Assigned section 213 Claims are unsustainable in law. The challenge is not about whether the factual allegations are arguable or whether the claims fell within the gateways relied upon for the grant of permission to serve the claims out of the jurisdiction.

III Background

15. FCIB is a bank incorporated in Curaçao, in the Kingdom of the Netherlands (formerly, the Netherlands Antilles). The Claimants claim that FCIB was so incorporated to take advantage of the reduced regulatory burden of being an 'offshore' bank, and in fact operated out of the Netherlands: see Hunt (2) at para. 2.4, and Hunt (4) at para. 32. FCIB says that it was properly so incorporated and operated centrally from Curaçao.

16. In respect of FCIB, Mr Deuss was a de jure director from its inception until 30 May 2005 when he resigned as a director. The Claimants' case is that he did not in fact relinquish control. In respect of TWPS, the Claimants' case is that Mr Deuss was a de facto or shadow director: see Hunt (2) at para. 2.5. As noted below, Mr Deuss resides in Bermuda and not in Curaçao.

17. TWPS acted as a marketing company for FCIB's financial services from around 2003. Its name was changed to 'Transworld Payments Solutions U.K. Limited' on 11 December 2003 and thereafter the registered directors of TWPS were at all material times Ms Tineke Deuss (Mr Deuss' sister) ("Ms Deuss") and Mr Charles Geerts. The Claimants say that in fact, Mr Deuss was at all times in control of TWPS and he was a de facto director: see Hunt (2) at para. 2.2.

18. The Claimants say that TWPS' staff were largely based in and operated in London. The president of the company, to whom the members of staff at least nominally reported, Mr Vallerey, was based in France, but most of its senior employees were based in London, the centre of its day-to-day operations. TWPS promoted FCIB's banking services from its London office to companies based in England and Wales. Key meetings were held at the London office, including meetings attended by Mr Deuss: see Hunt (2) para. 5.4.

19. The customers of FCIB and TWPS were largely English companies. Details of the companies making claims on TWPS and against Defendants ("the MTIC Companies") can be found at Schedule 1 to Hunt 1. The MTIC Companies were incorporated, registered and traded in England and Wales: see Hunt (2) at para. 5.5. At least some of the MTIC Companies' transactions were with English companies.

20. Over a period of years, in particular 2004-2006, the Claimants allege that both FCIB and TWPS were engaged in the facilitation of substantial MTIC fraud in the UK, and were so engaged under the direction of Mr Deuss, their beneficial owner. Over that period, it is alleged that while ostensibly marketing the financial services on offer at FCIB, TWPS' role went beyond that and extended to every major stage of onboarding new clients to FCIB including:

(1) sourcing customers for FCIB's financial services;

(2) providing support services for FCIB in opening new accounts;

(3) facilitating the opening of accounts; and

(4) purporting to carry out know-your-client ("KYC") and anti-money-laundering ("AML") checks on new and existing customers for FCIB: see the Amended Particulars of Claim at paras. 6 and 10-18.

21. TWPS was implementing the strategy devised by Mr Deuss allegedly to take advantage of and profit from the MTIC fraud. To this end, TWPS facilitated the opening of a number of accounts without any or without sufficient KYC and AML checks.

22. Customers onboarded by TWPS (i.e. the MTIC Companies), traded large quantities of computer processing units and mobile phones without paying the resultant VAT liabilities or retaining the means to do so. The Claimants allege that they thereby breached their fiduciary duties to act in the companies' best interests, leaving the MTIC Companies heavily insolvent on account of their unpaid VAT liabilities.

23. Following raids in September 2006 by HMRC on TWPS' offices in London, and raids on FCIB and related companies in the Netherlands, TWPS ceased to carry out any marketing or related activities for FCIB. FCIB was placed into 'emergency measures', akin to liquidation, in or around 9 October 2006.

24. TWPS was dissolved on 5 October 2010, then restored to the register and wound up on the petition of TC Catering Supplies Limited (in liquidation), a creditor of TWPS, on 22 September 2014. Mr Hunt was appointed as liquidator on 17 November 2014.

25. Prior to FCIB's entry into the 'emergency measures' regime, Mr Hunt, together with certain other liquidators, had been involved with the recovery of account balances which FCIB held on behalf of various companies involved in MTIC fraud. Following its entry into 'emergency measures', FCIB stopped paying out on balance claims, citing money laundering concerns. Mr Hunt was thereafter involved in negotiations with HMRC and the Curaçao and Dutch criminal authorities which resulted in the creation of a system, known as the "Protocol", which provided FCIB with sufficient comfort as to the risk of criminal prosecution such that it would pay out on balance claims.

26. Claims to balances were thereafter paid out under the Protocol until 2013, when FCIB changed its position, and indicated that it would no longer pay out on such claims. It was in that context that Mr Hunt – as liquidator of certain companies with outstanding claims to balances – commenced negotiations with FCIB. Mr Hunt's firm Griffins had taken the lead, but there was no united front among the various liquidators involved. Negotiations continued thereafter, and a first draft of a settlement agreement was produced in September 2014. After further negotiation, a number of IP Settlement Agreements were entered into in or around early February 2015. There were separate IP Settlement Agreements for the various liquidators involved in the negotiations.

27. The parties to the template IP Settlement Agreements are expressed to be *"First Curaçao International Bank N.V. ("FCIB")" and (for example) "Stephen John Hunt (the "Liquidator")" solely in his capacity, pursuant to the Insolvency Act 1986 of England and Wales, as liquidator of the companies set out in Exhibit A (each a "Griffins Company" and together the "Griffins Companies").*

28. As noted above, on 5 February 2016, the Original LBA was sent on behalf of Mr Hunt as liquidator of TWPS, explaining that TWPS was faced with claims from English companies used as the defaulting companies in the MTIC fraud, enclosed a list of the relevant creditors, and set out claims against FCIB under s. 213 of IA 1986 and in unlawful means conspiracy. In the face of this letter, on 9 March 2016, FCIB issued the petition in Curaçao against 96 defendants as noted above, and then additional proceedings on 22 June 2016 against Mr Hunt in his capacity as liquidator of TWPS. The claims made in the Curaçao Proceedings are set out in detail in Mr van der Wiel's Report, the expert instructed by the Claimants.

29. Whilst FCIB's case in Curaçao is pleaded on both a contractual and non-contractual footing, Mr van der Wiel (para. 3.2 of his report) notes that "FCIB's substantiation of all the claims is very similar and, in essence, comes down to its interpretation of the IP Settlement Agreements, namely that TWPS and the English Claimants are parties to the IP Settlement Agreements and therefore bound to the waiver provision included therein."

IV The Curaçao Proceedings

30. The claims made in the Curaçao Proceedings are as follows:

    (1) A declaration that FCIB is not liable to TWPS or Mr Hunt in his capacity as liquidator of TWPS on the basis of the "TWPS Claims" and an order that TWPS and Mr Hunt in his capacity as liquidator of TWPS confirm in writing to FCIB within two days after the date of the judgment to be rendered in the Curaçao Proceedings that the Original LBA is revoked and that they have no claim against FCIB and/or on the FCIB Entities, subject to a penalty of one million Antilles Guilder for each day that they fail to comply with such judgment (the "Negative Declaration Claim");

    (2) In the alternative, an order that the English and Welsh Claimants (referred to as a shorthand only as "English Claimants"), as well as the liquidators of the English Claimants in their capacity as liquidators, indemnify FCIB from any amount due under the *"*TWPS Claim*"* (the "Indemnity Claim", together with the Negative Declaration Claim, "Claim 1");

    (3) A declaration that the English Claimants, as well as the liquidators of the English Claimants in their personal capacity and as liquidators, have defaulted in performance to FCIB of the IP Settlement Agreements and/or have acted wrongfully to FCIB ("Claim 2"); and

(4) An order that the defendants to the First Action perform the IP Settlement Agreements and refrain from any actions against FCIB and FCIB Entities in violation of section SECOND (1) of the IP Settlement Agreements ("Claim 3").

31. The second petition dated 22 June 2016 repeats the Negative Declaration Claim and Claim 3 as against Mr Hunt in his capacity as liquidator of TWPS, so as to rectify an omission in the First Action.

32. In the Curaçao Proceedings, FCIB's case (the references in brackets are to the paragraph numbers in the Curaçao First Action Petition) is that:

(1) The account holding companies which engaged in the MTIC fraud were liable for the damages they have caused to FCIB including the collapse of FCIB [2];

(2) The aim in concluding the IP Settlement Agreements was to arrive at "*total peace*" and that this aim was expressed in the negotiations and acknowledged by Mr Hunt [3];

(3) The claims which are threatened in the Original LBA violate "*both the letter and the spirit*" of the IP Settlement Agreements [6, 26-61 and 75];

(4) TWPS and the English Claimants should be considered as parties to the IP Settlement Agreements in line with the intentions of the parties, as expressed by FCIB and acknowledged by the insolvency practitioners s in the negotiations. As a matter of the law of Curaçao, such evidence may be received in connection with the interpretation of the contracts [79];

(5) The insolvency practitioners s have acted in bad faith – by developing the claims in the Original LBA at the same time as negotiating for the IP Settlement Agreements [8, 77 and 90]; and

(6) The IP Settlement Agreements provide for broad release language and TWPS is among the releasees as an 'FCIB Entity' which means that the claims set out in the Original LBA are in breach of the IP Settlement Agreements.

33. The Defendants also draw attention to the fact that TWPS was struck off the register on 5 October 2010. In 2014, it was restored to the register. A debt of £1,833.06 had been identified as owed to Chubb Electronic Security which was assigned to a company called TC Catering Supplies Limited ("TC Catering"), a company in liquidation where the liquidator was a partner of Mr Hunt. TC Catering applied for TWPS to be restored to the Register and to be wound up on the basis of this debt.

34. The arrangement of Mr Hunt was that if the Claimants were to succeed on the claim in the EWHC Proceedings, Mr Hunt would receive 50% of recoveries. In respect of

the instant claim, this is said to be worth £140 million: see the Second Defendant's skeleton argument at para. 8 and footnote 7.

35. Following the issue of the proceedings in March and June 2016:

(1) The defendants to those proceedings raised a motion on 21 November 2016 contesting the jurisdiction of the Curaçao court;

(2) Judgment was given by the Court of First Instance on 30 October 2017, largely rejecting the motion;

(3) The defendants appealed that judgment on 13 November 2017. By a judgment of 30 April 2019, the appeal court – the Joint Court of Justice of Aruba, Curaçao and Sint Maarten and of Bonaire, Sint Eustatius and Saba ("the Joint Court") – set aside the first instance judgment and declared that the Curaçao court lacked jurisdiction regarding most of FCIB's claims;

(4) FCIB then appealed that judgment (to the Supreme Court of the Netherlands), and the defendants filed a conditional cross-appeal. By a judgment dated 2 February 2021, the Supreme Court upheld a large part of the parties' grounds of appeal, reversed the judgment of the Joint Court to that extent, and referred the case back to the Joint Court for a new judgment which would take into account the Supreme Court's judgment; and

(5) The parties subsequently submitted court documents known as "Statements after Referral" on 21 September 2021, and a hearing took place before the Joint Court on 23 November 2021. The Joint Court announced that it would give judgment on 25 January 2022, but judgment has subsequently been delayed.

36. The Curaçao Proceedings have now been on foot for over 6 years. They have been delayed by jurisdiction challenges filed by the defendants to the proceedings including Mr Hunt and TWPS. These jurisdictional challenges have resulted in proceedings before the Court of First Instance, the Joint Court (the appellate court), and the Supreme Court of the Netherlands (the ultimate appellate court).

37. The current status of the proceedings in Curaçao is not contentious amongst the experts. By way of summary, it has been finally determined that:

(1) The Curaçao courts <u>have</u> jurisdiction in respect of FCIB's claim for (i) a negative declaration that FCIB is not liable towards TWPS and/or Mr Hunt in his capacity as liquidator of TWPS on the grounds of the Curaçao law doctrine of "unlawful act" and (ii) certain relief ancillary to that;

(2) The Curaçao courts <u>do not have</u> jurisdiction in respect of FCIB's claim for (i) a negative declaratory decision that FCIB is not liable towards

TWPS and/or Mr Hunt in his capacity as liquidator of TWPS under section 213 of the IA 1986, and (ii) certain relief ancillary to that;

(3) The Curaçao courts do not have jurisdiction over FCIB's claims for a declaration that Mr Hunt together with two other liquidators, Michaela Hall and Tim Bramston breached their obligations towards FCIB in their personal capacities; and

(4) The Curaçao courts do not have jurisdiction over FCIB's claim for (i) a negative declaration that FCIB is not liable to Mr Hunt in his capacity as liquidator of TWPS on the grounds of the TWPS Claim (as set out in the Original LBA), and (ii) certain relief ancillary to that.

(5) In respect of all other claims, the jurisdiction of the Curaçao court is still open to reconsideration by the Joint Court.

38. The Joint Court is yet to render a decision on jurisdiction in respect of:

(1) Claim 2 in the First Action to the extent that it concerns: (a) whether the English Claimants and the liquidators of the English Claimants (in their capacity as such and personally) have acted wrongfully towards FCIB; and (b) whether the English Claimants and the liquidators of the English Claimants (in their capacity as such) have defaulted in the performance of their obligations to FCIB;

(2) Claim 3 in the First Action; and

(3) Claim 2 in the Second Action.

39. The Joint Court heard arguments on jurisdiction in relation to the points at paragraph 38 above on 23 November 2021; the judgment of the Joint Court is awaited. Following this the Curaçao Proceedings will remain with the Joint Court to deal with the substance of the claims.

