



Neutral Citation Number: [2020] EWHC 2757 (Comm)

Case No: CL-2015-000047

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

Rolls Building,
Fetter Lane
London, EC4A 1NL

Date: 19/10/2020

Before :

SIR MICHAEL BURTON GBE
SITTING AS A JUDGE OF THE HIGH COURT

Between :

- (1) ALTA TRADING UK LIMITED
(2) ARCADIA ENERGY (SUISSE) SA
(3) ARCADIA ENERGY PTE. LTD
(4) FARAHEAD HOLDINGS LIMITED

Claimants

- and -

- (1) PETER MILES BOSWORTH
(2) COLIN HURLEY
(3) ~~STEPHEN CLIVE LANGFORD GIBBONS~~
(4) ~~MARK RICHARD LANCE~~
(5) STEVEN KELBRICK
(6) ~~SALEM CHUCRI MOUNZER~~
(7) ARCADIA PETROLEUM SAL OFFSHORE
(8) ARCADIA PETROLEUM LIMITED,
MAURITIUS
(9) ATTOCK OIL INTERNATIONAL LIMITED,
MAURITIUS
(10) ~~THE CORNHILL GROUP LIMITED~~

Defendants

Fionn Pilbrow QC and David Heaton (instructed by **Jones Day**) for the **Claimants**
Richard Eschwege (instructed by Quinn Emanuel Urquhart & Sullivan LLP) for the **First and**
Second Defendants

Hearing dates: 29, 30 September 2020 and 1 October 2020

Approved Judgment

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

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SIR MICHAEL BURTON GBE :

1. The hearing has been returned to me 5½ years on, after a journey to the Court of Appeal, Supreme Court, European Court of Justice (CJEU) and back to the Supreme Court again, of the issue between the parties of contested jurisdiction as to where the Claimants' claims for conspiracy and fraud should be heard.
2. At a time when it was conceded by the Claimants that the First and Second Defendants (“the Defendants”) were employees of one or more of the Claimants when they committed the alleged fraud, I concluded that, despite Article 18(1) of the Lugano II Convention, which allocates jurisdiction to the domicile of the employee (in this case Switzerland) in the case of “*matters relating to individual contracts of employment*”, the Claimants were entitled to pursue their claims in this Court, after they had specifically abandoned any claim under the contracts of employment and certain claims for fiduciary duty, for reasons which I set out in my Judgment dated 1 April 2015 ([2015] EWHC 1030 (Comm)). I do not repeat the Judgment but it can be referred to for the full history and background.
3. The Defendants appealed to the Court of Appeal, who upheld my Judgment, but in the course of the hearing before the Court of Appeal, and also in the hearing before the Supreme Court on further appeal by the Defendants, the issue was canvassed whether in fact the Defendants were employees, within the autonomous definition of individual contracts of employment provided by Article 18(1); the Claimants withdrew their concession that the Defendants were employees, and the Supreme Court referred to the CJEU four questions, the first, third and fourth arising out of my original decision upheld by the Court of Appeal, and the second as follows (as set out by the CJEU):

“(2) If a company and an individual enter into a “contract” (within the meaning of Article 5(1)) of the [Lugano II] Convention), to what extent is it necessary for there to be a relationship of subordination between the company and the individual for that contract to constitute an “individual contract of employment” for the purposes of Section 5 [of that Convention]? Can such a relationship exist where the individual is able to determine (and does determine) the terms of his contract with the company and has control and autonomy over the day-to-day operation of the company's business and the performance of his own duties, but the shareholder(s) of the company have the power to procure the termination of the relationship?”

In their Judgment (**Bosworth v Arcadia Petroleum** 11 April 2019 [2019] ILPr 22) the CJEU only answered that second question, (not considering it necessary in the light of its decision to answer the other questions) as follows: –

“35 Having regard to the above, the answer to the second question is that the provisions of Section 5 of Title II (Articles 18 to 21) of the Lugano II Convention must be interpreted as meaning that a contract between a company and a natural person performing the duties of director of that company does

not create a relationship of subordination between them and cannot, therefore, be treated as an ‘individual contract of employment’, within the meaning of those provisions, where, even if the shareholder(s) of that company have the power to procure the termination of that contract, that person is able to determine or does determine the terms of that contract and has control and autonomy over the day-to-day operation of that company’s business and the performance of his own duties.”

4. The Supreme Court was persuaded by the Defendants that the facts underlying the conclusion by the CJEU as to the relationship of subordination had not been considered or found by me, and the Supreme Court ruled as follows:

“1. The appeal be allowed but only to the extent of remitting the case to the Commercial Court to hear further evidence and submissions on whether the Appellants were in “a relationship of subordination” to their employing company or companies in the sense used by the Court of Justice of the European Union in its Judgment..., so as to place them in an employment relationship to which Section 5, Article 18(1) of the Lugano II Convention could apply.”

5. Hence the return to me of a case which, after 5½ years, has not even commenced to be heard: Mr Pilbrow, now QC and leading Mr Heaton, and Mr Eschwege, opposing juniors in 2015, have now themselves ably presented the case before me, the other difference, apart from the absence of the original leaders, being the interposition of Covid-imposed computer screens rather than live submissions.
6. The Claimants carry the burden, as before me in 2015, of establishing jurisdiction (on the basis, in this new issue, that the Defendants were not employees) and as before, by agreement between the parties, the Defendants went first.
7. I have first to address a number of preliminary questions. Mr Eschwege submits that the Claimants have what he described as threshold difficulties, namely that the pleaded case, and the original hearing before me, was run by the Claimants on the basis that the Defendants were employees. Now the Claimants are seeking to persuade me that they were not employees. I have no doubt at all that there is no threshold difficulty. The question before me has been succinctly summarised by the Supreme Court, as set out above. The fact that at English common law the Defendants were employees, at least of the First and Third Claimants (see paragraph 13 of my Judgment), and were conceded to be such at a time when the question of the autonomous definition within Article 18 (1) had not been addressed, is only a starting point, and the existence of (unsigned) contracts of employment no more prejudices a conclusion that there were contracts of employment within Article 18 (“Article 18 employment”) than would the absence of any such contract prejudice a case that there was not Article 18 employment (see paragraph 27 of the CJEU’s judgment, approving paragraphs 34 to 36 of the Advocate General’s Opinion of 24 January 2019 to that effect). The question for me stands or falls on whether there was a “*relationship of subordination*”, as expounded by the CJEU at paragraphs 28 to 35 of its Judgment. Reference to cases on English domestic law, such as the illuminating decision of Andrew Baker J in **Cunico Resources NV v**

Daskalakis [2019] EWHC 57 (Comm) does not provide an answer. Nor is it an answer for Mr Eschwege to postulate the binary conclusion that if the Defendants are not employees they must be self-employed. That might follow a similar conclusion at English domestic law and for tax purposes, but it does not follow where the question is whether they are Article 18 employees for jurisdictional purposes.

