IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 213 OF 2021 (DDJ)

MAPLESFS LIMITED

Plaintiff

AND

1. **B&B PROTECTOR SERVICES LIMITED**
2. **PJSC NATIONAL BANK TRUST**
3. **PJSC BANK OTKRITIE FINANCIAL CORPORATION**

Defendants

Appearances:	John Machell QC and Adam Huckle of Maples and Calder (Cayman) LLP for the Plaintiff Alex Potts QC, Alecia Johns and Tonicia Williams of Conyers Dill & Pearman LLP for the Second Defendant
Before:	The Hon. Justice David Doyle
Heard:	14 and 15 June 2022; further written submissions pursuant to leave of the court filed on 20, 28 June and 11 July 2022
Draft Judgment circulated:	11 July 2022
Judgment delivered:	14 July 2022

HEADNOTE

Substituted service and appropriate forum issues – Cayman Trustee of Cayman Trust – governing law and jurisdiction provision and firewall provisions – Russian Banks and English Proceedings – desirability of all issues in dispute between the parties being dealt with in one forum – identification of the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice

JUDGMENT

Introduction

1. By Originating Summons dated 21 July 2021 the Plaintiff, a company incorporated under the laws of the Cayman Islands, as trustee of the MF Trust (the "Trustee") sought, then stated to be pursuant to the Trusts Act (2021 Revision) and/or the Grand Court Rules ("GCR") Order 85 rule 2, the following "directions, orders and relief" namely, a declaration that the Trustee is the trustee of the MF Trust, which is a trust governed by a deed dated 27 December 2017 (as amended and restated by a Deed of Amendment and Restatement dated 13 December 2018) (the "Trust Deed") and Cayman Islands law, and that it holds various assets (specified in the Schedule to the Originating Summons and referred to as the "Trust Companies") as assets of the MF Trust for the beneficiaries and on the terms set out in the Trust Deed, and not on bare trust for Boris Mints.

2. On 22 November 2021 this court on an *ex parte* application made, on consideration of the papers without an oral hearing, an order (the "Service Order") permitting the Trustee to serve any documents in the Cayman proceedings on the Second and Third Defendants (the "Russian Banks") by sending such documents by courier and email to the English solicitors acting for the Russian Banks in London and by courier and post to the Russian Banks' respective addresses in Moscow.

3. The Russian Banks have applied, on various grounds, for the Service Order to be set aside or for the Cayman proceedings to be stayed.

Summary

4. In this judgment I have declined to set aside the Service Order and I have concluded that there was no lack of disclosure or lack of fair presentation. I have, however, granted a *forum non conveniens* stay and leave the parties, including the Trustee, to argue all the points in dispute between them in the proper context of the proceedings in England and Wales which were commenced as long ago as June 2019.

The Service/Jurisdiction Summons

5. The application of the Russian Banks is in two main parts. The issues raised relate firstly to service and secondly to jurisdiction.

The service issues

6. By summons dated 25 January 2022 (the "Service/Jurisdiction Summons") the Russian Banks made an application that the Service Order be set aside on various grounds, namely:

(1) permission was not applied for service out of the jurisdiction;

(2) it was not "impracticable" for the Originating Summons to be served "personally" on the Russian Banks in Russia;

(3) the Trustee's assertions in the skeleton argument dated 17 November 2021 that an order for substituted service was not necessary to achieve expedition or to avoid delay and that the Trustee would be materially "prejudiced" by effecting service on

the Russian Banks through the Hague Service Convention were incorrect and/or not the subject of fair presentation;

(4) the Trustee's following assertions were misleading and/or not fairly presented:

(a) service may take anywhere between one and three years;

(b) there appears to be no proper reason why the Banks would refuse to accept service via their English solicitors;

(c) "the Banks have given no reason for their position".

(5) the Trustee's assertion that "substituted service" on the Russian Banks in Russia or via their English solicitors in England is not contrary to the law of Russia (within the meaning of such phrase in GCR Order 11 rule 5(2)) was incorrect and/or not the subject of fair presentation;

(6) the Service Order was irregular in that it failed to specify the date on which the Originating Summons would be deemed to be served on the Russian Banks and/or the period by which the Russian Banks should file any acknowledgement of service and/or defence and/or affidavit evidence;

(7) the Originating Summons was irregular in requiring the Russian Banks to file an acknowledgement of service within 21 days contrary to the 28 day period specified in GCR Order 11 rule 1(4);

(8) the Trustee failed to discharge its duty of full and frank disclosure and its duty of fair presentation including:

(a) by failing to draw the Court's attention to the various matters set out above;

(b) by failing to draw the Court's attention to the fact that the *Beddoe* order and reasons provided by Kawaley J were made on an *ex parte* and unopposed basis and were not binding on the Court nor the Russian Banks;

(c) by failing to draw the Court's attention to various findings made in the LCIA Tribunal's Final Partial Arbitration Award dated 23 June 2021 including the findings that certain individuals had participated in a dishonest conspiracy to defraud the Third Defendant of around US$600 million in a transaction that took place in August 2017. In fairness I should record that the Trustee says at paragraph 4 of its skeleton argument that the English Court (Foxton J [2022] EWHC 871 (Comm) 11 April 2022) has recently decided that the findings in the LCIA arbitration are not binding on the Mints;

(d) by failing to draw the Court's attention to the timing and circumstances by which the MF Trust was purportedly established on 27 December 2017;

(e) by wrongly describing the Russian Banks' position at paragraphs 12 and 23 of the Trustee's skeleton argument dated 17 November 2021 as "relying on a technical position simply to delay the progress of these proceedings".

The stay applications and jurisdiction issues

7. The Russian Banks also apply for an Order staying the proceedings on the grounds of *forum non conveniens* and/or *lis alibi pendens* on the basis that the High Court of England and Wales is both an available forum with competent jurisdiction, and the appropriate forum for the trial and determination of the Trustee's claims against the Russian Banks and the Russian Banks' claims against the Trustee (and various other parties) which are already the subject of proceedings commenced by the Russian Banks against the Plaintiff (and various other parties) in the High Court of England and Wales in Claim No CL-2019-000412 and CL-2020-000432 (the "English Proceedings") in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

8. Further or alternatively the Russian Banks seek an order staying the proceedings before this court on "case management grounds" pending final determination of the substantive

English Proceedings and/or the Trustee's application to set aside the Order of Knowles J dated 28 July 2021 (which the Russian Banks state "is currently scheduled for hearing in or about September 2022").

The Application for Substituted Service

9. By summons dated 17 November 2021 (the "Substituted Service Application") the Plaintiff applied, pursuant to GCR Order 65 rule 4(1), for the Trustee to be permitted to serve documents in these proceedings on the Russian Banks by way of substituted service upon their English solicitors in London and on the Russian Banks' addresses in Moscow.

10. The Substituted Service Application was supported by the second affidavit of Peter Goddard sworn on 17 November 2021. Mr Goddard referred to the Originating Summons and the English Proceedings. Mr Goddard at paragraph 13 said that any delay in the determination of the proceedings extends the time during which there is an outstanding challenge to how the Trustee continues to hold the trust assets of the MF Trust. He added:

> "It is of critical importance to the Trustee to have certainty as to how it holds the trust assets."

11. Mr Goddard indicated that the Russian Banks' English solicitors were provided with copies of the Originating Summons and evidence in support by letter dated 27 July 2021. Mr Goddard referred to "the importance to all parties of determining the question of the validity of the MF Trust as quickly as possible … without the delay that would result from the Trustee needing to serve the Banks via the Hague Main Channel." Mr Goddard referred to the litigation prejudice.

12. Mr Goddard referred to an opinion from the Trustee's Russian counsel KIAP that (1) service of the proceedings on the Russian Banks in Russia under the Hague Main Channel

may take between one and three years (paragraphs 21, 51-52 of the Opinion) and (2) the proposed methods of substituted service would not be contrary to Russian law.

13. Mr Goddard said that the Trustee was concerned that if the sole option to serve the Russian Banks was via the Hague Service Convention, the proceedings in the Cayman Islands may only be able to proceed after a delay of up to three years and (1) the bare trust claim in the English Proceedings is likely already to have been determined, or at least be sufficiently advanced so as to prejudice the Cayman Proceedings and (2) the Trustee would have continued to act in circumstances where there is an outstanding and continuing challenge to how it holds the trust assets – a point that goes to the core principles of its role as trustee.

14. The legal opinion of Anna Grishchenkova ("Ms Grishchenkova") of KIAP was dated 2 November 2021 and I have revisited it in detail.

15. Also before the court was the detailed skeleton argument of the Trustee dated 17 November 2021 which I have also revisited for the purpose of determining the Service/Jurisdiction Summons.