V The EWHC Proceedings

40. In the EWHC Proceedings, the following claims as summarised by Mr Hunt (2) at paras. [4.24-4.26] are made:

(1) Mr Hunt in his capacity as liquidator of TWPS claims against FCIB and Mr Deuss for a contribution to meet TWPS' liability to various companies who banked with FCIB and who are alleged to have participated in MTIC Fraud (the "MTIC Companies") in causing or allowing TWPS to knowingly participate in fraudulent trading (the "TWPS Fraudulent Trading Claim"). The MTIC Companies are largely the same as the English Claimants as set out in the Original LBA with a few minor changes;

(2) TWPS in its own right claims:

(1) Against Mr Deuss, damages (or equitable compensation) for breach of fiduciary duties allegedly owed to TWPS in rendering it liable to the MTIC Companies, or in the alternative a contribution under section 1 of the Civil Liability Contribution Act 1978 (the "CLCA 1978") (the "Breach of Duty Claim"); and

(2) Against FCIB, contribution under section 1 of the CLCA 1978 to meet TWPS' liability to the MTIC Companies (the "FCIB Contribution Claim"); and

(3) As assignee of the MTIC Companies, TWPS claims:

(1) Against FCIB and Mr Deuss, damages (or equitable compensation) for dishonestly assisting the directors of the MTIC Companies to breach their fiduciary duties (the "Assigned Dishonest Assistance Claim"); and

(2) Against FCIB and Mr Deuss, a contribution pursuant to section 213 of the IA 1986 to meet TWPS' liability to the MTIC Companies in causing or allowing TWPS to knowingly participate in fraudulent trading (the "Assigned Fraudulent Trading Claim").

41. The Claims were filed on 21 September 2020 in the form of a part 7 claim form and an Insolvency Act Application Notice which were consolidated and the subject of an order to be managed and heard together.

42. As noted above, on 28 April 2021 Mr Lance Ashworth QC made the Permission Order for the claims to be served out of the jurisdiction. On 21 May 2021, Mr Deuss was served with the proceedings in Bermuda.

43. On 30 July 2021, Mr Deuss applied for a stay of these proceedings pending final determination of the Curaçao Proceedings. Mr Deuss further sought permission to rely on Mr Cornegoor's expert report dated 29 July 2021 (the "Cornegoor Report").

44. On 6 September 2021, the Claimants served proceedings on FCIB in Curaçao: the service was either valid (as per the Claimants) or was to be treated as valid (as per FCIB). There were directions about expert evidence made on 10 December 2021, culminating with a joint statement of issues on or before 1 April 2022.

45. On 14 January 2022, FCIB applied for an order setting aside the Service Order insofar as it relates to the Contribution Claim, the Dishonest Assistance Claim and the Assigned section 213 Claim and seeking a stay of the proceedings pending determination of the Curaçao Proceedings.

VI The expert evidence

46. The parties have each filed expert reports on the nature and status of the Curaçao Proceedings, namely: the report of Mr Deuss' expert Mr Jacob Cornegoor ("Mr Cornegoor") dated 29 July 2021 (the "Cornegoor Report"), the report of FCIB's expert Professor Arthur Hartkamp ("Prof Hartkamp") dated 14 January 2022 (the "Hartkamp Report"), and the report of the Claimants' expert Mr Bart van der Wiel ("Mr van der Wiel") dated 4 March 2022 (the "van der Wiel Report").

47. There are significant areas of dispute between the parties as regards what is in issue in the Curaçao Proceedings. There is an issue between the experts as to the scope of the Negative Declaration Claim in the Curaçao Proceedings, and whether it extends to (a) the merits of the underlying claims in relation to the wrongful/unlawful acts, and (b) to claims in respect of delictual liability. Professor Hartkamp believes that the legal basis of the claims is both a contractual basis and a non-contractual basis, which is an unlawful act. His view is that in the negotiations on the IP Settlement Agreements, the liquidators and the English Claimants have concealed the fact that they revived TWPS with the intention of submitting new claims against FCIB. This will, in his view, contribute to the success of the first basis, namely a justified expectation that there were no companies represented by the liquidators that were not parties to the agreements. Even if this does not give rise to a waiver, it will also, in his view, be relevant to a negative declaration of the non-contractual claims, covering much of the same ground.

48. The defendants in the Curaçao Proceedings, on the other hand, believe that TWPS is not a party to the IP Settlement Agreements because it is not mentioned in any of the annexes to these agreements and that the English Claimants are not parties to these agreements because they (i) are not mentioned in any of the annexes to the IP Settlement Agreements and (ii) belong to a different category than the three categories mentioned in the IP Settlement Agreements, namely, a fourth category that was discussed during the negotiations, but that was ultimately not included in the IP Settlement Agreements: see Mr van der Wiel para. 3.2. The Curaçao court gives considerable weight to the written words of the parties' agreements and there are limited prospects that where those words have been agreed between commercial parties, professionally advised, that an interpretation departing from the express words will be permitted: see para. 3.3.

49. There is an issue as to whether the declaration in respect of delictual liability is limited to the claims contained in the LBA. Mr van der Wiel says that the waiver of the unlawful means conspiracy claim is such that the Claimants in the Curaçao court no longer have a sufficient interest in a negative declaratory decision. Professor Hartkamp disagrees in that he submits that the Court will not restrict itself to the claims mentioned in the LBA and will consider the claim for an unlawful act based on the factual allegations of the parties regardless of any cause of action specified by the parties. Mr Cornegoor challenges whether it is a waiver or a decision not to pursue a claim, such that it does not amount to release of FCIB which would extinguish the required interest. In any event, if additional claims are brought, the Curaçao court may then decide on whether such claims can be the subject of adjudication.

50. Mr van der Wiel's view is that the Claimants in the Curaçao Proceedings do not have a legitimate interest in the claims. This is because the claims are not for damages. Professor Hartkamp and Mr Cornegoor are of the view that it is not necessary to combine the claim with one for damages: that may be added at the merits stage.

There is a disagreement about the impact of a Supreme Court case (NJ 2016/77) as to whether a claim for payment of damages is assumed without such a claim or only if a such a claim is made if it is assumed that there have been damages. In the view of Mr van der Wiel alone, the claim has to be asserted for a positive declaration as to a claim for damages.

51. Mr van der Wiel argues that the Negative Declaratory Claim overlaps with defences which might be brought in proceedings in EWHC such as would mean that the current interest is absent. Mr Cornegoor believes that the possibility of resolving the proceedings in this court through a defence does not deprive FCIB of its interest in the Curaçao Proceedings, especially where the proceedings in this Court are only issued after four years. Further, the question whether the EWHC Proceedings would cause FCIB's interest to be extinguished is linked to the question as to whether a decision in the EWHC Proceedings would be eligible for recognition in Curaçao.

52. The Claimants say that the Negative Declaration Claim in relation to wrongful unlawful act is limited to the terms of the IP Settlement Agreements, and that it does not extend to claims in respect of delictual liability. The Defendants say that the scope of the declarations might extend to having no liability for unlawful conduct under the applicable law even if the defendants in the Curaçao Proceedings were held not to be liable under the IP Settlement Agreements.

53. It may be the case that the scope of the claims in the Curaçao Proceedings will depend on the arguments put forward by FCIB and/or upon what is accepted by the Curaçao courts. This may turn out to be a significant qualification on the position of the Claimants as set out in the previous paragraphs: see the van der Wiel report paras. 8.2.3 – 8.2.4, 8.2.14 and 8.2.17-8.2.18. This may mean that the Curaçao court has jurisdiction in respect of all causes of action, including the Dishonest Assistance Claim, which are based on unlawful conduct or wrongful acts as alleged by the Claimants.

54. There is a dispute between the parties as to when the proceedings will be decided. The Defendants submit that a judgment in the Curaçao Proceedings can be expected in 2024. However, this ignores the appeal procedure. The Claimants submit that it will not be until 2028, bearing in mind appeals and the like and the delays to date. It seems to be unrealistic to ignore the impact of appeals and the experience to date. In any event, no precision can be given as to when the first instance decision will take place. Having regard to the progress of proceedings thus far involving years on the jurisdictional issues, there is a need for considerable caution about estimates such as a two year period for the determination of the first instance proceedings.

55. There is a question of whether the Curaçao courts would give a judgment if the EWHC has given judgment because FCIB will lack a *"sufficient interest in its claims to the Curaçao courts to grant them."* There is considerable debate as to what amounts to a *"sufficient interest"*. The argument goes that in the event that the EWHC decides the matter first, there might not be a sufficient interest in the claims to the Curaçao court. This argument depends on the Curaçao courts recognising the decision of the EWHC. Even if it did recognise the decision of the EWHC in theory, a question might arise as to whether recognition might not be made until after the exhaustion of appeals. Taking all this together, it is a matter of speculation as to

which decision would be first, and that even if it did come first, recognition might be deferred pending an appeal.

56. There are issues as to the merits of whether the case in Curaçao will succeed in the case that TWPS and the English Claimants are bound by the IP Settlement Agreements. The Claimants submit that the prospects are limited, but the Second Defendant submits that these are not matters on which the Court can or should sensibly form a view, especially at this stage of the Curaçao Proceedings. Since the Claimants do not submit that the claims in Curaçao are vexatious, but have some limited prospects of success, it is not sensible for this Court to make its own calibration of how strong or limited are such prospects of success.

57. There are further reasons to be hesitant about a prediction as to how the Curaçao court, applying Curaçao law, would weigh the agreements of the parties. This is in the absence of full pleadings of the parties. It also takes into account the difficulty of having a feel for how a Curaçao court would approach these matters involving both substantive and procedural law.

VII Application for stay on ground of forum non conveniens and on ground of case management: the law

(a) The connecting factors

58. The hearing of FCIB's application proceeds as a rehearing of the question whether permission to serve out ought to have been granted: see *Microsoft Mobile Oy (Ltd) v. Sony Europe Ltd* [2017] 5 CMLR 5 per Marcus Smith J. at [91]. "The matter will be considered at an inter partes hearing on the basis of evidence adduced by all relevant parties" "the further evidence must be directed at the situation at the date when permission was originally granted" (emphasis added): see *Satfinance Investment Limited v Athena Art Finance Corp* [2020] EWHC 3527 (Ch) at [43] per Morgan J.

59. The Claimants retain the burden of persuading the Court that there is a proper basis to take jurisdiction over each claim pursued. The requirements for service out under CPR r. 6.36 are that in respect of each claim: (i) there is a good arguable case as to the availability of gateways in CPR PD6B, para. 3.1; (ii) there is a serious issue to be tried; and (iii) the EWHC is the proper place for the claim to be heard: see *AK Investment CJSC v. Kyrgyz Mobile Tel Ltd.* [2012] 1 W.L.R. 1804 (P.C.) per Lord Collins at [71].

60. As regards a serious issue to be tried, the Court's task is to ascertain whether each claim proposed to be served out has a real as opposed to a fanciful prospect of success: *AK Investment* per Lord Collins at [82].

> *"In considering whether to assume jurisdiction in any of the cases mentioned in Rule 35 (service out of the jurisdiction with the permission of the court) the court will generally require the claimant to show England to be clearly or distinctly the appropriate forum for the trial of the claim":* see Rule 41(3) of Dicey, Morris & Collins on Conflict of Laws 16th Ed.": see

> *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] A.C. 50, 72; *Spiliada Maritime Corp v Cansulex Ltd* [1987] A.C. 460, 478-482; *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 W.L.R. 1804; *VTB Capital Plc v Nutritek International Corp* [2013] UKSC 5, [2013] 2 A.C. 337."

61. In *Spiliada Maritime Corp v Cansulex Ltd* [1987] A.C. 460 at 480 Lord Goff gave the locus classicus of the key question before the Court:

> *"It seems to me inevitable that the question in both groups of cases must be, at bottom, that expressed by Lord Kinnear in Sim v. Robinow, 19 R. 665, 668, viz. 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."*

62. Although the term *"natural forum"* was not used in *Spiliada*, this term is used as a shorthand: see Dicey, Morris & Collins at para. 12-016. In *Bank of Baroda v Vysya Bank Ltd* [1994] C.L.C. 41 at 52, Mance J stated:

> *"The criterion of appropriateness requires the court to consider the ambit of the issues and the likely course of any trial. The task of the court is to identify the 'natural forum' in the sense of the forum with which the action has 'its closest and most real connection'. So,*
>
> > *'... it is for connecting factors in this sense that the court must first look; and these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction ... and the places where the parties respectively reside or carry on their business.' (Spiliada per Lord Goff at p. 478 A–B)"*

63. Lord Collins summarised the essence of this enquiry in *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* at [88] in the following terms*:* "in both stay cases and in service out of the jurisdiction cases, 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." CPR r. 6.37(3) reflects the Court's long-standing practice of only permitting service out where the EWHC is clearly and distinctly the most appropriate forum. The EWHC should look for the forum with which the dispute has the most real and substantial connection. As explained in *Vedanta* per Lord Briggs at [66]:

> *"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."*

64. The list of potential factors that may be relevant to the question of the 'natural forum' is almost limitless. However certain factors are frequently taken into account and are of particular importance. Dicey, Morris and Collins, The Conflict of Laws 16th Ed. (15th ed., Sweet & Maxwell 2012) refers at 11–102 to "the nature of the dispute, the legal and practical issues involved, such questions as local knowledge, availability of witnesses and their evidence, and expense."

