



Neutral Citation Number: [2022] EWHC 529 (Comm)

Case No: CL-2020-000784

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

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

Date: 01/04/2022

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

Between:

ABU DHABI COMMERCIAL BANK PJSC

Claimant

- and -

- (1) BAVAGUTHU RAGHURAM SHETTY
(2) KHALEEFA BUTTI OMAIR YOUSIF ALMUHAIRI
(3) SAEED MOHAMED BUTTI MOHAMED
ALQEBAISI
(4) PRASANTH MANGHAT
(5) SURESH KUMAR VADAKKA KOOTALA
(6) PRASHANTH SHENOY

Defendants

Mr Adrian Beltrami QC, Mr Rajesh Pillai QC, Mr Scott Ralston and Ms Rebecca Zaman (instructed by Holman Fenwick Willan LLP) for the Claimant
Ms Ruth den Besten (instructed by Farrer & Co LLP) for the First Defendant
Mr Tim Penny QC, Mr James Sheehan, Mr Frederick Alliott and Mr Sam Goodman (instructed by PCB Byrne LLP) for the Second and Third Defendants
Mr Adam Zellick QC, Mr Tim Taylor QC and Mr Daniel Carall-Green (instructed by KWM Europe LLP) for the Fourth Defendant
The Fifth and Sixth Defendants did not appear and were not represented.

Hearing dates: 29-30 November 1-2 December 2021

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.

.....
HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is the hearing of:
 - i) An application by the Claimant (“ADCB”) made by an Application Notice dated 7 December 2020 for an Order continuing a Worldwide Freezing Order made by Bryan J on 2 December 2020 (“WFO”) until judgment or further order in these proceedings;
 - ii) An application by ADCB made by an Application Notice dated 4 November 2021 for Orders:
 - a) Permitting ADCB to rely on an additional jurisdictional gateway being that set out in paragraph 3.1(9)(a) of CPR PD6B; and
 - b) Permitting the amendment of the Particulars of Claim; and
 - iii) Applications by the First to Fourth Defendants for orders setting aside permission to serve these proceedings on the defendants out of the jurisdiction and discharging the WFO.

The Fifth Defendant has accepted service and filed a Defence. Neither the fifth or sixth defendants appeared or were represented at this hearing.

Background

2. These proceedings are concerned with what ADCB characterises as “*a massive fraud*” within NMC Plc (“Plc”), its main UAE based subsidiary NMC Healthcare Plc (“Healthcare”) and its other subsidiaries (together “the Group”).
3. The Group’s business was the operation of private medical facilities mainly in the UAE. The First to Fourth Defendants were the controlling shareholders in Plc and/or Group company officeholders or senior managers. Until December 2019, it appeared that Plc was a successful FTSE 100 company but by April 2020 it had been placed in administration on the application of ADCB and the existence and scale of the fraud became apparent.
4. In essence, ADCB alleges that the defendants conceived or carried into effect a scheme by which false financial statements were created for Plc, which gave a false impression of Plc’s financial strength by concealing the losses that it had accumulated within its subsidiaries as a result of massive dishonest misappropriation. It is alleged that these statements were deployed by or with the encouragement and consent of the defendants as the basis for presentations to ADCB, made for the purpose of inducing ADCB to extend or renew credit facilities to entities within the Group (other than Plc), which ADCB maintains would not otherwise have been agreed or made. ADCB alleges that the first to third defendants benefitted from the scheme because it enabled them to raise sums totalling about US\$1 billion from share sales and pledges that would otherwise have been impossible. It is also alleged that entities controlled by the first or second defendants received sums totalling about US\$335 million from the

sums borrowed. In addition, it is alleged that part of the sums borrowed was used to make payments to employees and others involved in the fraud (including the fifth and sixth defendants) by transfer of the funds so expended to the bank accounts of entities outside the Group controlled by the first to fourth defendants.

5. The result of this activity is alleged to have led to undisclosed debt within the Group by the date when administrators were appointed (9 April 2020) of between approximately US\$4.357 billion and US\$5.352 billion. ADCB alleges that without the substantial funds advanced by ADCB amongst others the scheme could not have succeeded or continued for as long as it did. It claims that as a result of the dishonest scheme it has lost sums that it advanced under what are called in these proceedings the “Core Facilities” totalling US\$1.2 billion.
6. ADCB alleges that the fraudulent scheme could have succeeded only as a result of very close control over internal management and accounting information. It alleges that management and control over the affairs of the Group was exercised by the defendants at all material times and it was they who conspired to create the false accounts which enabled the scheme to function for their mutual dishonest benefit. ADCB claims damages from the defendants in deceit and unlawful means conspiracy, the unlawful means alleged being either the fraudulent misrepresentations on which its claim in deceit is based or breach of fiduciary duties which it is alleged were owed by the defendants to Plc.
7. Although the defendants challenge jurisdiction on the basis that there is no real issue to be tried and no PD6B gateway through which the claimant can pass, at the heart of the jurisdiction challenge is an assertion that England is manifestly not the most suitable forum for the resolution of this dispute which all defendants maintain should be resolved by the UAE courts. Unsurprisingly, ADCB places significant reliance for its case that England is the most suitable forum for resolution of this dispute on the fact that Plc was a FTSE 100 quoted company, that the contracts by which the two most important of the Core Facilities were given contractual effect (the Syndicated Facility Agreement and the Club Facility Agreement) were drafted and completed in London by a prominent London law firm and were subject to London arbitration clauses and on its contention that England is the governing law of the dispute. Equally unsurprisingly the defendants emphasise that Plc was a holding company that carried on no active business activity, that the activity in London was essentially administrative in nature, that the lending which it is alleged lies at the heart of the scheme was lending by ADCB (a UAE registered entity trading in the UAE) to entities within the Group including principally Healthcare, all of which were based elsewhere than England and Wales. They maintain that if what is alleged is true then this was from first to last a conspiracy that was conceived and carried into effect in the UAE. They maintain that the governing law is beyond argument UAE law. Mr Zelic QC on behalf of the fourth defendant submitted that in these circumstances, it is necessary to look no further than the *forum conveniens* issues that arise in order to reach the conclusion that the court should set aside permission to serve these proceedings on the defendants out of the jurisdiction.
8. Tempting though it is to adopt the course suggested by Mr Zelic QC (which would necessarily involve assuming that all the other issues that arise are to be resolved in favour of ADCB) the better course is to consider the issues that arise in the

conventional order in which they arise, which means that forum is the last issue that I consider. Any other course runs the risk of multiple appeals and hearings, resulting in significant avoidable cost and delay, the allocation to this dispute of a more than proportionate amount of state funded resources and delay to other litigants. I recognise however that if I conclude that ADCB has satisfied all the other requirements but that it has failed on the *forum conveniens* issue then my conclusions on those issues on which ADCB has succeeded are likely to be regarded as academic and *obiter* at best.

The Defendants

9. The First Defendant (“Mr Shetty”) is the founder of the Group. He was the Chief Executive Officer or managing director of Plc from July 2011 to February 2020 and its Joint Non-Executive Chairman from March 2017 to February 2020. It is alleged and it does not appear to be seriously in dispute that he lived in the UAE for about 50 years ending in 2020 when he returned to India. The Second Defendant was Executive Vice Chairman of Plc from July 2011 to March 2014 and a director from June 2017 to February 2020. The Third Defendant was a non-executive director of Plc from July 2011 to February 2014. Each of the First to Third Defendants were directors of Healthcare from 2011 and the First to Third Defendants collectively were at all material times together Plc’s majority shareholders, holding slightly less than 60% following the initial public offering of Plc’s shares.
10. The only other defendant I need mention in any detail at this stage is the Fourth Defendant. He is a Chartered Accountant who was Company Secretary of Plc from July 2011 to September 2012, its Chief Financial Officer from 2011 to 2014, deputy Chief Executive Officer from January 2015 to March 2017 and Chief Executive Officer from March 2017 (when he replaced Mr Shetty as Chief Executive Officer) until his removal by the board of Plc in February 2020. He was a director of Plc from June 2014 until February 2020. In common with the first to third defendants, he was one of Healthcare’s directors from June 2014 to February 2020.
11. None of the first to fourth defendants are or ever have been resident or domiciled in England.
12. The defendants do not dispute that a substantial fraud has taken place. Indeed, the first defendant has alleged as much in proceedings commenced by him in New York against the fourth and fifth defendants. Instead, as Mr Beltrami QC puts it in his written submissions:

“... every Defendant has told the Court they were innocent, while at the same time seeking to avoid giving a full account of their actions, distancing themselves from the affairs of NMC Plc, and blaming others, including other Defendants. Between them, the Objecting Defendants seek to challenge nearly every aspect of the relief sought on the Applications and to contest, even at this interlocutory stage, almost every issue arising on the merits of the claims advanced. The Defendants intend to advance defences that they were not aware of the fraud, much less actually involved in it. It is a classic instance of multiple

Defendants running cut-throat defences in a commercial context.”

That may be so but it is not necessary for me to arrive at a conclusion about that or most of the other merits based issues that arise given the approach that must now be adopted in relation to the applications I have to determine.

13. Since all the defendants maintain that the orders permitting service of these proceedings on them out of the jurisdiction ought to be set aside it will be necessary to consider that issue before turning to the question whether the WFO should be continued.

The Jurisdiction Issues

Introduction.

14. The principles which underlie the grant of permission to serve proceedings out of the jurisdiction are well-established. They were summarised by Lord Collins in Altimo Holdings and Investments Limited v Kyrgyz Mobile Telephones Limited [2011] UKPC 7 [2012] 1 WLR 1804 at paragraphs 71 and 88. In summary if the claimant is to obtain permission to serve proceedings on a defendant out of the jurisdiction, it must establish:
 - i) As against each foreign defendant concerned, that there is a serious issue to be tried on the merits applying the summary judgment test - that is whether there is a real as opposed to a fanciful prospect of success;
 - ii) A good arguable case including a plausible evidential case that the claim against each foreign defendant passes through one of the gateways identified in paragraph 3.1 of Practice Direction 6B; and
 - iii) In all the circumstances the *forum conveniens* for the determination of the litigation is clearly and distinctly England and that therefore the court ought to exercise its discretion so as to permit service out of the jurisdiction. At this stage of the enquiry, “... *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 ...*”.
15. As to the first of these issues, the first to fourth defendants largely make the same points but it is necessary to remember that the question has to be looked at separately in relation to each defendant. In particular, since the first and fourth defendants are alleged to be directly responsible for the allegedly fraudulent misrepresentations on which ADCB relies but the second and third defendants are alleged to have “... *procured, instructed, encouraged, authorised and/or adopted ...*” those representations it is possible that different considerations may apply at any rate if UAE law is the governing law of the dispute.
16. ADCB’s case on gateways is primarily that the first defendant has been served as of right under s.1140 of the Companies Act 2006 and is therefore an anchor defendant for the purposes of paragraph 3.1(3) of PD6B (“the necessary or proper party gateway”). It maintains that the remaining defendants are necessary or proper parties

to the claim by ADCB against the first defendant and, therefore, that the requirements of the necessary or proper gateway are satisfied in relation to each of the defendants who are challenging jurisdiction.

17. Each of the defendants contests the assertion that the first defendant has been properly served under s.1140. Even if this submission is wrong they dispute that there is between the claimant and first defendant a real issue which it is reasonable for the court to try. If that hurdle is overcome then it will be necessary to consider whether any of the second to fourth defendants are necessary or proper parties to the claim against the first defendant. For the reasons already identified, it will be necessary to consider the position of each of the second to fourth defendants separately. If it is concluded that any of the second to fourth defendants is a necessary or proper party, it will be necessary then to decide whether the *forum conveniens* for the determination of the litigation is clearly and distinctly England.
18. In the alternative, the claimant relies on paragraph 3.1(9) of PD6B. This gateway applies where either (a) damage was sustained, or will be sustained, within the jurisdiction; or (b) damage has been or will be sustained results from an act committed, or likely to be committed, within the jurisdiction. At the without notice hearing before Bryan J at which permission to serve the defendants out of the jurisdiction was obtained, ADCB relied only on (b). At this hearing it seeks permission to rely on (a) in the alternative. It is not appropriate that I should refuse that application or determine the jurisdiction application without considering that issue. To do otherwise would increase costs and the avoidable use of court resources to determine the jurisdiction issues in this case.
19. If paragraph 3.1(9)(b) is to be relied on it is necessary that the claimant shows that damage has resulted from substantial and efficacious acts committed within the jurisdiction by the defendant against whom the gateway is relied on, whether or not substantial and efficacious acts have been committed elsewhere – see Metall und Rohstoff A.G. v Donaldson [1990] 1 QB 391 at 437E-F. This is an issue which if it is to be established requires “... a plausible (albeit contested) evidential basis for it ...” – see Brownlie v Four Seasons Holdings Inc [2017] UKSC 80 at paragraph 7 and Goldman Sachs International v Novo Banco SA [2018] UKSC 34 at paragraph 9. Each of the defendants denies that either of the tort gateway requirements is satisfied in relation to any of them but in any event maintain that permission to serve out should either not be granted under paragraph 3.1(9)(a) or permission under paragraph 3.1(9)(b) should be set aside because the *forum conveniens* for the determination of the litigation is plainly not England much less clearly and distinctly England.

Serious Issue to be tried

20. All defendants dispute that there is a serious issue to be tried on the merits against any of them. This question necessarily also engages the question whether for the purposes of the necessary or proper party gateway there is between the claimant and first defendant a real issue which it is reasonable for the court to try. This is not the only question that arises when considering whether the claim against the anchor defendant is one that permits the claimant to rely on the necessary or proper party gateway but it is the threshold issue – see Lungowe and others v Vedanta Resources plc and another

[2019] UKSC 20 at paragraph 20 where Lord Briggs summarised the position as being:

“The express terms of the Practice Direction set out only part of what a claimant relying upon the necessary or proper party gateway must show. It is common ground that, by reference to those terms and well-settled authority, the claimant must demonstrate as follows: (i) that the claims against the anchor defendant involve a real issue to be tried; (ii) if so, that it is reasonable for the court to try that issue; (iii) that the foreign defendant is a necessary or proper party to the claims against the anchor defendant; (iv) that the claims against the foreign defendant have a real prospect of success; (v) that, either, England is the proper place in which to bring the combined claims or that there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place, or the convenient or natural forum.”

21. There has been recent guidance from the Supreme Court on how these issues should be approached - see Okpabi v. Royal Dutch Shell plc [2021] UKSC 3; [2021] 1 WLR 1294 *per* Lord Hamblen at paragraph 22, where he stated:

“Where, as will often be the case where permission for service out of the jurisdiction is sought, there are particulars of claim, the analytical focus should be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. Any particulars of claim or witness statement setting out details of the claim will be supported by a statement of truth. Save in cases where allegations of fact are demonstrably untrue or unsupported, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue.”

Critically, as Lord Hamblen observed, a failure to focus on this relatively narrow issue will lead to a court being:

“... drawn into an evaluation of the weight of the evidence and the exercise of a judgment based on that evidence. That is not its task at this interlocutory stage. The factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupported.”

I adopt the approach set out in the final sentence of this extract in this case. An unintended consequence of this may be that more cases will pass the first two of the three tests referred to earlier (and the first of the tests that has to be satisfied if a defendant is to be an anchor defendant), which in turn underlines the importance of the forum issue as one of the principal means by which inappropriate assertions of jurisdiction against foreign based defendants is controlled.

22. The defendants do not dispute for the purposes of the issue I am now considering the primary factual allegations made by ADCB. Their case on the issue I am now considering is that on the facts as alleged there is no serious issue to be tried because (i) the claim is not one that as a matter of law can be tried by a court in England and Wales by operation of an evidential bar imposed by statute; (ii) the governing law of the claim is beyond realistic argument UAE law not English law and ADCB has failed to plead a coherent claim by reference to UAE law or one that complies with English procedural law requirements where allegations of dishonesty are being made; (iii) unlawful means conspiracy is not a cause of action available as a matter of UAE law and the claim based on vicarious liability advanced against the second and third defendants is one that is bound to fail; and (iv) no coherent case on reliance has been pleaded and in particular no plausible evidential case has been shown that any of the decision makers within ADCB were aware of the implied representations that are at the heart of this claim, and therefore the claim is bound to fail as a matter of UAE law or English law, if it is the governing law of this dispute.