Submissions

16. I have considered the contents of the comprehensive skeleton arguments and the oral submissions. I do not set them all out in this judgment. They form part of the record and I take them all into consideration. It should be obvious from the determination section of this judgment which submissions I accept and which submissions I reject and the reasons for such determinations.

Law on Substituted Service

17. I now turn to some of the relevant law on substituted service.

18. GCR Order 65 rule 4 (1) under the heading "Substituted Service" provides that:

> "If, in the case of any document which by virtue of any provision of these Rules is required to be served personally on any person, it appears to the court that it is *impracticable for any reason* to serve that document personally on that person, the Court may make an order for substituted service of that document." (my italics)

19. Under GCR Order 11 rule 1 (1) it is permissible with leave of the court to serve a writ or an originating summons (Order 11 rule 9) out of the jurisdiction if:

> "(j) the claim is brought for any relief or remedy in respect of any trust, whether express, implied or constructive, that is governed by or ought to be executed according to the laws of the Islands or in respect of the status, rights or duties of any trustee thereof in relation thereto".

20. Order 11 rule 1 (2) provides:

> "Service of a writ out of the jurisdiction is permissible without leave of the Court if every claim made in the action begun by the writ is one which by virtue of a Law or these Rules the Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within the jurisdiction, including, for the avoidance of doubt, applications made pursuant to sections 48, 63, 64, 67, 68, 72, 103 or 104 of the Trusts Act (*as amended and revised*) or Order 85."

21. Order 11 rule 2 (4) provides that where a writ is to be served out of the jurisdiction under paragraph (2), the time to be inserted in the writ within which the defendant served therewith must acknowledge service shall be 28 days.

22. Order 11 rule 9 (1) provides that rule 1 applies to service out of the jurisdiction of an originating summons.

23. Order 11 rule 9 provides that Order 10 (personal service) and Order 65 rule 4 (substituted service) shall apply in relation to the service of a writ notwithstanding that the writ is to be served out of the jurisdiction save that the accompanying acknowledgement of service shall be modified.

24. Order 11 rule 5 (2) provides that nothing in the rule or in any order or direction of the Court made by virtue of it shall authorise or require the doing of anything in a country in which service is to be effected which is contrary to the law of that country.

25. Order 1 rule 5 (2) provides that the Supreme Court Practice, 1999 of England and Wales (the "1999 White Book") may be relied upon where appropriate as an aid to the interpretation and application of the GCR. I think it sensible and appropriate also to have regard to subsequent editions of the English White Book and the developing case law in Cayman and other sophisticated common law jurisdictions throughout the world including England and Wales.

26. GCR Order 65 rule 4 is in similar form to the old English Order 65 r.4. The commentary in the 1999 White Book at paragraph 65/4/2 includes:

> "The terms of this rule are of very wide application, and give a very wide discretion which the Court is not included [sic: inclined?] to limit: see, per Reading C.J. in *Porter v Freudenberg* [1915] 1 KB 857 CA and mere technicalities have been disregarded …
>
> Substituted service may take the form of service by letter, advertisement, or otherwise, as may seem just (*Jay v Budd* [1898] 1 QB 12 at 16) …"

27. In respect of the wording "such steps as the Court may direct" the commentary at paragraph 65/4/3 of the 1999 White Book states "service on an agent or solicitor or bankers known to be in communication with the defendant is sometimes ordered …".

28. The commentary at paragraph 65/4/17 of the 1999 White Book refers to substituted service and service of a writ out of the jurisdiction:

> "The application should not be granted unless the Master is satisfied that a practical impossibility of actual service exists, and that "the method of substituted service asked for by the plaintiff is one which in all reasonable probability, if not certainty, will be effective to bring knowledge of the writ or the notice of the writ (as the case may be) to the defendant" (*Porter v Freudenberg* [1915] 1 KB 857 and 889, CA) …In *Lazard Bros. & Co. v Banque Industrielle de Moscou* (1932) 146 L.T. 240, affirmed 148 L.T. 242, Scrutton L.J. pointed out that judges should be slow to order substituted service on pre-war Russian banks – for reasons given in his judgment … In ordering substituted service on a person out of the jurisdiction the kind of service ordered is not restricted to service out of the jurisdiction, but may be by substitution effected within the jurisdiction … although the court has a discretion to allow substituted service where the defendant was out of the jurisdiction at the time of the issue of the writ, such discretion had to be exercised so as to avoid conflict with RSC, O.11, r.1, and accordingly if the defendant was outside the jurisdiction when the writ was issued and the case does not come within any of the cases listed in O.11, r.1, no order for substituted service should be made, since to do so would add yet another cause of action to those listed in O.11 (*Myerson v Martin* [1979] 1 W.L.R. 1390; [1979] 3 ALL ER 667, CA).
>
> The present rule applies to service out of, as well as within, the jurisdiction (see O.11, r.5(1)) …"

29. Lord Reading CJ delivered the judgment of the English Court of Appeal in *Porter v Freudenberg* [1915] 1 K.B. 857 (a case concerning an "alien enemy" whose rights to

appeal were suspended until peace) and at page 888 commented that in order that substituted service may be permitted it must be clearly shown that the plaintiff is in fact unable to effect personal service and the writ is likely to reach the defendant or come to his knowledge if the method of substituted service which is asked for by the plaintiff is adopted adding:

> "The terms of this rule are of very wide application, and give a very wide discretion which we are not inclined to limit … substituted service either within or without the jurisdiction may be permitted in special circumstances."

30. Swinfen Eady J in *Western Suburban and Notting Hill Permanent Benefit Building Society v Rucklidge* [1905] 2 Ch 472 at 474 agreed that the practice was correctly stated as follows:

> "In ordering substituted service on a person out of the jurisdiction, the kind of service ordered is not restricted to service out of the jurisdiction, but may be substitution effected within the jurisdiction."

31. In *Myerson v Martin* [1979] 1 WLR 1390 Lord Denning MR (in the Court of Appeal of England and Wales) considered the interplay between orders for service out of the jurisdiction and orders for substituted service stating at page 1393:

> "It is clear that the courts have to draw a dividing line between cases which are appropriate for service within the jurisdiction (which do not require the leave of the court) and those for service out of the jurisdiction (where leave of the court is required)."

Waller LJ at page 1395 agreed that Order 65 rule 4(1) [substituted service in cases of impracticability] gave the court a discretion and that it was impossible for the court to say "that the discretion is not sufficiently circumscribed to avoid the conflict between R.S.C.,

Ord. 65, r.4(1) and Ord.11, r.1" [service out of the jurisdiction]. Everleigh LJ at page 1396 stated that when exercising its discretion under Order 65 rule 4 (substituted service) the court should also have regard to Order 11 (service out of the jurisdiction) adding:

> "When the defendant is abroad and the case is outside the court's jurisdiction under Ord. 11, I do not think that the court should exercise its discretion under Ord. 65, r.4, to order substituted service where the effect would be to add yet another cause of action to those listed in Ord. 11. So, even if the court were to have jurisdiction under Ord. 65 r.4, I do not think that this case is a proper case in which to exercise it."

32. Smellie J (as he then was) in *Chile Holdings (Cayman) Limited v Santiago De Chile Hotel Corporation SA* 1997 CILR 319 dealt with an application for substituted service on a Saudi Arabian corporate defendant on its Panama attorneys and London solicitors who represented it in related proceedings in Panama and England. It was alleged that the company had made efforts to evade personal service in Saudi Arabia via the British Consulate. Smellie J held that it was "impracticable" for personal service to be effected and ordered substituted service on the company's Panama attorneys and English solicitors. Smellie J at page 326 stated:

> "The measure of what is now practicable must take account of the possible effect of delay upon the cause of action …"

33. Smellie J at page 327 did not want the foreign corporate defendant "to use the protective shield of the Rules of court as a foil to the due administration of justice" so as to delay the action from proceeding.

34. Smellie J at page 328 stated:

"The fundamental principle of both English and Cayman law is that any person sued in our courts shall have effective service of the proceedings instituted against him. And therefore substituted service can only be resorted to when there is a "practical impossibility" of actual service and the method of substituted service will in all reasonable probability be effective to bring the proceedings to the notice of the party or person to be served."

35. I accept that service, especially on foreign defendants, is a matter of some importance and the procedural rules must be duly observed. See for example *Société Générale v Goldas Kuyumculuk Sanayi Ithalat Ihracat A.S and others* [2018] EWCA Civ 1093, per Longmore LJ at paragraph 33 and *Barton v Wright Hassall LLP* [2018] UKSC 12 in respect of electronic service on English solicitors, albeit as Lady Hale, in a strong dissent, suggested electronic communications these days are fast becoming the norm.