(b) The impact of proceedings overseas

65. How relevant is it to the consideration of the appropriate forum that the Curaçao Proceedings were commenced prior to the EWHC Proceedings, and especially where a large part of those proceedings was to seek negative declaratory relief?

66. *In Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* [2020] Bus LR 2422 Lord Reed held at [99] that:

> *"The English courts have wide case management powers, and they include the power to impose a temporary stay on proceedings where to do so would serve the Overriding Objective: see CPR r1.2(a) and 3.1(2)(f)…A temporary stay may be ordered where there are parallel proceedings in another jurisdiction, raising similar or related issues between the same or related parties, where the earlier resolution of those issues in the foreign proceedings would better serve the interests of justice than by allowing the English proceedings to continue without a temporary stay: see Reichhold Norway ASA v Goldman Sachs International [2000] 1 WLR 173. But this would be justified only in rare or compelling circumstances: see per Lord Bingham MR at pp 185–186, and Klöckner Holdings GmbH v Klöckner Beteiligungs GmbH [2005] EWHC 1453 (Comm)."*

67. The position is summarised in Dicey, Morris & Collins 16th Ed. at para. 12-051 as follows:

> *"The common law approach is that the existence of simultaneous proceedings is no more than a factor relevant to the determination of the appropriate forum….The foreign proceedings may be of no relevance at all, for example, if one party has commenced them for the purpose of demonstrating the existence of a competing jurisdiction, or if the proceedings have not passed beyond the stage of initiating process. But if genuine proceedings have been started and have had some impact on the dispute between the parties, especially if it is likely to have a continuing effect, then this may be a relevant (but not necessarily decisive) factor when considering whether the foreign jurisdiction provides the appropriate forum. Regardless of whether the two claims constitute a lis pendens or are simply closely related, the court will attach importance to the risk of irreconcilable judgments arising from parallel proceedings, whilst recognising that this cannot be avoided in all cases."*

68. The risk of irreconcilable decisions is capable of amounting to such a circumstance: *Curtis & anor. v. Lockheed Martin UK Holdings Ltd* [2008] 1 C.L.C. 219. In that case, Teare J made it clear at [12] that: "the court may manage the order in which the proceedings are heard. It is clear from [Reichhold] that such case management is appropriate even where the proceedings are taking place between different parties in different jurisdictions." In that case, Teare J refused a defendant's application to stay proceedings pending the completion of proceedings in Italy because the claimants would not have been bound by the outcome of those proceedings and so could seek to challenge the Italian court's finding [18]. However, Teare J emphasised at [17] that:

> *"The risk of inconsistent decisions between the London and Turin Courts is a matter which is capable of amounting to a 'very strong reason' for granting the stay which is sought….I was therefore not attracted by the submission made on behalf of the Claimants that 'inconsistency of findings would simply be a fact of life'…"*

69. In *Vetco Gray v UK Limited v FMC Technologies Inc* [2007] EWHC 540 (Pat), Mann J said [at 36] that a modern court should not be encouraging or assisting parallel litigation, although he accepted that would happen if forum non conveniens grounds were not made out.

70. The Court should consider the resolution of the dispute as an entirety rather than focus on the individual proceedings. In *Autoridad dal Canal v. Sacyr S.A.* [2018] 1 All E.R. 916 (Comm) at [165], Blair J. observed, in relation to the interaction between arbitral and court proceedings: *"... it makes good commercial sense for the court to have regard, where appropriate to the orderly resolution of the dispute as a whole, if necessary by granting a temporary stay in favour of arbitration. A coherent system of commercial dispute resolution has to take into account the fact that various different*

tribunals may be involved, each of which should aim to minimise the risk of inconsistent decisions, and avoid unnecessary duplication and expense". The same is true where different parts of the dispute are before courts in two or more jurisdictions.

71. In *Bundeszentralamt für Steuern v Heis* [2020] 1 BCLC 649 the German tax authorities and a bank applied for an order staying their appeals against special administrators' rejection of their proof of debt. The proofs related to refunds of withholding tax claimed under German law and the stay was sought on the basis that the liability should be determined in the German courts. Hildyard J explained the factors which led him to order a stay:

> *"112. The first such factor is the point at the forefront of Mr Smith's (and indeed Mr Fisher's) submissions and has particular weight in consequence of the fact that the Later MFGUK Refund Claims are to be adjudicated in Germany. If no stay is granted, broadly the same issues would fall to be considered by the court here and the court there at (again speaking broadly) the same time and between the same parties. There is an obvious risk of inconsistent, indeed conflicting, judgments.*
>
> *113. That is always capable of amounting to a very strong reason for granting a stay, as the cases I have referred to in para [61] above show and emphasise. [The Judge referred to Curtis]."*

72. Hildyard J went on at [114] to hold that the desirability of removing the risk of inconsistency is "not only a matter of judicial consistency" but there is also "a real possibility, perhaps likelihood, that if the two sets of proceedings go forward to adjudication at first instance, then whatever the sequence, practical conundrums will develop". The Judge held at [116] that:

> *"As it seems to me, the "potential disaster from a legal point of view", as in The El Amria [1981] 2 Ll. Rep. 119 (at 128) Brandon LJ (as he then was) described the risk of inconsistent decisions in concurrent proceedings in different jurisdictions, is the more acute when in one of the jurisdictions the issue is a systemic one, or may be decided in a manner which has systemic consequences…."* [The reference to a systemic issue is one where there is called into question the adequacy of the system of justice in one or more of the relevant jurisdictions.]

Brandon LJ went on as follows:

> *"Especially in such a context, there is a preference for a case to be heard by the courts of the country whose law applies: see VTB Capital v Nutritek International [2013] 2 AC 337 at [46] per Lord Mance:*

> *'it is generally preferable, other things being equal, that a case should be tried in a country whose law applies. However, 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 or rules applicable to such issues in the two countries in contention as the appropriate forum.'"*

73. This has to be seen in context of the characterisation of the complexity of the issues of law in that case which were described by Hildyard J at [115] as follows:

> *"the legal issues at stake are not only plainly matters of German law, but controversial and complex issues of statutory construction of systemic importance and substantial public interest in terms of the legitimate interests of the public in the protection of its taxation system from what are alleged to be colourable schemes."*

(c) Negative declarations

74. The petitions in Curaçao are in large part based on claims for negative declarations and in the alternative for indemnities. Dicey, Morris & Collins 16th Ed. at para. 12-056-12-057 state the law in this regard as follows:

> *"It sometimes happens that a party seeks a negative declaration in the English court, or in the foreign court, in order to support a contention that the English court, or the foreign court (as the case may be), is the appropriate forum. This doubtless lay behind the earlier judicial view that claims for negative declarations must be viewed with great caution in all situations involving possible conflicts of jurisdiction, since they lend themselves to improper attempts at forum shopping. It is still open to a court to take the view that proceedings have been brought by way of forum shopping, and the court will in all cases still exercise scrutiny to ensure that the declaratory procedure is not being abused. Accordingly, it may stay English proceedings for a negative declaration against defendants subject to the jurisdiction of the English court where a foreign court is the forum conveniens; and the English court will not be disposed to authorise service out of the jurisdiction under Pt 6 of the CPR, i.e. Rule 35, in a claim for a negative declaration, unless England is the appropriate forum. Nor generally will a claim ... generally…a claim in a foreign court for a negative declaration [will not] be of much weight in determining whether the foreign court is the appropriate forum for the purpose of staying English proceedings, or in determining whether the English court is the*

> *appropriate forum for the purposes of service out of the jurisdiction…." [12-056].*
>
> *"Where a stay of proceedings for a negative declaration is sought (or there is an application to set aside service out of the jurisdiction) the court will have to consider both the question whether there is justification for seeking that form of relief and the question whether England is the appropriate forum; and there will be no presumption that the proceedings are inappropriately brought" [12-057].*

75. The editors of Dicey, Morris and Collins then went on to discuss how in many cases there is a legitimate role for bona fide claims for a negative declaration, notably in the field of insurance. A party may have an genuine commercial need to obtain an earlier determination upon his liability to another who may seek to claim against him. This might happen, by way of example, in back-to-back cases of liability under an insurance policy and liability for reinsurance.

76. In *BNP Paribas SA v Trattamento Rifuti Metropolitani SPA* [2020] EWHC 2436 (Comm) at [66-68], Cockerill J expressed the current approach of caution rather than reluctance to negative declarations as follows:

> *"66. The authorities certainly indicate that a court should be cautious when asked to grant negative declaratory relief because, while negative declarations can perform a positive role, they reverse the more usual roles of the parties and this can result in procedural complications and possible injustice to an unwilling "defendant".*
>
> *67. In addition a declaration will normally make the issue* res judicata*, so as to prevent the defendant from subsequently bringing an action to vindicate the right denied to him by the declaration. It is the* res judicata *implications of granting a declaration which makes the question of the grant of a declaration particularly acute where there may be a danger of the dispute not being fully contested in the proceedings: see Zamir & Woolf at 4-182.*
>
> *68. There is however a distinction between caution (approved in the authorities) and reluctance (not approved in the modern authorities). Thus in Messier Dowty Ltd v Sabena SA [2001] 1 WLR 2040, Lord Woolf stated at [36] – [41]:*
>
> > *"I can see no valid reason for taking an adverse view of negative declaratory relief.... The use of negative declarations domestically has expanded over recent years. In the appropriate cases their use can be valuable and constructive. ...*

> *[41] ...The approach is pragmatic. It is not a matter of jurisdiction. It is a matter of discretion. The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved the courts should not be reluctant to grant such declarations. They can and do assist in achieving justice."*

77. In *Wright v Granath* [2021] 4 WLR 24 at para. 27, Popplewell LJ said:

> *"There was a time when the courts in this jurisdiction took a restrictive approach to the circumstances in which someone facing a claim could properly instigate proceedings seeking a declaration of non-liability by way of negative declaratory relief ("NDR"), but that is no longer so: see Messier Dowty Ltd v Sabena SA [2000] 1 WLR 2040. As Rix LJ put it in Andrea Merzario Ltd v Internationale Spedition Leitner Gesellschaft GmbH [2001] EWCA Civ 61; [2001] 1 All ER (Comm) 883 , para 73: "Although at one stage English courts may have viewed claims for negative declarations with suspicion or even hostility, the modern approach is more open minded."*

78. That the issue is which forum is the appropriate forum irrespective of the forum in which proceedings may already have been initiated was reiterated in the recent decision of *Lekoil Limited v Akinyanmi* [2022] EWHC 282 (Ch). HHJ Hodge QC, sitting as a Judge of the High Court, heard broadly similar arguments to those now made by the Defendants. The defendant in that case, a resident of New Jersey, USA, had issued proceedings in New Jersey shortly after receiving a letter before action threatening proceedings in the EWHC. The New Jersey proceedings sought a binding declaration that no sum was owed to the claimant in the English proceedings. The Judge said, about the general approach to the New Jersey proceedings:

> *"12. The New Jersey proceedings were issued less than a fortnight after a pre-action protocol letter of claim sent by the claimant's solicitors to the defendant. The claimant invites the court to infer that the New Jersey complaint was filed in response to that letter. ...*
>
> *13. I am satisfied that I should approach this application without regarding the existence of the New Jersey proceedings as determinative of its outcome. That is because of the pending strike-out application, on which I understand judgment to be awaited; but also because I am satisfied that the defendant should derive no litigation advantage from having filed the New Jersey complaint in response to the pre-action protocol*

> *letter. For the claimant, Mr Benson submits that it would discourage claimants from invoking the pre-action protocol procedure if they could anticipate that a defendant could derive a litigation advantage from issuing proceedings in a foreign jurisdiction in response, and by way of alternative to engaging properly in the pre-action protocol procedures. Mr Piccinin, on the other hand, submits that a pre-action protocol letter should not operate effectively as an anti-suit injunction, preventing a recipient of such a letter from instituting proceedings in a foreign jurisdiction.*
>
> *14. In my judgment, the appropriate way of dealing with the matter is not to treat the existence of the New Jersey proceedings as determinative of the outcome of this application because the court is presently in no position to determine whether those proceedings are going to continue in the face of the application to enforce the arbitration provisions in the appointment letter; and because I consider that no litigation advantage should be derived from the defendant having effectively pre-empted the issue of the present claim by issuing his own proceedings in New Jersey.*
>
> *15. I must focus upon the real question, which is whether the claimant has properly satisfied the court that England and Wales is the proper place in which to have brought the present claim. In his skeleton argument, Mr Benson has identified the real question as to whether England is clearly or distinctly the appropriate forum and the proper place to bring this claim…"* (emphasis added)

(d) Relevance of which system is the proper law

79. *VTB* was a case where English law (used as a shorthand to refer to the law of England and Wales) was the proper law of the tort, but where the majority of the court nonetheless stayed the action in favour of the matter being more appropriately litigated in Russia. Lord Mance at para. 46 was cited by Hildyard J in *Bundeszentralamt für Steuern v Heis* as quoted above. Lord Wilson at para. 153 said as follows:

> *"The government by English law of VTB's claims in tort, as held unanimously by this court and as explained in judgments above with which I agree. A spectre of considerable practical inconvenience is raised around the receipt by a Russian judge of evidence of English law and around his application of it to such facts as he were to find. On the other hand the legal framework of VTB's case does not appear to be complex or controversial and Arnold J was entitled to conclude [2011] EWHC 3107 (Ch) that the key issues in the case were likely to be factual rather than legal."*

80. In *VTB*, the Court was considering a tort claim in deceit, but the passage applies to a contract claim, and might appear with particular force where the parties have made a choice of law. Dicey, Morris & Collins 16th Ed. at para. 12-034 stated:

> *"The choice of English law is generally a positive factor in favour of England as the appropriate forum, though it is not dispositive and may be outweighed by other factors, such as the location of witnesses and evidence. If the legal issues are straightforward, or if the competing fora have domestic laws that are substantially similar, the identity of the governing law will be a factor of rather little significance. But if the legal issues are complex, or the legal systems very different, the general principle that a court applies its own law more reliably than does a foreign court will help to point to the more appropriate forum, whether English or foreign".*

81. In a tort claim, a "prima facie starting point" is to stand back and identify the place of commission of the tort, since, in the absence of other compelling factors, this is likely to be the appropriate forum. But this does not relieve the court from the need to make an overall determination in the light of the issues of fact and law in the case and all of the relevant factors, which, in the particular circumstances of the case, may outweigh the importance of the place of the tort: see *VTB Capital Plc v Nutritek International Corp [2013] UKSC 5, [2013] 2 A.C. 337*.