ADCB's pleaded Case in Summary

23. I start therefore with the pleaded case advanced against the first defendant without regard to the amended claim because the application to amend has yet to be determined and the challenge to jurisdiction must be resolved on the basis of the material as it was at the date when permission to serve out was granted.
24. I have set out in summary the role of the parties and what is alleged by ADCB to have occurred already. In essence ADCB relies on four separate categories of implied representation – referred to in the Particulars of Claim as the SFA Representations, the CFA Representations, the Compliance Certificate Representations and the Accounts Representations - as the foundation of its case in deceit against the defendants. It alleges that each of these categories of representation were made fraudulently for the purpose of inducing ADCB to enter into the Core Facilities. ADCB also alleges an unlawful means conspiracy involving each of the defendants. The unlawful means that it relies on are the fraudulent representations and in addition what it alleges are breaches of fiduciary duties which it is alleged were owed to Plc. No separate cause of action based on breach of fiduciary duty is alleged since those duties would be owed to Plc not ADCB.
25. Given ADCB's reliance on the necessary and proper party gateway and on the first defendant being the anchor defendant, it is necessary to be clear as to what allegations are made specifically against the first defendant. The only allegations that I need consider in detail (other than those made against the first defendant) are those made by the other defendants challenging jurisdiction – that is the second and third defendants and the fourth defendant.
26. The SFA Representations are those pleaded in Section H of the Particulars of Claim and are alleged to have been made by the fourth (and sixth) defendants and concern the signature of one of the Core Facilities referred to as the “*Syndicated Facility Agreement*”. This is one of the Core Facilities that ADCB alleges (i) was drafted by Linklaters' London Office, (ii) was completed by Linklaters in London, (iii) was expressly made subject to English law and (iv) contained a London arbitration agreement.

27. The CFA Representations are pleaded in Section I of the Particulars of Claim and concern the signature of the Club Facility Agreement. As with the SFA Representations they are alleged to have been made by the fourth (and sixth) defendants. This is the other agreement that is said to have been drafted and completed in London, to have been expressly made subject to English law and to have contained a London arbitration agreement.
28. The Compliance Certificate Representations are pleaded in Section J of the Particulars of Claim and are alleged to have been made by the fourth (and the fifth and sixth) defendants.
29. Finally, the Accounts Representations are pleaded in Section K of the Particulars of Claim and are alleged to have been made by the first and fourth defendants.
30. It is alleged as against the defendants other than the first and fourth defendants (and therefore against the second and third defendants) that the Accounts Representations “... were procured, instructed, encouraged, authorised and/or adopted by the remaining Defendants who intended that a fraud would be practised on ADCB through those representations” – see paragraph 50 of the Particulars of Claim. It is also alleged that the Representations by Third Parties referred to in section G of the Particulars of Claim “... were procured, instructed, encouraged, authorised and/or adopted by the Defendants. The Defendants are accordingly liable in respect of the same ...” – see paragraph 34 and that the other Representations were similarly “... procured, instructed, encouraged, authorised and/or adopted by the remaining Defendants ...” – see paragraph 39 (SFA Representations) and paragraph 43 (CFA Representations). That allegation is not pleaded in relation to the Compliance Certificate Representations.
31. The only deceit allegation made against the first defendant therefore is in relation to the Accounts Representations. The other representations are alleged to have been made by the fourth defendant alone of the defendants challenging jurisdiction. The allegations in paragraphs 29 and 43 of the Particulars of Claim are made against the first defendant. The allegations in paragraphs 29, 43 and 50 are the only allegations made against the second and third defendants, other than the unlawful means conspiracy pleaded in Section D of the Particulars of Claim. It is advanced against all the defendants – see paragraph 21. The unlawful means relied on are the implied fraudulent misrepresentations to which I have referred already and the breaches of fiduciary duty pleaded in Section E of the Particulars of Claim. It is alleged as against the first and fourth defendants that they breached their duties as directors of Plc under sections 171-175 of the Companies Act 2006 and/or their fiduciary or equitable duties in the respects particularised in paragraphs 27 to 28 of the Particulars of Claim.
32. It follows from this that ADCB must establish:
 - i) As against the first defendant, a plausible evidential case in deceit in respect of the Accounts Representations and/or liability by reference to the allegations made in paragraphs 29 and 43 of the Particulars of Claim and/or breach by him of the fiduciary duties summarised above (assuming that unlawful means conspiracy is available at all as a cause of action) if it is to pass the threshold

test for him to be an anchor defendant for the purposes of the necessary or proper party threshold;

- ii) As against the second and third defendants, a realistically arguable case in relation to the paragraphs 29, 43 and 50 and the conspiracy allegation; and
- iii) As against the fourth defendant, a plausible evidential case in deceit in relation to the SFA Representations, the CFA Representations, the Compliance Certificate Representations as well as the Accounts Representations and/or the paragraphs 29, 43 and 50 allegations and/or the conspiracy allegation.

Against that background, I turn to the allegations that matter for present purposes in more detail.

33. At the heart of what is alleged in this case is what is pleaded in paragraph 11 of the Particulars of Claim. In summary it is alleged that:
- (a) The Defendants used their offices and power as a means for their own personal enrichment. Part of their scheme allegedly involved defrauding ADCB into supplying credit facilities premised on false accounting, and recycling loans through financial institutions (a practice explained in more detail below) – see paragraph 11.2;
 - (b) In order to carry this “*scheme*” into effect, it was necessary that the Group should have access to legitimate sources of finance and carry on what seemed to be a highly successful business – see paragraph 11.5; and
 - (c) To promote and maintain this impression, the Defendants practised a sustained and deliberate fraud by misleading ADCB as to the Group's financial position, and so inducing ADCB to lend very significant sums of money via six core credit facilities, all of which were entered into or renewed in the period 26 February 2018 to 11 November 2019 – see paragraph 11.6. These are the facilities referred to in the Particulars of Claim as the “*Core Facilities*”.
34. It is alleged at paragraph 14 of the Particulars of Claim that each defendant and, therefore, the first defendant knew that:
- i) ADCB would rely on the integrity and good faith of the directors and senior management of the Group when deciding whether to grant credit facilities; and
 - ii) ADCB's lending decisions involved a process of evaluation during which ADCB relied on the accuracy of the customer's financial statements; and
 - iii) Before any decision to grant credit facilities to the Group, ADCB assessed the financial condition of the Group for the purpose of considering different aspects of the lending, including the decision whether to proceed with the transaction, how to price the credit, the acceptable level of security, and what financial covenants were appropriate.

None of this is demonstrably untrue or unsupportable.

35. ADCB alleges that a “*loan recycling scheme*” was operated within the Group from 2013. This scheme involved in essence procuring loans from financial institutions, which were not then reported within the Group’s financial statements, were at least in part regularly re-financed but some or all of which were misappropriated in various ways thereby leading to the accumulation of undisclosed debt that led to further lending that would not have been forthcoming had it been disclosed. ADCB alleges that this could only have been carried into effect with the knowledge and participation of each defendant and, therefore, of the first defendant – see paragraph 20 of the Particulars of Claim. ADCB alleges that in breach of fiduciary duties owed to Plc, each of the first to fourth defendants failed to disclose any of this activity to the board of Plc and that the first defendant:

“... approved (i) the annual Financial Statements; and (ii) the annual Directors' Reports for the years ending 31 December 2015 to 31 December 2018 knowing that that the activities described in paragraphs 15 to 20 above had not been disclosed or otherwise reflected on NMC plc's balance sheet or reported in NMC plc's financial statements”,

see section E of the Particulars of Claim *passim*. It is these breaches of duty that are alleged to constitute one of the unlawful means by which the Defendants implemented the conspiracy. Again, none of this is demonstrably untrue or unsupportable.

36. In relation to the Core Facilities, it is alleged that various third parties to the knowledge of the defendants including the first defendant impliedly represented that Plc’s annual accounts for 2017 and 2018 had been honestly prepared and were not materially misstated and that the third parties (mainly employees within the Group) had either been instructed or authorised to make the implied representations - see section G of the Particulars of Claim, *passim*.
37. It is alleged against the first and fourth defendants in paragraphs 47-48 of the Particulars of Claim that in relation to Plc’s annual accounts for 2015 – 2018 inclusive, they made continuing implied representations (referred to as the “Accounts Representations”) that those accounts had been prepared honestly, were not materially misstated, they were not aware of any reason to suppose that they did not give a true and fair view or had been prepared on the basis of false information.
38. In relation to the first defendant, it is alleged that these alleged representations are to be implied from:

“... the following facts and matters:

- 48.1 [The first defendant’s] role as particularised in paragraph 5 above.
- 48.2 The relationship context between the NMC Group and ADCB as particularised in paragraphs 12 to 14 above.
- 48.3 The (i) Directors' Report and (ii) the Directors' Statements in NMC plc's Annual Report and Accounts for the financial year (a) 2015, dated 13 March 2016;

(b) 2016, dated 7 March 2017; (c) 2017, dated 6 March 2018; and (d) 2018, dated 6 March 2019, in circumstances where [the first defendant] knew and intended, for the reasons given in paragraph 14 above, that those statements would be read and relied on by ADCB.”

39. In summary therefore, it is alleged that the Accounts Representations are to be implied as against the first defendant from:
- i) The first defendant being CEO of Plc from 20 July 2011 until March 2017, Managing Director of Plc from 20 July 2011 until his resignation on 16 February 2020 and Joint Non-Executive Chairman of Plc from March 2017 until his resignation; and
 - ii) The first defendant’s knowledge that:
 - a) ADCB would rely on the integrity and good faith of the directors and senior management of the Group when deciding whether to grant credit facilities; and
 - b) ADCB's lending decisions involved a process of evaluation during which ADCB relied on the accuracy of the customer's financial statements; and
 - c) Before any decision to grant credit facilities to the Group, ADCB assessed the financial condition of the Group for the purpose of considering different aspects of the lending, including the decision whether to proceed with the transaction, how to price the credit, the acceptable level of security, and what financial covenants were appropriate.
40. In addition, as I have explained, an allegation is made of conspiracy against the first defendant and also that he was a joint tortfeasor with the other defendants and liable with them on that basis. Broadly similar allegations are made against the fourth defendant – see paragraph 49 of the Particulars of Claim.
41. The Particulars of Claim contains a statement of truth signed by Mr Honey, a partner in the firm of solicitors acting for the claimant, which verifies that ADCB believes the facts stated in the Particulars of Claim to be true. Again, none of this is demonstrably untrue or unsupportable.
42. It is alleged against the remaining defendants (being for present purposes the second and third defendants) that they “... *procured, instructed, encouraged, authorised and/or adopted* ...” these implied representations - see paragraph 50 of the Particulars of Claim. This is not challenged factually for present purposes and in any event is not demonstrably untrue or unsupportable. The challenge advanced in relation to this allegation is essentially one of law – that UAE law is the governing law of the claim and a claim based on allegations of this sort is not available as a matter of UAE law. I return to that issue below.

43. ADCB's case in inducement and reliance is pleaded at Section L of the Particulars of Claim in these terms:

“52. ADCB's entry into each of the Core Facilities was the product of a number of factors that included: (i) satisfactory account conduct, including the provision of compliance certificates, satisfaction of financial covenants, and repayment of past obligation; (ii) the integrity and accuracy of NMC plc's audited financial statements; (iii) Ernst & Young LLP's position as auditor of NMC plc's financial statements; (iv) NMC plc status as a listed UK entity subject to a high degree of public disclosure and regulatory reporting requirements; and, in those premises, (v) the Defendants' Representations insofar as they had been made at the date of entry into the respective Core Facilities.

53. Especially in circumstances where financial statements were issued periodically, the Defendants' Representations above were intended to and did create a cumulative impression of honesty and reliability in respect of the NMC plc Accounts.”

In paragraph 54 and following in relation to each of the Core facilities, it is alleged that ADCB, “... *induced by or in reliance on* ...” the representations alleged including the representations via third parties and the Accounts Representations referred to above, entered into each of the Core Facilities. All the defendants submit that whether English or UAE law is the governing law this is not a sufficient reliance case because there is no pleading or evidence that the decision makers even knew of the alleged representations much less acted on them in entering into the Core Facilities. This is an issue I return to below.

44. It is alleged that each of the representations was untrue when made and, at Section N of the Particulars of Claim that each of the defendants knew or is to be taken to have known that the representations were false when made or that the defendants were reckless as to whether they were true or false by reference to the allegations made earlier in the pleading. Again this is not challenged at a factual level and is not demonstrably untrue or unsupportable.

45. In section O of the Particulars of Claim ADCB alleges that it has been caused loss and damage by the fraudulent misrepresentations and unlawful means conspiracy alleged earlier in the pleading. Again this is not challenged at a factual level and is not demonstrably untrue or unsupportable. What is alleged is that UAE law is the governing law and as a matter of UAE law there is a distinction to be drawn between loss caused by direct and consequential harm. The defendants submit that ADCB has failed to plead out this issue or show how the conditions that UAE law imposes on claims based on consequential harm are alleged to have been satisfied.

46. At section P of the pleading, it is alleged that each defendant is a “... *joint tortfeasor jointly and severally liable for the losses suffered by ADCB, by reason of his sharing a common design with others ... and his knowingly and deliberately profiting ... insofar as the deceits were committed by the other Defendants.*” This allegation is mainly relevant to the claim against the second and third defendants but also to the first defendant in relation to the implied representations allegedly made by the fourth defendant to which he is not alleged to have been party. Each of the defendants maintain that these alleged facts do not support a claim in UAE law. I return to this allegation below.
47. As will be apparent from this summary, ADCB has pleaded its case down to this point on the implicit assumption that the governing law of the claim is English law. At paragraph 72 of the Particulars of Claim however, it is pleaded:

“The nature of the tort claims that arise under English law and UAE law from the Defendants' conduct are similar. Schedule 2 hereto sets out the principles of UAE law on which ADCB relies in the alternative to English law. By the case pleaded herein, ADCB has met the requisite elements under either English law or UAE law, and ADCB is entitled to claim the loss and damage as pleaded herein.” [Emphasis supplied]

The defendants' case on this application is that (a) UAE law is the governing law of the claim; (b) there is a no more than fanciful case that the governing law of the claim is English law; and (c) ADCB's claim based on UAE Law is so defective that permission to serve out should be set aside. In those circumstances I should set out Schedule 2 to the Particulars of Claim in full. It is headed “*Principles of UAE Law*” and is in these terms:

“1. Upon the application of UAE law, the principles of UAE law on which ADCB will rely are as follows.

2. ADCB claims damages for tortious wrongdoing under the general provisions of Part 3 (“*Acts causing harm*”) of Federal Law No.5 of 1985 (as amended) concerning the Issuance of Civil Transactions (the “**Civil Code**”).

3. ADCB claims that each of the Defendants committed acts of harm within the meaning of Article 282 of the Civil Code. Article 282 and following provide:

“*Article 282.-*

Any harm done to another shall render the actor, even though not a person of discretion, liable to make good the harm.”

Article 283.-

(1) Harm may be direct or consequential.

(2) If the harm is direct, it must unconditionally be made good, and if it is consequential there must be a wrongful or deliberate element and the act must have led to the damage.

Article 284.-

If the harm is both direct and consequential, the rules relating to direct harm shall apply."

4. The Defendants are liable for those acts of harms jointly and severally under Article 291 of the Civil Code, which provides:

"Article 291.-

If a number of persons are responsible for a harmful act, each of them shall be liable in proportion to his share in it, and the judge may make an order against them in equal shares or by way of joint or several liability."

5. Further or alternatively, for the reasons particularised herein each of the Defendants committed deceits within the meaning of Article 285 of the Civil Code. Article 285 provides:

"Article 285.-

If a person deceives another he shall be liable to make good the harm resulting from that deception."

6. The Defendants are liable for the deceits jointly and severally under Article 291, which is set out above.

7. ADCB is entitled to and claims compensation in respect of its claim under Article 282, further or alternatively, Article 285 for the amount of the harm suffered calculated in accordance with the principles set out in Articles 292 and 293, which provide:

"Article 292.-

In all cases the compensation shall be assessed on the basis of the amount of harm suffered by the victim, together with loss of profit, provided that that is a natural result of the harmful act.

Article 293.-

(1) The right to have damage made good shall include moral damage, and an infringement of the liberty, dignity, honour, reputation, social standing or financial condition of another shall be regarded as being moral damage.

(2) It shall be permissible for an order to be made by way of compensation for moral damage caused to a spouse, or relatives of the family, by reason of the death of the victim.

(3) The right to receive compensation for moral damage may not be transferred to a third party unless the amount of it has been fixed by agreement or by a final judicial order."