36. Stanley Burnton LJ in *Cecil v Bayat* [2011] 1 WLR 3086 at paragraph 65 suggested that in cases with service out of the jurisdiction outwith the Hague Service Convention and therefore "without the consent of the state in which service is to be effected" service by what in England is now described as "an alternative method" under CPR rule 6.15 "should be regarded as exceptional, to be permitted in special circumstances only." Stanley Burnton LJ at paragraph 66 added:

> "... while the fact that proceedings served by an alternative method will come to the attention of a defendant more speedily than proceedings served under the Hague Convention, is a relevant consideration when deciding whether to make an order under CPR r.6.15, it is in general not a sufficient reason for an order for service by an alternative method."

37. If delay and reliance on the overriding objective were good reasons "service by alternative means would become normal." Rix LJ in *Knauf UK GmbH v British Gypsum Ltd* [2002] 1 WLR 907 at paragraph 47 stated that: "a mere desire for speed is unlikely to amount to a

good reason, for else, since claimants nearly always desire speed, the alternative method would become the primary way." Longmore LJ in the *Société Générale* case at paragraph 33 suggested that service on a party in a Hague Service Convention state by an alternative method is to be permitted "in special circumstances only."

38. The Trustee at paragraph 19 of its skeleton argument realistically accepts that it is "clear that mere delay is of itself unlikely to be a sufficient reason for an order for substituted service" but adds "the effect of delay, or a delay of exceptional length, may lead to the test being satisfied". Mr Machell relies on a number of authorities to make that submission good including Smellie J in the *Chile Holdings* case 1997 CILR 319 at [6] on page 326 as quoted above.

39. Mr Machell says that the court looks at all the relevant circumstances adding: "where the delay in service might cause some form of litigation prejudice or prevent the efficient progress of the litigation, the impracticability test may be met." In support of that submission Mr Machell relies on the comments of David Foxton QC sitting as a Deputy High Court Judge in *Marashen Ltd v Kenvett Ltd* [2018] 1 WLR 288 where at paragraph 57 the judge refers to observations in other English cases to the effect that in Hague Service Convention cases "exceptional circumstances" rather than merely good reason must be shown before an order for alternative service other than in accordance with the terms of the Convention can be used and that mere delay or expense in serving in accordance with the Convention cannot, without more, constitute such "exceptional circumstances". The judge adds:

> "I say "without more" because delay might be the cause of some other form of litigation prejudice, or be of such exceptional length as to be incompatible with the due administration of justice."

40. In *Marashen* there was an application for permission to serve a third party costs order on the defendant's beneficial owner in the Russian Federation and to effect service by an alternative method within the jurisdiction on the defendant's former solicitors under CPR rule 6.15 (pursuant to which the court if satisfied there is "a good reason" may order service "by an alternative method or at an alternative place"). The master granted the application and decided that it was unnecessary to make an order for service out of the jurisdiction. The third party appealed and the appeal was allowed. It was held that the source of the power to make an order for service by an alternative method in respect of a person who was out of the jurisdiction was via CPR r.6.37 (5) (b), which provided that where the court gives permission to serve a claim form out of the jurisdiction it may give directions about the method of service. It was further held that an order for service by an alternative method within the jurisdiction against a person who was resident outside of the jurisdiction could only be made if the court had satisfied itself that the case was a proper one for service out of the jurisdiction and had made an order to that effect.

41. The judge in *Marashen* dealing in June 2017 with the appeal against the master's order noted at paragraph 69 that the evidence before the master was that service in the Russian Federation "would take between eight and ten months from the receipt of the request from the United Kingdom authorities, to which an estimate of two months for translation has been added (which seems surprisingly long). The master appears to have been aware from his own experience of service taking longer (he referred to delay of 12 to 18 months being "not unknown"), but there was no evidence to this effect, and it is unclear whether there were any unusual features of the cases to which the master was referring." The judge at paragraph 72 stated:

> "I do not think the level of delay inherent in service in the Russian Federation under the Hague Service Convention rises beyond the level of mere delay … There was no suggestion of delay causing prejudice or potentially prejudicing the fair determination of the section 51 application, merely an understandable desire on Marashen's part to "get on with it"."

The judge set aside the alternative method service order and gave permission to serve the section 51 application on Mr Ivanchenko out of the jurisdiction. He declined to make a fresh order for service by an alternative method.

42. Mr Machell also referred to the comments of Moulder J made on 24 May 2019 in *Avonwick Holding Ltd v Azitio Holdings* [2019] EWHC 1254 (Comm) at paragraphs [33], [34] and [37]:

> "… it seems to me that were the court to now require service through the Hague Convention this would inevitably result in these matters not being capable of being dealt with at all in the trial in October 2019. In my view this falls within the concept of "litigation prejudice" identified at [57] in *Marashen* …" (paragraph 33)
>
> "… the evidence here is that service can take a year or more and more significantly, that in this case the consequences of such a delay could cause prejudice to the progress of the litigation … one must look at the question of delay in a fact sensitive way and look at the significance of the delay in the context of the proceedings …" (paragraph 34)
>
> "In reaching a conclusion as to whether or not alternative service should be ordered, the court takes into account all the relevant circumstances. In this case those circumstances include weighing the time that would be taken to effect service under the Hague Convention against the "litigation prejudice" which would be caused to the efficient progress of the litigation where … a trial has been fixed for October 2019. In addition, the court takes into account the knowledge of the applicants and the reality that on the evidence they are fully aware of he claims against them and thus in my view no prejudice to them arises if the order for alternative service is upheld … Finally having regard to the potential delay in this case, it would not in

the circumstances have been feasible for service to have been effected through the Hague Convention without disrupting the progress of the litigation."
(paragraph 37)

43. The Manxman, Teare J in *JSC BTA Bank v Ablyazov* [2011] EWHC 2988 (Comm) at paragraph 39 referred to a submission in respect of "the likely delay in serving in Russia" stating "It may take between one and two years, though the Second Defendant has been advised by his Russian lawyer that it usually takes about 9 months. This is a long period of time." Teare J referred to a submission that the delay was a significant matter because four of the defendants to the Paveletskaya proceedings had served defences and such a long period of time to serve the Second Defendant risked holding up the proceedings. Teare J added:

> "This is the sort of point which Rix LJ had in mind in *Cecil v Bayat* when observing that in case of long delays some flexibility might have to be shown when "litigation could be prejudiced". There is however a limit to that risk in this case because three other defendants have yet to provide defences and the proceedings are not going to be tried until after the trial of Drey, Chrysopa and Granton proceedings in any event. Mr Hollander submitted that the appropriate way of dealing with this point is to recognise that if the time came when delay in Russia risked interfering with the proper disposal of the Paveletskaya proceedings then an application for alternative service could be made at that time."

44. Teare J at paragraph 41 stated:

> "It is clear from *Cecil v Bayat* that "a mere desire for speed" is not likely to amount to a good or sufficient reason for permitting alternative service."

Teare J says that in his case (1) there are grounds for believing that the Second Defendant may refuse to accept service in Russia and (2) there was a risk, though not a great risk, that the delay in service may impede the proper disposal of the Paveletskaya proceedings which involve seven other defendants (3) the Second Defendant had known of details of the claim sought to be made against him since the end of December 2010 and (4) the Second Defendant has accepted service of other proceedings but has not accepted service of the Paveletskaya proceedings because he does not want to have to defend those proceedings now. For those reasons Teare J concluded (applying the words of the relevant English rule) that there was "good reason" for an order for alternative service and dismissed the application to set aside the order for alternative service.

45. There are two local cases which counsel did not refer to in their submissions but which are worthy of mention.

46. In *China Shansui Cement Group Limited* (FSD; unreported judgment 27 January 2021) Segal J dealt with, amongst other issues, an application for substituted service. Reference was made to *Bush v Baines, Taylor and Attorney General* 2016 (2) CILR 274. Segal J at paragraph 62 of *China Shansui* states:

> "The following are the key issues for the Court to consider in deciding whether to exercise the power to make an order for substituted service: (a) is personal service impracticable? (b) are the steps which are to be taken to effect service and bring the document to the notice of the person to be served contrary to the general law of the country in which they are to be taken? and (c) are those steps reasonably likely to bring the document to the notice of the person to be served and otherwise appropriate, having regard to the overriding objective …".

47. To that helpful three stage process I would merely add the obvious point that in having regard to the overriding objective insofar the impracticability question is concerned, the

court must take care not to equate delay, even lengthy delay, with impracticability otherwise substituted service would become the norm when it should be the exception.