82. As regards the law of the tort, the law applicable to a non-contractual obligation to which the Rome II Regulation applies and arising out of a tort/delict (Reg.864/2007 on the law applicable to non-contractual obligations) is in general the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur: see Article 4(1). Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in Article 4(1), the law of that other country applies instead: see Article 4(3). (Article 4(2) is an additional exception, but it has no obvious application in this case.)

83. This applies to all of the liabilities arising out of a tort/delict. That includes not only the allegations of deceit and of conspiracy, but also is very likely to include equitable wrongs including dishonestly assisting breach of trust/fiduciary duty: see Dicey, Morris and Collins 16th Ed. at para. 36-060 – 36-061. Para. 36-060 reads as follows:

> *"Dishonest assistance in a breach of trust is very likely to fall within the choice of law rules for torts in the Rome II Regulation. It is a claim based on non-contractual wrongdoing for which the paradigm claim is for compensation for loss. At common law, after some uncertainty, it appeared to have been established that the choice of law rules for torts applied equally to dishonest assistance. In* Casio Computer Co Ltd v Sayo*, the Court of Appeal considered that dishonest assistance*

fell within the European autonomous meaning of "matters relating to tort" under Art.5(3) of the Brussels Convention."

84. It is not necessary at this stage to say any more than that it seems unlikely that Article 4(3) would apply given the closer connection of any tort or delict with England and Wales rather than with Curaçao or any other country. It is not necessary to decide this for all purposes, but to simply to make a judgment in a non-definitive sense in the context of the jurisdiction application. It is available to the Court at another stage to form a more definitive view as to the law to apply.

85. In *VTB*, there was discussion as to the weight to be given to *Cordoba Shipping Co. Ltd. v. National State Bank, Elizabeth, New Jersey* [1984] 2 Lloyd's Rep. 91 "*The Albaforth")* where in a case of negligent misrepresentation, a telex had been received and acted on in the jurisdiction. Ackner LJ said (at p.94) that the jurisdiction in which a tort has been prima facie committed is prima facie the natural forum for the determination of the dispute. Robert Goff LJ said (at p.96) that "where it is held that a Court has jurisdiction on the basis that an alleged tort has been committed within the jurisdiction of the Court, the test which has been satisfied in order to reach that conclusion is one founded on the basis that the Court, so having jurisdiction, is the most appropriate Court to try the claim, where it is manifestly just and reasonable that the defendant should answer for his wrongdoing. This being so, it must usually be difficult in any particular case to resist the conclusion that a Court which has jurisdiction on that basis must also be the natural forum for the trial of the action. If the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts of that jurisdiction are the natural forum."

86. In *Berezovsky v Michaels* [2000] 1 WLR 1004, a libel case in respect of a publication within the jurisdiction, it was held that the approach in *The Albaforth* was consistent with *The Spiliada*. In *VTB*, all the justices stated that *The Albaforth* did not state that there was a presumption where a tort is committed in the jurisdiction that the courts of that jurisdiction were clearly or distinctly the appropriate forum. According to the majority, *The Albaforth* line of cases were a "*useful rule of thumb or prima facie starting point, which in many cases also prove to give a final answer on the question whether jurisdiction should appropriately be exercised. But the variety of circumstances is infinite, and The Albaforth principle cannot obviate the need to have regard to all of them in any particular case*" (Lord Neuberger at para. 18). That must be followed over the minority opinion (Lord Clarke [217] and Lord Reed [241]), that it was a strong or weighty factor.

87. In the instant case, it was submitted for the Defendants that *The Albaforth* line of authority is for cases where all ingredients of the tort are committed within the jurisdiction. In his dissenting speech, Lord Clarke at [217] accepted that the principle in *The Albaforth* had not been expressly stated to apply where the loss was sustained in the jurisdiction, but the other elements of the tort occur elsewhere, but he noted that in *The Albaforth* the negligent misrepresentation had been received and acted upon in the jurisdiction.

(e) The place where the entirety of a dispute being determined as a factor

88. The desirability of the entirety of a dispute being determined has been repeatedly emphasised in cases such as *BAT Industries Plc v Windward Prospects Ltd* [2014] 2 All E.R. (Comm) 757 (emphasis added):

> *"70. The fact that all possible related claims can be tried in one of the competing fora but not another carries great weight in deciding where the claims can best be tried in the interests of the parties and the interests of justice. In Donohue v Armo Inc et al [2002] 1 Lloyd's Rep 425 (where the issue was whether effect should be given to an exclusive jurisdiction clause) Lord Bingham said:*
>
> > *'It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue. A procedure which permitted the possibility of different conclusions by different tribunals, perhaps made on different evidence, would in my view run directly counter to the interests of justice.' (Para 34)"* (Emphasis added)

89. There are cases where all of the parties are before one jurisdiction and not another. In this case, subject to undertakings on the part of Mr Deuss referred to below, he is before the Court in the EWHC Proceedings but is not a party to the Curaçao Proceedings. In this regard, the Claimants rely on the case of *Meadows Indemnity Co Ltd v The Insurance Corporation of Ireland plc* [1989] 1 Lloyds Rep 180 at 190 per Hirst J, upheld on appeal [1989] 2 Lloyds Rep. 298, who said:

> *"Lastly there is the consideration to which I attach considerable importance that England is the only forum in which all three parties …are at present all before the Court in one single action. It is obviously convenient that all three parties should be involved together in one action, if only to avoid the risk of inconsistent findings".*

90. There now follow summaries of points of the parties. In no sense are they intended to be comprehensive, and there is no significance to be attached to the fact that points which might be important have been omitted. Any other course would require the Court to include even greater detail to the summaries which would extend this judgment unnecessarily.

VIII Summary of the points of the Claimants

91. The Claimants claim that the EWHC is the appropriate forum for the dispute between the Claimants, FCIB and Mr Deuss to be determined in that:

    (1) The claims relate to an MTIC fraud, by which English companies, which were based and carried out their operations in England and Wales, defrauded HMRC, the UK governmental body in charge of the collection of taxes, of VAT;

    (2) TWPS, an English company, was tasked with and did onboard the MTIC Companies to FCIB's banking facilities;

    (3) The section 213 Claims can only be determined by the EWHC. As regards the other claims, the EWHC is plainly the most appropriate forum;

    (4) The alternative forum proposed by FCIB is Curaçao based on the existence of the Curaçao Proceedings. Mr Deuss is not party to those proceedings. In any event, the courts of Curaçao are not a more appropriate forum than the EWHC in respect of any of the Claims; and

    (5) The extent of the recovery is only an issue in these proceedings.

92. The Curaçao Proceedings were issued in response to the (then) threatened EWHC Proceedings, which claims were set out in the Original LBA. FCIB should obtain no advantage from this manoeuvre but in any event the scope of the Curaçao Proceedings is so narrow that it provides no barrier to the EWHC Proceedings. In these circumstances, the point of the Applicants that the Curaçao Proceedings were commenced first in time should carry little, if any, weight.

93. The Curaçao Proceedings do not overlap with the EWHC Proceedings to any significant extent. The claims put forward in Curaçao are, or should be, limited to the scope and effect of the IP Settlement Agreements and the circumstances in which the IP Settlement Agreements were entered into.

94. There is a clear juridical advantage to the dispute being heard in the EWHC. The EWHC is the only forum that can resolve the entire dispute between the parties:

    (1) The section 213 Claims can only be litigated in the EWHC;

    (2) Mr Deuss is not a party to the Curaçao Proceedings; and

    (3) The Curaçao Proceedings, even if they are capable of determining that no sums are owed by FCIB, are not capable of determining what sums are owed. If the negative declaration sought in the Curaçao Proceedings is not granted, the EWHC Proceedings will be necessary to determine the quantum of FCIB's liability.

95. England and Wales is the most convenient place to try the claim in terms of location of witnesses and, to the extent relevant, documents; certainly it is more convenient than Curaçao. The Claimants draw attention to the following:

(1) Matters of law:

(i) There are issues of law in respect of the section 213 Claim which are of English law, and which are claims which the Curaçao court has found that it would not be appropriate for it to try.

(ii) There is a particular issue of whether acts of FCIB's officers are attributable to FCIB, and in particular whether the actions of Mr Deuss should be attributed to FCIB.

(iii) The Claimants submit that there is no reason to believe that the issue of the scope and effect of the IP Settlement Agreements could not be decided by the EWHC.

(2) The location of the witnesses:

(i) The Claimants say that there is a large number of potentially key witnesses who live in England, especially TWPS' senior managers and marketers, who were central to the activities of TWPS giving rise to these claims.

(ii) The Applicants have named two individuals only one of whom is in Curaçao. They are not named in the pleadings and do not play a prominent part in Mr Hunt's evidence. There are references to individuals at the Central Bank who must only have become involved after the alleged wrongdoing was being dealt with. There is no evidence of any important evidence which any of these employees may have.

(3) Location of documents:

In an electronic age, this is unlikely to be significant, but since TWPS was based in England and Wales, and the MTIC Companies were based in England and Wales, it is highly likely that the majority of the key documents are based within the jurisdiction of the EWHC.

(4) Timing:

Mr van der Weil considers that it will be at least until 2028 before a final decision in the Curaçao Proceedings will be reached. While Mr Cornegoor says that the "final jurisdiction judgment" (Cornegoor 1, para. 30) will be delivered in "in the first quarter of 2022", and that the merits claims will be determined 12-18 months later, given the history of the Curaçao Proceedings to date, this appears optimistic. In 6 years, those proceedings have not managed to get past the jurisdiction stage. The final jurisdiction judgment was not delivered in the first quarter of

2022 and that may not be final in the sense that it may be subject to an appeal.

96. The merits of FCIB's position in the Curaçao Proceedings are sufficiently weak that the Court ought to be very hesitant to derail the EWHC Proceedings in favour of them. The Claimants are highly critical of FCIB's argument that the rights of the MTIC Companies and/or TWPS were somehow waived or settled by the IP Settlement Agreements even though they were not named as parties to those agreements: they refer to it as being extraordinary.

97. The VAT fraud was committed in this jurisdiction. The MTIC Companies and TWPS were English companies that carried out their operations in England and Wales. Mr Deuss resides in Bermuda and was not based in Curaçao. FCIB, whilst incorporated in Curaçao, was operated from the Netherlands.

98. The claims in these proceedings require a determination of eight principal issues:

(1) TWPS' liability to the MTIC Companies (which the Defendants do not accept) (a) under s213 IA 1986 and (b) in respect of dishonest assistance which liability is a pre-requisite for TWPS' direct (non-assigned) claims. Not only can the s213 Claims only be litigated in the EWHC, but these are also claims by English companies on an English defendant;

(2) The liability of Mr Deuss to TWPS for breach of fiduciary duty as a de facto or shadow director of an English company, TWPS, in rendering it liable to other English companies: Mr Deuss has no connection to Curaçao and the duties in question are fiduciary duties owed to an English company;

(3) The liability of Mr Deuss to TWPS (a) under s213 IA 1986 and (b) for a contribution. It is not in dispute that the s213 Claims can only be litigated in the EWHC;

(4) The liability of Mr Deuss to the MTIC Companies: (a) under s213 IA 1986 and (b) for dishonest assistance. It is not in dispute that the s213 Claims (if validly assigned as a matter of English law) can only be litigated in the EWHC;

(5) The liability of FCIB to TWPS (a) under s213 IA 1986 and (b) for a contribution. It is not in dispute that the s213 Claims can only be litigated in the EWHC;

(6) The liability of FCIB to the MTIC Companies: (a) under s213 IA 1986 and (b) for dishonest assistance. It is not in dispute that the s213 Claims (if validly assigned) can only be litigated in the EWHC;

(7) Whether the claims of the MTIC Companies and TWPS were compromised by the IP Settlement Agreement; and

(8) The quantum of any recovery: the quantum of recovery is not in the least bit relevant to the declarations sought by FCIB in the Curaçao Proceedings.

99. Of these issues, there can be no real dispute but that the EWHC is the appropriate forum for issues (1)-(6) and (8). If issue (7) had been the only issue then, putting it at its highest, there would have been arguments in favour of Curaçao as the appropriate forum. But issue (7) is not the only issue, and in the context of the dispute holistically, those arguments cannot outweigh all the other factors that point to the EWHC as the appropriate forum for the dispute as a whole. Therefore, even if Curaçao were thought to be the appropriate forum for the determination of issue (7), the desirability of all aspects of a dispute being resolved in one set of proceedings in a forum that is the appropriate forum for the dispute as a whole dictate that the issue be resolved in a forum that, from the perspective of that issue in isolation, may not be its natural forum. That forum is the EWHC.