8. The second question is as to what can be challenged by way of findings made by me and the Court of Appeal, now that the case has been returned to me. I concluded at paragraph 14 of my judgment as follows:

“They were both, at all material times, the possessors of senior titles in the Arcadia Group. The First Defendant was CEO and the Second Defendant CFO. None of the individual contracts of employment, all of which were drafted by the First and Second Defendants themselves, and contain an entire agreement clause, contain any provision that the First and Second Defendants should act as CEO or CFO of the Arcadia Group”

(my underlining).

Upon their return from the CJEU to the Supreme Court, the Defendants sought to challenge this underlined passage. The Supreme Court ruled that:

“The Court ... refuses to allow the Appellants to raise at this late stage a new ground of appeal which seeks to attack the factual basis of a finding made by Mr Justice Burton in para 14 of his judgment. His finding, which was repeated in substance in the judgment of Gross LJ in the Court of Appeal (para 2) was not challenged or contradicted in the Statement of Facts and Issues (see paras 10 and 13). On those findings and statements, the contracts of employment would have been drafted under the Appellants' direction and there is no suggestion that their terms were reviewed by a remuneration committee of their employing companies. In the Court's view it is too late and would lead to disproportionality if this finding were to be reopened.”

(The Court also denied the Claimants' attempts to withdraw their abandonment in the Court of Appeal certain of their claims for breach of fiduciary duty).

9. This is clear. However, there was some argument before me in relation to the words of Gross LJ in paragraph 2 of his Judgment of 19 August 2016 in the **Court of Appeal** [2016] EWCA Civ 818. He said, in summarising the issue, that it fell to be decided “*in circumstances where, on the facts available to us, the Appellants, though employees, exercised control over by whom, where and on what terms they were employed.*” This became what was expressly incorporated in paragraph 15 of the Order for Reference to the CJEU: “*The judgment of the Court of Appeal stated that the appellants, though employees, exercised control over by whom, where and on what terms they were employed.*” This then expressly featured in the Judgment of the CJEU at paragraph 30. In the reference back to me by the Supreme Court, which I have recited above, there was mention of paragraph 2 of Gross LJ's Judgment, but no finding by the Supreme Court as to whether this could be reopened. I am satisfied that because Gross LJ

expressly said that this was “*on the facts available*” to them, the Defendants are entitled to challenge that statement in the course of the dispute before me as to the relationship of subordination.

10. The next question is as to the nature of the test which I must adopt on a challenge to the jurisdiction by a defendant, in the light of the speech of Lord Sumption in **Brownlie v Four Seasons Holdings Inc** [2018] 1 WLR 192 at paragraph 7, the decision of the Supreme Court (again per Lord Sumption) in **Goldman Sachs International v Novo Banco SA** [2018] 1 WLR 3683 at paragraph 9, and the exposition of it by the Court of Appeal in **Kaefer Aislamientos SA de CV v AMS Drilling Mexico SA de CV** [2019] 1 WLR 3514 per Green LJ at paras 57–80 and Davis LJ at para 119 who, though describing himself as being in a fog, was able to consign the words of Waller LJ in **Canada Trust Co v Stolzenberg (No 2)** [1998] 1WLR 547 at 555F to “*outer darkness*”.
11. One thing that is clear is that there is universal agreement that a claimant must have a “*good arguable case*” to survive a challenge to jurisdiction. But the issue is whether this requires 'relativity', i.e. whether the claimant must have the “*better of the case*” on the evidence (not “*much the better*” as per Waller LJ) or simply a “*plausible evidential basis*”. Green LJ’s attempt at exposition, within the confines of Lord Sumption’s three limb test, seemed to lead him to contradict himself as between paragraph 73 of his judgment (“*The reference to “a plausible evidential basis” in limb (i) is hence a reference to an evidential basis showing that the claimant has the better argument*“) and paragraph 74 (“*In limb (i) – which is the basic test – the test is plausibility alone*”). Mr Pilbrow’s contribution to resolve this was to contend that in order to establish that a claimant has a good arguable case the claimant must have the better of the case that he has a plausible evidential basis.
12. However Carr J in **Tugushev v Orlov** [2019] EWHC 645 (Comm) had no difficulty in finding her way through at paragraph 59, and the Supreme Court itself in **Aspen Underwriting Ltd v Credit Europe Bank NV** [2020] 2 WLR 919, a case in which there had been considerable dispute as to the test in the Court of Appeal, per Lord Hodge simply stated at paragraph 21:

“Although there was a challenge in the Court of Appeal, there is now no disagreement between the parties that in relation to the preliminary question of the jurisdiction of the English courts it is for the [Claimants] to show that they have a good arguable case in the sense that they have the better of the argument.”

Mr Pilbrow's ingenious solution is not necessary.

13. My interpretation of the state of the law and the three limb test is straightforwardly as follows:
 - (i) In limb (i) the Court must decide if it can who has the better of the case. If it decides that the claimant has the better of the case, he will have a good arguable case or a plausible evidential basis. If the defendant has the better of the case then the claimant fails.

(ii) Limbs (ii) and (iii). The judge may have to struggle because at the jurisdiction stage the evidence may be wholly uncertain and insufficient and, in particular, because there has been no testing of that evidence by cross-examination or otherwise, and usually no adequate disclosure of documents by either side. He or she may not be able to reach even a provisional conclusion as to which party has the better case, and even if the judge tried to do so he or she may well turn out to be wrong. In such a circumstance where the judge cannot decide, after conscientiously doing his or her best, who has the better of the case, then it is sufficient if the claimant has a plausible evidential basis and that will suffice for a good arguable case.

14. I turn to what is of course preliminary, but necessarily fundamental, to my conclusions, namely an assessment of what the CJEU requires in order to establish a relationship of subordination. Mr Eschwege refers to a number of decisions of the CJEU relating to the definition of employee or worker and the distinction between worker and self-employed for the purpose of various Regulations. He also relied upon the decision of the CJEU in **Holterman Ferho Exploitatie BV v Spies von Büllesheim** [2016] ICR 90, which was a decision of the CJEU expressly on the definition of Article 18 employment. The Advocate General in terms, and the CJEU by their omission, showed that it was this decision, and not decisions on other Regulations, which would give guidance. However it was only two paragraphs of **Holterman** which were expressly approved by the CJEU in **Bosworth**, paragraphs 46 and 47, though paragraphs 34 and 37 were mentioned in passing. Paragraphs 46 and 47 read as follows: –

“46 More specifically, with regard to the relationship of subordination, the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship between the parties: see Balkaya v Kiesel Abbruch- und Recycling Technik GmbH (Case C-229/14) [2015] ICR 1110, para 37.

47 It is for the referring court to examine the extent to which Mr Spies von Büllesheim, in his capacity as a shareholder in Holterman Ferho Exploitatie, was able to influence the will of that company’s administrative body of which he was the manager. In that case, it will be necessary to establish who had authority to issue him with instructions and to monitor their implementation. If it were to turn out that Mr Spies von Büllesheim’s ability to influence that body was not negligible, it would be appropriate to conclude that there was no relationship of subordination for the purposes of the court’s case law on the definition of a worker.”