48. At paragraph 65 Segal J added that the key question when considering the second issue is, as Mangatal J noted in *Bush v Baines* "whether the law of the state concerned prohibits the acts in question":

> "An alternative method of service [substituted service in the Cayman Islands] may be ordered even if it is not expressly permitted by the foreign jurisdiction. But the method must not be one prohibited by the law of the foreign jurisdiction."

49. Segal J referred to the statements of Field J in *Habib Bank v Central Bank of Sudan* [2007] 1 W.L.R. 470 at paragraph 30:

> "… it is implicit … that the court may permit any alternative method of service abroad … so long as it does not contravene the law of the country where service is to be effected …"

50. At paragraph 68 Segal J noted:

> "There is authority that the Court may in certain circumstances order substituted service on the defendant's solicitors even where they have no authority to accept service (see *Hallam Estates v Baker* [2012] EWHC 1046 (QB) at [30]) and on third parties but there needs to be a strong and clear justification for doing so…"

51. Kawaley J in *Bridge Global Absolute Return Fund SPC* (FSD; unreported judgment 10 May 2022) dealt with an application for substituted service on a company on email addresses. At paragraph 13 Kawaley J noted counsel's references to a leading English

authority "which has been applied by the Cayman Islands courts" namely *Abela and others v Baadarani* [2013] 4 ALL ER 119 (UKSC) and Lord Clarke's statement at paragraph 37:

> "Service has a number of purposes but the most important is to my mind to ensure that the contents of the documents served, here the claim form, is communicated to the defendant …"

52. Kawaley J at paragraph 14 also referred to the statement of Mangatal J in *Bush v Baines* 2016 CILR (2) 274 at 317:

> "The purpose of service of proceedings is to bring the proceedings to the notice of a defendant. It is not about playing technical games …"

53. Kawaley J at paragraph 18 concluded:

> "I was satisfied that substituted service should be granted because it was clearly impracticable to serve the Petition ordinarily by leaving it at the Company's registered office because no registered office existed. I was also satisfied that the crucial question which arose were the same issues Segal J identified in *China Shanshui Cement Group Limited: "will service by email to* [Mr Nicholas McDonald] *be reasonably likely to bring the documents to the notice of* [the Company]?" On balance I felt able to answer this question in the affirmative."

Determination

54. I now turn to my determination of the issues presently before the court.

Was personal service impracticable for any reason?

55. On the evidence presented in November 2021 (as now confirmed) it was impracticable to serve the documents personally on the Russian Banks and an order for substituted service was necessary. This was not on grounds of mere delay. It was also because of the significant period of the likely delay (at least 12 months) which would be incompatible with the due administration of justice. There was also litigation prejudice. There was sufficient evidence before the court in November 2021 for the Trustee to jump the impracticability hurdle including the evidence as to the likely excessive delay point and as to the litigation prejudice. It is true that leave was not applied for and was not granted in November 2021 to rely on expert evidence but there was sufficient evidence before the court in November 2021 for the court to properly conclude that service was impracticable and that the proposed methods of service were not contrary to the laws of the place where service was to take place. I am comforted by the fact that the court now has before it (with leave) additional evidence in the form of Drew Holiner's expert opinion (which I accept on the excessive delay point and the lack of contravention of Russian law point) which in effect confirms the position as at November 2021. In respect of the litigation prejudice this was covered at paragraph 24 of Adam Huckle's skeleton argument dated 17 November 2021 and Mr Machell reiterates it at paragraph 27 of his skeleton argument:

> "This is a trust claim where the Plaintiff needs to know, as a responsible Cayman Islands trustee, for whom it holds assets. How a trustee holds the trust assets is one of the core principles of any trusteeship, and is of critical importance. The Plaintiff is prejudiced by not being able to pursue these proceedings to determine that issue within a reasonable time. This is the litigation prejudice that justifies an order for substituted service, particularly in circumstances where no prejudice whatsoever is caused to the Banks."

56. I have considered the evidence which was before the court in November 2021 and the evidence which is now before the court on this impracticability issue.

57. Ms Grishchenkova in her opinion dated 2 November 2021 stated that based on a combination of official statistics, academic commentary and her own experience and that of her firm, service in Russia pursuant to the Hague Service Convention may take between 1 and 3 years (see especially paragraphs 21 and 52).

58. Mr Goddard in his affidavit sworn on 17 November 2021 referred to the possible delay of "anywhere between one and three years" (paragraph 11) and referred to litigation prejudice in paragraph 12 to 14 and 23 stressing that it was of "critical importance to the Trustee to have certainty as to how it holds the trust assets."

59. A legal opinion from Elena Vasilevna Kudryavtseva ("Ms Kudryavtseva") dated 1 March 2022 has been produced on behalf of the Russian Banks and, amongst others, Ms Kudryavtseva makes the following points:

(1) she is a director of law and professor at Lomonosov Moscow State University and teaches procedural courses;

(2) the average time for execution of a request to serve foreign legal proceedings on Russia under the Hague Service Convention is 3 – 6 months once the relevant documents are lodged with the Russian Central Authority but it can take longer in some cases depending on the facts of the particular cases;

(3) as at the date of Ms Grishchenkova's opinion there were federal restrictions on the activities of the Ministry of Justice and Russian courts related to the Covid-19 pandemic. There are currently no federal or regional restrictions.

60. The Russian Banks' expert agrees that the published information set out on the official website of the Hague Service Convention indicates that the time to complete service in Russia is "between 3 and 6 months" but she says "the suggestion that it may take up to three years to effect service on the Banks under the Hague Convention is wrong."

61. An expert report by Drew Holiner ("Mr Holiner") dated 2 May 2022 has been produced on behalf of the Trustee and, amongst others, makes the following points:

(1) he is a qualified and practising member of the Russian Bar and has over 20 years of experience in litigation, advocacy and advisory work involving matters with a close connection to Russia;

(2) with reference to the opinions of Ms Grishchenkova and Ms Kurdryavtseva his experience with the length of time to effect Hague Service Convention service in Russia more closely reflects that of Ms Grishchenkova (i.e. 1 – 3 years), although there are examples of it being effected in Russia in a shorter time frame;

(3) although the war in Ukraine is itself unlikely to affect service in Russia (which would take place in Moscow), there is a significant risk that the resulting political fallout between Russia and the West will have an impact. In a recent case (April 2019) the Hague Service Convention requests between the UK and Russia were not being processed and there are risks it may be formally discontinued under Western sanctions or Russian countersanctions;

(4) in one specific English case the documents were lodged in April 2019 in respect of service on two defendants but the claimant did not hear back from the Foreign Process Section until late June 2020 when it forwarded a letter from the Russian Central Authority stating that process "was not performed" due to the first defendant's failure to appear at the appointed court hearing. The response was silent as to the second defendant. Attempts were made to seek clarity but by September 2021 no further response had been received from the Russian Central Authority and the claimant applied for and obtained from the English High Court an order for alternative service.

62. In her legal opinion dated 27 May 2022 Ms Kudryavtseva says that she cannot agree with Mr Holiner's assessment of the average length of the service procedure in Russia under the Hague Service Convention and she remains of the opinion that the average time for execution of a request to serve a party in Russia under the Hague Service Convention is 3 – 6 months from when all of the relevant documents are lodged with the Russian Central Authority. She says that the assessment of Mr Holiner "is not substantiated by the authorities" and adds that the specific case referred to by Mr Holiner is "not typical". She does not agree with Mr Holiner's suggestions that sanctions may adversely affect the service process between Russia and the Cayman Islands. She says that the Russian Central Authority is still processing applications from foreign authorities in the usual way including from the UK.

63. I prefer the evidence of Mr Holiner who has relevant practical experience and refers to various cases, one of which he has direct knowledge of. His predictions appear to be based on past experience. I note the cases referred to by all experts and I note the opinions expressed and the predictions as to the possible timescale. I find, on the evidence presented to the court, that the relevant time period could extend to over a year, and such significant delay coupled with litigation prejudice could be incompatible with the due administration of justice. I conclude that the impracticability test was duly met in November 2021.

Were the methods of substituted service in the Service Order contrary to the law of the country in which the steps were to be taken

64. I should record that it is plain from the English authorities that service by post, courier or email is not expressly prohibited by the law of England and no evidence was presented to the court to suggest otherwise. It is correct that there are specific requirements in respect of service by electronic means (see Practice Direction 6A at 4.1 and by way of example the recent judgment of Waksman J in *Sir Robert McAlpine Ltd v Richardson Roofing Co Ltd* [2022] EWHC 982 (TCC)) but it is certainly not contrary to English law or "expressly

prohibited". Insofar as the substituted service took place in England it was plainly not contrary to or expressly prohibited by English law. That should be enough to dispose of this point but, for the sake of completeness, I should also refer to the position under Russian law and my findings in that respect.