100. As regards Mr Deuss who applies for a stay pending the hearing in Curaçao to which he is not a party, he cannot show that Curaçao is the appropriate jurisdiction for the claims being made. Indeed it is clear that the EWHC is the appropriate forum for the claims. None of the claims against Mr Deuss are the subject of the Curaçao Proceedings so the claims against Mr Deuss are not to be determined in the Curaçao Proceedings. The result is an application for an indefinite stay whilst the Curaçao Proceedings are concluded, even though such proceedings will not be determinative of the claims against him.

IX Summary of points for the Defendants

101. The Defendants submit that the Claimants are unable to show that the EWHC is clearly or distinctly the appropriate forum and the proper place to bring the claims other than the section 213 Claims. As regards the Assigned section 213 Claims, that is flawed in law. I shall refer to the submissions of the parties in respect of the latter separately and later in this judgment.

102. The Defendants submit that the Curaçao Proceedings were issued for entirely legitimate reasons and not to support any abuse or forum shopping. They claim that Curaçao was the appropriate forum being the place where the wrongs were most closely connected in that Curaçao bank accounts were used to facilitate the fraud, Curaçao is the place where FCIB is situated. Further, the IP Settlement Agreements provide for Curaçao law and Curaçao jurisdiction (albeit not exclusive jurisdiction), and that it was therefore appropriate for the Curaçao court to determine this matter central to the dispute between the parties. As to the factors of convenience, they submit that there is at least as much, if not more, to be said for the convenience of Curaçao over the English court.

103. The Defendants submitted that there were assumptions in the Claimants' case that the Court should ignore at this stage since they were premised on an examination of the merits of the case which could not be undertaken at this stage. They included the following:

(1) The suggestion that the defence of release by reason of the IP Settlement Agreements had very limited prospects of success. This is a question which depends on an appreciation of a foreign system of law and on facts which cannot be determined without having the matter fully pleaded and hearing evidence from the various parties involved.

(2) The proper law of the torts and delicts cannot yet be determined. At this stage, they submit that the connecting factors are greater with Curaçao than with England and Wales. They submit that central to the fraud were the banking services provided by FCIB. On the case of FCIB, this operated centrally from Curaçao. It was this which was the hub of the fraud.

(3) The reliance on *The Albaforth* was said to be misconceived in that that is said not to apply to cases such as the instant one where different elements of the torts and delicts were in different countries, and the Court would have to carry out an evaluative exercise based on the whole of the evidence as to where the closest connections lay. An example is the equitable wrong of dishonest assistance where the assistance of FCIB is said to have come from Curaçao through the relevant bank accounts, and the participation of FCIB in the alleged fraud. In those circumstances, at this stage, the Court should conclude that Curaçao law will be the law with which the alleged wrongs had the closest connections.

104. The question of whether the IP Settlement Agreements have resolved the matter is potentially determinative of the matter as a whole. It is logical for that to be dealt with first. It should be heard in Curaçao because the agreements provided for jurisdiction of the Curaçao courts and for the law to be that of Curaçao. The principles of law in respect of construction are different from the principles in English law, particularly as regards the matters outside the agreement of which the Court could take into account. The result of this is that parties not specifically named in the agreements may as a matter of construction and of the relevant law be bound by the provisions of the agreement. It is therefore desirable for the law to be applied in the court in Curaçao which is familiar with the relevant law. If the issue is decided in favour of the Defendants, that would be dispositive of the case.

105. It was suggested on behalf of the Claimants in oral submissions that given that TWPS was not expressed to be a party to the IP Settlement Agreements, an issue arose as to whether Curaçao law would govern the law of whether it was a party to the contract. Mr Scott KC on behalf of FCIB made the point that this was covered by Rome I Regulation (Reg.593/2008 on the law applicable to contractual obligations). Article 10 of the Rome I Regulation reads as follows:

> *"Consent and material validity*
>
> *1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.*

> *2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1".*

106. In a note after the hearing dated 20 May 2022, the Claimants submitted that the exception in paragraph 2 above applied. It was submitted by Mr Scott KC for FCIB that since Mr Hunt, who was the liquidator of TWPS, was a party to the IP Settlement Agreements, the putative governing law of the agreements as regards TWPS would be the law of Curaçao and that the exception would not apply: see T2/151/17 – T2/152/8.

107. The Defendants submit that timing and delay are relevant factors. Even if, contrary to the foregoing, it could be said that the Curaçao Proceedings were issued in the face of the Original LBA, that was a long time ago. The actions in Curaçao have now been on foot for over six years, and that at the time when the EWHC Proceedings were commenced, they had been in existence for over 4 years. The jurisdiction points had been taken in hearings at all levels, and the Curaçao Proceedings alone had become the centre of gravity between the Claimants and FCIB. There has been no evidence based explanation as to why there has been a delay of so many years in the commencement of the EWHC proceedings, and the inference is that is there is no sensible explanation for the delay.

108. If the EWHC proceedings proceed, there is the real danger of inconsistent findings in the two actions. This would lead to "practical conundrums" and would be a "potential disaster from a legal point of view". There would be a race for an earlier judicial determination between the parties in the different jurisdictions. There would be a duplication and worse of legal fees as the same ground was covered in both jurisdictions. It would be worse because of the complication of dealing with the inconsistencies.

109. There is no real problem about all issues not being before the court in Curaçao or this factor is outweighed by the other factors relevant to the EWHC not being clearly or distinctly the appropriate court. With the exception of the section 213 Claims and the determination of damages, the whole of the dispute between the Claimants and FCIB can be decided in Curaçao. The expert evidence shows on the Defendants' case that the fraud cases are before the Court in order to decide what was released. Even if and to the extent that that is not the case, the Curaçao court can determine in due course to decide these issues. Accordingly, the scope of the Curaçao Proceedings is not limited to the contractual issue but extends to the fraud case. As regards the parts that cannot be dealt with, that is not a problem because once the determination has been made by the Curaçao court, there will be much less to deal with due to the overlap between the section 213 Claims and the other fraud claims. Further, the damages would be a discrete subject, which could logically be assessed after the liability issues.

110. The attempt to distil the case into eight propositions so as to show that the EWHC is the natural form is artificial and unhelpful. The issues are repetitive, and they could be distilled into a smaller number of issues. The analysis ignores the fact that the frauds are to be considered in the Curaçao Proceedings. The analysis fails to give

adequate weight to the importance of the release point and its potential consequences on the dispute as a whole.

111. Although Mr Deuss is not a party to the Curaçao Proceedings and therefore might not be bound by a decision of the Curaçao court, he has offered undertakings to deal with this. Through his solicitors, he offered on 26 April 2022 "to be bound by any final determination of the courts of Curaçao of the substantive issues in case numbers AR 78075/2016 and AR 7904/2016." He has extended those undertakings following the hearing. By a letter of 6 May 2022, the revised undertaking was expressed as follows:

> *"Mr Deuss undertakes to be bound, in Claim BL-2020-001543 (the "English Proceedings"), by the result of case numbers AR 78075/2016 and AR 79404/2016 (the "Curaçao Proceedings") and by any factual and/or legal findings or determinations that the Curaçao Court makes in the Curaçao Proceedings (whether or not relating to the conduct of Mr Deuss personally) so long as such result and/or finding or determination is final and binding on the parties to the Curaçao Proceedings and is not subject to appeal, and Mr Deuss further undertakes to not relitigate in the English Proceedings any such matters which have been finally resolved and/or determined by the Curaçao Court in the Curaçao Proceedings and are not subject to appeal."*

112. The Claimants say that this is not adequate because there might not be findings in respect of Mr Deuss. Further, it does not extend to decisions which might be appealed. By a letter from the solicitors for Mr Deuss dated 16 May 2022, the response was that:

> *"The undertaking plainly applies to all findings and determinations made in the Curaçao proceedings irrespective of whether or not they are in respect of Mr Deuss' own conduct."*

113. As regards negative declarations, there is no rule of law that such proceedings carry no or little weight. In the instant case, it is important to have such proceedings because the frauds have a close connection with Curaçao, and the IP Settlements Agreements contain a jurisdiction clause for Curaçao and are subject to the law of Curaçao. The liquidation of FCIB also needs to be brought to an end, and therefore FCIB has an interest in having these proceedings determined rather than waiting on the Claimants.

X Discussion

(a) Characterisation of the case

114. There is a fundamental question as to how the proceedings are characterised. The Claimants say that seven of the eight issues, as characterised by them, point to the EWHC as the appropriate forum. The principal eight issues as per the Claimants have been noted above. I prefer for the purpose of characterisation not to approach matters in this way. It makes a number of assumptions which may become wrong including:

    (1) It may be that the section 213 Claims cannot be validly assigned (at this stage of the analysis, I shall assume that they cannot be so assigned: this may remove issues (4) and (6)).

    (2) Although issues (2) and (3) may be separated, they may also be properly regarded as one issue being a course of conduct having legal consequences as breaches of fiduciary duties and as giving rise to liabilities under section 213 of the IA 1986 and for a contribution under the CLCA 1978.

    (3) Even issue (5) involving the liability of FCIB is very closely related to issue (2) and (3), being a course of conduct having legal consequences as breaches of fiduciary duties and as giving rise to liabilities under section 213 of the IA 1986 and for a contribution under the CLCA 1978.

    (4) The quantum of recovery is a different issue and arises as a separate issue; and

    (5) It ignores the Defendants' argument that the scope of the proceedings in Curaçao are broader than the construction of the IP Settlement Agreements.

115. It follows that the number counting of the issues is, in my judgment, over-simplistic if the suggestion is that one eighth or less of the time is to be devoted to the matters being litigated in Curaçao.

116. Despite these concerns about this characterisation of the issues in the case, I accept broadly that the issues as a whole are more closely connected with England and Wales than with Curaçao or any other country. It relates to an alleged VAT carousel fraud committed in the UK against HMRC depriving them of large amounts of VAT. This was done by TWPS which was largely based in London through its staff based largely in London although Mr Vallerey was based in France. The key meetings were in London including meetings attended by Mr Deuss. The MTIC companies which were used as part of the fraud were largely English companies, and the fraud was achieved by trading large quantities of equipment without paying the resultant VAT liabilities or retaining the means of doing so leaving the MTIC companies heavily insolvent on account of their VAT liabilities.

117. The allegation is that FCIB dishonestly participated in the fraudulent trading of the UK companies. It provided financial services to assist, opening new accounts for the MTIC companies which were used in the fraud. This was done without carrying out any adequate KYC and AML checks. It is alleged that whilst ostensibly marketing the financial services at FCIB, TWPS' role went beyond that and extended to every

major stage of onboarding new clients to FCIB. Although FCIB was incorporated in Curaçao, it is suggested that a part of the electronic banking was carried out in the Netherlands.

118. In my judgment, the essence of the dispute is the fraud itself, and the fraud has its closest connection with England and Wales. The alleged fraud and the common law, equitable and statutory causes of action arising out of the same have their closest connection with England and Wales. That is because its object was to defraud HMRC through companies largely incorporated in England and Wales. Even if FCIB were acting from Curaçao alone and did not in fact trade wholly or partly from the Netherlands, I am satisfied that the planning of an alleged fraud by largely English companies in order to defraud HMRC and to deprive them of VAT provides a closer connection with England and Wales than any other jurisdiction. The fact that the bank accounts at FCIB in Curaçao facilitated the alleged fraud and the involvement of FCIB in the fraud is not as closely connected with the fraud as England and Wales, being the place where TWPS and most of the MTIC companies were based and operated and the place where many of the key meetings were held and where at least some of the breaches of fiduciary duty occurred. It was in this place that was based the object of the fraud, which is HMRC. It was in this place that the frauds were acted upon, and that the damage occurred largely, that is those of HMRC and of TWPS and the MTIC companies which are the claims in the instant case giving rise to the claims in damages and for compensation and contributions. Even taking into account the role of FCIB in opening accounts to facilitate the fraud and its presence in Curaçao, the closer overall connection was England and Wales where breaches of trust/fiduciary duty took place, where the fraud was acted upon and where the damage occurred. It was ultimately a fraud on HMRC in the jurisdiction of the EWHC with consequent damage to largely English companies.

119. There is an issue which may arguably require determination and involve Curaçao law, namely whether acts of FCIB's officers and in particular Mr Deuss are attributable to FCIB. Mr Travers, citing the Hartkamp Report, says that this depends on "*public opinion/generally accepted principles/generally accepted standards within society*". It does not seem to be suggested that it will be difficult for an English court to apply this to the facts of the instant case, especially so if the Claimants' case prevails that Mr Deuss was at all material times a director, the ultimate beneficial owner, and the controlling mind of FCIB.

120. Although the point does not arise for definitive determination at this stage, in respect of the equitable wrong of dishonest assistance to breach of trust/fiduciary duty, this appears to be treated as a tort/delict for the purposes of Rome II Regulation. The alleged wrong involving breaches of trust/fiduciary duty to predominantly English companies with an ultimate target of the fraud being HMRC and related to other wrongs subject to English law. The closest connection of the equitable wrong is also with England and Wales. Indeed, there is a question as to the extent to which the assistance took place in Curaçao or outside Curaçao in Netherlands in the event that the accounts were operated there. There is enough to indicate at this preliminary stage that even if the accounts were operated in Curaçao and not outside Curaçao, the equitable wrong of dishonest assistance still has its closest connection with England and Wales.