Defendants' case on Serious Issue to be Tried

48. The defendants start with an assertion that because the first defendant (or any of the other defendants) did not sign the accounts the relevant claims against him are bound to fail by operation of section 6 of the Statute of Frauds (Amendment) Act 1828 (the "1828 Act") (the "Section 6 point").
49. It is then alleged that it is manifest that the law governing ADCB's claim is UAE law, that ADCB has failed to plead a comprehensible case by reference to that law against the first defendant or any of the other defendants and for that reason cannot demonstrate that there is a real issue to be determined between it and the first defendant or any of the other defendant. Finally the defendants argue that ADCB's case on reliance is fanciful and that is fatal to ADCB's claim whether English or UAE law is applied to it.

The Section 6 Point

50. I turn to the Section 6 ("s.6") point before considering the governing law issue, because s.6 is procedural in its effect and so will apply whether the proper law to be applied by a Court in England and Wales to ADCB's claim is English or UAE law – see by analogy Leroux v Brown (1852) 12 CB 801, approved and followed in G & H Montage GmbH v Irvani [1990] 1 WLR 667 by Mustill LJ (as he then was) at 684, where he said:

“Leroux v. Brown (1852) 12 C.B. 801, which decides that the statute [of Frauds] applies to contracts of whatever provenance sued upon in the English courts, has been much criticised, so far as the reasoning depended upon classifying the statute as a matter of procedure (and hence for the *lex fori*) rather than substance. I am bound to say, however, that it would take a good deal to persuade me that this court should now hold it to be wrongly decided. On the contrary, the reasoning on the interpretation of the statute seems to me (as it seemed to Saville J.) unassailable. The statute has twice been amended, since Leroux v. Brown was decided, at times when the criticisms of that decision were current. Yet the opportunity was not taken to confine it to domestic contracts.”

The language used in s.6 is in all material respects identical to that in s.4 (the provision being considered in Leroux v Brown (*ibid.*)). The Court of Appeal has made clear that Leroux v Brown (*ibid.*) should be followed where similar statutory language has been used – see Monterosso Shipping Co. Ltd. v International Transport Workers Federation [1982] ICR 675 *per* Lord Denning MR at 682A. The doubts that May LJ

expressed on that point are not applicable to the point that arises in this case. In my judgment that leads to the conclusion that the outcome set out in that case will be the same in respect of a claim in which s.6 is relied on.

51. The defendants maintain that s.6 operates as a complete procedural bar to a court in England and Wales hearing ADCB's claim based on the implied fraudulent misrepresentations on which it relies. They maintain that the conspiracy claim is entirely parasitic on the deceit claim and so falls with it and in consequence ADCB has no realistic claim it can maintain in England against the first defendant or any of the other defendants. ADCB submits that this is wrong because:
- i) The representations on which it relies related to Plc but Plc was not a borrower under the Core facilities and that Plc did not obtain money on credit is fatal to the applicability of s.6;
 - ii) The 1828 Act does not apply to representations concerning the accuracy of documents and is confined in its scope to fraudulent misrepresentations which relate directly to the creditworthiness of the person or individual in respect of whom the representations relied on have been made;
 - iii) A representation that is implied from a qualifying document will satisfy the requirement of being "*made in writing*" such that the 1828 Act is not a defence and in this case the representations were nearly all made in or implied from signed documents;
 - iv) In any event, s.6 only applies to claims in deceit under English law. It does not apply to (and there is neither reason nor authority nor principle to apply it to) claims in conspiracy, which is an independent cause of action in its own right; and
 - v) The issues that arise are issues that can or should only be resolved at a trial and thus do not preclude the claimant from establishing a realistically arguable case as against the first (or any other) defendant in deceit.
52. Corrected for a typographical error following Roder UK Ltd v Titan Marquees Ltd [2012] QB 752, *per* Longmore LJ at paragraphs 13-16, s.6 provides that:

“Action not maintainable on representation of character etc., unless they be in writing signed by the party chargeable

No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other persons may obtain money or goods upon credit unless such representation or assurance be made in writing, signed by the party to be charged therewith. ”

As Flaux J (as he then was) explained at paragraph 93 of his judgment in Lindsay v. O'Loughnane [2010] EWHC 529 (QB); [2012] BCC 153:

“The mischief which that section was designed to address was that, at the time the Act was passed, potential claimants were seeking to bring actions for misrepresentation against defendants who had made casual statements about other people’s financial standing or probity in conversation or otherwise orally, whether in City coffee houses or elsewhere.”

However, as he added:

“the section remains the law, so that where it is applicable, it must be applied, even if that might seem an injustice in a modern context.”

Parliament has repealed other provisions within the 1828 Act but not s.6. It is to be inferred therefore that Parliament considers the 1828 Act one with an enduring utility and is one that should take effect in accordance with its terms. That being so, I conclude that ADCB’s submission that the section should be given a narrowly circumscribed construction in order to limit its effect is mistaken.

53. That said, I accept that on the current state of the authorities the scope of s.6 is confined to fraudulent misrepresentations which relate to creditworthiness – see Diamond v. Bank of London and Montreal [1979] QB 333 *per* Lord Denning MR at 347C and Shaw LJ at 351A. In this case the representations could concern creditworthiness only if (a) a court accepts that the representations alleged are to be treated as implied as and by reason of what is alleged by ADCB and (b) a court concludes they were impliedly made at a time when the alleged representors all knew and intended that ADCB's entry into the Core Facilities would be predicated on its reliance on Plc's financial statements.
54. I do not think it appropriate that I should attempt to resolve a question concerning the applicability of s.6 to implied representations on an application of this sort. It is not appropriate to come to a final conclusion on an issue of law of this sort unless and until the appropriate findings of fact have been made by the court carrying out the construction exercise since the applicability of s.6 to an implied representation may depend on the presence of particular factual considerations which may become apparent only following a trial and should only follow the detailed and careful consideration of the issue that the opportunity of a trial presents.
55. Secondly, ADCB is correct to submit that it is at least realistically arguable as a matter of language that s.6 is of no application to representations (whether express or implied) that do not directly concern creditworthiness. The construction for which the defendants contend is a novel one, that if right will materially extend the scope of the 1828 Act. As with the applicability of the 1828 Act to implied representations, it is wrong to reach a decided view on the scope of the 1828 Act as a matter of construction until the appropriate findings of fact have been made and after the detailed and careful consideration of the issue that the opportunity of a trial presents.
56. Thirdly, on its face, s.6 is concerned with representations about the creditworthiness of persons who by reason of representations concerning their creditworthiness “... *may obtain money or goods upon credit* ...”. It is at least realistically arguable that the implied representations on which ADCB relies do not satisfy this requirement. The

Core Facilities are concerned with loans to “*New Medical Centre*” (paragraph 30.1 of the Particulars of Claim), Healthcare, which is a subsidiary of Plc registered in the Abu Dhabi Global Market (paragraphs 30.2, 30.4, 30.5 and 30.6 of the Particulars of Claim) and, the purchase of some certificates issued by NMC Healthcare Sukuk Limited, another Plc subsidiary. It is not alleged that any sums borrowed from ADCB were loaned to Plc either in reliance on the implied representations or otherwise. The representations relied on by ADCB however all concern Plc’s accounts and its case is advanced exclusively on the basis that the Defendants all knew and intended that ADCB’s entry into the Core Facilities would be predicated on its reliance on Plc’s financial statements – see paragraphs 14 and 31 of the Particulars of Claim. That is an issue that will have to be investigated at trial but as a matter of language s.6 at least realistically arguably does not apply in those circumstances. It may well be argued by the defendants that as a matter of purposive construction, a representation concerning the truthfulness of a holding company’s accounts comes within the scope of s.6 even though the borrowers are legally distinct operating subsidiaries. However, that would involve a material extension of the scope of the 1828 Act and one that if right would have to take effect notwithstanding the English law view that in general subsidiary companies are to be treated as separate from their owners. This may involve consideration of the understanding of corporate personality as it was in 1828. However, that is not an issue that can properly be resolved other than against detailed factual findings and after the detailed and careful consideration of the issue that the opportunity of a trial presents.

57. In my judgment these conclusions are fatal to the submission that s.6 is an answer even to the deceit claims that are advanced against the first defendant. Thus to the extent that it is suggested there is no real issue to be determined between the claimant and defendants (including the first defendant for necessary or proper gateway purposes) because s.6 operates as a bar to any such issue being resolved by a court in England and Wales, it is a suggestion that I must reject.

The conspiracy Claim and the Section 6 Point

58. In those circumstances, it is not necessary that I consider further the question whether the conspiracy claim is wholly parasitic on the deceit allegations. I do so only in case I am wrong in the conclusions I have reached so far concerning the application of s.6 to the deceit claims.
59. I accept that if the premise of this submission was correct (namely the conspiracy was a claim that depended wholly and exclusively on the deceit allegations and reliance on those allegations is barred by operation of s.6) then it is probable that (as the defendants maintain) the conspiracy claim would suffer the same procedural bar that in those circumstances the deceit claims would face, applying the reasoning in Clydesdale Bank Limited v Paton [1896] AC 381 *per* Lord Herschell at 393, where he states of the Scottish equivalent of s.6 that it “... *positively forbids any effect being given to those representations. It is impossible to conceive of an enactment in more general or unambiguous terms ...*”. Whilst it is now well established that (a) the tort of conspiracy to injure by unlawful means is a tort of primary liability and (b) the question of what constitutes unlawful means does not depend on whether the use of those means would give rise to a different cause of action independent of conspiracy – see JSC BTA Bank v Ablyazov and another [2020] AC 727 *per* Lords Sumption and

Lloyd-Jones at paragraphs 9 and 11 - it is probable that s.6 will have the effect for which the defendants contend because it is concerned with the effect to be given generally to the representations to which it applies rather than with particular causes of action based on such representations and so would bar reliance of representations coming within the scope of s.6 for whatever purpose a party sought to deploy them in litigation before a court in England and Wales. Indeed, adopting any other view would arguably defeat the purpose of s.6. However, I conclude I should not attempt to resolve this point finally on an application of this sort, particularly since the point is an academic one on the conclusions I have so far reached.

Unlawful Means other than Deceit

60. Assuming that I should have concluded that s.6 precluded ADCB from relying on the fraudulent misrepresentations on which it relies for any cause of action which depends on them, the question that remains is whether ADCB could nevertheless rely on its conspiracy claim if it could not rely on the fraudulent misrepresentations as part of the unlawful means.
61. The unlawful means conspiracy is pleaded in section D of the Particulars of Claim. The unlawful means relied on are pleaded in paragraph 23 as being:

“The unlawful means pursuant to the combination or agreement above included (1) the Defendants' breaches of fiduciary duty in Section E below; and (2) the Defendants' deceits in Sections F to N below.”

Even if, as the defendants allege, ADCB is precluded from relying on the deceits it alleges as being part of the unlawful means, that says nothing about the ability of ADCB to rely on the breaches of fiduciary duty relied on.

62. It is submitted by the defendants that the breach of fiduciary duty claim is demurrable because (a) there is only a generalised plea of intention and (b) there is no plea that the alleged breaches were the specific means by which the defendants (including the first defendant) intended to harm ADCB.
63. Had it been necessary to consider these points, I would have accepted that it was necessary for ADCB to plead and prove that the breach of fiduciary duty alleged was the means by which it was intended to harm ADCB by causing it loss – see JSC BTA Bank v Ablyazov and another (ibid.) *per* Lords Sumption and Lloyd-Jones at [13]-[14]. I accept that if paragraph 22 and paragraphs 25-29 of the Particulars of Claim are read in isolation, it appears that this requirement has not been complied with. However I would have been satisfied that when these paragraphs are read together with paragraph 21, an intention to injure by causing loss by reference to the effects of the breaches alleged is sufficiently pleaded at any rate for the purpose of establishing jurisdiction.

Governing Law of the Claims by ADCB against the First and other Defendants.

64. All the defendants contend that the proper law of the torts alleged is UAE not English law. This is important for two reasons – first it is relevant to an assertion by the defendants that there is no real issue to be tried between the claimant and defendants

(including between the claimant and first defendant in relation to the availability of the necessary or proper party gateway) because ADCB has not pleaded or properly pleaded its case on the basis that UAE law applies and secondly because, if the defendants are correct in their submission that the applicable proper law is UAE law, that will be material to the resolution of the question whether the appropriate forum for determination of ADCB's claim is clearly and distinctly England. By the same token if the governing law is English law then that will provide significant support for the contention that England is the appropriate forum. If it is realistically arguable that either UAE or English law applies then the defendants' UAE law pleading point will disappear as an answer to the real issue to be tried question and the significance of the point for forum purposes will be significantly diminished.

65. This dispute is non-contractual and therefore the system of law that is the governing law of this dispute is to be determined applying Regulation (EC) No 864/2007 Of The European Parliament and of The Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II").
66. The provision of Rome II that is centrally important is Article 4, which provides:

"TORTS/DELICTS

Article 4

General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be 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.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. 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 paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question."

67. ADCB submits that for the purposes of Article 4(1), the damage suffered by ADCB is to be treated as having occurred in England. In support of this proposition, it relies on

the two syndicated facilities that form part of the Core Facilities (The Syndicated Facility Agreement and the Club Facility Agreement) having been made and completed in London, that the facilities were governed by English law and the dispute resolution provisions within each provided for resolution of disputes by a London seated arbitration. It submits that in a case such as this, where it is alleged that ADCB was induced to enter into a loan facility by the alleged deceits of the defendants including the first defendant, the loss occurs at the place where the induced party (here ADCB) enters into the transaction that it alleges that it has been induced to enter into.

68. Pausing only to note that these points apply to only two of the six Core Facilities relied on, Article 4(1) is clear: The governing law that applies is the law of the country in which the damage occurs, not that of the country in which the event giving rise to the damage occurred. Assuming for present purposes that all that ADCB says summarised in the previous paragraph is correct, it may well be that England was the country in which the event giving rise to some of the alleged damage occurred because the or at least some of the Core Facilities were contained in or evidenced by contracts made and completed in London that are subject to English law and a London arbitration clause, but that is nothing to the point because the damage occurred when a UAE based company drew down against or otherwise benefitted from the Core Facilities offered by a UAE based bank. As ADCB accepted in its skeleton argument filed in support of the without notice application to Bryan J, ADCB “... *ultimately acted upon the representations in Abu Dhabi, from where the relevant loan funds were drawn down by NMC Healthcare*”.
69. I do not regard Dicey, Morris & Collins on the Conflict of Laws (15th Ed.), paragraph 35-026 as being in conflict with these conclusions. The issue is essentially a fact sensitive one. The analogy with the release of security referred to in that section is pertinent – it suggests that in a case such as this the damage occurs in the place where the security that is released is located, not the place where the claimant took the decision to release, much less the country where a contract for the release of the security was drafted, entered into or completed or the country whose law that agreement was made subject to or where any arbitration concerning its alleged breach was to be seated. That suggests what in any event is obvious – that the loss occurred in the circumstances of this case where the Core Facility was drawn down or performed, not where the contract to make the facility available was entered into.
70. However the application of Article 4(1) is subject to the applicability of Article 4(2). As to that, the Article must be applied to each claimant (if there is more than one) and each defendant since the Article requires that all parties have their habitual residence in the same country if it is to apply – see Marshall v Motor Insurers’ Bureau [2015] EWHC 3421 (QB) *per* Dingemans J (as he then was) at paragraphs 17–18, where the proposition that the Article could apply only where there was a single claimant and a single defendant was decisively rejected.
71. Turning first to the defendants, they were all habitually resident in the UAE at the time the alleged damage occurred. As ADCB accepted in its submissions made to Bryan J at the without notice hearing: “... *there are reasons to suppose that the Defendants were all habitually resident in the UAE (as was the Bank) at the date of the wrongdoing*”. As Mr Zo’mot (ADCB’s senior official who provided evidence in

support of the without notice application) stated in paragraphs 228-229 of his first affidavit:

“As far as I am aware, until early 2020, all of the six Defendants were based in, and worked from Abu Dhabi in the UAE. I understand that the two Defendants of Emirati nationality, namely Khaleefa Butti and Saeed Butti, are ordinarily resident in the UAE. However, as I explained above, ADCB's inquiries have revealed that Khaleefa Butti and Saeed Butti each departed the UAE for India in early 2020 and we do not know if they have returned.

229. I have explained that the Indian Defendants left the UAE for India in January and February 2020. I believe that BR Shetty is still located in India, I am unaware of the current whereabouts of the other three Defendants who travelled to India.”

The second and third defendants dispute that they departed the UAE as alleged and that ADCB accepted that it may have been wrong in what Mr Zo'mot said on this issue. In any event, the damage occurred before “... *early 2020*...” – see paragraphs 54-59 of the Particulars of Claim. Whilst the habitual residence of a natural person is his or her principal place of business when acting in the course of his or her business – see Article 23(2) of Rome II – there is no suggestion that the defendants' place of business was anywhere other than the UAE at the time the loss occurred.