65. Ms Kudryavtseva on behalf of the Russian Banks says that the methods of service in the Service Order do not comply with the procedure provided for under Russian law and the Hague Service Convention and are not permitted under Russian law for the purposes of service of foreign proceedings.

66. Mr Holiner confirms the position placed before the court in November 2021 and says that the means of service under the Service Order are not contrary to Russian law, notwithstanding Russia's reservation made in respect of Article 10 of the Hague Service Convention. Ms Kudryavtseva maintains that the means of service under the Service Order are not permitted and do not comply with Russian law. I prefer the evidence of Mr Holiner, which addresses the correct issue in a persuasive way.

67. The Russian Banks suggest that the method by which service was to take place in Russia was contrary to the law of that country. I agree with Mr Machell that the better view is that service by the means permitted by the Service Order was not expressly or positively prohibited by Russian law (see for example paragraphs 66-67 of Ms Grishchenkova's opinion dated 2 November 2021 and paragraph 26 of Mr Holiner's expert opinion dated 2 May 2022). Ms Kudryavtseva at paragraph 59 of her opinion dated 1 March 2022 states that the methods of service "are not permitted and do not comply with Russian law". She does not say that they were expressly or positively prohibited by Russian law. I accept that Ms Kudryavtseva at paragraph 30 of her second opinion dated 27 May 2022 disagrees with Mr Holiner on this point but for the brief reasons I have stated I prefer the expert evidence of Mr Holiner on this issue. I am comforted by the fact that this approach is consistent with the approach of the English courts, for example Blair J in *BNP Paribas SA v Open Joint Stock Company Russian Machines* [2011] EWHC 308 (Comm) at paragraph 135.

Were the steps specified in the Service Order reasonably likely to bring the documents to the notice of the persons to be served and otherwise appropriate having regard to the overriding objective?

68. In my judgment the steps specified in the Service Order were reasonably likely to bring the documents to the notice of the Russian Banks and were otherwise appropriate having regard to the overriding objective. The provision of the documents by courier and email to the English solicitors actively acting on behalf of the Russian Banks was reasonably likely to and did in fact bring the documents to the notice of the Russian Banks. This requirement was plainly satisfied. Moreover, the Russian Banks appear to have received the documents at their Russian addresses also.

69. The Russian Banks have had the Originating Summons and the evidence in support since July 2021 (paragraph 24.4 of Mr Goddard's second affidavit). There has been no prejudice to them. They are aware of the proceedings and have an opportunity to participate in them. The Originating Summons is deemed to have been served on them since the date in December 2021 upon which their English solicitors received it pursuant to the Service Order.

70. The failure to expressly specify a 28-day time period within which the Russian Banks must acknowledge service may have amounted to a trivial, technical irregularity but no prejudice has been caused and such minor omission was not fatal to the validity of the Service Order. It is not a valid reason to set it aside as requested by the Russian Banks. Moreover, the further minor complaints in respect of the failure to specify the date on which the Originating Summons would be deemed to be served on the Russian Banks are not fatal to the validity of the Service Order and come nowhere near justifying setting it aside.

Was permission to serve out of the jurisdiction necessary?

71. In my judgment the Trustee was not required to apply for permission to serve the Originating Summons by substituted service out of the jurisdiction. The Originating Summons properly construed was seeking to advance a claim pursuant to Order 85. It was as described by Mr Machell a construction summons seeking to deal with the bare trust claim and not touching the statutory avoidance claims. Mr Machell properly conceded that it could have been better pleaded from the outset. During exchanges Mr Machell expressly disclaimed any reliance on any sections in the Trusts Act and made it crystal clear that the Trustee was solely relying upon Order 85. To ensure that such clarification was properly reflected in the pleading and on the court record I gave the Trustee leave to amend the Originating Summons to delete reference to "the Trusts Act" and also to insert "on a true construction". Such amendments were permitted pursuant to Order 20, the overriding objective and the general law. See for example *Swiss Bank and Trust Corporation Limited v Iorgulescu* 1994 – 95 CILR 149 (CICA); *Cayman Islands Civil Aviation Authority v Island Air Limited* 2003 CILR 483 (Smellie CJ) and *Jafar v Abraaj Holdings* (FSD; Segal J unreported judgment 20 December 2021). The original pleading plainly referred to Order 85 and Mr Machell confirmed that it was on that sole basis that the construction summons was being advanced.

72. Order 11 rule 1 (2) is plain in its wording. In effect permission to serve out of the jurisdiction is not necessary in respect of applications under Order 85. The Originating Summons was an application under Order 85. I reject the argument of Mr Potts that Order 11 rule 1 (2) was only intended to cover *Beddoes* applications or other "internal" non-contentious applications. It is plain from its wording, in particular the reference to "wrongful act, neglect or default", that it is apt to cover contentious proceedings and specifically applications made pursuant to Order 85. Permission to serve out of the jurisdiction was not necessary.

73. Mr Potts produced a belated fresh argument in reply on Order 85 which was not canvassed in his skeleton argument or his opening submissions. Insofar as I understood it this argument ran as follows: Order 85 rule 2 only applies if the question of relief could be

determined or granted in an administration action and the relief sought in the Originating Summons could not be granted in an administration action. When asked to refer the court to some law to make that submission good the best Mr Potts could come up with was the 1999 White Book commentary at 85/1/1 and 85/2/2. Frankly, I simply did not understand the point Mr Potts was attempting to make. The commentary at 85/1/5 refers to "If the application is made by originating summons the master will be able to make the order unless the summons raises for determination a question of the construction of a document." In an action for the execution under the direction of the court of a trust questions of construction may arise which need to be dealt with by a judge. A cumbersome full administration order need not be granted. The 1999 White Book commentary refers to applications for *Beddoe* orders and pre-emptive costs orders and at 85/6/3 the point is made that a summons under Order 85 [r.6] which raises a point of "construction should be adjourned into Court, not Chambers" and assumes that construction summonses can be dealt with under Order 85. The commentary in the English White Book 2022 at 64.2.6 states that general administration orders are now rarely made. The commentary adds: "It is now far more common for specific issues or situations requiring directions to be raised by trustees or executors with the court." Construction issues would be specific issues. Rule 64.2 (a) expressly provides for the court to determine "any question" (which would include a question of construction) arising in the execution of a trust. There is nothing in this Order 85 argument belatedly raised by Mr Potts in his reply.

74. The Originating Summons is in effect an application pursuant to Order 85 and in my judgment leave to serve out of the jurisdiction was not necessary. That much is clear from the plain wording of Order 11 rule 1 (2).

75. I do however leave open the question as to whether, in a substituted service case in respect of a foreign defendant where an application for service out is not required, the court should nevertheless consider proper forum factors as suggested by Everleigh LJ in the English Court of Appeal in *Myerson v Martin* [1979] 1 WLR 139 which seems sensible but is not

yet settled at first instance or appellate level as a matter of Cayman law and appears to go against the plain wording of Order 11 rule 1(2).

Alleged lack of fair presentation and lack of disclosure

76. I now turn to the numerous complaints of the Russian Banks in relation to alleged lack of fair presentation and lack of full and frank disclosure. I have concluded that there is nothing of substance in them.

77. I have refreshed my mind as to the relevant law in respect of the duty to make a full disclosure of material facts and the duty of fair presentation: see for example my judgment in *Wang v Credit Suisse* AG (FSD unreported judgment 8 April 2022) and Teare J in *PJSC National Bank Trust v Mints* [2021] EWHC 692 (Comm) at paragraph 86. In that case Teare J found that Mr Dooley of the Claimants' solicitors had made a "serious omission" (paragraph 90) albeit "not deliberate but inadvertent" (paragraph 94) and concluded that he was "persuaded that in this case the interests of justice do not require that the permission to serve out of the jurisdiction be set aside. Rather, the Claimants' failure to comply with their duty can properly be marked by an appropriate order as to costs so that the importance of their breach of duty is made plain not only to them but also to other litigants." (paragraph 97). I note also paragraph 74 of Mangatal J's judgment in *Cowan v Equis Special LP* (FSD; unreported 3 October 2019).

78. I have also refreshed my mind as to the evidence and the skeleton argument dated 17 November 2021 which was before the court when the application was considered on the papers on an *ex parte* basis.

79. The skeleton argument concisely outlined the relevant factual and legal position. It helpfully referred to the relevant authorities. It stressed that "mere delay" was unlikely to be a sufficient reason for substituted service. There was clear reference to the "litigation

prejudice." The author of the skeleton argument should be commended rather than condemned.