121. If it were the case that the fraud was admitted, but the only real question was whether it was settled as a result the IP Settlement Agreements, then it might be said that the issue was about the IP Settlement Agreements which had their closest connection with Curaçao owing to their being subject to the law of Curaçao and being subject to the jurisdiction of the courts of Curaçao. However, it is not the case that this construction is the sole or the predominant question. On the Claimants' case in the EWHC Proceedings, and indeed on the way that FCIB characterises its case in the Curaçao Proceedings, the existence, nature and extent of the fraud all have to be proven. On the way in which the case is now formulated, the negative declaration is being used to seek to force the Claimants to prove their case in fraud in Curaçao.

122. There is an issue as to the extent that the fraud itself arises for consideration in the courts of Curaçao. The Defendants contend that in order to determine the effect of the IP Settlement Agreements, it is necessary to identify the fraud and damage caused by the fraud. The Defendants' evidence is that "Unless FCIB admits such liability in Curaçao, the defendants in the Curaçao Proceedings will have to establish such liability": see Travers' first statement at para. 55.1.4. That has a different emphasis from the way in which the petitions were originally formulated which was on the non-admitted assumption that there was liability, the IP Settlement Agreements provided a complete answer to the Claimants' claims. That will inform as to what was settled not only in respect of contractual but also non-contractual liabilities. The Claimants point to the fact that in the early stages of the Curaçao Proceedings, the correspondence of the Defendants was to the effect that the issue of the IP Settlement Agreements was confined to the construction question as to its meaning and effect and whether it discharged the liabilities of the Defendants. An example was a letter dated 19 July 2019 from FCIB's solicitors Jones Day stating:

> *"… FCIB issued a writ in Curaçao seeking declaratory relief that the English claimant companies… and/or TWPSUK <u>are not entitled to pursue</u> claims relating to the alleged MTIC fraud against FCIB <u>by reason of the settlement agreements</u> between FCIB, a number of companies that allegedly engaged in MTIC fraud and held accounts at FCIB and their liquidators……"* (emphasis added).

123. The Defendants point to the proceedings themselves which provide some support for their view that there has been a widening of the scope to extend to the question of what fraud has been committed. There is an issue between the parties as to whether in fact at the time of the application for service out, the issue in the Curaçao Proceedings was broader than the construction of the IP Settlement Agreements.

124. There were detailed submissions before the Court by both parties as to the scope of the Curaçao Proceedings by reference to the court documents in those proceedings. In the submission of FCIB, the letters had been wrong not to show how the nature of the frauds were before the Curaçao Court, and that any error in the correspondence was irrelevant. In the submission of the Claimants, the scope of the proceedings was more limited, and the intent to extend the case was in the context of this jurisdiction battle and the preparation of expert advice. It was on this basis that the application was made at the without notice stage for permission to serve out, and the Claimants submit

that it is not available to the Defendants to change their focus at the later inter partes (on notice) stage.

125. As noted above, the Defendants say that the battleground is arid because it is available to the Curaçao Court to determine the ambit of the dispute and to the extent that the existence and nature of the fraud were not already in issue, it can become in issue as the case progresses. The Claimants say that it is not clear what would happen in the Curaçao Proceedings if their stance was not to put forward evidence in support of the fraud claims.

126. The Defendants' analysis that the fraud issues are to be a part of the Curaçao Proceedings may be designed to demonstrate that a much larger part of the claim is in Curaçao. This is contested. Even if fraud issues are to be before the Curaçao courts, the following significantly reduce the impact of this point in the context of the instant applications, namely:

(1) The fraud claims do not lend themselves naturally to negative declarations. It is necessary to identify the specific frauds, which are in issue as regards the involvement of FCIB, and then to disprove them or to show how they are discharged by the IP Settlement Agreements. Given that there are not admissions as to the frauds, it is much more natural for the issue to be whether the Claimants can prove the frauds than whether they can be the subject of negative declarations. In a fact intensive claim for fraud with different causes of action, it is artificial to set it all up for negative declarations. In any event, the alleged frauds have their closest connection with England and Wales and not with Curaçao.

(2) It is not certain that the Curaçao Proceedings will consider the alleged fraud for the purpose of the negative declaration. This depends on the willingness or otherwise of the Curaçao Proceedings to consider the nature and extent of the fraud. In the EWHC Proceedings, the allegations of fraud are centre stage.

(3) The law of the frauds, applying English private international law and the Rome II Regulation, as a result of the connections with England and Wales, is likely to be English law. There is no specific evidence as to how different this might be from the law of Curaçao. It might be that there are similarities in that one would expect a civilised system of law to have causes of actions and remedies to deal with fraud, but there are likely to be differences. To the extent that there is an advantage in having the law of the IP Settlement Agreements decided in the Curaçao Proceedings, there are clear advantages in having the fraud causes of action decided in the EWHC Proceedings. These issues may be more wide ranging in that there is a wider scope of the fraud claims than the law relating to the scope of the release under the IP Settlement Agreements.

(4) Even if the Curaçao Proceedings were to proceed, it has been determined in the jurisdiction hearings that the Curaçao court does not have jurisdiction to decide the section 213 Claims. Only the EWHC has that jurisdiction. The perspective of the Defendants is to contemplate what would remain to be done if this claim was to be stayed whilst the other fraud claims were litigated in Curaçao. This is on the basis that the findings in respect of the other claims might be relevant to the section 213 Claims. This is artificial because one could just as easily start with the section 213 Claims and see what the impact of those was on the other claims. In fact, given the closer connection of the fraud with England and Wales, this may be the more logical course to take (in respect of the section 213 Claims and indeed for the reasons above stated with the fraud claims generally).

(5) If the Claimants are successful on liability, it may be difficult to have in effect an assessment of damages or compensation or contribution in a different jurisdiction from the jurisdiction dealing with liability. This is not some attachment at the end of the case. In this case, as a matter of case management, a split trial may in any event be undesirable because of the cross-over of liability and remedy inherent within this case.

(b) The natural forum question on the alternative ways of characterising the case in Curaçao

127. Assume for the moment that the proceedings in Curaçao are limited to the construction of the IP Settlement Agreements but not to the question of whether there was a fraud and assume also that the EWHC Proceedings were commenced shortly after the commencement of the proceedings in Curaçao, then in my judgment, the EWHC would clearly be the natural forum for the proceedings. The reasons for this would include the following:

(1) The fraud claims have their closest connection with England and Wales as concluded above;

(2) It is more natural for the fraud claims to be conducted in the country with which it has the closest connection;

(3) It is not natural for the fraud claims to be determined by proceedings for negative declarations as set out above in the section about how artificial such proceedings to deal with the instant fraud claims are;

(4) The law of the fraud claims is likely to be English law given the close connection of the torts and delicts with England and Wales;

(5) The fact that the section 213 Claims can only be determined by the EWHC;

(6) The fact that it may be natural to deal with remedies at the same time as liability, but this would not be possible in the event that liability was decided in Curaçao; and

(7) The fact that, on the proceedings as they currently stand, Mr Deuss is before the EWHC, but not before the Curaçao court. The relevant parties can all be before the EWHC and all the causes of action can be dealt with by the EWHC, but this could not be the case before the Curaçao court.

128. The impact of the IP Settlement Agreements being subject to the law of Curaçao is a significant factor in favour of the Defendants' argument on forum, but it is no more than this. In my judgment, it does not remove the fact that the EWHC is the natural forum. Although the principles of construction of the contract are different in the law of Curaçao from the law of England and Wales, they are not difficult to comprehend or to apply.

129. The evidence is that in Curaçao law, there is a wider ambit of admissible evidence outside the agreement and what in English law might be referred to as the contractual matrix which might be admissible on the question of construction. It is on this basis that the Defendants expect to have considered a wider ambit of evidence about the parties' intentions (even in contradiction of words in the IP Settlement Agreements) in order to prove that parties not mentioned in the agreements will be bound by the compromise. It is suggested that since there was an objective of total peace, the agreements will be interpreted to this end.

130. The area of law of construction of contract in Curaçao law appears to be in short compass. It is a factor in favour of Curaçao to have a point of law determined by the court applying its law, but in this case, the legal issues in contract are not complex. It will not be difficult to resolve any difference and the EWHC is used to ascertaining and applying foreign law. It is a factor to have the law determined by the Curaçao court where it is applying the law of Curaçao, but in this case, the EWHC is unlikely to find it difficult to ascertain and apply the relevant law. These issues are very far from the sort of complex and controversial areas of law identified in some of the cases referred to above, in which the relevance of the foreign law to a stay has been considered.

131. In my judgment, although there is a particular point in favour of Curaçao, it does not carry great weight. It is not particularly significant in circumstances where the law can be ascertained and applied, as here, without much difficulty. It is to be weighed against all the other circumstances which may outweigh the significance of the proper law or the jurisdiction clause (not exclusive) of the IP Settlement Agreements.

132. As regards the submission of the Claimants that Article 10(2) of Rome I Regulation will be applied so that English law will be the law determinative of whether TWPS and/or English companies not named in the IP Settlement Agreements were bound by the same, I have taken into account the discussion in Chitty on Contracts 34th Ed. considering the likely ambit of Article 10(2). At para. 33-237, after reference to a case of *Egon Oldendorff v Libera Corp (No.1)* [1995] 2 Lloyd's Rep.64, the editors said that the conclusion in that case supported "the sensible conclusion that legal

persons engaging in commercial transactions should receive little protection from Article 10(2) of the Regulation in typical commercial situations and that what protection they might receive should be limited to unusual situations where the strict application of Article 10(2) of the Regulation would produce a result which is *commercially unreasonable*." The wording of Article 10(2) is expressed as an exception and it is a pre-requisite that it would not be reasonable to determine the effect of the conduct of the party saying that he did not consent in accordance with the law specified in Article 10(1).

133. In a jurisdictional challenge, I do not need to form a final view in respect of this provision, and it can be considered afresh if the point arises. A preliminary view of the provision is that Article 10(2) is unlikely to apply for the following reasons, namely (a) the inability to show that the result would be commercially unreasonable, (b) the fact that it arose in a commercial transaction where advisers with a knowledge of Curaçao law were available to Mr Hunt, (c) the close connection between Mr Hunt and TWPS (Mr Hunt being the liquidator of TWPS) and those other English companies which might be affected by the IP Settlement Agreements, and (d) whether the alleged bad faith on the part of Mr Hunt and others is established or not, prima facie it is not unreasonable for the other parties to have been informed about the terms of the IP Settlement Agreements and its possible consequences from the perspective of its proper law.

134. There is a separate delict referred to in respect of the allegation that the parties to the IP Settlement Agreement were misled into believing that all liabilities were being settled whether in respect of the named parties or anybody else arising out of the alleged fraud. That is likely to be subject to Curaçao law as a result of its connection with the IP Settlement Agreements. That is again not an area that English law would find difficult to ascertain and apply: there are connections with the law of deceit and with the law of unilateral mistake where a party stands by to take advantage of another's mistake. Here too, there is a factor in favour of Curaçao, but one which does not carry great weight in the scale of things.

135. In addition, there is in particular a factual controversy as to the relevant background to the agreements. The Defendants emphasise the desire to have a total peace, and the Claimants emphasise a narrower approach as parties were seeking to identify which part of money available was attributable to what specific claims rather than by reference to unascertained claims from parties not even mentioned in the IP Settlement Agreements. It is not possible to form a judgment as to the outcome of this factual controversy, but the resolution of this factual controversy is something as easily dealt with in London as in Curaçao.

136. The position is not significantly different in the event that the subject matter of the proceedings in Curaçao include or will include the question of whether there was a fraud. The reasons for this are as follows:

    (1) The fact that the proceedings in Curaçao are at least in large part for negative declarations is highly material. Generally, a claim in a foreign court for a declaration will not be of much weight in determining whether the foreign court is the appropriate forum: see *Lekoil Limited v Akinyanmi* [2022] EWHC 282 (Ch) at [13 - 14].

(2) Insofar as the proceedings for a negative declaration are a reiteration of the point of construction, this is a significant factor, but no more than that, and certainly not conclusive, as noted above.

(3) Insofar as it touches upon the issue of the existence, nature and extent of the fraud, in my judgment, this does not significantly affect the analysis including for the following reasons, namely:

(a) It is artificial in circumstances where the precise nature and extent of the fraud have not yet been fully formulated that the scope of the fraud should be determined in proceedings for a negative declaration rather than in substantive proceedings alleging the fraud.

(b) As noted above, the fraud has its closest connection with England and Wales. Although bank accounts were used from FCIB in Curaçao, on the information currently available, the connections of the fraud with England and Wales were more significant than the connections with Curaçao, as set out in more detail above.

(c) This might necessitate the determination of English law by the Curaçao court.

(d) Despite the fraud being considered in Curaçao on this premise, it is a significant lacuna that the connected section 213 Claim 1986 is not justiciable in Curaçao. The Defendants seek to sideline the section 213 Claim by starting from the remaining allegations, but equally one could start with the section 213 Claim and then go to the other allegations. Put this way, the section 213 Claim is potentially a large part of the action.

(e) The assessment of damages or quantum could not take place in Curaçao other than by way of a counterclaim as to which there is no or little evidence. It is not apparent that there is scope for a counterclaim procedurally or, if there is, that it is not time barred.