72. Turning to ADCB, its habitual residence is its place of central administration – see Article 23(1) of Rome II – because it is not suggested that the claim arises from the activities of a branch located elsewhere. In relation to ADCB that is the UAE as was accepted in its skeleton filed in support of the without notice application quoted above.
73. Thus, tested in the way these issues should be, each of the persons alleged to be liable (for present purposes each of the first to fourth defendants) and ADCB were habitually resident in the UAE. If it is relevant to consider the other defendants, that leads to no different conclusion for the reasons identified by Mr Zo'mot in the paragraphs of his first affidavit quoted above.
74. Finally, ADCB submits that even if it fails by reference to Articles 4(1) and (2), its claim is nevertheless manifestly more closely connected with England than the UAE and so it succeeds under Article 4(3). In support of that assertion, it relies on the Defendants being directors or officeholders of Plc, the breach of fiduciary duty claims, the central importance of Plc's financial position to the fraud, that Plc was a LSE quoted company and that the two most significant of the Core Facilities were entered into in England, were subject to English law, completed in London and contained a London arbitration agreement. This leads ADCB to submit that it has a good arguable case that the governing law of its tort claims is English law whilst at the same time submitting that the point does not matter because it has a good arguable case on the merits applying either UAE or English law.

75. In my judgment, that two out of four of the Core Facilities were entered into in England, were governed by English law and are subject to a London arbitration provision is close to immaterial to the issue that arises having regard in particular to the points I have made concerning to whom the loans were advanced, where those entities were administered and where the individual defendants and ADCB were habitually resident. None of the factors relied on by ADCB, either of themselves or when considered with any other factors material to the issue I am now considering, demonstrate that the claimant's claims are more closely connected with England than the UAE, much less "*manifestly*" so. The two Core Facilities were simply mechanisms by which the allegedly dishonest scheme was implemented. This is all the more the case when it is remembered that these points can be deployed in relation to only two of the Core Facilities.
76. I accept that the role of Plc's accounts in the alleged fraud and the reliance placed by ADCB on alleged breaches of fiduciary duty owed by the defendants to Plc mean that there is a connection with England. However, I do not accept that this leads to the conclusion that these factors demonstrate that the claim is even realistically arguably manifestly more closely connected to England than the UAE. On the claimant's case the conspiracy on which it relies was conceived and carried into effect or very largely carried into effect in the UAE by individuals who were habitually resident in the UAE at the material time against ADCB, which had and has its place of central administration in the UAE, which caused alleged losses that occurred in the UAE. As the use of the word "*manifest*" makes clear, Article 4(3) represents the exception rather than the rule – see FM Capital Partners Ltd v Frédéric Marino [2018] EWHC 1768 (Comm) per Cockerill J at paragraph 517; and Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP [2013] 2 BCLC 351 per Flaux J at paragraph 47, where he held that Article 4(3) was to be used "... *on an exceptional basis ...*" where "... *there is a 'clear preponderance of factors' pointing to another country than that indicated by Articles 4(1) and (2)*". As Picken J observed in Avonwick Holdings v Azitio Holdings [2020] EWHC 1844 (Comm) at paragraph 156:

" ... relevant matters include: where the alleged wrongdoing "*was planned, orchestrated and implemented*" which, as Flaux J put it in Fortress Value at [74], may involve focusing on the country in which "*the 'puppet masters' pulling the strings*" carried out the relevant alleged acts, even if other entities carried out other alleged acts in one or more other countries; the places of domicile of the parties ...; the location of the "*damage arising from the tort, whether direct or indirect*" ... ; the location of assets which are "*at the heart of*" the alleged wrongdoing, even if this is not the place where the direct damage occurred for the purposes of Article 4(1) ...; and, as expressly stated in Article 4(3) itself the "*pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question*", in contradistinction to "*mechanisms by which the allegedly dishonest scheme was implemented*""

77. Approached in this way, it is clear that this is not a case where the governing law will even arguably be determined by reference to Article 4(3). The alleged wrongdoing was planned, orchestrated and implemented by the defendants in the UAE, which was the country from which they allegedly “*pulled the strings*”, the country in which they were all habitually resident at the time material to the alleged fraud and the place where the damage occurred.
78. Contract is immaterial on the facts of this case because the contracts on which ADCB rely for present purposes were between it and Plc not any of the entities or individuals involved in the conspiracy and so do not evidence a pre-existing relationship between the parties to this dispute. If and to the extent that ADCB relies on Article 12 of Rome II, that is misplaced for similar reasons – that is because it is not alleged that any of the defendants were parties to any of the agreements it is alleged that ADCB was induced to enter by the deceits or as a result of the conspiracy – see Avonwick Holdings v Azitio Holdings (ibid.) at 162-164.
79. I return to these conclusions when considering the forum issue below. It is relevant for present purposes to whether ADCB has a properly pleaded claim against the first defendant (or any of the other defendants) under UAE law.

The UAE Pleading Point

80. In relation to governing law, the claimant’s pleaded case is in section R of and Schedule 2 to the Particulars of Claim, the substance of which I set out earlier. As the words emphasised in the quotation set out earlier make clear, the schedule is to be read not in isolation from but together with the whole of the rest of the Particulars of Claim.
81. The defendants submit that whilst various principles of UAE law have been set out in Schedule 2 to the Particulars of Claim, no attempt has been made to plead how these principles apply to the facts alleged by ADCB, nor that there is a serious issue to be tried that ADCB relied on any of the alleged Representations. The second and third defendants maintain that ADCB’s pleading on UAE law fails to demonstrate there is a real issue to be tried as between ADCB and the first defendant or that there is a real issue to be tried as between ADCB and the second or third defendants, once it is accepted that it is UAE law that is the governing law of the dispute.
82. In Brownlie v. FS Cairo (Nile Plaza) LLC [2021] UKSC 45; [2021] 3 WLR 1011, the relief sought had been damages pursuant to Egyptian law but the Particulars of Claim had not specified any provision of Egyptian law on which the claimant relied and the expert evidence relied on passed the evidential threshold for service out in relation to some but not all the causes of action relied on. The claimant had maintained that to the extent this was so she was entitled to rely on English law in the absence of any satisfactory evidence of the relevant foreign law. It was in that context that Lord Leggatt JSC held (and the other members of the panel agreed) that:

“The rationale for applying English law by default ... depends upon neither party choosing to advance a case that foreign law is applicable. If either party pleads that under the relevant rules of English private international law foreign law is applicable to an obligation, and that case is well founded, it is the duty of the

court to apply foreign law. To apply English domestic law in that situation would *ex hypothesi* be unlawful. In accordance with general principle, the burden is on the party who is making or defending a claim, as the case may be, to prove that it has a legally valid claim or defence. Where the law applicable to the claim or defence is a foreign system of law, this will require the party to show that it has a good claim or defence under that law

...

I cannot accept that it is consistent with legal principle, however, to apply English law by default if the party who has the burden of proving that it has a good claim or defence under foreign law fails to do so. An English judge does not in that event still have to adjudicate - if by that is meant decide the case by applying a system of law (English law) which has been shown not to be applicable. Rather, the ordinary consequence must follow that, if a party fails to prove its claim or defence, the claim is dismissed or the defence rejected. Where it is asserted and established that the applicable law is a foreign system of law, there is simply no scope for applying English law in its own right.” [Emphasis supplied]

83. Lord Leggatt went on to hold that where it was agreed that a claim was subject to foreign law or a party had decided to plead that it was then it became “... *incumbent on the claimant to specify in her statement of case any rules or provisions of Egyptian law on which she intends to rely so that the defendant knows in outline the case it has to meet*” – see paragraph 165. When Brownlie v. FS Cairo (Nile Plaza) LLC (ibid.) had been before the Court of Appeal, it had directed the claimant to serve revised particulars of claim pleading the content of Egyptian law, including the relevant principles and sources, on which she relied and upon which each of the claims was based. The Supreme Court rejected the claimant’s challenge to that direction.
84. In the context of applications such as this, if a claimant chooses to rely on foreign law (as here ADCB has chosen to do in the alternative to its case that English law is at least realistically arguably the governing law of the dispute) it will be for that party to plead its case or alternative case with at least the precision required by the Court of Appeal in Brownlie v. FS Cairo (Nile Plaza) LLC (ibid.) and if there is a challenge to the accuracy of what is pleaded to prove the correctness of what is alleged to the level of reasonable arguability, probably by expert evidence.
85. Returning to this case, the defendants have asserted that UAE law applies and ADCB has accepted that it might arguably do so. Since UAE law is the governing law of the claim and English law is not at least realistically arguably the governing law, the hurdle that ADCB must overcome is to show a real prospect of success based on the foreign law that it relies on (UAE Law) in the alternative to its case concerning English Law.
86. Unlike in Brownlie ADCB has set out in Schedule 2 to the Particulars of Claim the rules or provisions of UAE law on which it intends to rely. It maintains that this is

sufficient applying the principles set out above because that schedule when read with the rest of the pleading as a whole sets out the provisions of UAE law on which ADCB intends to rely and on which each of its claims is based so that the defendants know in outline the case they have to meet.

87. In paragraph 3 of Schedule 2 to the Particulars of Claim, ADCB alleges that “... *each of the Defendants committed acts of harm within the meaning of Article 282 of the Civil Code...*”. The defendants allege that no attempt has been made to identify the particular acts relied on as constituting the acts of harm alleged or whether the harm alleged is direct or consequential even though it is common ground that UAE law distinguishes between direct and consequential harm with different requirements for each.
88. I do not accept that at a factual level there has been a failure to identify the acts relied on as constituting the acts of harm relied on. They are as I have summarised them earlier in this judgment. As I have said already and repeat Schedule 2 to the Particulars of Claim cannot be read in isolation from the rest of the pleading and should be read as meaning simply that if the factual allegations made in the main body of the pleading are proved then as a matter of UAE Law the defendants are liable applying the principles of UAE Law summarised in Schedule 2 to the Particulars of Claim.
89. However that focuses attention on whether ADCB’s case on UAE law passes the relevant threshold or can be shown to be demonstrably unsupportable. If ADCB has shown a realistically arguable case against each defendant applying the principles of UAE Law summarised in Schedule 2 to the Particulars of Claim that is sufficient for present purposes. It is common ground between the parties that UAE law does not recognise a cause of action based on conspiracy. It follows therefore that two broad questions arise – namely whether (a) the deceit allegations made against the first and fourth defendants are realistically arguable applying the principles of UAE law identified in the schedule and (b) whether there is a realistic prospect of success against the second and third defendants based on the allegations made against them, which in relation to the paragraphs 29, 43 and 50 allegations in the Particulars of Claim is that they “... *procured, instructed, encouraged, authorised and/or adopted ...*” the Representations (other than the Compliance Certificate Representation).

The Pleading of Consequential Harm

90. The focus of all the defendants’ submissions has been on whether a sufficiently coherent case has been pleaded by reference to the harm which is it is alleged has been caused by the defendants. Since this point is common to all defendants I address that first below. I then turn to deceit allegations made against the first and fourth defendants, where the issues are whether intention has been sufficiently pleaded and can be made good on the factual allegations made and whether on the factual case alleged a realistically arguable case of reliance has been made out. I then turn to the allegations against the second and third defendants.
91. Leaving the concept of direct harm to one side, it is common ground between the experts that consequential harm is harm caused by an act that triggers some other

consequence leading to the harm it is alleged has been suffered. The defendants' UAE law expert states in his first opinion that:

“... where the harm is caused by a consequential act, one of two conditions must be satisfied being that:

- (a) There has been an infringement or a deliberate act; or
- (b) The act leads to the damage or harm.

14. The application of these principles was considered in numerous rulings of the Courts of Cassation (or equivalent) of all Emirates in a similar manner. I will be relying on authorities issued by the Dubai Court of Cassation as these are more conveniently accessible through the Dubai Courts' online portal. The meaning of what constitutes an infringement or deliberate act was considered by the Dubai Court of Cassation in Cassation Appeal No. 302/2003 Rights (Exhibit 3). The court explained that:

- (a) An infringement is where the perpetrator carries out an act that he/she is not entitled to carry out;
- (b) Being deliberate is about deliberately wanting to cause the harm not being deliberate in the act itself;
- (c) The act leading to harm means that the nature of the act is one that normally causes harm. These acts are those which inherently or by their nature cause harm such as starting a fire or firing a gun towards a person.

15. The cited Court of Cassation ruling indicates that the meaning of infringement can encompass any matter that a person is not entitled to carry out. These would include for example breaches of laws, company policies, or in some circumstances what is customary. This will certainly include breaches of UAE Law. There is no clear answer as to whether a breach of a foreign law would also qualify as an infringement.”

ADCB's UAE law expert agrees with this analysis – see paragraph 47 of Mr Al Aidarous's second Opinion.

92. The defendants submit that ADCB's pleaded case concerning harm other than harm caused by deceit is limited to that set out in paragraph 3 of Schedule 2 to the Particulars of Claim set out above and so fails to identify whether its case is based on an allegation of direct or consequential harm and if the latter how it is alleged the requirements have been met. It is further submitted that there has been no attempt to identify the alleged acts of harm that are relied on by paragraph 3 of Schedule 2 to the Particulars of Claim.

93. The same points are made by reference to the allegation made in paragraph 5 of Schedule 2 to the Particulars of Claim concerning deceit. In that paragraph it is pleaded that “... *for the reasons particularised herein each of the Defendants committed deceits within the meaning of Article 285 of the Civil Code*”. This is an attempt to cross reference the generalised allegation in that paragraph back to the factual allegations made in the main body of the pleading summarised above and is reflective of what is pleaded in paragraph 72 of the Particulars of Claim by which it is alleged that by “ ... *the case pleaded herein ...* ” and applying the principles of UAE law set out in Schedule 2 to the Particulars of Claim , ADCB has met the requirements of UAE law so as to entitle it to succeed in its claim applying that law.
94. The defendants allege that it is probable that ADCB asserts it has suffered consequential harm. That is probably so but the absence of a specific averment of that effect does not preclude the defendants from understanding the case they face or from pleading to what is alleged. It is open to them to plead that harm must either be direct or consequential; that on the facts alleged direct harm has not been caused and so any harm alleged must be proved to be recoverable consequential harm. However, the defendants argue that it is necessary for ADCB to plead a positive case as to the basis on which it is alleged that damages for consequential loss are recoverable by identifying whether it alleges that the defendants acted unlawfully, or deliberately so as to cause harm to it, and if so in what respect. The defendants argue that this has not been done and so on the pleading as it is currently structured no serious issue to be tried on the merits has been demonstrated against any of them.
95. ADCB submits that this is an attempt to obfuscate with detail. It is sufficient for present purposes to show (as the expert evidence available to the Court demonstrates) that claims for misrepresentation including deceit can be made as a matter of UAE law and that is all that is required for present purposes because “ ... *the expert reports plainly show that if the Bank succeeds at trial in establishing the facts it pleads, then based on the principles of UAE law set out in Schedule 2 ... the Bank has a good arguable case that the Defendants will be liable under UAE law*”.
96. I consider that the submissions made on behalf of the defendants focus too much on Schedule 2 to the Particulars of Claim and not enough on the rest of the pleading. Deceit is clearly not an act that the defendants are entitled to carry out as a matter of UAE law and equally plainly is available as a cause of action in the UAE. Where deceit is proved then it is at least realistically arguable that loss caused consequentially will be recoverable because at least the first and third of the alternatives referred to by the experts would be made out at least to the level of realistic arguability. In any event the suggestion that the defendants cannot plead to what has been alleged is wrong: The factual allegations made are pleaded in the main body of the pleading and can be pleaded to whether the claim is advanced on the basis that the governing law is English law or UAE law. If the defendants wish to assert that the loss claimed is not harm for which compensation is recoverable as a matter of UAE law then that can be pleaded by reference to each of the three alternatives coupled with an assertion (if that is what is to be asserted) that none of them apply or have been made out on the allegations that have been pleaded. Equally, it will be open to ADCB to address any such assertions by way of a Reply. In those circumstances I reject the notion that on the case that has been pleaded against the defendants there is

not a real issue to be tried as a matter of UAE law. None of this supports the proposition that what has been pleaded is demonstrably untrue or unsupportable.

97. In relation to the second and third defendants as I see it, if the allegations made against them – that they “... *procured, instructed, encouraged, authorised and/or adopted* ...” the Representations – constitutes harm actionable as a matter of UAE law, then the question that arises is whether it is realistically arguable that consequential loss suffered as a result will be recoverable. That issue is one I turn to below.
98. I now turn to the issues concerning intention and reliance that arise in relation to the deceit allegations.

Pleading of Intention to Deceive

99. There is a dispute about the extent to which it is necessary in UAE law to prove an intention to deceive when alleging deceit and a suggestion that because intention must be established either actually or presumptively as a matter of UAE law, it follows that a claimant must logically plead and establish either a realistically arguable positive case on intention, properly particularised, or plead the presumption said to arise under UAE law and plead reliance on it. It is asserted that this has not been complied with because “... *All ADCB has done is to plead that “each of the Defendants committed deceit” (PoC, Sch 2 §5), without making any reference to intention....”*
100. In my judgment, the pleading point concerning intention does not lead to the conclusion that there is no real issue to be tried as between ADCB and the first and fourth defendants. The claimant’s expert’s opinion is that intention to deceive is presumed where a deceptive statement is made and is shown to have been false. The representations on which ADCB relies are expressly alleged to have been untrue when made – see paragraph 60 of the Particulars of Claim. ADCB’s case as to the defendants’ knowledge that the representations were false is set out in Section N of the Particulars of Claim. Critically, at paragraph 22 of the Particulars of Claim it is expressly pleaded that:

“The Defendants used NMC plc’s financial statements and associated representations to deceive ADCB into providing credit facilities.”

This material read together sets out a sufficient factual case on intention that satisfies me to the standard required for this part of the enquiry that there is a real issue to be tried between ADCB and the defendants. The pleading is sufficiently clear to explain that damages are claimed by reference to the deceptions alleged and the expert evidence available demonstrates that there is between ADCB and the first defendant a real issue to be tried as to whether intention must be separately proved or is to be presumed. If the defendants’ case is to be that intention must be pleaded and proved and is not to be assumed then it will be open to them to plead that in their defences. That is an issue in dispute and so is not a point that enables the defendants to show that there is not a real issue to be tried applying UAE Law. The only question at this stage is whether ADCB has shown that there is a real issue to be tried as between it and each of the defendants and I am satisfied that it has when Schedule 2 to the Particulars of Claim is read together with the rest of the pleading as a whole.

The Reliance Issue

101. The next issue that arises in relation to the deceit claims is whether and if so to what extent reliance must be pleaded and proved as a matter of UAE law and whether ADCB's pleaded case is sufficient to demonstrate that there is a real issue to be tried between the claimant and the first and fourth defendants (or for that matter the other defendants alleged to have been directly involved in making the Representations) on that issue. It is submitted that there is no real issue to be tried as between ADCB and the first defendant because ADCB has failed to produce any evidence that its officials were aware of the implied representations and acted on them.
102. ADCB's case on inducement and reliance is pleaded in Section L of the Particulars of Claim summarised above.
103. I accept that as a matter of UAE law it would appear to require that the person to whom the fraudulent misrepresentation is directed must have acted in reliance upon the misrepresentation for a claim to succeed. This much would appear to follow from the terms of Article 285, which refers in terms to "... *the harm resulting from that deception.*". This appears to be acknowledged by ADCB's own expert at paragraph 63 and following of his second opinion. There he refers to a commentary on Article 285 as defining deceit as meaning "... *making somebody accept what is no good by lying and misleading means, inducing him to proceed, in a circumstance where if he had known the truth he would not have proceeded.*" It continues that there is no deceit unless it is used "... *as a means of inducement ...*" as "... *where one persuades another to perform an act, leading him to believe that it is not dangerous, when in fact it is dangerous, and loss results*".
104. This leads the defendants to submit that whether UAE or English law applies, reliance cannot be proved unless the claimant (or in the case of a corporate claimant the relevant decision maker) is aware of the misrepresentation. The defendants allege that ADCB has failed to demonstrate that the implied representations on which it relies were known to any of its decision makers and that in those circumstances, there is no serious issue to be tried that ADCB relied on the alleged representations.
105. I accept that, in principle, proof that the representee had been aware of the representation is a constituent part of a case in misrepresentation and that a claim has no real prospect of success where the claimant fails to plead awareness or understanding of the relevant representation – see Leeds City Council v. Barclays Bank plc [2021] EWHC 363 (Comm); [2021] 2 WLR 1180. Although that case was decided on the basis that English law was the governing law, there is no basis for concluding the position is different when UAE law is the governing law once it is accepted that reliance must be proved if a claim in deceit is to succeed. There can be no reliance unless the representee is aware of the representation. That said, there is a disputed issue of UAE law that I cannot resolve on this application to the effect that if a claimant proves a deception and harm the claimant then does not have to prove causation, which is assumed.
106. Turning now to the evidence that is available, the first affidavit of Mr Zo'mot addressed this issue in paragraph 66 in these terms:

“The Bank relied upon the relevant false representations and was induced by them to enter into, and/or renew the Core Facilities extended to NMC Healthcare. Had the true position been known, the Bank would not have entered into or continued those Core Facilities, on the same terms or at all.”

That is consistent with ADCB’s pleaded case as summarised earlier.

107. In his subsequent witness statement, Mr Zo’mot confirms that he had oversight but not daily contact with representatives of the Group – see paragraph 131 – and that “... *Mr Ahmed and Mr Al Khaldi had the key day-to-day contact with NMC ...*” – see paragraph 132. There is no evidence from either of these officials. Having set out the stages that Mr Zo’mot says applies to lending proposal reviews, he then states:

“ADCB’s lending decisions were therefore reliant on the provision of accurate financial and business operations material from the customer because we relied on this data in preparing the memorandum that is ultimately passed up the chain and on which lending decisions are made. The above steps were generally applied in relation to the decisions to lend monies under the Core Facilities to the NMC Group.”

All this leads the second and third defendants to submit that what is missing:

“... is a single paragraph in a witness statement, or any document, which establishes that one or more relevant employees/agents of ADCB were aware that the Representations had been made or had them in mind at the time that the various Core Facilities were entered into or renewed. Indeed, ADCB has not even pleaded a case to that effect, nor does it seek to do so as part of its proposed amendments.”

108. In my judgment whilst these submissions would be appropriate at the end of a trial when all the relevant evidence can reasonably be expected to have been adduced, they are not in the context of the applications that I am considering, where the only question is whether there is a real issue to be tried. The function of this hearing is not to conduct a mini trial, nor does it involve ignoring the likelihood that at a trial more evidence is likely to be available than on an application of this sort – a factor that a court is specifically required to take into account on a summary judgment application – see the principles identified by Lewison J, as he then was, in Easy Air Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch), as summarised and approved by the Court of Appeal in TFL Management Services Ltd v Lloyds Bank Plc [2013] EWCA Civ 1415, which include that in reaching its conclusion on a summary judgment application, the court must take into account not only the evidence actually placed before it but also the evidence that can reasonably be expected to be available at trial. Furthermore, as I explained at the outset of this part of this judgment the current approach to applications of this sort is that factual averments made in support of the claim should be accepted unless, exceptionally, they are demonstrably untrue or unsupported. I cannot reject the evidence of Mr Zo’mot applying those principles or

conclude that even if what he says is correct there is nonetheless not a sufficient case in reliance demonstrated.

109. These factors lead me to conclude that the issue I am now considering is not one that should lead me to conclude that there is no real issue to be tried between ADCB and the defendants.

Pleading of Claim against Second and Third Defendants

110. The next issue that arises concerns the basis on which a defendant may be made liable for the acts of another. In summary ADCB alleges that it was caused harm by these defendants procuring, instructing, encouraging, authorising and/or adopting the Representations and in particular the Accounts Representations. It is also alleged that the defendants “... *all knew and intended that ADCB’s entry into the Core Facilities would be predicated on its reliance on NMC plc’s financial statements ...*” and that they knew the Representations were false or alternatively that the second and/or third defendants learned of the representations after the event and profited from them.
111. It is clear that conspiracy as a concept does not exist in UAE law but that there is what is said by ADCB to be a functional equivalent. Mr Bajamal (the defendants’ UAE law expert) states at paragraphs 52-53 of his First Opinion:

“I am instructed to address the question of whether UAE Law recognises conspiracy as a cause of action. The answer is that in the context of civil liability this concept does not exist in UAE Law. When faced with a claim that involves allegations of a conspiracy by a number of persons the UAE Courts will assess the individual/joint acts of each of the defendants under the general principles explained above with a view to reaching a conclusion as to whether all or some of the defendants should be held liable and in which proportions.

53. Therefore whilst there is no legal principle classifying concerted action as a conspiracy, UAE law has another principle under which such acts would be subject to legal scrutiny and an assessment of liability for each defendant.”

The functional equivalent is that addressed in paragraphs 40-41 of Mr Bajamal’s First Opinion namely whether and if so in what circumstances may defendants be held jointly and severally liable for harm caused under either Articles 282-284 or Article 285 of the UAE Civil Code. Mr Bajamal states that this question is answered by Article 291, which provides that “*If a number of persons are responsible for a harmful act, each of them shall be liable in proportion to his share in it, and the judge may make an order against them in equal shares or by way of joint or several liability.*” However that begs the question on what basis in UAE law can a defendant be made liable for the acts of others. The defendants submit that this is limited to cases where vicarious liability may be imposed applying Article 313 of the UAE Civil Code. The point made on behalf of the second and third defendants is that although there is an allegation that the defendants are jointly and severally liable for the acts of harm and deceptions relied on, no attempt has been made to plead how the requirements of UAE law have been satisfied in relation to this allegation.

112. The only basis on which it is alleged in Schedule 2 to the Particulars of Claim that the second and third defendants could be liable is by reference to Article 291 – see paragraphs 4 and 6 of Schedule 2 to the Particulars of Claim. This engages an issue which in my judgment can only be resolved at a trial, which is whether, aside from vicarious liability, a defendant can be liable for harm including consequential harm caused by procuring, instructing, encouraging, authorising or adopting a wrong committed by another. Whilst I can see that the concept of vicarious liability might be relevant to an allegation of authorising another to commit a wrong, that does not to my mind lead to the conclusion that procuring, encouraging or adopting a wrong committed by another is not of itself a harm that comes within the scope of Article 282 since that would be as much a harm caused to the claimant as that which was procured encouraged or adopted. If that is not so then it would be a startling omission from a civil law code of obligations. As the commentary to the UAE Civil Code says of Article 282, “...*The legislator in this article establishes general principle to the effect that any action causing damage to another should be made good ...*” – see paragraph 29 of the expert report of Mr Al Aidarous. The very broad and general scope of that provision is embedded as a fundamental principle of Islamic law, which in turn is embedded in the UAE Civil Code as one of its basic principles – see Article 42 and paragraph 30 of Mr Al Aidarous’s opinion. The concept of liability is not fault based - see paragraph 31 of Mr Al Aidarous’s opinion. As he puts it in paragraph 32, “... *under UAE law, harmful acts are governed by a general principle that covers any harmful act that can possibly be carried out.*”
113. On this analysis vicarious liability becomes a side issue and the only true issues (assuming the factual allegations made are proved) are whether consequential loss would be recoverable in the circumstances alleged and to decide where relative liability is to be allocated applying Article 291. As to the first of these points I consider it realistically arguable that a court could readily conclude that procuring one of the Representations was deliberately causing harm to ADCB given that it is alleged the defendants “... *all knew and intended that ADCB’s entry into the Core Facilities would be predicated on its reliance on NMC plc’s financial statements ...*” and that they knew the Representations were false. In any event, on ADCB’s case, the acts alleged against the second and third defendants actually caused harm, which is the alternative basis on which consequential loss is recoverable as a result of harm being inflicted. In my judgment it would be unsafe to attempt to dismiss out of hand this analysis at this stage. I am aware that these conclusions would not necessarily be accepted by the defendants’ UAE law expert but they are entirely consistent with the analysis of the claimant and are plainly at least realistically arguable.
114. For the reasons set out above, I am satisfied that ADCB has demonstrated as against each of the first to fourth defendants that there is a serious (that is more than fanciful) issue to be tried between them.

The Gateway Issues

115. It is next necessary to decide whether ADCB has demonstrated a good arguable case including a plausible evidential case that its claim against each defendant passes through one of the jurisdictional gateways set out in paragraph 31 of CPR, Practice Direction 6B (“PD6B”)

The Necessary or Proper Party Gateway - Service of Anchor Defendant

116. The primary gateway on which the claimant relies is the necessary or proper party gateway. It requires that:

“(3) A claim is made against a person (‘the defendant’) on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –

(a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.”

117. In order to rely on the necessary or proper party gateway the claimant must first serve the claim form on a defendant (usually referred to as the “*anchor*” defendant) otherwise than by relying on the necessary or proper party gateway.

118. ADCB’s case on this point is that it was entitled to and has served the first defendant under s.1140 of the Companies Act 2006 and that in consequence the first defendant is the anchor defendant for the purposes of the necessary or proper party gateway. The defendants argue that as a matter of construction ADCB could not serve the first defendant under s.1140 as long as he was out of the jurisdiction at the time when it purported to serve him using that provision.

119. S.1140 of the 2006 Act provides:

“1140. Service of documents on directors, secretaries and others

(1) A document may be served on a person to whom this section applies by leaving it at, or sending it by post to, the person's registered address.

(2) This section applies to—

(a) a director or secretary of a company;

(b) in the case of an overseas company whose particulars are registered under section 1046, a person holding any such position as may be specified for the purposes of this section by regulations under that section;

(c) a person appointed in relation to a company as—

(i) a judicial factor (in Scotland),

(ii) an interim manager appointed under section 76 of the Charities Act 2011 ..., or

(iii) a manager appointed under section 47 of the Companies (Audit, Investigations and Community Enterprise) Act 2004 ...

(3) This section applies whatever the purpose of the document in question. It is not restricted to service for purposes arising out of or in connection with the appointment or position mentioned in subsection (2) or in connection with the company concerned.

(4) For the purposes of this section a person's "registered address" means any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection.

(5) If notice of a change of that address is given to the registrar, a person may validly serve a document at the address previously registered until the end of the period of 14 days beginning with the date on which notice of the change is registered.

(6) Service may not be effected by virtue of this section at an address—

(a) if notice has been registered of the termination of the appointment in relation to which the address was registered and the address is not a registered address of the person concerned in relation to any other appointment;

(b) in the case of a person holding any such position as is mentioned in subsection (2)(b), if the overseas company has ceased to have any connection with the United Kingdom by virtue of which it is required to register particulars under section 1046.

(7) Further provision as to service and other matters is made in the company communications provisions (see section 1143).

(8) Nothing in this section shall be read as affecting any enactment or rule of law under which permission is required for service out of the jurisdiction."

120. It is not in dispute for present purposes that at the date when the order giving permission to serve out was made by Bryan J, the first defendant was the director of two English registered companies and had provided a registered address in England as defined by s.1140(4), which was in consequence the first defendant's registered address for the purposes of s.1140(1).

121. ADCB submits that a person who is the director of a company who has supplied an address for service can be served in respect of any claim against the director in any capacity because the availability of this service route is “... *not restricted to service for purposes arising out of or in connection with the appointment or position mentioned in subsection (2) or in connection with the company concerned* – see s.1140(3) and is available even if the director is not resident within the jurisdiction as long as the registered address is in England and Wales.
122. The defendants submit that this approach should be rejected because they argue that the effect of s.1140(8) is to limit the availability of s.1140 as a method of service to cases where the director or other official identified in s.1140(2) is already within the jurisdiction. They submit that the consequence of arriving at a contrary conclusion is to permit the necessary or proper party gateway to be used in a manner that is exorbitant and arbitrary because it permits foreign defendants with no connection to this jurisdiction to be forced to litigate a dispute here simply because the anchor defendant happens to be a director of a company (including a foreign company) who happens to have provided a registered address in England or has had one provided on his behalf. The defendants submit that this case is a particularly stark example because the first defendant has been habitually resident in the UAE for almost 50 years and was and was known to ADCB to be living in India at the date when it purported to serve him in accordance with s.1140 and it is only by relying on s.1140 that ADCB is able to assert jurisdiction over any of the defendants, none of whom are (or have been) resident or domiciled in England and Wales and none of whom have any real connection with this jurisdiction.
123. Although I have some sympathy with the submissions made by the defendants concerning the effect that ADCB’s construction has on the availability of the necessary or proper party gateway, I am bound to reject their alternative construction of s.1140 both because it is wrong as a matter of construction and contrary to decided authority that I am bound to follow unless satisfied it is plainly wrong. My reasons for reaching these conclusions are as follows.
124. To hold that this method of service is not available in respect of a director who happens at the time when service is affected not to be resident in the English jurisdiction would itself be at least potentially arbitrary and even if the test was one of domicile rather than residence it would significantly reduce the practical utility of providing for this method of service. There is no reason why a director who is resident or domiciled abroad but who provides a “*registered address*” in England should be incapable of being served there without permission to serve out of the jurisdiction being obtained any more than would be the case where service is by a contractually agreed method in accordance with CPR r.6.11.
125. S.1140(8) has been included because it is open to a director to provide an overseas “*registered address*”. This provision is required in those circumstances because, by CPR r.6.6, a Claim Form must be served within the jurisdiction save where one of the two exceptions referred to in that rule applies. Where a foreign based director supplies a “*registered address*” within England and Wales then that director can be served there without permission being obtained but if a director provides a foreign “*registered address*” then permission to serve out at that address is required.

126. These conclusions are consistent with a number of previously decided cases, each of which decided that permission to serve out was not required where a “*registered address*” in England had been provided – see Key Homes Bradford Limited v. Patel [2015] 1 BCLC 402; Idemia France SAS v Decatur Europe Limited [2019] EWHC 946 (Comm) per Richard Salter QC at paragraphs 125 – 126; Njord Partners SMA Seal v Astir Maritime [2020] EWHC 1035 (Comm) and PJSC Bank Finance and Credit v. Zhevago [2021] EWHC 2522 (Ch.), where at paragraph 55 Sir Julian Flaux C held the earlier cases had been correctly decided. As I said earlier, I am bound to follow these authorities unless satisfied that they are plainly wrong. I am not so satisfied.
127. Two points remain. First, it might be thought surprising that a provision within the Companies Act that applies to directors or company officials would apply to proceedings brought against them other than in their capacity as directors or company officials. However, that is the clear legislative effect of s.1140(3).
128. Secondly, although the defendants submit that the construction I found to be correct should be rejected because of its exorbitant effect when combined with the necessary and proper party gateway, in my judgment that ignores the constraint provided by CPR r.6.37(3), which precludes permission being granted to serve proceedings out of the jurisdiction unless the court is satisfied that England and Wales is the proper place in which to bring the claim. It also ignores the constraint imposed by the requirement that before permission can be granted under the necessary or proper party gateway, the court must be satisfied that there is between the claimant and the anchor defendant a serious issue to be tried on the merits applying the summary judgment test. The requirement that a claimant show there is a real issue between it and the anchor defendant is designed to ensure that a party who is out of the jurisdiction cannot be brought within the jurisdiction by reference to a claim against an anchor defendant that is bound to fail and which is being used as a device to bring the non-anchor defendants into the jurisdiction – see Altimo Holdings and Investment Ltd v. Kyrgyz Mobil Tel Ltd (ibid.) *per* Lord Collins at paragraphs 80 and 82.
129. For these reasons I reject the defendants' submissions as to the effect of s.1140 both as a matter of principle and because the contrary is not arguable below the Court of Appeal. In those circumstances I conclude that the first defendant has been properly served in England and so is capable of being an anchor defendant for the purposes of the necessary or proper party gateway.

Anchor Defendant – Real Issue to be Tried

130. I have already decided that there is a real issue to be tried as between the claimant and the first defendant and each of the second to fourth defendants. I need say no more about that issue.

Necessary and Proper Party Gateway – Other issues

131. As I set out earlier, as Lord Briggs summarised the position in Lungowe and others v Vedanta Resources plc and another (ibid.) at paragraph 20, it is necessary for me to be satisfied in addition (i) that it is reasonable for the court to try the real issue between the claimant and anchor defendant; (ii) that the foreign defendant is a necessary or proper party to the claims against the anchor defendant and (iii) either England is the

proper place in which to bring the combined claims or that there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place, or the convenient or natural forum.

132. As to these issues, it is not contended that it is not reasonable for the court to try the real issues between the claimant and first defendant (or the other defendants) other than by reference to the *forum conveniens* issue to which I turn at the end of this judgment. It is not suggested that the second to fourth defendants are not proper parties, assuming that the first defendant can be properly regarded as being the anchor defendant for the purposes of the necessary or proper party gateway and in any event they are on the basis of the conclusions I reached earlier concerning whether there is a real issue to be tried as between them and ADCB. It is not suggested that the first defendant has been sued merely for the purpose of obtaining jurisdiction against the other defendants. On ADCB's pleaded case he is a major participant in the fraudulent scheme in respect of which it brings proceedings. I address the forum conveniens and allied discretionary issues at the end of this judgment.

Other Gateways

133. *6BPD 3.1(9)(b)*

As I summarised at the start of this judgment, ADCB seeks to rely on CPR 6BPD 3.1(9)(b) against all defendants further or alternatively to its reliance on the necessary or proper party gateway. As stated already, that requires that ADCB demonstrates a plausible evidential case that damage “*has been or will be sustained that results from an act committed, or likely to be committed, within the jurisdiction*”.

134. Since this gateway is relied on against each of the defendants it will be necessary to consider them individually and by reference to each factual allegation made and each cause of action relied on. In relation to each, the focus is on whether a “*substantial or efficacious act*” has been committed within the jurisdiction - see Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc. [1990] 1 QB 391 at 437.
135. In support of its submission that its claims can pass through this gateway, ADCB submits that the Defendants used Plc “... *to present a fraudulent edifice to the world ...*” by the creation, promulgation and implied endorsement of accounts for Plc that were and were known to be false and that it is alleged involved the defendants deceiving Plc's board, its auditors and the London Stock Exchange. ADCB also relies on the point referred to earlier that in relation to two of the Core Facilities, the relevant agreements had been drafted in London by Linklaters, were completed in London, were subject to English law and a London arbitration agreement and that some of the defendants at least were directors or senior managers of Plc. No other allegedly efficacious acts are relied on by ADCB for these purposes.
136. The defendants submit this is all misconceived. They submit that a rolled up approach of this sort is wrong and that it is necessary to look at each defendant separately and in relation to each ask what factual allegations are made against that defendant and what causes of action are relied on. In any event, they submit first that Plc's accounts were not published in London as alleged by the claimant but on the Group's website, which is on a UAE domain – see paragraph 52 of the second witness statement of the second and third defendants' solicitor Mr Mascarenhas, where he states:

“52.1 NMC Health plc was incorporated on 20 July 2011. For every year from 2012 until 2018 (the last full year for which accounts are available), NMC Health plc’s annual reports and accounts appear to have been published on the group website at www.nmc.ae . This website has a UAE domain. Whilst at present, only the 2016 annual report appears on the website, all of the annual reports state on their face that they can be viewed on the group website. For the years 2012 and 2013, this is referred to as www.nmc.ae. For the years 2014 to 2018, the annual reports give the web address www.nmchealth.com. When this latter address is typed into a browser, it redirects to www.nmc.ae, and so appears to be the same website, hosted on a UAE domain.

52.2. NMC Health plc’s annual reports and accounts are also available on Companies House. However, it appears that the annual reports for the years relevant to ADCB’s claim (i.e. 2015, 2016, 2017 and 2018) were only published on the website of Companies House some time after their original publication ...

54. The publication of NMC Health plc’s annual reports on its website in the UAE is consistent with the fact that there appears to be no English website for the company. The only NMC website identified by my colleague from a Google search was www.nmc.ae, which states that “*NMC Healthcare is the largest private healthcare company in the UAE*”. This appears also to be the website for NMC Health plc itself, since the Stakeholder Information page shows NMC Health plc’s registered office in the UK and other details for that company.”

The defendants also submit that in any event, where the accounts were published is immaterial because the Core Facilities were negotiated and managed in the UAE. It is not suggested that ADCB gained access to the accounts other than via the Web which could only have been accessed in the UAE since as I have said it is not alleged that ADCB had a place of business anywhere else.

137. As I have said a number of times already, all the relevant parties were located at the relevant time in the UAE. I am satisfied that the accounts that form the basis of the Accounts Representations were published in the UAE and in any event were considered by ADCB’s officials in the UAE. The two officials with everyday responsibility for managing ADCB’s relationship with the Group lived and worked in the UAE. The alleged misrepresentations were acted on if they were acted on at all in the UAE and the funds advanced by ADCB were drawn down in the UAE by entities that were managed and operated exclusively in the UAE. The defendants rely on these factors as supporting the proposition that the events that took place in England and Wales could not even arguably be “*substantial or efficacious*”.
138. As the authorities in this area make clear however, a court considering the paragraph 3.1.9(b) gateway has to look at the tort alleged in a common sense way and decide

whether damage has resulted from substantial and efficacious acts committed within the jurisdiction (whether or not other substantial and efficacious acts have been committed elsewhere) – see Metall und Rohstoff v Donaldson, (ibid.) at 437 E-G [emphasis supplied]. It has to look at the issue separately in relation to each defendant against whom the gateway is relied on. Bearing in mind the words in parenthesis quoted above the facts and matters relied on by the defendants and summarised in the previous paragraph are nothing to the point if, viewed in a common sense way, the facts and matters on which ADCB relies were themselves “*substantial or efficacious*”.

139. The SFA Representations, the CFA Representations and the Compliance Certificate Representations are all implied representations, said by ADCB to have arisen from the signature by one or more of the fourth defendant or sixth defendant. The fourth and sixth defendants' evidence is that these documents (which concerned lending to a UAE company by a UAE bank) were executed in the UAE. They have no connection with England.
140. The Accounts Representations are all implied representations. It is in relation to this set of allegations that the factors relied on by ADCB could arguably be relevant.
141. There is no pleaded case that either the second or third defendants actually made any of the representations on which reliance has been placed in the Particulars of Claim. The case against them is that they “... *procured, instructed, encouraged, authorised and/or adopted* ...” the Representations made relevantly for present purposes by the first and fourth defendants. That is activity that could only have taken place in the UAE.
142. Conspiracy is not material because I have concluded that UAE law is the governing law and that system of law does not recognise conspiracy as a cause of action. I do not see how this gateway can assist in relation to the claims against the second and third defendants to the extent that they depend on them having “... *procured, instructed, encouraged, authorised and/or adopted* ...” other than the Accounts Representations because the SFA Representations, the CFA Representations and the Compliance Certificate Representations have no connection with England and the facts and matters relied on by ADCB are not material to the allegations made in relation to those representations.
143. With very great hesitation, I am prepared to accept for the purposes of this exercise that ADCB have shown at least a plausible evidential basis for saying that the accounts or a summary of them were published by the LSE on its website and were accessed from that site by ADCB. It follows therefore that ADCB has satisfied the requirements of the gateway I am now considering in relation to its claims based on the Accounts Representations against all the defendants. I am not otherwise satisfied that the claims by ADCB pass through this gateway.
144. *6BPD 3.1(9)(a)*

Paragraph 3.1(9)(a) may be relied on in respect of a claim where “(a) *damage was sustained, or will be sustained, within the jurisdiction*”. This gateway was not relied on by ADCB on its without notice application. There is no basis for not permitting them to rely on this gateway at this stage other than perhaps one relating to costs. That

will depend on the ultimate outcome and will be addressed following the hand down of this judgment.

145. ADCB submits that the test to be applied is that identified by the Supreme Court in FS Cairo (Nile Plaza) LLC v Brownlie (ibid.), which involves asking whether the claimant has shown a plausible evidential basis that direct or indirect actionable harm has been caused to the claimant within the jurisdiction by the wrongful acts alleged.
146. The evidential basis for this argument is set out primarily in the first witness statement of Mr Zo'mot that I referred to earlier. His evidence on this issue in summary is that syndicated loan agreements become binding only when all the lenders have bound themselves to the agreement; that Linklaters were the solicitors to the facility agent in respect of the Syndicated facility Agreement and the Club Facility Agreement and they did not become effective until they had received all the signed and executed copies from all the syndicate lenders at their London office. This is said to establish that these two facilities were entered into in England at the London offices of Linklaters when Linklaters received the signed but undated counterparts and then dated them bringing the agreements into effect. ADCB submits that it suffered harm by entry into these transactions in London because it was at that point it became bound by the obligations set out in the agreements that were subject to English law and enforceable by arbitration in London.
147. There are a number of points deployed by the defendants in relation to this issue to the effect that this analysis is not even arguable. I am not able to accept those submissions. All I have to be satisfied of is that there is a plausible evidential basis for what is being asserted. I am satisfied by reference to the evidence I have referred to and the documents exhibited with that evidence that there is such a basis. The earlier case law on which the defendants rely has to be reconsidered in light of the recent Supreme Court decision on which ADCB relies and although the defendants submit that the obligations under the agreements were subject to compliance with various conditions precedent that took place in the UAE, Linklaters were concerned in sending confirmation of satisfaction with those conditions. What the effect of this is will require a trial. For me to go further would be to embark on the sort of mini trial that should not occur on an application of this sort.
148. In the end, the defendants submit that the point is one devoid of common sense because ADCB never transferred funds from or into this jurisdiction, nor did it become liable to do so. London was, at most, simply the place that some of the legal administration appears to have been conducted. However that point ignores the approach that appears to have been endorsed by the Supreme Court in Cairo (Nile Plaza) LLC v Brownlie (ibid.) that the forum issue should be used as the mechanism for excluding claims that otherwise pass through the gateway adopting the wide test espoused by the Supreme Court - see Lord Lloyd-Jones' judgment at paragraph 77, where he said:

“The gateways alone do not confer jurisdiction and the discretionary test must be satisfied before permission to serve out of the jurisdiction will be given. (See CPR r 6.37(3) set out at para 30 above.) Provided that the discretionary test correctly applied, there should, therefore, be no danger that the wider

reading of damage ... would permit foreign defendants to be brought before the English courts in cases where there is no substantial connection between the wrongdoing and the jurisdiction. In this regard the domestic system is markedly different from the Brussels regime which does not possess such a safety valve. As a result, there is no need to adopt an unnaturally restrictive reading of the domestic gateways.”

As he added at paragraph 78:

“The discretionary test of *forum non conveniens*, well established in our law, is an appropriate and effective mechanism which can be trusted to prevent the acceptance of jurisdiction in situations where there is merely a casual or adventitious link between the claim and England. Where a claim passes through a qualifying gateway, there remains a burden on the claimant to persuade the court that England and Wales is the proper place in which to bring the claim. Unless that is established, permission to serve out of the jurisdiction will be refused (CPR r 6.37(3)). In addition and this is a point to which I attach particular importance - the *forum non conveniens* principle is not a mere general discretion, the application of which may vary according to the differing subjective views of different judges creating a danger of legal uncertainty. On the contrary, the principle applies a structured discretion, the details of which have been refined in the decided cases, in a readily predictable manner.”

That said, I accept that the points made by ADCB apply to only two out of six of the Core Facilities but that is immaterial. I accept that the claims based on these facilities pass through the Paragraph 3.1(9)(a) gateway. I do not accept that the claims based on the other Core Facilities do. Had the governing law of the dispute been English as opposed to UAE law I would also have concluded that the allegations of breach of fiduciary duty were sufficient to allow the conspiracy claim to pass through the Paragraph 3.1(9)(a) gateway.

Forum Conveniens

149. Unless England is clearly the most appropriate forum for determination of this dispute, the forum challenges must succeed because as Lord Lloyd-Jones said in paragraph 82 of his judgment in Cairo (Nile Plaza) LLC v Brownlie (ibid.):

“The courts will be astute in ascertaining whether the dispute has its closest connection with this jurisdiction and the principle of *forum non conveniens* will provide a robust and effective mechanism for ensuring that claims which do not have their closest connection with this jurisdiction will not be accepted here.”

This factor has become all the more important in light of the approach that is now required to be taken in respect of the real issue to be tried requirement considered

earlier in this judgment namely to concentrate on the particulars of claim and ask whether, on the basis that the facts there alleged are true, the cause of action asserted had a real prospect of success – see Okpabi v. Royal Dutch Shell plc (ibid.) – because a result of that approach may be that more cases will pass through the widely defined gateways than before.

150. It has particular importance where, as here, the claimant relies principally on the necessary or proper party gateway because, as Lord Collins JSC stated in Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd (ibid.) at paragraph 73:

“The necessary or proper party head of jurisdiction is anomalous, in that, by contrast with the other heads, it is not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English court ...”

In consequence, as Lloyd LJ said in Golden Ocean Assurance Ltd v Martin (The Goldean Mariner) [1990] 2 Lloyd’s Rep 215, “... *caution must always be exercised in bringing foreign defendants within our jurisdiction under ...*” the necessary or proper party gateway.

151. In this case, if I conclude that the most appropriate forum is not England, then it is at least possible that the issues that arise will have to be decided by this court in relation to the defendant who has voluntarily accepted jurisdiction and the courts of whatever jurisdiction I conclude is more appropriate than England in relation to those of the defendants that have challenged jurisdiction. As to this, Lord Collins JSC approved in Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd (ibid.) at paragraph 73 the observation of Lloyd LJ in Golden Ocean Assurance Ltd v Martin (The Goldean Mariner) (ibid.) that “ ... *it must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction ...*” although, as Lord Briggs JSC held in Lungowe v Vedanta Resources plc (ibid.) at paragraph 80, that “ ... *does not mean, when the court comes to apply its national rules of private international law ... that the risk of irreconcilable judgments is thereby altogether removed as a relevant factor. But it does in my view mean that it ceases to be a trump card*”.
152. Before turning to the facts relevant to this issue, I should record that it is the defendants’ submission that the (on-shore) courts of Abu Dhabi are manifestly the most appropriate forum for the resolution of this dispute. It is in that context that:

- i) the first defendant has offered an undertaking:

“... to submit to the jurisdiction of the onshore civil courts of Abu Dhabi for the purpose of determining ADCB’s claim as presently advanced in these proceedings against me. For the avoidance of doubt, I do so without prejudice to my right to raise any defence that may be available to such claim, without any admission of any wrongdoing and without prejudice to my right to defend fully any civil claim as well

as any criminal or regulatory allegations advanced in Abu Dhabi or elsewhere.”

ii) the second and third defendants have offered undertakings:

“ ... voluntarily and irrevocably to submit to the jurisdiction of the onshore civil courts in Abu Dhabi in respect of the Claimant’s claim as presently advanced in these proceedings (in the event that such claim is commenced in the said courts), but for the avoidance of doubt without prejudice to their right to raise any defence that may be available to such claim, without any admission of any wrongdoing and without prejudice to their right to defend fully any civil claim as well as any criminal or regulatory allegations advanced in Abu Dhabi or elsewhere.”

and

iii) the fourth defendant has offered an undertaking:

“... not to challenge the jurisdiction of the onshore civil courts of Abu Dhabi or the offshore Abu Dhabi Global Markets courts for the purpose of determining ADCB’s claim as presently advanced in these proceedings against me in the event that (i) these proceedings are stayed or dismissed following judgment on my application heard by the Commercial Court between 29 November and 2 December 2021 and (ii) consequently ADCB commences that claim in either of those Courts. I give this undertaking without any admission of any allegations made, without prejudice to my right to raise any defence that may be available to that claim, and without prejudice to my right to defend fully any civil, criminal or regulatory allegations advanced in Abu Dhabi or elsewhere.”

These undertakings were offered in order to meet a submission on behalf of ADCB that if I came to the conclusion that the courts of Abu Dhabi were the most suitable forum for the resolution of this dispute, there was nothing that could preclude the defendants from challenging the jurisdiction of those courts if proceedings were commenced there. I am satisfied that these undertakings eliminate that as a real risk, at any rate if combined with an order staying rather than dismissing these proceedings and a direction giving the claimant liberty to apply to lift the stay in the event that the undertakings are not complied with. The question that remains is whether Abu Dhabi is the most suitable forum for the resolution of this dispute.

153. Before turning to the facts and matters that are relevant for present purposes it is necessary to note on whom rests the onus in relation to the issue I am now deciding. In relation to applications for permission to serve proceedings out of the jurisdiction the onus rests on the claimant to show that England and Wales is clearly the most appropriate jurisdiction in which to resolve the claims - see Spiliada Maritime Corp v Cansulex Ltd [1987] AC 460 *per* Lord Goff at 481E, where he said “... *the burden of*

proof rests on the plaintiff to persuade the court that England is the appropriate forum for the trial of the action, but that he has to show that this is clearly so. In other words, the burden is, quite simply, the obverse of that applicable where a stay is sought of proceedings started in this country as of right.” Where a defendant has been served in the jurisdiction – as has the first defendant in this case, applying s.1140 of the Companies Act 2006 - the onus rests on that defendant to show that there is another available forum having competent jurisdiction which is clearly or distinctly the more appropriate forum for the trial of this action – see Spiliada Maritime Corp v Cansulex Ltd (ibid.) *per* Lord Goff at 476-478, paragraph (c), although as he added, where “... *the connection of the defendant with the English forum is a fragile one ... it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.*”

154. The exercise must start by first identifying what factors there are which point in the direction of another forum as being that with which the claim has the most real and substantial connection – see Spiliada Maritime Corp v Cansulex Ltd (ibid.) *per* Lord Goff at 476-478, paragraph (d), which 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 ...*” It is “... *necessary to include both the residence or place of business of the defendant and the relevant ground invoked by the plaintiff as factors to be considered by the court when deciding whether to exercise its discretion to grant leave ...*” – see Spiliada Maritime Corp v Cansulex Ltd (ibid.) *per* Lord Goff at 482A. In relation to disclosure, Lord Goff said at 482F-G:

“We know that there is a spectrum of systems of discovery applicable in various jurisdictions, ranging from the limited discovery available in civil law countries on the continent of Europe to the very generous pre-trial oral discovery procedure applicable in the United States of America. Our procedure lies somewhere in the middle of this spectrum. No doubt each of these systems has its virtues and vices; but, generally speaking, I cannot see that, objectively, injustice can be said to have been done if a party is, in effect, compelled to accept one of these well-recognised systems applicable in the appropriate forum overseas.”

155. If the court concludes that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay – see Spiliada Maritime Corp v Cansulex Ltd (ibid.) *per* Lord Goff at 476-478, paragraph (e). If however, there is another available forum which appears clearly more appropriate for the trial of the claim then a stay will usually be granted unless the claimant is able to show there are circumstances by reason of which justice requires that a stay should nevertheless not be granted – see Spiliada Maritime Corp v Cansulex Ltd (ibid.) *per* Lord Goff at 476-478, paragraph (f), where Lord Goff also holds that at this stage of the enquiry the onus has shifted to the claimant.

156. The defendants each rely on the following facts and matters:

- i) ADCB is a bank incorporated and based in the UAE and majority-owned by the Abu Dhabi government. I would add that all the relevant officials

(including its relevant decision makers) employed by ADCB live and work in Abu Dhabi and that ADCB conducts all its business from its offices in Abu Dhabi. All its relevant decisions were taken by or on behalf of ADCB in Abu Dhabi in the UAE – see the first affidavit of Mr Zo'mot at paragraph 95 where he states that “... *it is fair to say that ADCB took its decisions in Abu Dhabi ...*”

- ii) All the defendants were at all material times and are either UAE nationals resident in Abu Dhabi or have permanent residency rights there. That said, as I noted earlier, the first defendant at least is currently resident in India;
- iii) All the Group's relevant business was conducted in the UAE where all the relevant entities were registered; and the borrowers under the six Core Facilities were all UAE registered entities – see the first affidavit of Mr Zo'mot at paragraph 7 – operating exclusively in the UAE or at any rate not in England and Wales and the loans and other payments on which ADCB rely were all made by it in the UAE to UAE entities within the Group which received the advances in the UAE. No funds were lent by ADCB to Plc, there are no agreements between ADCB and Plc that are material to this claim and none are alleged so that from first to last this claim is concerned with funds loaned by a bank based exclusively in the UAE to borrowers based exclusively in the UAE;
- iv) All the relevant borrowing entities are now registered in the Abu Dhabi Global Market (“ADGM”), a free zone in Abu Dhabi and most if not all of them are in administration pursuant to orders made by Sir Andrew Smith sitting as a Justice of the ADGM Court – see Sir Andrew Smith's judgment In re the Matter of NMC Healthcare Ltd and others [2020] ADGMCFI 0008. The administration is being carried on by administrators based in the ADGM. In making the without notice application ADCB relied very heavily on statements filed by the administrators in support of the application for them to be appointed as administrators. As Mr Zo'mot states of these sources at paragraph 16 of his first affidavit in these proceedings,

“These are vital sources of information for the Bank in relation to the internal workings of NMC plc and its subsidiaries, and to the nature and effect of the fraud that has been carried out. They are vital to the presentation of the Bank's case to this Court in support of the current application. I rely on these statements as the source of my knowledge and endeavour to show through references where I have relied.”
- v) There are other proceedings in Abu Dhabi relating to or connected with this dispute, all taking place in courts in the UAE including claims by ADCB against the first, second and third defendants in Abu Dhabi, and a criminal complaint made by ADCB against the defendants in Abu Dhabi in relation to the matters the subject of these proceedings, in which a civil claim in respect of the same subject matter can be made;

- vi) The governing law of this dispute is UAE law. As to this issue I have found that to be so and have concluded that ADCB has no better than a fanciful case that English law is the governing law. This follows because, as I have set out in more detail earlier in this judgment, the damage on which ADCB relies occurred in the UAE, all the relevant parties (that is ADCB and each of the defendants) were at all material times habitually resident in the UAE and the suggestion by ADCB that the claim is manifestly more closely connected with England than the UAE is unarguable; and
- vii) All or most of the relevant witnesses and all the relevant documents are in the UAE.
157. In the course of its submissions concerning forum, ADCB argued that one reason why England was clearly the more appropriate forum for the trial of this dispute was that a significant number of documents were in the hands of Plc's administrators. It was suggested that access to these documents could be obtained by bringing third party disclosure proceedings against the administrators in London rather than the more cumbersome and time-consuming process of using Letters Rogatory sent by the Abu Dhabi court to England – see T3/177/2 to 11. There are a number of points to be made about this submission.
158. First, I query whether this is a legitimate basis for contending that England is clearly the more appropriate forum in light of the points to which I have referred so far and in light of what Lord Goff said about disclosure quoted earlier. In any event however, the relevant administration is that of the UAE borrowers, all of whom as I have said already are now registered in the ADGM. It is this administration and the information accumulated by those administrators and used in support of the application for their appointment, that have been identified as the “... *vital sources of information for the Bank in relation to the internal workings of NMC plc and its subsidiaries, and to the nature and effect of the fraud that has been carried out.*”
159. I am satisfied that any documents needed by ADCB in support of a claim against the defendants in the Abu Dhabi (onshore) courts could be obtained with relative ease from the Abu Dhabi based administrators for the reasons set out by Mr Zellick QC in his post hearing Note. In particular it would appear that as Mr Zellick QC submits,
- “... document production requests from one court within the UAE to another court within the UAE will be executed—as is hardly surprising within a single state. Thus, if the Abu Dhabi onshore court were to request that the ADGM Court direct the production of the documents under the ADGM Court regulations referred to above, those documents could be expected to be produced and there would be no basis for them not to be.”
160. I now turn to ADCB's case on this point. In doing so, I note at this stage that all the defendants submit that whether viewed individually or collectively, on proper analysis the points relied on by ADCB are points that Lord Lloyd Jones described in Cairo (Nile Plaza) LLC v Brownlie (ibid.) as “... *casual or adventitious* ...” links between the claim and England. ADCB's central submission is that whilst the factors relied on

by the defendants are one to which “... *some force must be attributed* ...” on analysis none of these points are relevant to the issues that truly arise.

161. ADCB places some reliance on the decision of the Court of Appeal in Manek v IIFL Wealth (UK) Ltd [2021] EWCA Civ 625 as assisting where the jurisdiction challenge is made in respect of a claim concerning an alleged international fraud. However, that case was factually very different to this case. As Coulson LJ observed in that case, the court will generally be looking for a single jurisdiction where the claims against all the defendants may most suitably be tried. In that case however, the claim was said to arise out of a misrepresentation “... *made in England about the onward sale of the shares in an Indian company (Hermes) to a company (EMIF) domiciled in Mauritius, without revealing the fact that the ultimate purchaser, a German company (Wirecard) was going to pay much more for the same shares. There was never going to be one jurisdiction which would emerge as the only candidate for the hearing of this claim*”. It was because that was so that Coulson LJ posed the question to be decided as being “... *whether, in all the circumstances, and taking a realistic approach to the numerous jurisdictions that might potentially be involved, the Appellants have demonstrated that England and Wales is clearly the place where the claims against all the Defendants may most suitably be tried.*” That is simply not this case: Here the possible fora are two in number being either England or Abu Dhabi. There was a dispute at one stage as to whether the most appropriate court was the ADGM CFI or the onshore courts of Abu Dhabi. However, the only defendant contending for that had been the fourth defendant and by the end of the hearing that contention had been withdrawn. It follows that all the challenging defendants contend the plainly more appropriate forum to be the onshore courts of Abu Dhabi. In my judgment therefore if and to the extent that the Court of Appeal suggested that a different approach was required where multiple different jurisdictions were in play (and I am not convinced that is what was being suggested) it is of no application to the facts of this case where there is said to be a single jurisdiction other than England where this claim can most suitably be tried.
162. The only remaining point concerning split jurisdictions is the role of the fifth defendant who has acceded to the jurisdiction of the English court¹. That of itself is a relatively weak point. On analysis it is that if I conclude that Abu Dhabi is the most suitable jurisdiction it follows that there will be a trial in two different jurisdictions concerning the same facts thereby giving rise to a risk of duplicated costs and inconsistent findings and judgments. As to that however, if the correct analysis is that the jurisdiction where this dispute can most suitably be tried is Abu Dhabi then the fact that there will be two trials is the result of ADCB choosing to commence these proceedings here notwithstanding that, that is so. In any event the risk of irreconcilable judgments is not a trump card – see Lungowe v Vedanta Resources plc (ibid.) *per* Lord Briggs at paragraph 80 – and so would not justify the conclusion that England was the most suitable jurisdiction for this case to be tried if an evaluation of all other factors pointed to Abu Dhabi as being the most suitable jurisdiction.
163. As I indicated at the start of this judgment the primary point that ADCB relies on is that it is the defendants’ exploitation of an English registered public company that lies

¹ ADCB does not rely on the fifth defendant as an anchor defendant applying ID v. LU and another [2021] EWHC 1851 (Comm; [2021] 1 WLR 4992). Thus the relevance of the fifth defendant’s concession is to the forum issue.

at the heart of the fraudulent scheme. There is a difficulty about this however. ADCB's case on this issue in summary is that its claims in deceit and conspiracy "... arise out of a fraud on and using ...Plc by its officers and senior management (in breach of the English law fiduciary duties which each owed to ...Plc...". However, for the reasons that I have set out above, the conspiracy claim is unarguable because such a cause of action is unknown to UAE law, which is the governing law of the dispute.

164. Secondly, this claim is not a claim by or on behalf of Plc against its former directors and officers for breach of fiduciary duty. If it had been the position would have been entirely different. At this stage of the enquiry, the focus is on issues that need to be tried. Whilst this dispute relates to Plc, it does not concern it in any meaningful way. This is a claim by ADCB against the defendants based on an allegation that it was deceived into lending money to subsidiaries of Plc in the UAE by implied misrepresentations by the defendants concerning the truth and accuracy of Plc's accounts. The breach of fiduciary duty allegation was pleaded only because it was relied on as one of the unlawful means by which the conspiracy is alleged to have been carried into effect. It ceases to be relevant or at any rate centrally relevant to the claim once the conspiracy cause of action ceases to be relevant.
165. The core of the deceit claim is that Plc's accounts were inaccurate, were known by the defendants to be inaccurate but were also known to them to be materials on which ADCB would rely when deciding to lend to the subsidiaries. Thus whilst ADCB is no doubt correct to submit that that falsification of Plc's books was at the heart of the fraud it alleges, that of itself is not the point where the representations were made to and acted upon by the bank in the UAE, where the loss that ADCB seeks to recover was suffered in the UAE and where the governing law of the fraud is the UAE.
166. Similar considerations apply to the terms of the two largest facilities – the Syndicated and Club Facility Agreements. I have summarised these factors a number of times earlier in this judgment but they are summarised in paragraph 207 of ADCB's written submissions in these terms:

"The Syndicated and the Club Facility Agreements (i) were each governed by English law and provided for English dispute resolution; (ii) involved a syndicate of banks from England and the UAE; (iii) came into effect in England at Linklaters' offices; (iv) made NMC plc a party to the lending documentation as well as a guarantor; (v) stipulated financial covenants (concerning NMC plc's ratio of EBITDA to its interest expense and to its total debt) which applied to NMC plc not the borrower NMC Healthcare; and (vi) imposed ongoing "Information Undertakings" on NMC Healthcare to provide the consolidated financial statements and management accounts from time to time of "the Company" (NMC plc) along with quarterly Compliance Certificates signed by two authorised signatories of NMC plc confirming ongoing compliance with the facility's financial covenants. The Sukuk was issued on the LSE, and its Offering Circular is based on NMC plc's audited and interim financial information and statements. The nature

and quantum of these financing transactions depended on NMC Plc's presence in London as a stock market darling.”

167. Pausing only to note that (ii) of itself does not point towards England being clearly the most suitable jurisdiction for this claim to be tried, the real point is that while these factors are all correctly stated (indeed they are not disputed by the defendants) they do not point to England being the most suitable jurisdiction for the trial of this claim because they are not in dispute, relate to only two out of the six Core Facilities and are not material to the allegations between the parties, which as I have said concern whether the defendants made false implied representations to the effect that the accounts of Plc were accurate. In truth, that Plc is listed in London is a casual or adventitious factor, the Core Facility points summarised above are immaterial to the issues in this case and to the extent that reliance is placed on any dealings by any of the defendants in Plc shares that too is irrelevant because they do not form the basis either of the misrepresentations alleged or the loss that ADCB seeks to recover in this claim. All this leads the defendants to submit, in the words of Mr Zelic QC that “... *the alleged linkage to England is an artifice constructed to support a jurisdiction case ...*”.
168. Applying the tests referred to earlier I am satisfied that ADCB's claims do not have their closest connection with this jurisdiction but on the contrary have their closest connection with Abu Dhabi in the UAE, where I am satisfied this claim could be suitably tried in the interests of all the parties and the ends of justice.
169. The connection of the first defendant with this jurisdiction is on any view a fragile one in the sense identified by Lord Goff in Spiliada Maritime Corp v Cansulex Ltd (ibid.) when compared with his connection to Abu Dhabi. The first defendant says and it does not appear to be in dispute that he has been resident there since 1973, where his family and business administration is based and where he has numerous business interests and substantial assets – see his first witness statement at paragraphs 17 and 20-21. Whilst it is true that the first defendant is currently resident in India, that is not because he does not wish to return to Abu Dhabi, where his family is located but because he is precluded from leaving India as a result of proceedings taken against him in India. Thus his current absence is not of itself a material factor particularly because he has legal representation in the UAE. ADCB is able to obtain jurisdiction over the remaining defendants principally because they are necessary or proper parties to the claim against the first defendant although to a limited extent using the other gateways to which I referred earlier. However none of these defendants have any connection to this jurisdiction. The second and third defendants are UAE citizens and long time residents in Abu Dhabi with substantial business interests and assets in the UAE. The fourth to sixth defendants are Indian nationals who are long term residents in Abu Dhabi.
170. As I have explained at length already ADCB is a UAE incorporated and domiciled bank that is owned in part by the Government of Abu Dhabi and describes itself as one of the largest banks in the UAE. It has no connections to England other than its engagement of London solicitors to prepare some of the documentation against which it was prepared to lend in the UAE.

171. These factors indicate that the parties have their closest connection with the UAE and no or no material connection with England.
172. This dispute has its closest connection with the UAE. As I have explained in detail above, the alleged wrongdoing took place in the UAE in that the alleged implied representations were received and acted on in the UAE if they were received and acted on at all (a point in dispute between the parties as I have explained) and the loss which ADCB seeks to recover from the defendants was suffered in the UAE where the Core Facilities were drawn down against by UAE domiciled entities. I accept that the implied representations on which ADCB relies are based on false accounting by Plc but ADCB's claims are based on alleged implied fraudulent misrepresentations by the defendants concerning the truth and accuracy of Plc's accounts. This constitutes a connection with England but does not support the proposition that the dispute has its closest connection with England or that it can more suitably be tried here rather than in Abu Dhabi. The points made concerning the agreements containing or evidencing the two syndicated loan agreements that form part of the Core Facilities are immaterial to the forum issue.
173. It is because the parties have their and this dispute has its closest connection with Abu Dhabi that a criminal investigation has been launched in Abu Dhabi in relation to the facts and matters giving rise to this claim. No one suggests that criminal proceedings could be brought against the defendants in this jurisdiction and civil proceedings have been brought here principally on the basis of the fragile and technical connection between the first defendant and this jurisdiction. Although whether criminal proceedings have yet been commenced is in dispute, the point made by the defendants is that the process has been instigated by ADCB. It is submitted (and does not appear to be in dispute) that if criminal proceedings are commenced in Abu Dhabi then civil proceedings will run or can run in parallel. Thus two points arise – first if proceedings here are permitted to continue then the defendants may be severely disadvantaged in relation to the criminal proceedings in Abu Dhabi and will be faced with concurrent civil proceedings as well. Mr Penny QC characterised a situation in which proceedings were permitted to continue here and in Abu Dhabi as unfair because it created a risk of double jeopardy. That is usually material where an individual faces criminal prosecution twice whereas, of course, there is no material risk of a criminal prosecution here. I accept however that it would be fairer all other things being equal for civil proceedings to take place in Abu Dhabi, where the courts could manage the civil and criminal cases either together or otherwise as required by UAE Law. Mr Penny QC is entitled to submit that in those circumstances (a) the defendants would not run the risk of having to face the same civil claim in two separate courts and (b) would be able to seek a stay of the civil claim until after the completion of any criminal proceedings.
174. For the reasons set out in detail above, the governing law of this dispute is the law of the UAE. There are disputes between the UAE law experts the parties have retained as to the scope and effect of UAE law. UAE law is a civil law (not a common law) based system of law with a significant Islamic law element. It is manifest that the issues of UAE law that arise are better resolved by the UAE courts than by a court in England. That is all the more so because in the UAE there is a right of appeal on legal issues to the Court of Appeal and the Court of Cassation. As Cockerill J held in VTB Commodities Trading v JSC Antipinsky Refinery [2021] EWHC 1758 (Comm) at

paragraph 201, where there is a disputed issue of foreign law, the appeal process available here poses a significant difficulty for a party dissatisfied with the first instance outcome because “...*any appeal from a decision on [foreign] law here would be impeded by being a decision on facts and expert evidence, where the Court of Appeal is very unlikely to interfere, whereas in [the relevant foreign jurisdiction] the full appeals process would be available.*” Whilst the degree of complexity that arises in relation to a foreign law dispute will vary it is nonetheless preferable that such an issue be determined by the courts of the country concerned particularly when as here there is a clear route of appeal that can be utilised if necessary. The (onshore) courts of the UAE are manifestly the most appropriate forum for determining a dispute governed by UAE law, particularly where there are disputes of law between the parties and particularly when that consideration is weighed with the others that I have referred to so far.

175. There are various practical considerations that support this conclusion though of themselves they would not be determinative. They include that most if not all the relevant witnesses live and work in the UAE. ADCB’s lead witness Mr Zo’mot gives his address as the head office of ADCB. Although he does not disclose where he is resident it is overwhelmingly likely that it is Abu Dhabi given that he has worked for ADCB in various capacities since 2003 and has been since 2016 its Head of Wholesale Banking. In his first witness statement, Mr Zo’mot identifies the officials with day-to-day contact with the Group as being their relationship manager Mr Ali Ahmed and the Unit Manager Mr Eyad Al Khaldi. Neither have filed witness statements. However each have been employed in their current roles since 2011 and so again it is improbable that they live anywhere other than in the UAE and probably Abu Dhabi. No other witnesses have been identified by ADCB as likely to give evidence who do not live and work in Abu Dhabi. It seems unlikely that any of the solicitors will be required to give evidence at a trial but if and to the extent they have to do so that is more than outweighed in assessing the place that is most suitable for the trial by the fact that most if not all the witnesses of fact for all parties live and work in Abu Dhabi. As I have said, the first defendant currently lives in India but that is immaterial since the reasons why he is there mean that he is as unable to travel to London as he is to travel to Abu Dhabi.
176. As I have said already the documents likely to be relevant to the claim that ADCB actually makes are located in the hands of the administrators in the UAE. It is said by ADCB that if and to the extent there are documents in London that are material to the claim, then it would be necessary for them to be obtained by the letters rogatory procedure. It is said that this is materially more disadvantageous than would be the case in proceedings in London because documentation could be obtained from the UAE based administrators using the Norwich Pharmacal procedure. I am doubtful whether that is so, other than by consent, at any rate on the current state of the authorities – see AB Bank Limited v. Abu Dhabi Commercial Bank PJSC [2016] EWHC 2082 (Comm). If that is right then it is likely that the English Court would have to resort to the letters rogatory procedure in order to obtain documents in Abu Dhabi but in any event in my view this is a point of limited importance because (a) it assumes the administrators would not cooperate with ADCB wherever that claim was brought and (b) it ignores the fact that if proceedings were in England many more documents would have to be obtained from Abu Dhabi than is likely to be required from England if the proceedings were started in Abu Dhabi. This is all the more the

case if as the first defendant maintains the London offices of Plc did not operate as a document repository.

177. Another factor relied on by ADCB is that many of the documents will be in English and if proceedings are in Abu Dhabi the documents that are relied on by the parties will have to be translated into Arabic for use by an Abu Dhabi court, where the official language is Arabic. I do not underestimate the cost and time that this task will take. Indeed, I accept that it is likely that this exercise will increase the costs of the litigation above and beyond the figures in the evidence as to the likely costs of a claim such as this for each party. However there are two contextual points to be borne in mind when considering this factor. First, the costs of the proceedings in Abu Dhabi will be dramatically lower than the cost of these proceedings in this jurisdiction even taking account of this factor. This is the real consideration when the impact of costs come to be considered. Secondly, the translation factor is one that arises in a significant number of cases with an international dimension where the language used by the court is different from the language used in some of the documents relevant to the case being tried. It happens on an almost everyday basis in cases across the Business and Property Courts. The impact of a point such as this will be fact sensitive. It was regarded as a significant factor by Sir Julian Flaux C in PJSC Bank v. Zhevago (ibid.) but there were a significant number of other points in that case that suggested Ukraine was the most suitable jurisdiction for the determination of the dispute in that case. It was not suggested by Sir Julian Flaux C in that case that the issue was a trump issue or anything close to it but was one of a number of factors that pointed towards Ukraine being the most appropriate jurisdiction for the determination of the dispute.
178. In this case, that a significant number of documents will require translation at significant cost is a factor that might point towards England being a suitable jurisdiction but it does not justify regarding England as the most suitable place for the trial of this claim when considered in the round with the other facts and matters I have considered so far. Although it is suggested that there will be difficulties at hearings because the first language of the defendants is not Arabic, that again is a problem faced by most courts round the world. It is likely that English will not be the first language of ADCB's witnesses although I accept it is more likely that they or most of them will be fluent in both English and Arabic.
179. Some reliance has been placed by the defendants on the point that these proceedings will be cheaper if litigated in Abu Dhabi than would be the case if it was litigated in London. This is a point I have alluded to already when setting the translation costs issue in its correct context. The basis on which the first defendant has been served here is a fragile basis for asserting jurisdiction and this is compounded by the reliance placed on the necessary or proper party gateway as the principal gateway by which jurisdiction against the second to fourth defendants has been asserted. As I have noted already, "... *caution must always be exercised in bringing foreign defendants within our jurisdiction under ...*" the necessary or proper party gateway. There are a number of reasons for that, one of which is relative cost. The weight this factor should be given in an overall assessment as to the most suitable jurisdiction in which to try a claim will vary but in a case such as this where the principal factors I have considered already are as they are, this factor provides additional support for the view that the most suitable jurisdiction in which to try this claim is the UAE. The evidence suggests

that the costs faced by each party is in the range of between AED 3-5 million or the equivalent of £600,000 to £1 million. That is on any view a significant saving over the cost of litigating a similar dispute in London.

180. Pausing there, for the reasons set out above I am satisfied that there is another forum which is clearly and distinctly more appropriate than England and that is Abu Dhabi. The only question that remains is whether there are circumstances by reason of which justice requires that the case be tried in England notwithstanding these conclusions. In relation to this issue, ADCB bears the burden.
181. ADCB's submissions on this issue focus on the differences between how a claim is managed and tried in this jurisdiction with how it is likely to be managed in Abu Dhabi. It relies on an assertion that in UAE proceedings there is no obligation to disclose evidence and particularly adverse evidence, that it is rare for the UAE courts to order a party to produce documents and orders against third parties requiring the production of documents by third parties particularly third parties outside the jurisdiction are rarely made. In summary, ADCB submits that it would wish to rely on disclosure from the defendants and third parties, on oral evidence and cross examination and that the absence of such tools in litigation in Abu Dhabi creates a significant risk of inconsistent judgments. As to this last point, as I have already said, the risk of inconsistent judgments is not a trump card on a forum assessment and of itself is a weak factor in this case for reasons explained in detail earlier in this judgment. Furthermore, the fact that different procedures are available in different courts is usually not a legitimate reason for preferring England over other jurisdictions. Although not submitted in terms, the implicit point made on behalf of ADCB is that because this was a case of international fraud and because the courts here have great experience in trying such cases that ought to lead to the conclusion that this case should be tried here. If that was the implicit suggestion then I reject it for all the reasons identified and adopted by Sir Julian Flaux C in PJSC Bank "Finance and Credit" v. Zhevago (ibid.) at paragraph 147. The relative experience or inexperience of one court when compared to another cannot displace the appropriateness of Abu Dhabi as the forum for the determination of this dispute any more than it could of Ukraine in that case.
182. In relation to the criticisms of the procedures available in Abu Dhabi as opposed to here, in my judgment they are points that ought not to lead to Abu Dhabi being displaced as the clearly most appropriate jurisdiction for the determination of this claim for the reasons identified by Sir Julian Flaux C at paragraphs 94 and 156-157 of his judgment in PJSC Bank "Finance and Credit" v. Zhevago (ibid.). Although there have been any number of decisions of the higher courts over the years concerning these issues, the fundamentals have not altered since Lord Goff's landmark judgment in Spiliada Maritime Corp v Cansulex Ltd (ibid.). As he stated at 482F "... *as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave ... simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum*". As Mr Jonathan Sumption QC held in his judgment quoted by Sir Julian Flaux C at paragraph 94 of his judgment in PJSC Bank "Finance and Credit" v. Zhevago (ibid.):

“All judicial systems are more or less imperfect, because they represent a compromise between competing objectives. It is certainly not possible to say that the absence of extensive facilities for disclosure of documents and discovery makes substantial justice unobtainable, even in cases which are evidentially complex or arise out of commercial fraud”

183. In summary, I am satisfied that (a) there is another forum which is clearly and distinctly more appropriate than the English forum namely Abu Dhabi and (b) that there are no circumstances by reason of which justice requires that this claim be tried here rather than Abu Dhabi.

Other Issues

184. In light of these conclusions it is not necessary for me to decide whether the WFO should be extended or whether ADCB was guilty of material non-disclosure in the without notice presentation that it made to Bryan J.
185. I should however comment on the alleged lack of full and frank disclosure argument. I accept that the s.6 point is one that ought to have been the subject of detailed submission concerning its potential availability as a defence. I have concluded that the point is not one that in the end benefitted the defendants but I am clear that it is something that ought to have been drawn to Bryan J’s attention, not least because if it applies then it provides an answer to the whole of the deceit claim and most of the conspiracy claim, assuming such a cause of action was available as a matter of UAE law.
186. The principles that apply in this area are well established– all facts and matters that reasonably could or should be taken into account by a judge in deciding the application ought to be disclosed to the judge hearing the without notice application. The court has a number of remedies available to it if a breach of this duty is established including taking no action, discharging the order obtained as a result and setting aside the order and then re-granting it, which in practice may have little significance other than in relation to costs. The issue I am now considering is one that could best be addressed by making no order other than an adverse costs order attributable to the full and frank submissions made by reference to the s.6 point.
187. I consider the UAE law issue was not fairly presented to the Judge. For the reasons that I have set out above, in my view UAE law was plainly the governing law of the claim. That had a significant impact on (a) whether a conspiracy claim was available against all the defendants (it was not) and, (b) the forum issue since the governing law issue is plainly a major consideration in deciding which forum is most suitable for the determination of the dispute. Had I come to the conclusion that forum should have been resolved in favour of England I would nonetheless have made an adverse costs order by reference to that issue against ADCB. In all other respects I would have been satisfied that the presentation was full frank and fair.

Conclusion

188. For the reasons set out above, I am satisfied that there is a real issue to be tried between the claimant and each of the defendants, that the first defendant has been

properly served in accordance with s.1140 of the Companies Act 2006 and that in consequence the claims against the second to fourth defendants passed through the necessary or proper party gateway. I am satisfied also that the claims passed through the tort gateway to the limited extent identified earlier. However, in my view (a) there is another forum which is clearly and distinctly more appropriate for the trial of this claim than England namely Abu Dhabi and (b) there are no circumstances by reason of which justice requires that this claim be tried here rather than Abu Dhabi. In those circumstances, I am satisfied that I should accept the undertakings offered by the defendants and stay these proceedings with liberty to ADCB to apply to lift the stay and make any consequential applications in the event that the undertakings offered are breached. I will hear the parties as to the appropriate orders to make at the hand down of this judgment.