80. There was, in my judgment, no material non-disclosure or lack of fair presentation. The Trustee's assertions in respect of prejudice were well founded and properly presented. The concerns over the length of time for service were also well founded and have more recently been confirmed. The Trustee was entitled to its view that there appeared to be no proper reason why the Russian Banks would refuse to accept service via their English solicitors. The Trustee's statement that the Russian Banks had given no reason for their position must be considered in light of the submission that there was no proper reason. The Trustee was correct to assert that substituted service would not be a contravention of Russian law. There was no need for the Trustee to educate the Court in respect of the status of Kawaley J's judgment on the *Beddoe* application. There was no need to refer the court to the detailed findings made in the LCIA or to refer to the detailed circumstances by which the trust was established. Again it was not improper for the Trustee to state that in its view the Russian Banks were "relying on a technical position simply to delay the progress of these proceedings". That was a legitimate and proper view to express.

81. There is nothing in the Russian Banks' lack of full and frank disclosure and fair presentation points.

Forum Factors

82. In his skeleton argument Mr Potts refers to the application for an order staying these proceedings on the grounds of *forum non conveniens* and/or *lis alibi pendens* and, amongst other authorities, cites Kawaley J's judgment in *The Stingray Trust* (FSD; unreported 21 December 2020) and *Crociani v Crociani* [2014] UKPC 40.

83. Mr Potts refers to the affidavit evidence of Mr Dooley, an English solicitor acting for the Russian Banks, which I have considered. Mr Potts stresses the following points:

(1) in assessing the issue of forum the court should have regard to the totality of the disputes between the parties;

(2) the Cayman Islands courts do not have exclusive jurisdiction notwithstanding the involvement of a Cayman Islands trust, a Cayman Islands trustee and Cayman Islands law. Mr Potts refers to the approach of the courts being to take into account:

(a) the country in which the action has the most real and substantial connection;
(b) the place of residence or business of the parties;
(c) the availability of factual and expert witnesses;
(d) the law governing the dispute;
(e) the significance of the proper law will vary from case to case: where the issues will be primarily factual rather than legal, or the trusts law of the competing fora are similar the proper law may not matter greatly;
(f) whether the parties have conferred jurisdiction on a particular court;
(g) common language;
(h) the more advanced status of foreign proceedings (especially if a jurisdictional challenge in that foreign jurisdiction has been unsuccessful) may be dispositive of a stay application.

(3) even a contractual exclusive jurisdiction provision can be properly disapplied in favour of another forum with competent jurisdiction, if the interests of justice so require, including in cases where there is a risk of multiplicity of proceedings, and inconsistent judgments. The weight to be attached to forum or jurisdiction clauses in trust deeds involving non-parties, or non-signatories is likely to be less than in contractual agreements (*Crociani v Crociani* [2014] UKPC 40 at paragraph 37);

(4) the English High Court will be just as well placed as the Grand Court of the Cayman Islands to determine any issues of Cayman Islands law that may be in dispute

between the parties (with the benefit of expert evidence) with a view to ensuring that any judgment of the English High Court would be capable of recognition and enforcement in the Cayman Islands in due course. Conversely, the Grand Court will be less well equipped to determine all the issues of fact in dispute between all of the various parties and witnesses to the litigation (in its proper context) given the extensive history of the litigation in England (which commenced in June 2019 with already eight reported judgments at first instance and one from the Court of Appeal), and the nature and extent of the English High Court's powers, having regard to the nature of the proceedings, including the location of parties, witnesses and documents.

84. Mr Machell submits that the existence of clause 19 of the Fifth Schedule of the Trust Deed (governing law, forum and place of administration) makes the Cayman Islands the natural forum, and the starting point is that the jurisdiction provision should be upheld. He adds that the fact that the Russian Banks are not beneficiaries is irrelevant as they advance their claim through Boris Mints and contend that he is the sole beneficiary. Mr Machell makes the following additional submissions, amongst others, in support of the Cayman Islands as the appropriate forum:

(1) it is plainly appropriate for the Cayman Islands-resident Trustee to bring the proceedings in this jurisdiction and to uphold the jurisdiction provision;

(2) the Cayman Islands court can determine the Bare Trust Claim construction issue far more quickly than the English court;

(3) there is no overlap or inconvenience in dealing with that issue in the Cayman Islands;

(4) the Bare Trust Claim raises a simple question of construction. For this purpose the Trust Deed must be read in light of the admissible limited factual matrix,

and the subjective intention of Boris and his sons, including Boris's wishes or knowledge, is inadmissible and irrelevant as are contentions as to Igor (as Protector) exercising his powers as agent or nominee for Boris. The plea in respect of the Protector is nonsensical in the context of a simple construction issue given that it is not alleged that the Trustee was aware of the alleged agency. Even if relevant, there is no reason why such matters cannot properly be dealt with by the Cayman Islands court;

(5) so far as convenience is concerned the matters relied upon in Mr Dooley's evidence do not come anywhere close to establishing that England is the most appropriate forum. They are at best neutral from the Russian Banks' perspective;

(6) the Bare Trust Claim, which Kawaley J in his *Beddoes* judgment described as "barely arguable", should be resolved efficiently and properly in the Cayman Islands.

85. To properly consider the jurisdictional challenge of the Russian Banks it is important to have regard to the totality of the disputes between the parties (see Floyd LJ in the English Court of Appeal in *Huawei Technologies Co Ltd v Conversant Wireless Licensing Ltd* [2019] EWCA Civ 38 at paragraph 32) and to consider, albeit briefly, the nature and context of the English Proceedings and the proceedings in the Cayman Islands.

86. In the English Proceedings Mr Dooley provided his 11th witness statement dated 16 July 2021 in support of an application for permission (1) to join the Trustee to the English Proceedings (2) to serve the Trustee out of the jurisdiction and (3) to re-amend the Amended Consolidated Particulars of Claim to include new claims against the First Defendant Boris Mints and the Trustee.

87. Reference is made to a Final Partial Award dated 23 June 2021 made in arbitration proceedings and the finding that Boris Mints, Dimitry Mints (the Second Defendant in the English Proceedings) and Alexander Mints (the Third Defendant in the English Proceedings, together the "Mints Defendants") had participated in a dishonest conspiracy with others (including the Fifth and Sixth Defendants in the English Proceedings) to defraud PJSC Bank Otkritie Financial Corporation ("Bank Otkritie") of around US$600 million in a transaction that took place in August 2017. It is alleged by the Russian Banks that shortly after the fraud Boris Mints set up the MF Trust from which the Russian Banks say it is to be inferred that such was part of his plan to judgment-proof his family's assets given the likelihood of proceedings by Bank Otkritie's hostile new management.

88. The Russian Banks issued proceedings in England on 27 June 2019 against the Mints Defendants and applied *ex parte* for and were granted a worldwide freezing order to the value of US$572 million. Various attempts to set aside the Order were unsuccessful.

89. On 10 July 2020 the Russian Banks issued a separate claim in England (CL-2020-000432) and the claims were consolidated and permission granted to serve out of the jurisdiction.

90. All the Defendants deny the allegations of fraud. There are also civil and criminal proceedings in Russia.

91. The Russian Banks refer in detail to the MF Trust and allege that the reality of the situation is that Boris Mints retains complete economic and practical control over the assets held within the MF Trust and that his son Igor Mints will and does exercise the powers of the Protector as directed by his father Boris Mints. The Russian Banks in effect allege that Igor Mints is a puppet protector with Boris Mints pulling the strings. The Russian Banks seek in the English Proceedings a declaration that Boris Mints is the beneficial owner of the assets held within the MF Trust as a matter of Cayman Islands law. The Russian Banks also refer to their claims under the Cayman Islands Fraudulent Dispositions Act and section 423 of the United Kingdom Insolvency Act 1986.

92. Mr Dooley refers to his firm's correspondence in April 2020 with Bird & Bird, the English solicitors acting for the Trustee, notifying them of the intention of the Russian Banks to join the Trustee as a defendant and asking for their consent. Bird & Bird responded on 12 May 2020 stating that England was not the proper forum for the claim against the Trustee and that the claims should be brought in the Cayman Islands. Bird & Bird also referred to the Trustee's intention to seek *Beddoe* directions from the Cayman court. Mr Dooley's firm replied on 18 May 2020 stating that the Russian Banks believed that England was the proper forum in circumstances where the First to Fourth Defendants (stated to be the discretionary beneficiaries of the MF Trust) were domiciled in England and it was logical for all claims to be determined in one set of proceedings rather than having parallel proceedings in the Cayman Islands involving the same parties and the same set of facts.