(f) Mr Deuss is not a party to the proceedings in Curaçao. On the claim as currently made, he is before the English court but not before the Curaçao court. The notion that his claim would be stayed potentially for years is unsatisfactory. His revised undertaking that he will be bound by the findings in the Curaçao Proceedings and the clarification that this will apply irrespective of whether or not they are in respect of Mr Deuss' conduct are not in my judgment sufficiently clear to avoid

matters being relitigated in respect of Mr Deuss. It is not clear what will be the ambit of the Curaçao Proceedings as regards fraud or the extent to which they will decide matters as regards Mr Deuss or matters which will have application to Mr Deuss. Despite the attempt to have greater definition in the undertaking, the concerns go beyond drafting matters, such that this does not assist.

(g) The desirability of determining the issues between the Claimants and Mr Deuss at the same time as the other issues is a significant reason for rejecting Mr Deuss' application for a stay.

137. There is a qualification which I take into account as regards the characterisation of the proceedings as of a negative declaration. It is the evidence of Professor Hartkamp that if the Curaçao court determines that (a) the Curaçao defendants have committed wrongful acts against FCIB, the companies concerned and insolvency practitioners will be liable in damages to FCIB and/or (b) the Curaçao defendants are party to the IP Settlement Agreements and have acted in breach of them, they will be liable for damages for breach of contract. There are a number of matters before getting to this conclusion. First, this appears to be the subject of Claim 2 where jurisdiction is currently before the Curaçao court. Second, even assuming that jurisdiction is taken, it is not obvious what would be the damages in the event that the claims of TWPS and the English companies concerned would fail and costs were awarded against the unsuccessful parties. Even taking into account the possibility of such a claim, in my judgment, this does not alter the primary characterisation of the Curaçao Proceedings as being in the nature of negative declarations.

(c) Inconsistent decisions

138. This is not a case where there are two claims in different jurisdictions about the same subject matter. This is a case where there are all of the claims and parties in one jurisdiction and a claim for a negative declaration about a part of the claims and not all of the parties in another jurisdiction. This is not a case where the Defendants are compelled to have brought the proceedings in the Curaçao court. It is common ground that the jurisdiction clause in favour of the Curaçao court is not an exclusive jurisdiction clause. It is not like an arbitration clause compelling the parties to go to arbitration. It is therefore a choice for the Defendants to have commenced the proceedings in Curaçao in the face of the LBA.

139. The possibility of inconsistent decisions has much less impact in this case than in cases referred to above. This is because of the many reasons which make the English Court the natural forum and the above-mentioned artificialities of the Curaçao Proceedings. Were the risk of inconsistent decisions a potentially decisive factor in these cases, then an earlier claim for a negative declaration would be a trump card

against subsequent proceedings. It is apparent that the law is not that way. Although there are not universally applicable principles, the corollary of the caution about negative declarations is that the risk of inconsistent decisions will in many cases carry much less weight. In the circumstances of this case, there are a number of factors which lessen considerably any concern about inconsistent decisions including but not limited to the following:

(1) The many factors to the effect that the EWHC Proceedings are the natural forum for the claims in question, lead to the conclusion that the applications should be rejected;

(2) The artificiality of the negative declarations as regards the fraud claims, reversing the more usual roles of the parties with procedural complications and possible injustice: see *BNP Paribas SA v Trattamento Rifuti Metropolitani SPA* at [66].

(3) The uncertainty of which, if any, fraud claims will be adjudicated upon in the Curaçao Proceedings;

(4) The fact that it is not possible to form a view at this stage that it is likely that the defence of release will operate so as to bring the dispute to an end. If it does not, then the consequence of a permanent or a temporary stay will be to cause potentially years of delay in the Claimants being able to pursue their claims; and

(5) The fact that the Curaçao Proceedings do not in any event deal with all the claims and all the parties and indeed omit important aspects of the case is an important pointer that the EWHC Proceedings should continue and not be stayed.

140. It has also been prayed in aid that the final relief sought in the Curaçao Proceedings includes an application for an anti-suit injunction. The outstanding decision on jurisdiction in respect of the First Action in Curaçao is awaited. This has not been moved as a separate application. There is no significant evidence before the Court as to in what circumstances it might arise or the arguments to be deployed in Curaçao if it were to be moved or the responsive arguments before the English court. The possibility of such relief depending on many factors known and not known has to be taken into account, but if the preponderance of factors indicates clearly or distinctly that the EWHC is the appropriate forum, then in my judgment, this possibility does not alter the overall analysis.

141. A further point to take into account is that there is no inference from such jurisdictional rulings as have been made in the Curaçao Proceedings that the Curaçao court has determined that it is the natural and appropriate forum for the determination of the dispute. The reason for this is that it is there is no concept of *forum non conveniens* in Curaçao. It follows that the decision that the EWHC is the proper forum does not cut across any decision thus far of the Curaçao court.

(d) Impact of delay

142. The question is then the significance of the delay of years before the EWHC Proceedings were brought. There is no evidence explaining the delay. The concentration is on the fact that the proceedings in Curaçao had not advanced beyond the jurisdictional phase at the time when permission was given to serve out of the jurisdiction. Despite suggestions that this would shortly come to an end, the case has not reached its substantive stage. It is not in my judgment an answer to these points that without the objections of the Claimants, the proceedings would have gone more quickly. The reason for this is that the Claimants were entitled to attempt to defeat the proceedings through a jurisdictional objection which would have been likely to have obviated the jurisdictional objection in the current proceedings. Although they have not had entire success in this, the Curaçao court has curtailed the scope of the claim significantly. The fact that the substantive part of the proceedings has not commenced greatly reduces the significance of the delay. Despite this, I do not for the purpose of this judgment discount the significance of the delay but take it into account as a factor against the Claimants.

(e) Witnesses

143. An important feature is the accessibility of the Courts for the witnesses. Mr Daniel Travers, a partner of Jones Day, solicitors for FCIB, says in his first witness statement at para. 47 that "a significant number of the key witnesses relevant to the Claims are not located in England". At para. 64, he identified two individuals, only one of which is based in Curaçao. The individuals are not ones who are named in the pleading, or who play a prominent part in Mr Hunt's evidence. He referred to individuals at the Central Bank who were in charge of FCIB after it was put into special measures, and therefore not ones who were involved in the alleged wrongdoing of FCIB or who could have first-hand knowledge of such wrongdoing. There is no identification of how they have important evidence, and the assertion appears to be based simply on the fact that Mr Hunt wrote to these witnesses.

144. By contrast, there are potentially key witnesses who reside in England and Wales, especially TWPS' senior managers and its marketers, who were central to the activities of TWPS giving rise to these claims. It is entirely logical that this would be the case given that the fraud appears to have been taken place in England and Wales being a fraud against HMRC with English companies at the centre of the fraud. Mr Hunt and members and employees of Griffins are also resident within the jurisdiction of this Court.

145. In the Petition in the Curaçao Proceedings, there were identified nine witnesses who would give evidence regarding what was said to be the culpable failure to identify TWPS as a party which would claim in the liquidation of FCIB. The witnesses were Mr Hunt, Mr Bramston, Ms Hall, Mr Potts, Mr Stewart, Ms Taylor, Mr Petersen, Mr Welten and Mr Douwes. Of these witnesses, six of them live in England. Mr Stewart and Ms Taylor are with HMRC. Mr Hunt, Mr Bramston, Ms Hall and Mr Potts are either liquidators or lawyers. None of the other witnesses outside the UK, as just noted, were involved in the alleged wrongdoing or had first-hand knowledge of the

same. Mr Welten and Mr Douwes are lawyers in Curaçao. Mr Petersen is the curator of FCIB.

146. There was discussion in the course of the hearing as to whether the location of witnesses might be less important than might previously have been the case owing to the availability of video links. It is still an advantage to see the witnesses in person in many cases and especially where issues of credibility arise. This is especially so in fraud cases where the advantage of seeing the witnesses in person is particularly significant. The effect is that the location of the witnesses is important in this case. On the other hand, if there are witnesses who are simply reviewing documents in which they had no personal involvement, it is more likely that their evidence would be less diminished by appearing remotely.

147. Whilst experts in the law of Curaçao would be required before this Court but not in the Curaçao court, the experts who have provided reports are from the Netherlands, that is Professor Hartkamp, Mr Cornegoor and Mr van der Wiel, and so will not have far to travel to court in London. If experts are required in English law before the courts of Curaçao, and if their evidence cannot be provided by video evidence, they are likely to have far to travel.

148. The effect of the foregoing is to indicate on the current information is that the availability of witnesses is a substantial point in favour of a trial in London rather than in Curaçao.

(f) Documents

149. The evidence of Mr Travers suggests that some documents relevant to the Claims are not located in England and Wales. This is unlikely to be a decisive factor because of the ease of transmission of documents. If it is significant at all, since TWPS was based in this jurisdiction, it is likely that a large number of documents will be here.

(g) Other factors

150. The Claimants' case goes further still and includes submissions that Curaçao Proceedings are likely to fail. Mr Parker KC submitted that "*the underlying facts indicate that there's a very, very remote possibility of them ever being found to be parties to the agreement*" [T2/62/19-21]. This submission is fuelled by the fact that the IP Settlement Agreements were drafted by legal advisers and that one might have expected the release clause to be broader than has been the case if it were to encapsulate claims or defences of parties not identified in the same. This does not enable the Court to form a definitive or an almost definitive view as to how the issue of the scope of the release will be determined or even how it is likely to be construed in that there arise issues of fact and law to be decided.

151. It is also a point of note, discussed by Mr Lance Ashworth QC sitting as a deputy Judge of the High Court in his judgment on the without notice application, that it is

not straightforward to see how TWPS had suffered the losses claimed. There is no challenge about serious issue to be tried and about gateways. This point has not been pressed in the argument before the Court. These are issues for a later day and do not arise at this stage and are therefore not taken into account on this application other than to note that the pre-requisites of arguable case and gateways are satisfied. The Court cannot form a preliminary view about the strength of these and other matters which are before the Courts.

152. Further, the Claimants' estimate that the Curaçao Proceedings are likely to go on until 2028 does not have to be the subject of determination. There are reasons to be sceptical about predictions in this case on timing, but it is not necessary to form a judgment about this, other than to remark that it is artificial not to take into account appeals in projections about timing. I therefore decline to accept that these submissions are to be taken into account in the balance of factors in favour of the Claimants (or indeed against the Claimants).

XII A preliminary issue in Curaçao?

153. In the course of the hearing, the Court asked the parties for submissions as to whether it would be possible to order a case management decision, which is to have the case remain in the EWHC, but to have a stay in order to enable the question of construction to be tried by the courts of Curaçao.

154. In my judgment, there are serious concerns about such a course of action including the following:

(1) There is no mechanism provided to the effect that the Curaçao court would be prepared to limit its jurisdiction to the trial of a preliminary issue of construction. It would have to agree that a preliminary issue was appropriate and to confine its deliberation to the issue.

(2) There are real issues of definition as to what is embraced in the issue of construction including as to whether it includes an evaluation of the fraud itself. On the Defendants' case, the issues before the Curaçao court also extend to the existence, nature and extent of the alleged frauds, and so are not limited to the question of construction. If that is the case, it is difficult to see how the issues can be detached from one another.

(3) Even if it could be detached, there are issues as to whether there was bad faith in respect of the failure to identify the significance of the omission from the IP Settlement Agreements of the claims now being pursued in the EWHC Proceedings, especially through TWPS and assigned claims. Once there is no discrete point of construction, there is a difficulty of definition between what is comprehended in the Curaçao Proceedings and in the EWHC Proceedings.

(4) The EWHC Proceedings provide a framework within which all of the issues can be considered. A preliminary issue, especially one which is potentially wide ranging evidentially, undermines that framework.

(5) Likewise, it is difficult to define at what point the EWHC Proceedings would be stayed for the determination of the preliminary issue, and at what point, the stay would be lifted.

(6) If the stay were lifted, it would not be clear what remained for decision in the EWHC Proceedings e.g. bearing in mind any findings about fraud in Curaçao and the outstanding section 213 Claim and/or any remaining claim in breach of fiduciary duty and other causes of action. It is also not difficult to imagine issues in restored EWHC Proceedings as to what had been and what had not been determined in the restored Curaçao Proceedings.

155. The essence of a preliminary issue is that it should be capable of definition and capable of application to the future of the proceedings. The effect of the above is that there are so many uncertainties that the short-cut could in the end appear deceptive, such that the preliminary issue would provide complications instead of a way through the dispute. This is familiar territory in the experience of the courts, which has led even within purely domestic dispute warnings in connection with preliminary issues. This becomes magnified in connection with a dispute in more than one jurisdiction. It follows that the idea of ordering a stay for the trial of a preliminary issue in Curaçao on the information presently before the Court is at best hazardous and at worst not workable and practicable. The Court will therefore not make such an order.

XIII Conclusion

156. In my judgment, looking at the position as a whole, and even if the court in Curaçao is prepared to adjudicate upon the fraud claims in the context of the negative declarations (as to which there are questions), I am satisfied that the preponderance of factors shows that overall the EWHC is clearly or distinctly the appropriate or proper place to bring a claim. By way of summary only (and without in any way replacing the detail set out above), relevant factors include:

(1) The fact that the torts and delicts are more closely connected with England and Wales than with Curaçao or any other country.

(2) On the facts of the instant case, the claims for negative declarations in this case are artificial: the natural forum to deal with these matters is by the party making the case in the English court.

(3) To the extent that the defence of release applies under the IP Settlement Agreements and/or the effect of any wrong relating to the exclusion of TWPS and any MTIC Companies from the IP Settlement Agreement, this is within a shorter compass than the claims in fraud underlying the action as a whole. In any event, this is likely to be capable of being ascertained and applied without significant difficulty by the EWHC.

(4) It is much more satisfactory to have all the claims and issues before the Court. This can only be done in the English court. That would enable the section 213 Claims and the claims against Mr Deuss to be determined. At the same time, there is the opportunity to hear the claims for damages, compensation and other remedies. All of this can only be done before the English court.

(5) All of the above makes the English court the natural forum. The delay in bringing proceedings in the English court has not converted Curaçao into the natural forum. The proceedings there at the time of the commencement of this action have been at the jurisdictional stage.

157. It therefore follows that FCIB's forum non conveniens application must fail. The Claimants have satisfied the Court (save as regards the Assigned section 213 Claims which will be discussed below) that EWHC is clearly or distinctly the appropriate forum for the claims before it.

XIV FCIB's alternative application for a stay

158. In respect of the alternative application of FCIB that even if the forum non conveniens application fails, there should be a stay of the EWHC Proceedings pending the outcome of the Curaçao Proceedings on case management grounds, I conclude the following:

(1) On the basis that the EWHC Proceedings are clearly or distinctly the appropriate forum, this is a major but not conclusive factor in indicating that they should proceed and that they should not be stayed.

(2) The overall analysis is that the country in which all or almost all of the relevant issues are to be determined should proceed with hearing them rather than postponing them until after the determination of matters in Curaçao.

(3) The reasons given for rejecting a preliminary issue in Curaçao apply in a wider sense to the instant application for a stay. It is not desirable to stay pending the determination of a preliminary issue in Curaçao for all the reasons set out in the immediately preceding paragraphs.

(4) Not all of the parties and issues are before the Curaçao court. For the reasons set out above, the provision of revised undertakings by Mr Deuss is not adequate not because of the form or drafting of the undertakings but for wider substantive reasons identified above. It is an important consideration that the case should be tried in a country where all the issues and parties are before the Court, and that is only possible in the EWHC Proceedings.

(5) The assumptions about similar issues in the two jurisdictions as regards the fraud claims are not necessarily sound. It is far from clear to what

extent the Curaçao Proceedings will determine the fraud claims, and if they do, the extent to which they will overlap with the fraud claims in the EWHC Proceedings, and particularly the section 213 Claims where in the Curaçao Proceedings it has been determined that there is no jurisdiction.

(6) If it had been the case that there were matters in respect of the application for Mr Deuss for a stay which were different or so substantial that they indicated that a stay may be appropriate, then that might be relevant to the application of FCIB for a stay. There are no such matters. For these reasons and for the wider reasons for rejecting the stay on the ground of forum non conveniens, the application of FCIB for a stay on the ground of case management issues is rejected.

XV Application of Mr Deuss for a stay on the ground of case management issues.

159. The position of Mr Deuss generally and the undertakings offered by him have been considered in connection with the applications of FCIB. Although the application of Mr Deuss is to be considered separately from that of FCIB, there are closely intersecting factors. It is relevant to the application of Mr Deuss that the application of FCIB fails. There is nothing so separate or substantial as to indicate that a stay is appropriate even if the applications of FCIB are unsuccessful. There is a very considerable overlap between the two applications. On the basis that the Court decides that the EWHC is the natural forum as between the Claimants and FCIB and that a stay is inappropriate on the application of FCIB, there is no basis in my judgment for a stay as between the Claimants and Mr Deuss. On the contrary, the balance of factors is in favour of the EWHC Proceedings continuing. The factors identified above in connection with the stay sought by FCIB apply here too. It is in the interests of justice for the matter to proceed in the EWHC where all of the issues can be resolved involving all parties affected.

160. It is relevant that this is not a case where it can be said that it is likely that the Curaçao Proceedings will resolve the disputes between the parties. The Claimants would wish the Court to find that the defence based on the IP Settlement Agreements has no or very limited prospect of success. I have refused to conclude this for the reasons set out above. Likewise, I do not conclude that it has such good prospects of success such that this Court could conclude positively that it is likely that the Curaçao Proceedings will bring to an end the dispute. On the contrary, absent a more definitive conclusion at this stage, even a recognised conclusion of the Curaçao Court might be a decision that the defence fails, and the matter must proceed on the basis that there is no defence of the kind contended for.

161. That then begs the question as to whether the Curaçao Proceedings will determine the alleged fraud. Here too it cannot be said that this is likely since there are uncertainties as to whether the Curaçao Court would embark on this exercise, and if so, how far it would go. Further, it is common ground that this would not extend to all of the causes of action between the parties.

162. With all this uncertainty, the conclusion is that the stay is sought against a background where there is no finding that it is likely that the Curaçao Proceedings will resolve the

disputes between the parties. In these circumstances, the justice of the matter is that the EWHC Proceedings should be allowed to proceed without a stay.

163. It therefore follows that the forum non conveniens and stay applications of FCIB and the stay application of Mr Deuss should be dismissed, but there still remains to be considered the application to stay the Assigned section 213 Claims, to which this judgment will next turn.

XVI No serious issue to be tried on the Assigned s. 213 Claim

164. The Assigned section 213 Claims are pursued by TWPS as assignee of the office-holders of the MTIC Companies. Before Mr Lance Ashworth QC on the without notice application, it was submitted that such assignment was effective because of s. 246ZD IA 1986, which was introduced by s.118 Small Business, Enterprise and Employment Act 2015 (the "SBEEA 2015"). The assignment was in 2020, but the liquidations were all prior to 1 October 2015.

165. The section 213 Claim, a fraudulent trading claim, was not the property of the company before the liquidation. Like a section 214 claim, that is a wrongful trading claim, it can only be brought in the course of a winding up by a liquidator. Whereas a misfeasance claim under section 212 of the IA 1986, such as a claim for breach of fiduciary duty would be company property prior to a liquidation, the claims under section 213 and 214 only arise in the event of a liquidation. They are therefore not property rights of a company before the insolvency.

166. Prior to 1 October 2015, it was impossible for an office-holder to assign office-holder claims under the IA 1986, including fraudulent trading claims under s. 213 IA 1986.

167. That was established in *Re. Oasis Merchandising Services Ltd. (In Liquidation)* [1998] Ch. 170 (C.A.). The case turned upon the invalidity of an assignment of a claim under section 214 of the IA 1986. The decision was based on two grounds. First, assignment was limited to property belonging to the company at the time of the commencement of the liquidation and property representing it, including rights of action which arose and might have been pursued by the company itself prior to the liquidation. A right under section 214 (as under section 213) only arose after the liquidation of the company and was recoverable only by the liquidator pursuant to statutory powers conferred on him. Since the fruits of the claim for wrongful trading (as with fraudulent trading) assigned by the liquidator were not the property of the company at the commencement of the liquidation but were subsequently acquired by him alone through the exercise of his statutory rights, they were not "the company's property" within paragraph 6 of Schedule 4 to the Act of 1986 (power to sell any of the company's property).

168. Second, as a matter of public policy, it was objectionable to permit liquidators exercising discretionary powers conferred by statute and any loss of control by the liquidator of that litigation was objectionable: see Re Oasis at p.186 A-C.

169. *Re. Oasis* has never been overruled and it has been cited with approval several times including in *Lewis v. Commissioners of Inland Revenue* [2002] B.C.C. 198 (C.A.) at

[37].

170. It was against this background that as a result of s.246ZD, office-holders may now assign rights of action, including section 213 claims, which vest in the office-holder by virtue of the IA 1986. However, this change to the law only came into force after the MTIC Companies went into liquidation, and so it has no application in respect of them or their purported assignment of the Assigned s. 213 Claim.

171. The relevant legislative changes entered into force in accordance with the SBEEA (Commencement No. 2 and Transitional Provisions) Regulations (SI 2015/1689) (the "Regulations"). These provide materially that: (i) by Reg. 2, "[the] *following provisions of the Act come into force on 1st October 2015* […] *(j) sections 117 to 119 (office-holder actions)*"; and (ii) by Sch. 2, para. 16, "[s. 246ZD IA 1986] *(as inserted by section 118 of the Act) applies in respect of a company which enters administration or goes into liquidation on or after 1st October 2015*". Thus, the relevant legislative changes only apply in relation to companies that go into liquidation on or after that date.

172. Each of the MTIC Companies which purported to assign s. 213 IA 1986 claims to TWPS on 17 September 2020 went into liquidation before 1 October 2015. Accordingly, s. 246ZD IA 1986 does not apply to the MTIC Companies. The consequence is that there was no valid or effective assignment of the s. 213 IA 1986 claims to TWPS. There is accordingly no serious issue to be tried on the merits of the Assigned s. 213 Claim as between the Claimants and the Defendants.

173. It was therefore wrong to rely on s. 246ZD IA86 at the without notice hearing of the application for permission to serve out. The Claimants now admit that their reliance was incorrect.

174. The Claimants now argue that the claims are assignable in that the effect of the change in the legislation is to end the concept that the section 213 Claims are not assignable. Once the legislation had decided that such claims were capable of being assigned and did not therefore infringe the law of champerty, Parliament could not have intended to have a difference between companies which entered into liquidation before and after 1 October 2015.

175. In my judgment, none of this assists the Claimants in that the clear language of the legislation is that it does not apply to companies which entered liquidation prior to 1 October 2015. The wording of the Regulations is clear and unambiguous. There is no scope in these circumstances not to give the language its natural and ordinary meaning.

176. The Claimants seek to use an analogy of a case which equated arbitration to litigation for the purpose of Conditional Fee Agreements in circumstances where legislation had specifically permitted CFAs to litigation in the courts which did not include arbitration: see *Bevan Ashford v. Geoff Yeandle (Contractors) Ltd. (In Liquidation)* [1999] Ch. 239. There are at least two reasons why this does not apply. First, it does not overcome the statutory construction that there was no scope for such assignments without a change in the law. Second, Sir Richard Scott V-C was of the view that

there was a lacuna in the law to distinguish between litigation and arbitration, and that it would be absurd not to equate them. None of this applies in the instant case where it was stated expressly that the law did not change in respect of liquidations prior to 1 October 2015. There is therefore no absurdity here. The law was only changed prospectively. Parliament's expressly declared intention was to change the position only in respect of liquidations from 1 October 2015.

177. The Claimants say that it would be illogical to treat claims which are the (pre-insolvency) property of the company differently from causes of action which arise as a result of the company entering formal insolvency. They also say that they rely on an extract from Hansard, recording a meeting of the Public Bill Committee on 4 November 2014. In the Parliamentary debate relating to the enactment of s.246ZD, the Minister said the following in a passage which recorded a meeting of the Public Bill Committee on 4 November 2014:

> *"However, the decision to take action is a judgment of the liquidator or administrator. In some cases, they may be unable to take action, perhaps due to a lack of funding for the litigation or because of the costs involved in prolonging the insolvency procedure. Currently, when the liquidator or administrator chooses not to bring a claim, there is no way for anyone else to take the claim; there is no other avenue, even if there is a creditor or another party who is willing to take it over. We have come to the view that that is illogical. Just as the liquidator or administrator can assign pre-existing claims that the company itself had the rights to pursue, the new measure will mean that claims that arrive on entering insolvency will be brought into line with the pre-existing claims that can already be assigned. It is not consistent to treat the two circumstances differently."*

178. As regard the passage from Hansard, it does not come into the limited category of cases where such passages can be relied upon. The legislation is not ambiguous or obscure, nor does it lead to an absurdity. It contains a very clear cut off date which cannot be obviated because the previous law contained an illogical distinction. The law came to end the distinction, but it had a very clear start date so as not to apply to liquidations prior to 1 October 2015. In any event, the benefit of referring to the passage above is difficult to discern in that the extract from Hansard relied upon by the Claimants is from a Committee meeting in which the commencement date of s. 246ZD IA 1986 and/or whether the provision was intended to have retrospective effect, was not discussed.

179. The illogicality of the distinction that pre-dated the change between an action based on a pre-existing claim and a claim which only arose in the liquidation did not lead to Parliament changing the position retrospectively. Parliament only changed the matter in respect of liquidations starting from 1 October 2015 onwards. The statement does not therefore provide any support for the notion that the commencement date in the Regulations can be departed from. That is what usually happens. A need for change

arises, and it comes into effect only prospectively. It is not absurd that the change should not be retrospective.

180. I have therefore concluded that as at present constituted, there is no serious issue to be tried between the Claimants and the Defendants as regards the Assigned section 213 Claims. The Defendants say that the Service Out Order should be set aside in relation to that Claim. Before deciding if that is the appropriate relief, I wish to give the parties time to consider whether a claim by the assignors is sought or whether any other amendment is sought to the pleadings.

XVII Disposal

181. As at present constituted, there is no serious issue to be tried as between the Claimants and the Defendants as regards the Assigned section 213 Claims. The order in the light of that ruling needs to be considered in view of observations which have made been made in the last sentence of the preceding paragraph in this judgment.

182. Subject to the foregoing, the application of FCIB to set aside the order granting permission to serve out of the jurisdiction all claims in these proceedings on it save for the section 213 Claims is dismissed.

183. So too is the alternative application of FCIB for a stay of any proceedings in respect of which this Court has jurisdiction pending the determination of the Curaçao Proceedings. Likewise, the application of Mr Deuss for a stay of these proceedings pending determination of the Curaçao Proceedings is also dismissed.

184. The parties are agreed that consequential matters should be adjourned to a date to be fixed, including any application for permission to appeal and an order is being made at the time of the handing down of this judgment. It remains for the Court to thank the parties for the high standard of their written and oral submissions which have been of great assistance to the Court.