15. The significant conclusory paragraphs of the CJEU Judgment in **Bosworth** were as follows:

“26 It follows that an employment relationship implies the existence of a hierarchical relationship between the worker and his employer, and that the issue whether such a relationship exists must, in each particular case, be assessed on the basis of all the factors and circumstances characterising the relationship

between the parties (judgments of 10 September 2015, Holterman Ferho Exploitatie and Others, C-47/14, EU:C:2015:574, paragraph 46, and of 20 November 2018, Sindicatul Familia Constanța and Others, C-147/17, EU:C:2018:926, paragraph 42).

27 It should, moreover, be noted that, according to the wording of the provisions of Section 5 of Title II (Articles 18 to 21) of the Lugano II Convention, the conclusion of a contract is not a condition for the application of the rules of special jurisdiction laid down in those provisions, and therefore that, as the Advocate General, in essence, indicated in points 34 to 36 of his Opinion, the absence of any formal contract does not preclude the existence of an employment relationship that falls within the concept of ‘individual contract of employment’ within the meaning of those provisions.

28 However, such a relationship can be treated as an ‘individual contract of employment’ within the meaning of the provisions of Section 5 of Title II (Articles 18 to 21) of the Lugano II Convention only if there is a relationship of subordination between the company and the director concerned.”

Then in particular:

“29 In the present case, it should be noted that, according to the information provided by the referring court, Mr Bosworth and Mr Hurley were, respectively, chief executive officer and chief financial officer of the Arcadia Group, that they were directors of Arcadia London, Arcadia Singapore and Arcadia Switzerland, that they were each party to a contract of employment with one of those companies drafted by themselves or at their direction and that they acted at all material times on behalf of all Arcadia Group companies.

30 It is also apparent from the order for reference that Mr Bosworth and Mr Hurley exercised control over by whom, where and on what terms they were employed.

31 In the circumstances, it appears that Mr Bosworth and Mr Hurley had an ability to influence Arcadia that was not negligible and that, therefore, it must be concluded that there was no relationship of subordination (see, to that effect, judgment of 10 September 2015, Holterman Ferho Exploitatie, paragraph 47), irrespective of whether or not they held part of the share capital of Arcadia.

32 The fact that Mr Bosworth and Mr Hurley were answerable to the Arcadia Group’s shareholders who, through Farahead

Holdings, had the power to 'hire and fire' them, is irrelevant in that regard.

33 As the Advocate General noted in point 46 of his Opinion, neither the general directives which a director may be given by the shareholders of the company he directs for the orientation of that company's business nor the legal mechanisms for control by shareholders point, in themselves, to the existence of a relationship of subordination, and therefore the mere fact that the shareholders have the power to revoke a directorship is not sufficient for the conclusion to be drawn that such a relationship exists.

34 It follows from this that a contract concluded between a company and the director of that company does not constitute, in circumstances such as those at issue in the main proceedings, as an 'individual contract of employment' within the meaning of Section 5 of Title II (Articles 18 to 21) of the Lugano II Convention.

35 Having regard to the above, the answer to the second question is that the provisions of Section 5 of Title II (Articles 18 to 21) of the Lugano II Convention must be interpreted as meaning that a contract between a company and a natural person performing the duties of director of that company does not create a relationship of subordination between them and cannot, therefore, be treated as an 'individual contract of employment', within the meaning of those provisions, where, even if the shareholder(s) of that company have the power to procure the termination of that contract, that person is able to determine or does determine the terms of that contract and has control and autonomy over the day-to-day operation of that company's business and the performance of his own duties."

16. Fundamental to Mr Eschwege's submission is his interpretation of paragraph 31 of the **Bosworth** judgment by reference to paragraph 47 of **Holterman**. Mr Eschwege submits that it is common ground in this case that the boards of the Arcadia companies played very little part, and that insofar as there were instructions and directions given to the Defendants as CEO and CFO, they were given by Farahead, the 100% shareholder, whose ultimate beneficial controller was Mr Fredriksen. Mr Eschwege's central submission is, by reference to his interpretation of paragraph 31 of the **Bosworth** Judgment (a paragraph not easy to understand) that subordination is only ousted if the employee is able to influence (to a non-negligible extent) the body that controls the Arcadia companies, of which the Defendants were CEO/CFO. That body, he says, was Farahead. The Defendants did not control or have any influence, non-negligible or otherwise, over Farahead, so the relationship of subordination is established.
17. Mr Pilbrow submits that this is wrong. In **Holterman** the board controlled the company and the issue was whether Mr Spies (through his shareholding or otherwise) had a non-negligible influence over the board, and therefore the company. It is obvious in

Bosworth that the Defendants did not control Farahead. The question however is, he submits, whether the Defendants had a non-negligible ability to influence the companies which are wholly owned by Farahead and ultimately beneficially controlled by Mr Frederiksen.

18. The Advocate General, clearly influenced by the Order for Reference to the CJEU set out in paragraph 9 above, concluded in paragraphs 60 and 111(1) of his Opinion that “A company director who has complete control and autonomy over the day-to-day operation of the business of the company which he represents and the performance of his own duties is not subordinated to the company and, consequently, does not have an ‘individual contract of employment’, with the company within the meaning of that provision [Article 18(1) of the Lugano II Convention].” The CJEU however concluded, Mr Pilbrow submits, that total or complete control and autonomy was not required if a CEO or CFO had a non-negligible ability to influence the company or companies. This is clarified by the CJEU’s approval, in paragraph 33, of paragraph 46 of the Advocate General’s Opinion:

“46. In particular, contrary to the argument of the defendants in the main proceedings, there cannot be any confusion between subordination and the general directives which a director may be given by the shareholders for the orientation of the company’s business. Such general directives do not concern the actual performance of the director’s duties or the manner in which he organises them. A company director is mandated to act for the company and, as such, may receive reasonable instructions regarding his mission. For the same reasons, the control mechanisms which the law establishes for shareholders do not in themselves point to the existence of a subordination relationship. Every agent must render certain accounts to his principal. Furthermore, the mere fact that the shareholders have the power to revoke a directorship is not sufficient to demonstrate a relationship of subordination. The fact that they have such a power of revocation does not mean that they have involved themselves in the way of directing the company. Here again, in the context of any mandate, a principal may unilaterally terminate the relationship with his agent, without this circumstance in itself demonstrating subordination.”

19. Mr Eschwege submits that this would dilute or weaken the characterisation of employee, and render it uncertain whether a CEO in any large or group company was or was not an employee. This would undermine what is otherwise relied on as the predictability of the jurisdiction rules under the Convention: hence what Mr Pilbrow has called the ‘lowering of the bar’ by the CJEU, as compared with the Advocate General’s test from complete control down to non-negligible influence, which would make this unpredictability greater.

20. Mr Pilbrow’s response is twofold: –

(i) This ignores the acceptance by the CJEU in both the **Holterman** Judgment (at paragraph 46) and the **Bosworth** Judgment (at paragraph 26) that “the issue whether such a relationship exists must, in each particular case, be assessed on the

basis of all the factors and circumstances characterising the relationship between the parties.” The resolution of any issue as to Article 18 employment, of a CEO or otherwise, will depend upon consideration of all the facts.

(ii) He relies upon the explanation by the Advocate General of his conclusion in paragraph 46, accepted by the CJEU in paragraph 33, in the following paragraphs (footnotes omitted):

“52. I should point out in this connection that, in the domestic legal systems of the Member States, the relationships between companies and their directors are governed not by employment law, but by company law. Directors are social bodies. The duties of managing director, and the powers and obligations which flow from those duties, are determined by company statutes and applicable legal provisions. Admittedly, in certain Member States, including the United Kingdom, directors and companies may frame their respective rights and obligations in a contract — which may be a management contract, an agency agreement or a contract of employment. Nevertheless, company law remains at the heart of their relationship.

53. In particular, disputes relating to the liability of company directors to their companies and their shareholders — and that is the background to the present case — are disputes which fall under company law in that they generally concern specific provisions of the laws of the Member States which govern the conditions for and extent of such liability.

54. Such a marked discord between domestic classifications and classification for the purposes of the Lugano II Convention and the Brussels I Regulation would not aid the application of those two instruments or the predictability of the jurisdictional rules which they lay down. Moreover, the practical disadvantages that would flow from the generalised application of Section 5 to company directors would ill serve the special nature of disputes concerning their liability and would not be very consistent with the objective of the proper administration of justice. In this area, the joint and several liability of the various company directors of a company for harm they have caused to their company in its management is a normal solution. However, if Section 5 were to apply, each director would have to be sued separately in the courts of his place of domicile, without it being possible to bring that dispute before a single forum.

....

59. The interpretation suggested in points 45 to 47 of this Opinion is equally not called into question by the argument of the Defendants in the main proceedings that the rules of Section 5 do not distinguish between categories of employees. Indeed, I do not suggest that the Court should draw any distinctions

between subordinated workers not contemplated by the drafters of the Lugano II Convention. I merely propose that it should construe the concept of 'subordination', for the purposes of the application of that section, in a way which accommodates the particularities of company law and the reality of social mandates."

These paragraphs were not adopted by the CJEU but plainly constitute the reasoning for the Advocate General's conclusion, which was adopted by the CJEU. This therefore leaves a particular question open to be explored as to whether in any given case a director is or is not an Article 18 employee. It is in any event significant to note that the CJEU's answer to the Supreme Court's question, which I have set out in paragraph 3 above, specifically addresses the position of a director, or someone performing the duties of a director, thus implying that there may be a distinct and different answer from one in respect of other employees (at domestic law).

21. I can see the force of Mr Eschwege's concern about predictability, and his emphasis on the derivation of paragraph 31 of the **Bosworth** Judgment from paragraph 47 of the **Holterman** Judgment. However the words in the latter paragraph do not quite fit Mr Eschwege's proposition, because Mr Spies was not the "*manager of the administrative body*" but the manager of the company: the CJEU's Judgment does not say "able to influence the will of the administrative body of the company of which he was the manager". Paragraph 31 of the **Bosworth** Judgment simply reads "*Mr Bosworth and Mr Hurley had an ability to influence Arcadia that was not negligible*". It does not say an ability to influence Farahead, the controller of Arcadia. Mr Eschwege submits that the facts were not sufficiently known to the CJEU, but there is reference to the position of Farahead as the controller of the Group in paragraph 32 of the **Bosworth** Judgment. Mr Eschwege also refers to the definition of Arcadia in paragraph 8 of the **Bosworth** Judgment as including Farahead.
22. It may or may not be relevant to note that in **Holterman** the relationship which, according to paragraph 46, must be examined by reference to "*all the factors and circumstances characterising the relationship between the parties*" is the relationship of subordination, whereas in the equivalent paragraph (26) in the **Bosworth** Judgment the relationship which must be so explored is the existence of a "*hierarchical relationship between the worker and his employer*".
23. Given the disagreement as to the meaning of the crucial paragraph 31 in the **Bosworth** Judgment, I am left with what seems to me to be important, namely the matters which the CJEU itself concluded that it should examine in order to arrive at its conclusion ("*In the circumstances*"), on the assumed facts before them, that the Defendants had an ability to influence Arcadia that was not negligible:
 - (i) (paragraph 29) that the Defendants were CEO and CFO of the Arcadia Group, that they were directors of Arcadia London, Singapore and Switzerland, that they were each party to a contract of employment with one of those companies drafted by themselves or at their direction and that they acted at all material times on behalf of all Arcadia Group companies. This was and I believe still is common ground.
 - (ii) (paragraph 30) that it was apparent from the order for reference that the Defendants "*exercised control over by whom, where and on what terms they were*

employed". This was, because of the reference, common ground and no longer is, but is plainly considered by the CJEU an important factor.

24. The CJEU Judgment then continues, in paragraph 31: "*In the circumstances, it appears that Mr Bosworth and Mr Hurley had an ability to influence Arcadia that was not negligible*". It seems to be clear that they were not considering any question of control over or influence upon the body which otherwise controls the Group, the holding company, whose role they regarded as irrelevant in paragraph 32, and whose general directives and (at least) legal mechanisms for control are not considered sufficient in paragraph 33. If they had known more, it might have been a factor, but it is certainly not being addressed by them as conclusive. Again I refer to the CJEU's answer to the Question, which did not, as Mr Eschwege would wish, refer to influence over the controlling body, but (inter alia) to "*control and autonomy over the day-to-day operation of that company's business and the performance of his own duties*".
25. I therefore disagree with Mr Eschwege: on his analysis, there would be no need to assess "*all the factors and circumstances characterising the relationship between the parties*", but the matter can be decided simply on the basis, which is common ground, that the Defendants had no ability to influence or control Farahead or Mr Fredriksen. I am satisfied that the issue which the CJEU resolved, though on the basis of assumed facts which I must now reconsider, is that the Defendants had a non-negligible influence over the Group companies of which they were CEO and CFO.
26. Before me, both sides directed their evidence to this question. The Claimants contend that the Defendants "*called the shots*" in relation to the companies they ran, while the Defendants claim that they were entirely subordinate to Farahead and Mr Fredriksen (and his associates). I must decide, if I can, which side has the better of the argument, or, if I am unable to decide that, then whether the Claimants have a plausible evidential basis and hence a good arguable case. Notwithstanding that there has been, as is understandable after 5½ years of litigation, a morass of papers even at this interlocutory stage to consider, and certainly lengthy submissions put before me by both sides, I must do my best to reach such conclusions. Although both sides have invited me to consider the separate position of the two Defendants, and it is clear that as between the two of them the Second Defendant was subordinate to the First Defendant, nevertheless I am satisfied that they worked together and that I can and should treat the two of them together in reaching the conclusion as to whether they had a non-negligible ability to influence the Arcadia companies.
27. There is one issue which, as agreed with the parties, I shall address separately and to which I shall return. It is common ground that the boards of the Arcadia Claimants (the first three Claimants) did not exercise any supervision over the Defendants. Mr Eschwege submits that it is because of the Defendants' subordination to the holding company Farahead that they are Article 18 employees. That may render them employees of the First and Third Claimant (and I am not invited to make any distinction between them and the Second Claimant, notwithstanding the present absence of any signed or unsigned contract of employment). He submits however that if I were to conclude that the Defendants were Article 18 employees of the first three Claimants then I should also so find in respect of Farahead. There are separate arguments in that regard to which I shall return if they arise.

The facts

28. The parties have referred to numerous documents. Included amongst them are a number of different flowcharts or management charts, and I have not found them very helpful, both because there are no clearly structured documents to support either side and because a number of them, if not all, are marked draft and are said to have been overtaken. Two documents are of significance in terms of the way in which the Arcadia Group presented itself to the public, namely two Singapore Investment Memoranda dated 2010 and 2012. Both were prepared by or under the direction of the Defendants but approved by Farahead. The second memorandum is slightly different from the first, which may indicate corrections or may simply indicate that 'life has moved on' in the two years. They refer to the important role of Mr Fredriksen and Farahead, but speak powerfully of the role of the Defendants:

(i) The 2010 Memorandum: –

(a) at Appendix 1 sets out the Key Management Team of the First Claimant, the first name in which is the First Defendant:

“Peter joined APL [the First Claimant] as the team leader for trading of West African crude oil. In 1999 Peter became joint head of trading APL and in 2000 Peter became the CEO of APL. Peter has led the Arcadia Group through its recent stages of change and expansion.”

and under the Key Management Team of the Arcadia Group contains a reference to Mr Fredriksen as the *“Ultimate beneficial controller of the Arcadia Group”*, to the First Defendant as *“Member of the Arcadia Group Management Committee”* and to the Second Defendant as (inter alia) Group CFO, and as having *“overseen the growth of the company turnover from \$7 billion to \$27 billion and the change in ownership”* [from Mitsui].

(b) in the text of the main body of the Memorandum contains a reference under Key Investment Considerations to *“Financial stability... the Arcadia Group has strong financial support and access to additional financial support (if required) from the ultimate beneficial controller, John Fredriksen”*.

(c) also in the body of the document under *“The Arcadia Group Management”* has a reference to the Arcadia Group Management Committee: *“Farahead has constituted a management committee to advise in respect of all matters relating to the Arcadia Group. Recommendations by the management committee are subject to final approval by the Farahead board of directors. The management committee consists of”* the First and Second Defendants, and two of their subordinates, Paul Adams and Mark Lance. There is contested evidence as to whether this Management Committee ever in fact came into existence, and it disappears from the 2012 Memorandum.

(ii) in the 2012 Memorandum the reference to the First and Second Defendants is expanded in the main body of the document under the heading *“The Arcadia Group Management”*:

“Group Chief Executive Officer

Peter Bosworth is the Chief Executive Officer of the Arcadia Group and [the First Defendant] and reports to and advises the board of directors of the relevant companies.

Peter Bosworth presides over the management of the Arcadia Group and the day-to-day trading operations of the Arcadia Group. Peter Bosworth is responsible for communication with the shareholders, employees, key individuals in the Arcadia Group and as leader of the Arcadia Group, Peter Bosworth represents the Arcadia Group with key individuals in the market.

Peter Bosworth, together with the Group CFO, play important roles in the formation of the strategy for the Arcadia Group, commercially and financially and the development of the Arcadia Group policies including trading strategies, investments, credit, fundraising, inspection and scrutiny of decision-making and performance of the subsidiaries.

Group Chief Financial Officer

Colin Hurley is the Chief Financial Officer of the Arcadia Group and reports to the CEO and the board of directors of the relevant companies.

Colin Hurley is responsible for the control of the financial risks of the Arcadia Group including credit, liquidity and market risk (currency, interest rate and commodity price risk). [He] also supervises the financial reporting for the Arcadia Group and liaises with the board of directors of the operating companies, the shareholders and key individuals in the Arcadia Group on all financial and accounting related matters.

Colin Hurley is a salient partner and advisor to the Group CEO.”

In Appendix 1, under the heading "*The Arcadia Group – Key Individuals and Profiles*", Mr Fredriksen is listed first with a cross reference to the description of him under the section dealing with Seatankers Group, described as in common ownership with Farahead, "*which is ultimately controlled by trusts established by John Fredriksen*": there are then descriptions of the First and Second Defendants, in almost identical terms to Appendix 1 of the 2010 Memorandum.

29. I now refer to the most significant parts of the evidence in relation to the general question of control. It is common ground that Farahead acquired the first Arcadia company - the First Claimant - from Mitsui with the First and Second Defendants already in place as CEO and CFO, and that the Defendants simply adopted a standard form Mitsui contract for their employment contracts with the First Claimant (although these were not signed). As to the witness statements:

(i) The First Defendant, in paragraph 4 of his fifth witness statement of 10 July 2020, said as follows:

“I did not determine the terms on which I was employed. Instead, I carried out my duties at Farahead's direction and was under its control. I was responsible for day-to-day management of Arcadia Group business, but that was only because of the authority that had been delegated to me by Farahead, which Farahead could take away at any time. The ultimate decision-making power in relation to the Arcadia Claimants lay with Farahead (and Mr John Fredriksen and Mr Tor Olav Troim in particular). I received my instructions from them and was subject to their direction and control. Their instruction or authorisation was necessary in relation to strategic decisions by or relating to the Arcadia Claimants, and often necessary in respect of more minor decisions too.”

Later in the same witness statement he said: –

“87 I reported to Mr Fredriksen and Mr Troim at all times and they supervised my performance. They managed my work, sometimes at a high level but on other occasions very closely, and they decided what parts of the business I would be involved in. ...

88 Mr Fredriksen and Mr Troim regularly instructed me to provide them with information. They were sometimes very demanding, putting us under a lot of pressure to provide them with concise reporting on a wide range of matters... There were multiple daily reports, weekly reports, monthly reports, and quarterly reports on all aspects of the global business, including for example the progress of our profit and loss, counterparty exposure, and position sizes.”

Further in his sixth witness statement dated 9 September 2020 at paragraph 19 he said:

“There were no limits on [Mr Fredriksen's] power to tell Arcadia's management, including the CEO, CFO and COO, what to do. He and Mr Troim used their power to direct and oversee us... The reason they were entitled to tell us what to do, and the reason we were obliged to obey, was that they were the bosses and owners. It had nothing to do with shares, financing, or guarantees.”

(ii) At paragraph 82 of his second witness statement, dated 10th July 2020, the Second Defendant said *“Mr Fredriksen and Mr Troim regularly instructed me to provide them with financial information. Providing financial reporting was a major part of my role.”*

(iii) Mr Fredriksen in his second witness statement, dated 18 August 2020, said this: –

“9.1 Mr Bosworth and Mr Hurley had and exercised control and autonomy over the day-to-day operation of the business of the Arcadia Group. They had and exercised control and autonomy over the performance of their own duties. They were able to, and did, determine how and when and where they worked. They were able to, and did, determine how the Arcadia Group operated....”

9.3 The involvement I (and indeed Mr Troim) had with the Arcadia Group was on behalf of Farahead (and not on behalf of the Arcadia Companies, as Mr Bosworth and Mr Hurley no seek to suggest), as Farahead sought to look out for its interests as shareholder and financier/guarantor. None of that involvement, however, negates the fact that it was Mr Bosworth and Mr Hurley who, in simple terms, “ran the show” at the Arcadia Group.

...

10.6 Once Farahead had purchased the Arcadia Group business, it operated exactly as I had intended - that is to say, Mr Bosworth and Mr Hurley were left to get on and run the business as they saw fit, and Farahead oversaw the business as shareholder and as financier/guarantor.”

(iv) Mr Adams, the subordinate and then successor of the First Defendant, said at paragraph 25 of his fourth witness statement, dated 14 August 2020:

“Mr Bosworth and Mr Hurley were the two senior executives of the Arcadia Group. Both inside and outside of the Group, Mr Bosworth was unquestionably accepted as the CEO, the “boss”, of Arcadia. Like any CEO, he relied heavily on operational support and strategic advice from his CFO, Mr Hurley, on all financial matters. As CFO, Mr Hurley was his trusted partner who organized the financing to execute Mr Bosworth’s commercial ideas.”

(v) At an earlier stage in these proceedings, when there was no issue as to Article 18 employment, Ms Vaswani, the solicitor at Allen and Overy then instructed by the Defendants, gave, on instructions, a second witness statement on their behalf, dated 25 March 2015, inter alia commenting upon Mr Adams’ earlier affidavit on the Claimants’ behalf dated 11 February 2015, from which she quotes: –

“18... Mr Adams said as follows:

“As CEO, Mr Bosworth exercised extensive powers on behalf of the Arcadia Group and made strategic and operational decisions that bound the companies in the Group. For example, he: (a) was the driving force behind decisions as to when and where to open Arcadia Group offices; (b) had oversight of and was accountable for the Arcadia Group’s trading activities; and (c) made decisions to appoint, transfer and terminate the employment of

the Group's employees and determined their salaries, bonuses and employment terms. In summary, he performed the duties and exercised all the usual powers of CEO”.

19 Mr Adams said of Mr Hurley:

“... He exercised extensive powers to act on behalf of the Arcadia Group and made strategic and financial decisions that bound the companies in the Arcadia Group. For example, he: (a) was responsible for the management and control of the Arcadia Group's finances; (b) oversaw the preparation of its financial records and accounts and was responsible for financial reporting to the Farahead Representatives; (c) opened, operated and terminated the Arcadia Group's bank accounts, credit facilities and other banking arrangements and managed the Groups relationships with its banks; and (d) was involved in decisions to appoint, transfer and terminate the employment of the Arcadia Group's employees within the finance function and the determination of their salaries, bonuses and employment terms. In summary, he exercised all the usual powers of a CFO”

20 Mr Adams could not have been clearer about the “employment status” of Mr Bosworth. ...”

30. Mr Eschwege relies upon the fact that in submissions before the Court of Appeal, still before the Article 18 employment issue had taken over, Mr Howard QC, then instructed by the Claimants, said while *"accepting for these purposes ... that [the Defendants] were employees"* as follows:

“although they were senior people and they effectively ran their own show in Arcadia, that's part of what went wrong here, we say, that they were left to their own devices. But I mean, ultimately, they were answerable to the ultimate shareholders in Arcadia through Farahead, Mr Fredriksen, who ultimately owns it all and, as Mr Foxtan says, there was a power to hire and fire or ultimately a power to say “Do this” or “Do that”.”

The power to “hire and fire” (perhaps a quote from this passage) was of course expressly said by the CJEU in paragraph 32 of its Judgment to be irrelevant.

31. The only way in which I could attempt to resolve the dispute was, at the initiative of the parties, to look at examples of whether the Defendants did, or did not, “*call the shots*”, in order to see whether they had a “*non-negligible influence*” on the Arcadia companies. This was helpfully summarised and stratified by the parties, in the Seventh witness statement of Mr Greeno, the Defendants' solicitor dated 10 July 2020 at paragraph 12, as examples of the “*directorial powers that Farahead and/or Mr Fredriksen and/or Mr Troim exercised over the Arcadia Group*” (“the Greeno schedule”) and in the schedule of “*Examples showing the absence of a relationship of subordination between the Claimants and [the Defendants]*” prepared by Mr Heaton during the hearing (“the Heaton Schedule”).

32. The Greeno Schedule

This is compiled by Mr Greeno on the basis of his clients' instructions and in the light of the Group Policy, drafted by Mr Ford, the Arcadia COO, and, as such, a subordinate of the First Defendant, in January 2009. If Farahead had, and exercised, as Mr Greeno says, the powers such as to subordinate the Defendants, it does not seem to me to matter whether it did so through the Articles of Association or, as Mr Eschwege described it, as a “*conventional shareholder*”, or otherwise:

(1) The power to declare dividends. According to Mr Hurley’s evidence, Farahead determined what dividends the Arcadia Group members would pay.

(2) The power to direct that members of Arcadia Group enter into particular transactions with one another, and the power to decide the terms of such transactions, according to Mr Hurley’s evidence. This is denied and explained by Mr Skilton and Mr Hannas in their witness statements on the Claimants’ behalf.

(3) The power to direct that members of Arcadia Group enter particular transactions with third parties, and the power to direct negotiations and decide what terms to contract on, according to the evidence of Mr Bosworth (and Mr Scheepers). Each of the six instances identified are explained in detail by Mr Fredriksen and Mr Adams and by reference to the evidence relied upon, in contesting this proposition.

(4) The power to require reporting from any director or employee of whatever nature and content they considered to be necessary or desirable, according to Mr Hurley. There was a great deal of discussion about reporting during the hearing (which could be said to be addressed by paragraphs 32 and 33 of the CJEU Judgment). Mr Eschwege referred to what he called the 'sheer scale' of the reporting. Plainly there is a distinction between reporting which ties the hands of the reporter and reporting which simply keeps the reportee informed. Mr Fredriksen addresses this, particularly in paragraph 10.8 of his witness statement.

(5) The power to close business divisions of the Arcadia Group, explained by Mr Bosworth in his fifth witness statement. This is addressed and contested in respect of the three examples given by Mr Bosworth by Mr Fredriksen, and by reference to contemporaneous minutes taken by Mr Ford.

(6) The power to hire and fire employees, and not only directors as might be expected of a shareholder, according to Mr Bosworth. This is apparently inconsistent with Ms Vaswani's witness statement cited in paragraph 29 (v) above. In any event insofar as examples are given, they are addressed by Mr Fredriksen, and contested.

(7) The power to discipline directors and employees (in fact only one example is given, that of the First Defendant himself). This is addressed by Mr Fredriksen and Mr Adams and contested.

(8) The power to determine the remuneration (salary and bonus) of individual employees, according to Mr Bosworth and Mr Hurley. This formed a significant part of the hearing, based upon their evidence and some contemporaneous documents, including a somewhat ambiguous interview with Mr Hurley by the

FSA and an email from Mr Gibbons, a subordinate of the Defendants, in October 2010, as to which there is a dispute between whether Mr Bosworth or Mr Fredriksen is there being referred to as “*his Majesty*”. Again this seems inconsistent with Ms Vaswani’s witness statement cited above, and it is denied and explained by Mr Fredriksen and Mr Adams.

(9) The power to effect corporate restructuring of the Group (only the one restructuring is addressed by Mr Hurley). This would appear to be a general directive within paragraph 30 of the CJEU Judgment, but again it is addressed and explained by Mr Fredriksen, Mr Hannas and Mr Skilton.

33. The Heaton Schedule

This is in the light of and notwithstanding the Group Policy referred to above. Some of the items in this Schedule are the direct antithesis of those in the Greeno Schedule, which emphasises the degree of contention between the parties:

(1) The Defendants were de jure, de facto or shadow directors of each of the Arcadia Claimants. This does not seem to have been contested.

(2) The Defendants decided, with certain exceptions, who were the directors of each of the Arcadia Claimants (and chose Arcadia Group employees or other associates of theirs) and on occasion changed their directors without involving Farahead. This is asserted by Mr Fredriksen and Mr Hannas and denied by Mr Bosworth.

(3) The Defendants negotiated for Mitsui the terms of the acquisition by Farahead of the Arcadia Group. This is not contested.

(4) The Defendants ran the day-to-day business of the Arcadia Group (this was in the Statement of Agreed Facts before the Supreme Court), and had between 40 and over 140 employees at material times. This was not contested.

(5) The Defendants had all the usual authority of a CEO and a CFO respectively, were not supervised by the directors of the Arcadia Claimants and accordingly had more extensive authority. The last few words are denied, and the rest admitted.

(6) and (7) A citation of paragraphs 18 to 20 of Ms Vaswani’s witness statement, quoted in paragraph 29 (v) above, and relied on by the Claimants.

(8) The Defendants caused or permitted the Arcadia Group to take on large exposures to Capital Oil and Gas (more than US\$71 million) and to Equinox (US\$16.2 million, of which US\$1 million was undocumented), without recourse to Farahead. This evidence from Mr Fredriksen and Mr Adams was not contested.

(9) The Defendants advanced a US\$10 million interest free loan to a third party from the First Claimant's funds, without recourse to Farahead, according to Mr Fredriksen: this is agreed.

(10) The Defendants were authorised to grant loans to third parties to complete the Arcadia Group's investments and/or for business development purposes. This is agreed.

(11) The Defendants used Arcadia Group funds for personal purposes (without recourse to Farahead), such as private air travel costs, hotels, tutoring, personal tax payments and cash advances, in substantial amounts: not in issue.

(12) The Defendants were able to avoid having written (and signed) employment contracts with the First and Third Claimants; the First Defendant was able to have an employment contract with Arcadia Dubai by describing him as the “Administrator / General”. This was not contested.

(13) The Defendants moved their employment to different Arcadia Group entities as they considered expedient, including for their own benefit, and determined the terms on which they were employed, according to Mr Fredriksen, Mr Adams’ affidavit and seemingly Ms Vaswani (above) and as the apparent consequence of not being able to challenge my finding in paragraph 14 of my Judgment (paragraph 8 above).

(14) The Defendants identified Switzerland as the place to which Arcadia Group should move its business from the UK (Farahead having given what the Claimants say was a general direction to move out of the UK), as described by Mr Fredriksen, Mr Hannas and Mr Skilton, not accepted by the Defendants, though this challenge seems inconsistent both with Ms Vaswani’s witness statement at paragraph 48 and the First Defendant’s own earlier (fourth) witness statement of 11 March 2019 at paragraph 95.7.

(15) The Defendants set trading limits, according to Mr Fredriksen. This is denied by the Defendants, supported by the content of the first, but not the second, Singapore Investment Memorandum.

(16) The Defendants decided to close trading books (business units) and implemented those decisions: two examples are given. This is the converse of the (disputed) assertion at Greeno (5) above.

(17) The Defendants resisted certain attempts to introduce controls and reporting requirements by Farahead. This is obviously contested.

(18) The Defendants determined the amount and timing of dividends that the Arcadia Group paid to Farahead. This assertion is the converse of (contested) Greeno (1) above.

(19) The Defendants determined the allocation of individual bonuses to Arcadia Group staff, including their own bonuses. This is the converse of (contested) Greeno (8).

(20) The Defendants called directors’ meetings and procured resolutions of the Arcadia Claimants: this specific allegation is not put in issue, albeit the Defendants’ evidence is that Farahead controlled the boards.

34. There is one specific area of contentious evidence, arising out of the restructuring in 2008/09. The Defendants rely on documents which are said to record emphasis given by tax advisers that the holding company should be seen to control the Group, for tax reasons. The documents include:

(i) advice from PricewaterhouseCoopers, given to Mr Ford in September 2008, on the topic of tax risks to Farahead relating to such risk from delegation of supervision by Farahead to the Group and the importance of reporting to it on a regular basis. It noted: *“As regards the operating companies of the group, most of the operating companies have managers resident in the country where the company is located. These managers have the knowledge and experience to run the day-to-day business. They have also the power to take the decision relating to the day-to-day operations (power to sign for their field of responsibility in the day-to-day operations) Provided the recommendations ... are followed ... risk of the operating companies in Switzerland is remote.”* Mr Ford notes in handwriting: *“Therefore, Farahead may delegate a supervisory role to [the First Claimant], providing all strategic decisions and core matters are decided at Farahead level!”*.

(ii) the drafting in August 2008 (seemingly put into effect sometime thereafter) of Service Agreements between the various Group companies, including provisions for approval by the Farahead board.

(iii) the advice of PKF accountants in January 2009, addressing the tax risk that the subsidiaries would be treated as resident in the UK. The report states (at clause 4.2) that it is *“important to be able to demonstrate that the Board members of each company have the expertise and experience to manage that company's business and that the decisions are not being made from outside that company's tax jurisdiction. We understand that the majority of directors on each board are local directors who have the expertise and experience to manage their own business.”* Again there is advice of the need for regular reporting from the Arcadia companies to Farahead (clause 4.4.3) *“to demonstrate that there is an experienced person in Farahead overseeing the financial role”*. However clause 4.5.4 records that *“... this should not extend to... Farahead making decisions on behalf of the subsidiaries. The subsidiaries' directors should have ultimate authority in all matters and should not be required to seek CFO APL's [presumably the First Defendant] approval.”* And at 4.6: *“If commercially it is necessary for CFO APL to partake in a subsidiary's decision making process, consideration should be given for arranging this so as to ensure that he is present in the subsidiary's local jurisdiction when those decisions are being made.”*

(iv) an email sent on 5 March 2009 from Farahead to Mr Ford, stating that it was important to make sure in order to avoid tax implications that:

“(a) the management and control of Farahead and the subsidiaries is exercised by the respective board of each company from the location where each individual company is tax resident.

“(b) the officers, appointed by Farahead, act as consultants/advisors only, who would report to the group, in writing, advising the group on policy matters, as well as market and financial issues, and the board of each individual group company is the responsible body to take/not take such advice”.

It is common ground that the Defendants operated without control by the boards of the subsidiary companies.

(v) the minutes of a Farahead/Arcadia quarterly meeting of 15th October 2008, attended by Mr Hannas and another from Farahead and by the second Defendant, Mr Lance and Mr Ford from Arcadia, record the preferred scenario as including “*Farahead produce and distribute to its subsidiaries a policy document which should reflect the will of Farahead to secure the group's cohesion and management principles. Such policy should contain general guidelines...*”.

35. The relevant question is whether any of the above, addressed for important tax considerations, in the event made any difference to the situation in which Farahead had bought Arcadia from Mitsui with the Defendants in place, and they were being paid a very substantial remuneration to 'run the show': the First Defendant received US\$ 48 million over seven years (plus a \$20 million loan), and the second Defendant somewhat under half of that:

(i) the dispute as to whether there was any effect is as between the First Defendant in his fifth witness statement:

“67... PKF advised that it would be better for Farahead and the Arcadia Group's tax position if the Group Policy were changed to say that the boards of the local subsidiaries had sufficient independence and expertise to make their own decisions. PKF's view was that the current draft showed that they acted at the direction of Farahead (this was true). They advised that this would give rise to tax in the United Kingdom or Cyprus, and that changes could be made to the Group policy that might reduce this risk... After this, PKF made changes to the Group Policy that suggested that the local subsidiaries had far more independence in their decision-making than they actually did. This was not correct because, as I have explained, they followed Farahead's instructions. They did not have the power to take the decisions that this document says they did.

...

91... Farahead inserted itself and its representatives directly into the governance structures of the Arcadia Group... In reality Farahead's board acted at the direction of and effectively included John Fredriksen and Tor Olav Troim. This was the Arcadia Group's ultimate management and decision-making body.”

and Mr Hannas:

“27... Mr Bosworth says that the PKF memo indicates PKF's concern that the draft Group Policy... shows that the boards of the Arcadia Companies acted at the direction of Farahead and that this was the case. This is wrong. In fact, the PKF memo does not suggest that the boards of the subsidiaries acted at Farahead's direction. Its focus is instead on parts of the draft Group Policy, which had been drafted by the Arcadia Group, that indicated that the CFO of Arcadia London (Mr Hurley)

“will supervise the subsidiaries” which “strongly implies that the subsidiaries are not controlling their own businesses”. As I explain in paragraph 70 below, the issue arose because [the Defendants] wished to continue to manage the Arcadia Group's business as they had done, but at the same time to avoid any permanent establishment in the United Kingdom, so that the tax benefits of the restructuring (including shifting certain operations to Switzerland) were in fact realised.

...

73. Mr Bosworth states that... Mr Fredriksen and Mr Troim (as well as me and others as their associates) were able to issue instructions to the Arcadia Group. I disagree, as I have said elsewhere. As it grew internationally, Arcadia struggled to provide adequate levels of corporate governance and reporting, which risked failures in the corporate structure, poor financial management and inadvertent tax liabilities within Arcadia and for Farahead. This need for a structure became the Service Agreements between those companies. As I understood it, the approval... , which the Arcadia Group requested, simply ratified the Service Agreements for Farahead and enabled Mr Bosworth and Mr Hurley to continue to manage the Arcadia Group as they had done but also ensuring that the tax benefits of the move to Switzerland were realised (without adversely affecting Farahead's tax position).”

(ii) The Second Defendant also does not suggest that there was any change in the management function as a result of the Group restructuring.

(iii) Mr Hannas also does not suggest there was any such change, as above, and as appears in paragraph 70 of his witness statement, referring to various options *“to preserve the way in which Mr Bosworth and Mr Hurley managed the Arcadia Group”*.

(iv) Ms Vaswani, on instructions from the Defendants, said as follows:

“15... the Arcadia Group adapted its management structures so as to minimise the tax obligations of its subsidiary companies in the different parts of the world where they operated... Mr Bosworth and Mr Hurley was simply employed by various of the Arcadia Group entities as was expedient from time to time, and as explained below, always with the same Arcadia Group roles.”

In paragraph 48, she endorsed the evidence of Mr Adams, who *“revealed the reality of the situation when he directly addressed the fact that Mr Bosworth and Mr Hurley were based in Switzerland, but had their 'official' employment elsewhere for tax reasons”*, and then separately in relation to the First and Second Defendants, recorded, first in relation to the First Defendant: *“Despite the changes in Mr Bosworth's physical and/or official employment location, his role as CEO of the Arcadia Group as a whole remained unchanged”*, and in relation to the Second

Defendant: “*It [the circumstance that Mr Hurley was based in, paid by and received other benefits from different Arcadia Group entities at different times, so as to improve his tax position] did not signify any change in the role he performed as CFO of the Arcadia Group as a whole.*”

36. I am left to decide the question on the basis of this very contested and untested evidence, which I have carefully considered, both before and at the hearing and, as Lord Templeman once advised, in my room afterwards, as to whether the Defendants were in a relationship of subordination to the Arcadia companies because of the degree of control of the companies and of the Defendants by Farahead (and Mr Fredriksen). Just as the Advocate General pointed to the fact (at paragraph 41 of his Opinion) that in **Holtermann** the Court “*stated that a director having a sufficient share of the capital to influence in a 'non-negligible' manner the persons normally competent to give him instructions and to supervise their implementation cannot be subordinate to the company*”, so the Claimants can say here that these Defendants between them, without a shareholding, had such power over the Arcadia companies that they were in a position to exercise that same influence. Whether the Defendants had the same powers as, or greater powers than, a normal CEO and CFO in such a situation, and in a case in which Farahead is in Cyprus, Mr Fredriksen in London and the Defendants are running an international group of companies, I do not need to decide. I am entirely clear however that, on the basis that the Claimants bear the onus to establish jurisdiction and my task has been to set their evidence against the rival evidence for the Defendants, and weigh it all in the context of such contemporaneous documents as are before me, I am satisfied that the Claimants have a good arguable case that there is not such a relationship, in that the Defendants had a more than negligible ability to influence the Arcadia companies. If I have, after such a difficult task, to conclude, on my assessment of the present evidence, without cross-examination, weighing the balance of the two Schedules, and taking into account, in addition to the submissions and evidence of the parties before me, in particular the Singapore Investment Memoranda and the witness statement of Ms Vaswani, that the Claimants have the better case, I do so. I am in any event satisfied, with reference to limbs (ii) and (iii) of the **Brownlie** test, that they have a plausible evidential basis.
37. Accordingly, I dismiss the Defendants' challenge to the jurisdiction in relation to the first three Claimants. Returning to paragraph 27 above, the same result must follow a fortiori without further consideration in respect of the Fourth Defendant.