93. Kawaley J in his helpful "Reasons for *Beddoe* Order" delivered on 27 July 2021 for the assistance and guidance of the Trustee noted at paragraph 2 that the application was made on notice to the Russian Banks "who did not, in the event, participate." At paragraph 3 Kawaley J recorded:

> "The Trustee formally adopted a neutral stance but explained why it might be considered appropriate for it to contest the threatened claims against it or (in the first instance at least) challenge the jurisdiction of the English Court. An active response was positively endorsed by the Beneficiaries, including by way of evidence. The Enforcer took no position"

94. Kawaley J at paragraph 22 referred to his judgment in *The Stingray Trust* (FSD; unreported judgment 21 December 2020) where he noted at paragraph 83 that if the application had been "heard before or shortly after the Milan Proceedings were commenced in 2016, the scales might well have tipped decisively in favour of finding that the Cayman Islands was the most appropriate forum. This Court's ability to deal with the validity issue under

Cayman Islands law without the need for expert evidence and probably more quickly might well have been decisive …"

95. Kawaley J dealt with the "Firewall Provisions" of Trusts Act in particular sections 90 – 93 and at paragraph 23 stated:

> "These elements of legislative scheme are a manifestation of a legislative intention of ensuring that the validity of trusts governed by Cayman Islands law will be determined in accordance with Cayman Islands law, being a system of law which has explicitly been designed to encourage foreign settlors to establish trusts here. It is a notorious fact that financial services is a (if not the) major pillar of the economy and that trust services play a not insubstantial role …"

96. I have noted carefully Kawaley J's observations (in particular at paragraphs 24 – 25 and 29 – 30) in respect of local public policy concerns.

97. I always pay close attention to the judgments of Kawaley J but as with all judgments (especially those at first instance) the determinations are based on the circumstances, information, evidence, law, arguments and the actual application put before the judge for determination. In the law context is all important. Indeed some including Lord Slynn in *R v Secretary of State for the Home Department, Ex Parte Daly* [2001] UKHL 26 at paragraph 28 would say that: "In law context is everything." Kawaley J was considering a *Beddoe* application. I am considering a forum challenge.

98. Kawaley J in his illuminating judgment in *The Stingray Trust* (FSD; unreported judgment 21 December 2020) made it clear that section 90 did not confer exclusive jurisdiction on this Court to adjudicate all trust issues which the section expressly required to be determined under Cayman Islands law (paragraph 54). *Stingray* also contains a useful summary of the role of puisne judges at first instance and the limited weight to be attached

to decisions of such judgments which depend largely on their own factual and legal matrix (paragraph 38).

99. On 28 July 2021 Knowles J in England, the day after Kawaley J's *Beddoe* judgment, gave permission to add the Trustee as an additional defendant and to advance new claims relating to the MF Trust against Boris Mints in the English Proceedings.

100. I have considered the Consolidated Re-Amended Particulars of Claim in the English Proceedings with the Trustee as the Eighth Defendant. Section H deals with the assets held in the MF Trust. Section H2 begins at paragraph 68 under the heading "Boris Mints retained beneficial ownership of the Trust Companies" and advances what counsel referred to as the Bare Trust Claim. Paragraph 68 alleges that on a true construction of the terms of the MF Trust Boris Mints retained the beneficial ownership of the Trust Companies. At paragraph 69 there is reference to Igor Mints as Protector being given "extraordinary powers" and it is pleaded at paragraph 69.3 that (a) Boris Mints wished to retain control over the trust assets and (b) he knew that his son Igor Mints could be trusted to act as Protector in accordance with his instructions in relation to the Trust Companies, and at paragraph 69.4 that Igor Mints in reality exercises the powers of the Protector as agent or nominee for Boris Mints and the true position is that Boris Mints has retained complete economic and practical control over the Trust Companies and therefore the beneficial ownership of them. The pleading refers to the powers of the Protector in the Trust Deed although no reference appears to have been made to sections 90 – 93 of the Cayman Islands Trusts Act. At paragraph 75 the Russian Banks seek a declaration that Boris Mints is the beneficial owner of the assets held with the MF Trust as a matter of Cayman Islands law.

101. Section H3 begins at paragraph 76 under the heading "Claims under the Fraudulent Dispositions Law" and H4 begins at paragraph 81 under the heading "Claims under section 423 of the Insolvency Act 1986". The Avoidance Claims, as they were described before me, are advanced under sections H3 and H4.

102. On 11 August 2021 the Trustee was provided with a copy of the Order made by Knowles J on 28 July 2021 and the re-amended English Proceedings.

103. On 7 October 2021 and 5 November 2021 respectively the Trustee and Boris Mints filed applications challenging the jurisdiction of the English Court which have been listed to be heard on 13-14 September 2022. Those parties claim that the Cayman Islands is the most appropriate jurisdiction and rely as to Cayman law on expert reports from Shân Warnock-Smith QC and Tom Lowe QC. The challenges are made in respect of two sets of claims:

(1) the "Bare Trust Claims", whereby the Russian Banks seek a declaration that Boris Mints is the beneficial owner of the assets within the MF Trust as a matter of Cayman Islands law; and

(2) the "Avoidance Claims", whereby the Russian Banks seek an order setting aside the transfer of the Trust Companies into the MF Trust under the Cayman Islands Fraudulent Dispositions Act and/or section 423 of the Insolvency Act 1986 of England and Wales.

104. On 17 December 2021, the Russian Banks filed their evidence in response in the English Proceedings including an expert report of Alex Henderson QC, who was formerly a judge of the Grand Court of the Cayman Islands.

105. Mr Dooley confirmed that his firm Steptoe & Johnson UK LLP has not previously had and does not have instructions to accept service of any documents filed in the Cayman Islands Court proceedings on behalf of the Russian Banks. Mr Dooley acknowledges that on 9 December 2021 he received an email from Adam Huckle of Maples attaching a cover letter with documents filed in the Cayman proceedings and such was also received by courier on 15 December 2021. In December 2021 the Russian Banks also received the same by courier and post in Russia.

106. It may be convenient at this stage to mention what have become known as the Firewall Provisions, namely Part VII – Trusts – Foreign Element, sections 87 – 93 of the Cayman Islands Trusts Act.

107. Kawaley J undertook a useful review of the authorities on section 90 in *The Stingray Trust* (FSD; unreported judgment 21 December 2020) and concluded at paragraph 54 that:

> "section 90, applying a purposive construction which is entirely consistent with the natural and ordinary meaning of the section in its wider statutory context, does not require all matters which must be determined under Cayman Islands law to be determined exclusively by this court."

108. Kawaley J also considered the decision of the Judicial Committee of the Privy Council in *Crociani v Crociani* [2014] UKPC 40 and at paragraph 64 extracted the following relevant principles:

(1) *prima facie*, a trustee can enforce an exclusive jurisdiction clause against a beneficiary;

(2) whether the clause is an exclusive jurisdiction clause may depend on the wording of such clause;

(3) whether a particular dispute is potentially caught by the clause depends on the nature or legal character of the dispute;

(4) it will be easier for a beneficiary to resist enforcement of an exclusive forum for administration clause than it will be for a party to resist enforcement of a contractual exclusive jurisdiction clause.

109. It is also important to consider clause 19 of the Fifteenth Schedule of the Trust Deed which provides as follows:

"19. Governing law, forum and place of administration

19.1 The governing law of this settlement shall be Cayman Islands law and all rights under this settlement and its construction and effect shall be subject to the jurisdiction of the courts, and construed according to the laws of the Cayman Islands.

19.2 The courts of the Cayman Islands shall be the forum for the administration of the trusts, powers and provisions of this settlement.

19.3 Notwithstanding the provisions of paragraphs 19.1 and 19.2 of this Schedule, the Trustee may carry on the general administration of the trusts of this settlement in any jurisdiction in the world whether or not any trustee or trustees of this settlement are for the time being resident, or domiciled in, or otherwise connected with, that jurisdiction."

110. In addition to considering the Firewall Provisions and the governing law and jurisdiction provision we must also consider the law in respect of *forum non conveniens*. It is well established (see the useful concise summary of Teare J in *PJSC National Bank Trust v Mints* [2021] EWHC 692 (Comm) at paragraphs 33 – 36) that 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. The concept generally requires a summary examination of connecting factors between the case and one or more jurisdictions in which it could be litigated. Those include matters of practical convenience such as accessibility to courts for parties and witnesses and the availability of a common language so as to minimize the expense and potential for distortion involved in translation of evidence. Although they are important, they are not necessarily conclusive. Connecting factors also include matters such as the system of law which will be applied to decide the issues, the place where the

wrongful act or omission occurred and the place where the harm occurred. Sometimes the risk of multiplicity of proceedings about the same issue and the risk of inconsistent decisions are very important factors in the evaluative task of identifying the proper place for the determination of the dispute.

111. In respect of an application by a defendant seeking a stay of proceedings commenced as of right the burden resting on the defendant is not just to show that the Cayman Islands is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the Cayman Islands forum. I agree with Mr Machell that given that leave to serve out was not required in this case the burden is on the Russian Banks to establish that England is "clearly or distinctly" more appropriate than the Cayman Islands, having regard to the interests of all the parties and the ends of justice.

112. Where permission is required to serve out of the jurisdiction the burden lies on the plaintiff to show that the Cayman Islands is clearly the proper place in which to bring the writ or originating summons.

113. If another forum appears to be "clearly or distinctly" (I confess that I have always struggled with the difference between those two words in this context) the more appropriate forum then normally it is in that jurisdiction in which the proceedings are to be progressed unless it can be shown that a party has a legitimate juridical advantage in pursuing its claim in the Cayman Islands as "substantial justice" cannot be achieved in the alternative forum. In this case there can be no reasonable doubt that "substantial justice" can be achieved in England and Wales.

114. With the relative ease of modern travel, the development and utilization of electronic communications and digital technology, including the ease of remote hearings and electronic data provision, the importance in forum challenges of the physical location of the parties, witnesses and documents is rapidly decreasing, as both counsel wisely accepted

in this case. The physical location of the parties, witnesses and documents are not determinative of the issue of appropriate forum in this case.

115. The major competing factors which are in issue in this case presently before me in respect of forum can be summarised briefly and broadly as follows:

(1) the Firewall Provisions and the governing law and jurisdiction provision;

(2) the existence of the English Proceedings and the desirability of all relevant issues between all relevant parties being decided in one forum.

116. I take full account of the Firewall Provisions and the Cayman governing law and jurisdiction provision but I have nevertheless reached the conclusion that the English High Court is clearly and distinctly the most appropriate forum in which this case can be suitably tried for the interests of all the parties and for the ends of justice. I am not persuaded that it would be appropriate to attempt to salami slice (to use the phrase used by Mr Potts) the Bare Trust Claim out of the bigger sausage being dealt with in England. It is best that all the issues between the parties, including the issues in respect of the alleged fraud and the Cayman Trust be dealt with in one forum and that forum should be England and Wales taking into account the advanced stage the English Proceedings have reached and the knowledge and experience of the English courts in respect of the English Proceedings to date.

117. I agree with the sentiments of Lord Bingham in *Donohue v Armco* [2002] 1 Lloyds Rep. 425 (an alleged fraudulent conspiracy, anti-suit injunction, exclusive jurisdiction clause case) at paragraph 34:

> "It seems to me plain that in a situation of this kind the interests of justice are best served by the submission of the whole dispute to a single tribunal which is best fitted to make a reliable, comprehensive judgment on all the matters in issue."

118. The strength of this factor, in my judgment, overrides the jurisdiction clause in the MF Trust and any policy considerations pursuant to the Firewall Provisions.

119. The Defendants (especially the Mints family) are properly before the English courts and it is that forum within which this dispute should be dealt with.

120. Standing back and looking at the matter in the round I have concluded that England is clearly the appropriate forum for the determination of all the issues raised in this case.

121. It is clear, on the persuasive English authorities, that in deciding where a matter should be most appropriately and justly tried the court must look at the overall dispute between the parties and the "case" is not restricted to an analysis of the claim and relief sought by the plaintiff, the Trustee in this case. The court should identify which forum is the appropriate forum for the dispute between the parties and not merely the claims the plaintiff wishes to advance or the relief it wishes to seek. Taking into account the wider dispute between the parties that has been making its way through the English court since June 2019 and noting the issues raised in the pleadings including the construction application and related allegations of a puppet Protector, and the statutory avoidance claims, I have reached the conclusion that the proper forum is England.

122. Mr Machell did his impressive best (perhaps utilising what Lady Rose in *What Makes a Good Judge?* 16 June 2022 at paragraph 8, available at www.supremecourt.uk, described as a skill of a top advocate namely "an ability to make a thoroughly bad legal submission seem plausible and attractive") to persuade me to carve out the bare trust construction claim. Mr Machell said the factual issues pleaded in England in respect of the simple construction claim were "strikeable" and that only very limited evidence would be admissible. I do not say for one moment that Mr Machell's point was a "thoroughly bad point". I was simply not persuaded by it despite his considerable eloquence. Mr Machell,

utilising his impressive advocacy skills, tried to persuade me that the determination of the Bare Trust Claim in the Cayman Islands would not require much by the way of evidence and there would be no real overlap with the issues in the English Proceedings. I do not think it will be that simple. To adopt language from another context, it may end up a treacherous short cut. The puppet Protector point, which may have some relevance to the Bare Trust Claim, may require considerable evidence and such evidence would overlap with the evidence to be adduced in the well advanced English Proceedings (although I accept that the trust claims were only introduced relatively recently). I do not think that such potential evidential overlap points can be dismissed as "nonsensical". In any event, even if no or little evidence was necessary to support the Originating Summons it is much better if all claims and contested issues are dealt with in one jurisdiction.

123. I appreciate that in considering the construction claim only limited evidence would be admissible but all issues should be dealt with together in their proper context in one forum. There would need to be some factual evidence in respect of both sets of trust claims. That factual evidence should be considered by the English Court along with all the other relevant evidence in respect of all of the issues before the English Court. We should not attempt to carve out one isolated issue in respect of the MF Trust and determine it, almost in the abstract, here in the Cayman Islands. That would lead to an undesirable multiplicity of proceedings. All the relevant disputes between the parties should be decided in one jurisdiction, namely England and Wales.

124. In my judgment, to develop Mr Potts' phraseology, the salami should be left whole for the English Court to devour in its totality as one main course; one small piece should not be sliced off and offered to the Cayman Court for separate digestion, as a little tasty starter.

125. It is right, of course, that within the law the Cayman courts should do their utmost to jealously protect the vibrant Cayman trust industry and apply the Firewall Provisions. I would however, as a relative newcomer to this wonderful jurisdiction, tentatively and respectfully suggest that for jurisdictions which attract a lot of international business and

need to be compliant with well recognised and accepted international standards there are dangers in taking too much of an insular self-protective approach. The Cayman Islands play an important and responsible role in international trust and finance work. We must always be conscious of the bigger worldwide picture. We must not ignore proceedings in the courts of other civilised jurisdictions. Comity comes into play in such situations. Furthermore, no doubt the English courts in the English Proceedings will have full regard to the fact that the MF Trust is expressly governed by the laws of the Cayman Islands (including the Firewall Provisions) and apply such laws where relevant and appropriate. Busy courts worldwide must work together to ensure that justice is done. In that way, (as progressive and aspirational Justice Blackmun of the Supreme Court of the United States sought to teach us as long ago as 1987) we can all be part of a "smoothly functioning international law regime" (Doyle *Harvard Lecture* 2007 available at www.courts.im). In addition to respecting and applying the Firewall Provisions and governing law and jurisdiction clauses we must also respect and apply well established principles of private international law. The concept of *forum non conveniens* is a well-established part of the laws of the Cayman Islands. Nothing I say in this judgment is intended to undermine the Firewall Provisions or the importance of the trust industry to the Cayman Islands.

126. Now that the Russian Banks have taken the opportunity to argue their forum case fully and provided more material than was provided to Kawaley J at the hearing of the Trustee's *Beddoe* application it is clear to me, taking into account the Firewall Provisions, the governing law and jurisdiction provision, the law in respect of *forum non conveniens* and the progress of the English Proceedings, that the courts of England and Wales are clearly and distinctly the most appropriate forum for the determination of all the issues in dispute between the parties, including the Trustee. I have concluded that it would be quite wrong for me to ignore the history of the English Proceedings and their present state of play and the desirability, despite the Firewall Provisions and the Cayman governing law and jurisdiction provision, for all issues (including the Bare Trust Claim) in dispute in this

matter to be argued and determined in one forum. In my judgment that forum is plainly England and Wales.

127. On balance I have concluded I should stay the Cayman Proceedings and leave the parties to argue all the points in dispute between them in the proper context of the English Proceedings, rather than trying to carve out the construction issue within the Bare Trust Claim for a separate trial here in the Cayman Islands.

128. As I have granted a *forum non conveniens* stay it is unnecessary for me to determine the application for a case management stay which was gently advanced on an alternative basis.

129. I ask that counsel let me have a draft Order to reflect my determinations above. Any applications in respect of ancillary issues should be filed within 14 days together with concise written submissions in support and any concise written submissions in opposition should be filed within 10 days thereafter. I intend to decide any ancillary issues on the papers.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT