Case No: BL-2020-000588

Neutral Citation Number: [2021] EWHC 872 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 19/4/2021

Before:

CHARLES MORRISON
(sitting as a Deputy Judge of the High Court)

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Between:

(1) MELFORD CAPITAL PARTNERS (HOLDINGS) LLP
(2) MELFORD CAPITAL PARTNERS LLP
(3) MELFORD CAPITAL GENERAL PARTNER LIMITED
(4) MELFORD II (GPCO) LIMITED
(5) MELFORD CAPITAL PARTNERS (GUERNSEY) LIMTED
(6) MELFORD II (GP) LLP)
(7) MELFORD SPECIAL SITUATIONS LP
(8) MELFORD SPECIAL SITUATIONS II LP
(9) MELFORD CARE LP
(10) MELFORD CARE GP (GUERNSEY) LTD
(11) CUA HOLDCO LTD
(12) MRI I (GP) LTD
(13) MRI II (GP) LTD

Claimants

- and -

FREDERICK JOHN WINGFIELD DIGBY

Defendant

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Philip Shepherd QC, **Bajul Shah** and **Aidan Eardley** (instructed by Armstrong Teasdale) for the **Claimants**
Thomas Grant QC and **Adam Smith** (instructed by Thomas Mansfield) for the **Defendant**

Hearing date: 3 March 2021
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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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on 19th April 2021.

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Charles Morrison (sitting as a Deputy Judge of the High Court):

Introduction

1. The Defendant (**Mr Digby**) in this case has been a partner in the first and second Claimants (the **Claimants**). He has been described to me as a merchant banker. The Claimants make their money though investments in English real property. The Claimants say that Mr Digby has been expelled from the relevant partnerships although Mr Digby disputes this. Upon his purported expulsion, Orders were obtained in this court restraining Mr Digby from using allegedly confidential information and preventing him from calling a meeting of investors. He was also ordered to return a laptop computer.

2. Related proceedings have since ensued in the courts of Guernsey; also by way of arbitration; and Mr Digby has served counterclaims (the **Counterclaim**) against the first Claimant (**Holdings**) and the second Claimant (**MCP**), in the proceedings in which the aforementioned Orders were obtained. At all events, I have before me now two applications designed to ensure that the matters in dispute between the parties are determined not in this court but variously in the Guernsey proceedings or in the arbitration.

3. By their Application Notice dated 2 July 2020, Holdings and MCP have sought the following orders:-

    3.1 Holdings seeks a stay or dismissal of the Counterclaim, on the grounds that the dispute it arises out of relates to a contract which is both subject to an exclusive jurisdiction clause in favour of the courts of Guernsey and governed by Guernsey law.

    3.2 Holdings and MCP both seek a stay under section 9 of the Arbitration Act 1996 (the **Act**) of Mr Digby's Counterclaim against MCP, on the grounds that that dispute

arises under a contract that is subject to a compulsory LCIA arbitration agreement and there is now an arbitration on foot dealing with that same dispute.

4. In November 2020, Holdings and four other Plaintiffs were given leave by the court in Guernsey to serve proceedings (the **Guernsey Proceedings**) outside of the jurisdiction of that court upon Mr Digby. The Guernsey Proceedings seek a Declaration that Mr Digby has been expelled and is no longer a member of Holdings. An application was made last month by Mr Digby to the Deputy Bailiff, for an order setting aside the permission to serve out of the jurisdiction or alternatively an order staying the proceedings. I have had the benefit of reading the judgment of the learned Deputy Bailiff handed down on the 16 March which dismissed the application, as well as submissions from the parties upon it. I am grateful to counsel for their assistance and also to the Guernsey Advocates who on instruction from the parties secured the permission of the Guernsey Court for reference to be made in this judgment to the decision of the Deputy Bailiff, the terms of which otherwise would have been confidential.

Evidence

5. The evidence in relation to the Application appears in three witness statements served by the parties and to which I have had regard: two from Mr Robert Paydon on behalf of the Claimant; and one from Mr Paul Thomas, on behalf of Mr Digby.

6. I have also had my attention drawn to witness statements filed by Mr Digby and Mr Harry Hart in April 2020 in earlier proceedings before this court, to which proceedings I will turn later in this judgment.

Background

7. Holdings is a limited liability partnership governed by a Second Amended and Restated Limited Liability Partnership Agreement dated 25 April 2018 (the **Holdings LLPA**). The Holdings LLPA is governed by Guernsey law and contains at clause 25.10.2, an exclusive jurisdiction clause in favour of the courts of Guernsey (the **Guernsey EJC**). This clause provides:

> "*The parties irrevocably agree that the courts of Guernsey have exclusive jurisdiction to determine any dispute or claim that arises out of or in connection with this agreement or the subject matter or formation (including non-contractual disputes or claims)*."

8. MCP is a limited liability partnership governed by a Third Amended and Restated Limited Liability Partnership Agreement dated 30 March 2017 (the **MCP LLPA**). This agreement is governed by English law. The MCP LLPA contains both an exclusive jurisdiction clause (at clause 27.2), and an arbitration agreement (at clause 28). I have set out the relevant provisions below:

> "27.2. *The parties irrevocably agree that the courts of England have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this agreement.*
>
> *28. Any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, or the legal relationships*

established by this agreement, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by refence into this clause."

The disagreement

9. The essence of the matter now before me is a breakdown in relations between the partners of the Claimants and Mr Digby. A group of partners on one side of the argument say that their relationship with Mr Digby has broken down irretrievably as a consequence of a variety of matters all turning on how they say Mr Digby had been behaving within the businesses. They say that he was variously attempting to frustrate his expulsion and also attempting to subvert the proper procedures regulating the expulsion of members and the calculation of entitlements of outgoing members. They say that Mr Digby made false and mischievous allegations as to tax and the restructuring of the group, against certain partners and professional advisers. At any rate and so far as concerns me for the purposes of the Applications, the background is that the relationship between Mr Digby and his partners appears to have broken down, and there have been allegations of wrongdoing and bad faith going both ways.

10. Holdings is a Guernsey limited liability partnership whose members include the Plaintiffs in the Guernsey Proceedings (two of which being Guernsey companies, Biminvest Limited and SAM Holdings Limited, and the other two being Mr Hart and Mr Osborne), and until his expulsion, Mr Digby, who until November or December 2020 held his carried interest entitlements in the various Melford funds through a Guernsey trust, The Everard Trust. Mr Digby joined the Melford group in October 2008. The relationship of the members of Holdings is governed by the Holdings LLPA.

11. MCP is an English limited liability partnership whose members are two of the Guernsey Plaintiffs, namely Mr Hart and Mr Osborne, Holdings and (until his purported expulsion) Mr Digby. Their relationship is governed by the MCP LLPA.

12. Until a restructuring carried out from 2017-2018, MCP was the holding entity for the group; following the restructuring, Holdings became the Melford group's holding entity. The restructuring was carried out with advice from experts in corporate restructuring, regulatory compliance and tax, in London and Guernsey (including Debevoise & Plimpton, CMS Cameron McKenna, Carey Olsen (Melford's Guernsey advocates), Bovil (Melford's FCA compliance advisers), and a firm of Accountants (Gerald Edelman).

13. The Claimants say that the restructuring was implemented, and completed, in 2018 by Mr Digby who was then in charge of the group's finance and administration and was also the group's Compliance Officer. They also say that Mr Digby was closely involved in appointing and liaising with the various advisers engaged by the group, and that he led the discussions in connection with, and generally oversaw, the restructuring. Of some importance is the Claimants' evidence that Mr Digby was responsible for supervising the drafting of the two LLPAs.

14. In 2018, as a result of friction over Mr Digby's management style and performance, the relations between the partners in the Melford funds became, I am told, unworkable. New terms

for the business relationship were offered to Mr Digby in April 2019, but it is said that initially he declined to respond to the proposals when they were first put forward. When pressed for a decision in July 2019, Mr Digby rejected the proposals by a letter dated 13 August 2019.

15. By August 2019, the Claimants say that Mr Digby's attitude had become increasingly aggressive and belligerent. Eventually it became clear to them that the relationship had broken down irretrievably. Having failed to agree terms for an amicable split, it is then said by the Claimants that between April and October 2019, Mr Digby clandestinely downloaded some 13,000 documents from the Melford group's computer servers. The 13,000 documents contained confidential information about investors and current and past employees (including personal details such as passport, school and medical details of the children of some employees) and well as confidential commercial information about Melford.

16. Having been warned by lawyers in October 2019 not to use the downloaded information as it was confidential, it is alleged that in November 2019, Mr Digby covertly attended the MCP London office early one next morning and removed a laptop belonging to MCP and used by Mr Digby, together with certain hardcopy files. At this juncture it is said that the Melford partners felt there was no alternative but to expel Mr Digby as a member of Holdings and MCP in accordance with the terms of the relevant LLPAs. The relevant resolutions were passed expelling him. Mr Digby voluntarily resigned his directorships of the general partners of each extant fund in the Melford group on 5 January 2020.

17. It also appears that Mr Digby instructed his solicitors to write to MCP's auditors Gerald Edelman telling them that they could not participate in the valuation of his share because in his view that they suffered from a conflict of interest. The Claimants say that Mr Digby had agreed to this role for Gerald Edelman, a firm they say had been Mr Digby's own personal accountants.

18. In simple terms what happened next is that on the Claimants' case, Mr Digby began to use for otherwise than lawful purposes, the confidential information that he had improperly obtained. They complain that he contacted certain of those investing in the Claimants and had discussions about selling his Melford interests; he also wrote to investors purporting to convene an advisory committee meeting, to be chaired by a barrister instructed by him, with the intention of explaining certain problems. Mr Digby's solicitors wrote to the Claimants' Guernsey solicitors stating that the object of the meeting was for the investors to "hear the facts". The investors were being asked among other things, to convene an 'independent' inquiry into Mr Digby's allegations and for the independent inquiry to be given the power to pay Mr Digby's costs in this matter.

19. On 27 March 2020, the Claimants' Guernsey solicitors wrote to Mr Digby's lawyers asking for both a retraction and an undertaking that Mr Digby would not repeat the allegations, failing which they would seek an injunction. The response repeated Mr Digby's allegations, asserted that Mr Digby remained a member of both Holdings and MCP, and claimed that the investors in the Funds needed to be informed of certain matters concerning the restructuring. Mr Digby did undertake to postpone the meeting but crucially, for only 10 days. The Claimants were invited to either convene a meeting of the Advisory Committee to consider Mr Digby's

demands for an external inquiry or to bring proceedings against him in the High Court in England for claims as to whether he remained a partner of MCP and to injunct him.

20. On the Claimants evidence, such a meeting of investors as had been proposed would have been highly damaging to their business. Mr Digby intended to have his Mr Digby intended to have a QC chair the meeting and to table motions including for the launching of an inquiry and the immediate payment of his costs. Mr Digby's lawyers had also sent to the Claimants a document which, the Claimants took the view, he was intending to provide to the investors in order to damage investor confidence. It was at this point the Claimants instructed English solicitors to seek urgent relief from the High Court.

21. The Claimants say that the bringing of proceedings in London was driven by a number of factors including, the short time available for evidence to be collated and drafted and counsel to be instructed; the fact that the unlawful downloading of information had taken place in London and the threatened meeting was to be held from London; Mr Digby resided in London and enforcement against him was crucial; a concern that Mr Digby would not regard himself as bound by an order from the Guernsey Courts; Mr Digby's lawyers assertion that any application would be vigorously defended; and the consequences for the Claimants of not obtaining effective injunctions within the 10 day period.

Procedural History - Trower J Order

22. On 6 April 2020, the Claimants made an application in the High Court for an urgent injunction restraining Mr Digby from calling the threatened meeting and from using the confidential information. The urgent application came before Trower J on 8 April 2020. Mr Digby did not attend and was not represented but made detailed written submissions in a letter dated 7 April 2020. Trower J granted the injunctions substantially in the form sought, thereby restraining Mr Digby from calling a meeting of investors or using the Claimants' confidential information. Mr Digby was also ordered to deliver-up a laptop owned by MCP, and to disclose the identity of the persons to whom he had disclosed any of the confidential information, as well as the date and the nature of the information disclosed.

23. On the return date, 23 April 2020, Birss J (as he then was) continued the injunctions with certain modifications. The judge also made directions including for service of any counterclaim by 4pm on 27 May 2020.

Procedural chronology – the claim and the pleadings

24. The Claim Form was issued on 6 April 2020 and Particulars of Claim were filed and served on 6 May 2020. The claims are in respect of breach of confidence and for injunctions to restrain Mr Digby from using and misusing the Claimants' confidential information, from calling a meeting of investors; and from wrongfully interfering with the Claimants' contractual relationships with their investors. A claim is also made for damages.

25. On 5 June 2020, Mr Digby served a Defence and Counterclaim. His defences are in summary that Holdings and MCP had no authority to bring the proceedings they did; he has not breached any duty of confidentiality and as a continuing co-founder, he has full rights of access to relevant documents, alternatively he accessed the relevant information in the performance of

his role as a member of MCP; and a denial of the claim for wrongful interference. It is important to note that Mr Digby maintains that he has not been validly expelled as a member of Holdings and MCP.

26. In the Counterclaim made against Holdings and MCP, Mr Digby seeks declarations that he has not been validly expelled as a member of those two entities, and a declaration that he is not bound by the opinion of the auditors of Holdings, Gerald Edelman, as to the value of his interest in Holdings because Gerald Edelman have been suborned by Mr Hart and Mr Osborne; and if he has been expelled he asks the court to provide substitute machinery for valuing his interest.

27. Holdings and MCP filed an acknowledgement of service on 19 June 2020, disputing the jurisdiction of the Court to try the Counterclaim. The Claimants had previously written to Mr Digby's solicitors on 16 June 2020, stating that they did not submit to the Court's jurisdiction in respect of the Counterclaim.

28. In their Reply served on 20 June 2020, Holdings and MCP objected to the Court determining the Counterclaims on jurisdiction grounds and averred that they should be stayed or dismissed because: the matters averred in the Counterclaim against Holdings were subject to the exclusive jurisdiction clause in favour of Guernsey and should be decided in Guernsey; and the matters averred in the Counterclaim against MCP were subject to the compulsory LCIA arbitration clause and should be decided in arbitration.

Arbitration

29. On 1 October 2020, Holdings and MCP, together with Mr Hart and Mr Osborne, submitted a Request for Arbitration to the LCIA. The respondent was Mr Digby. The Request was made pursuant to clause 28 of the MCP LLPA.

30. The main issues sought for determination were (i) that Mr Digby was validly expelled as a member of MCP, and (ii) that Mr Digby is bound by the opinion of MCP's auditors as to the sum to be paid to him as the value of his share in MCP. I am told that Mr Andrew Lenon QC was appointed the arbitrator by the LCIA Court on 7 January 2021. Mr Lenon QC made a procedural order on 25 January 2021, pursuant to which the claimants have served their Statement of Case.

Issues

31. A wealth of material has been put before me in this application. I have two skeleton arguments each in excess of 40 pages; I have speaking notes from both counsel of 30 and 15 pages; and a hearing bundle which runs to 1443 pages. The hearing of the application occupied a full court day. Paying due regard to the submissions of which I have had the benefit, it seems to me that

in essence the issues I have to decide are whether Mr Digby is to be held to his agreement to have disputes litigated in Guernsey or by way of arbitration; and should I make an order the effect of which would be to prevent Mr Digby continuing with the counterclaim that he has pleaded in response to the proceedings brought against him by the claimants in England.

32. As to the first controversy, there are a number of sub-issues, including,

a) can effect be given to the arbitration agreement when it is juxtaposed with an exclusive jurisdiction clause;

b) has MCP waived the right to invoke the arbitration clause or otherwise lost the ability to rely on s.9 of the Act, or is s.28 of the LLPA now "inoperative" such that it cannot found a s.9(4) Act stay application; and

c) has Holdings lost/waived the right to invoke the Guernsey EJC because it brought injunction proceedings in England.

33. As to the Counterclaim, does MCP have any right to see it stayed under the Act or has it waived any right it had; and should the court's discretion be exercised in favour of Holdings to stay the Counterclaim in any event, and separately, has any right to rely upon the Guernsey EJC been waived.

The Claimants' case

34. Holdings and MCP rely heavily on the fact that Mr Digby repeatedly and freely agreed to the jurisdiction and arbitration clauses in question, indeed they say he did so on seven occasions. They also contend that the Courts have repeatedly upheld arbitration agreements that appear in contracts which also provide for disputes to be subject to English law and jurisdiction. It is submitted that the English jurisdiction provision can be treated as importing the supervisory jurisdiction of the English court over the arbitration. Clause 28 of the MCP LLPA is an effective and separate arbitration agreement that is already being performed so in no sense is it inoperable. They go onto say that Mr Digby's Counterclaim as to his membership of MCP plainly falls within the scope of the arbitration agreement.

35. It is the Claimants' case that they were forced to bring proceedings in London for a limited purpose. They describe it as a "surgical strike". They needed to move quickly and be sure that they could enforce orders on a London-based Mr Digby in regard to the unlawful removal and use of confidential information, the delivery up of a laptop computer belonging to MCP, and restraining Mr Digby from calling a potentially harmful meeting of investors. Although they have pleaded claims for damages, in response to my enquiry at the hearing of this application the Claimants confirmed that they have no interest in proceeding with the action and the claims save as they relate to and aim at preserving the injunctions that they have already obtained on an interim basis. None of this they say has anything to do with the facts and matters brought before the court by Mr Digby in his Counterclaim. The bringing of the injunction related claims

they say did not amount to, nor has there ever been, any waiver of the arbitration agreement or the Guernsey EJC.

36. The claims made by Mr Digby in his Counterclaim are, the Claimants contend, new causes of action that do not arise in the claims brought by Holdings and MCP. They also submit that there has been no waiver by them of the arbitration agreement or the Guernsey EJC.

37. It is urged upon me that there is no discretion to refuse a stay under s.9 of the Act and that so much is clear from a reading of s.9(4) of the Act. This is because that provisions reads:

> "*On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.*"

38. The result it is said is that the discretionary grounds relied upon by Mr Digby as against MCP are of no relevance. I am nevertheless asked to stay Mr Digby's Counterclaim on the alternative grounds that it does not have all the necessary or proper parties (whereas the arbitration and the Guernsey proceedings do); because the arbitration and the Guernsey proceedings will in any event continue; and because staying Mr Digby's Counterclaim will reduce, not increase, the risk of conflicting judgments. As necessary, I am invited to exercise my discretion on case management grounds, certainly so as to manage costs and reduce the risk of conflicting judgments.

Mr Digby's Response

39. The case made before me on behalf of Mr Digby can perhaps, without doing any injustice to Mr Grant QC who appeared for him, be encapsulated within the following propositions:

a) clause 28 of the MCP LLPA has no effect because it is irreconcilable with the exclusive jurisdiction clause in clause 27.2;

b) to stop the Counterclaim being heard in England would lead to fragmented proceedings before different tribunals; and

c) by bringing the English proceedings, and raising the issues that they have, there has been a submission by MCP and Holdings to the jurisdiction of the High Court, and/or a waiver of the arbitration agreement and the Guernsey EJC.

Legal Framework – Jurisdiction clauses

40. I did not understand it to be in dispute before me that the English courts will uphold a jurisdiction agreement and keep the parties to their bargain unless strong reason is shown otherwise. Mr Shepherd QC on behalf of the Claimants, invited my attention to the decision of the House of Lords in *Donohue v Armco Inc* [2001] UKHL 64. One of the questions for decision in that case was whether Mr Donohue was entitled to an anti-suit injunction in a situation where as between him and the first three Armco appellants, there was a contractual obligation to submit any dispute which arose out of or in connection with the relevant sale and purchase agreement to the exclusive jurisdiction of the English court. Certain of the claims

made by the Armco companies in the New York proceedings fell outside the scope of this clause whilst some claims central to the Armco companies' complaint fell within it.

41. At [24] and following, Lord Bingham explained the law in this way:

> "*If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in The Eleftheria [1970] P 94, 99-100, Brandon J helpfully listed some of the matters which might properly be regarded by the court when exercising its discretion, and his judgment has been repeatedly cited and applied. Brandon J did not intend his list to be comprehensive, but mentioned a number of matters, including the law governing the contract, which may in some cases be material.*"

42. Leaving aside cases involving standard terms and conditions, which can give rise to different considerations, the difficult cases to decide are often those where the dispute before the court involves multiple parties with different jurisdiction regimes applying to different sub-sets of them. That was the factual backdrop to the *Donohoe* action that had reached the House of Lords. Having analysed the various authorities, Lord Bingham ultimately posed this question:

> "*Thus Mr Donohue's strong prima facie right to be sued here on claims made by the other parties to the exclusive jurisdiction clause so far as the claims made fall within that clause is matched by the clear prima facie right of the Armco companies to pursue in New York the claims mentioned in the last three paragraphs. The crucial question is whether, on the fact of this case, the Armco companies can show strong reasons why the court should displace Mr Donohue's clear prima facie entitlement. If strong reasons are to be found (and the need for strong reasons is underlined in this case by the potential injustice to Mr Donohue, already noted, if effect is not given to the exclusive jurisdiction clauses) they must lie in the prospect, if an injunction is granted, of litigation between the Armco companies on one side and Mr Donohue and the PCCs on the other continuing partly in England and partly in New York. What weight should be given to that consideration in the circumstances of this case?*"

43. In the event Lord Bingham decided that effect would not be given to the jurisdiction clause for the strong reason that justice demanded that there be one set of proceedings not in England but in New York, that jurisdiction being the only one where the objective of one set of proceedings could be achieved.

44. Although other authorities were cited to me I do not understand the position arising from them to be very different from that explained by Lord Bingham in *Donohoe*, the basis for the decision in which being self-evidently binding upon me.

Legal Framework –Inconsistent clauses

45. Perhaps unsurprisingly, this is not the first occasion on which conflicting contractual dispute resolution provisions have come before the courts. My attention was invited by counsel for the Claimants to the decision of Steyn J (as he then was) in *Paul Smith Ltd v H&S International Holdings Inc* [1991] 2 Lloyd's Rep 127. In this case a licensing agreement contained a clause providing that disputes "*shall be adjudicated upon*" under ICC arbitration, and another clause providing that the "*courts of England shall have exclusive jurisdiction*".

46. The judge recited the two competing clauses:

> "*13. SETTLEMENT OF DISPUTES If any dispute or difference shall arise between the parties hereto concerning the construction of this Agreement or the rights or liabilities of either party hereunder the parties shall strive to settle the same amicably but if they are unable to do so the dispute or difference shall be adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more Arbitrators appointed in accordance with those Rules.*
>
> *14. LANGUAGE AND LAW This Agreement, is written in the English language and shall be interpreted according to English law. The Courts, of England shall have exclusive jurisdiction over it to which jurisdiction the parties hereby submit:*"

47. The conflict was resolved by Steyn J adopting this analysis:

> "*The plaintiffs submit that one is driven to read cll. 13 and 14 as hopelessly inconsistent and accordingly insofar as those clauses provide for dispute resolution they must fall to the ground. That is a drastic and very unattractive result. It involves the total failure of the agreed method of dispute resolution in an international commercial contract. An incidental further result of such a conclusion would be that art. 9 (force majeure), which provides for a modification of, the terms of the agreement by an arbitrator, will be deprived of all legal effect. On the other hand, if the arbitration agreement is valid, there is no legal difficulty in giving effect to the so-called hardship clause.*
>
> *Fortunately, there is a simple and straight forward answer to the suggestion that cll. 13 and 14 are inconsistent. Clause 13 is a self-contained agreement providing for the resolution of disputes by arbitration. Clause 14 specifies the lex arbitri the curial law or the law governing the arbitration, which will apply to this particular arbitration. The law governing the arbitration is not to be confused with (1) the proper law of the contract, (2) the proper law of the arbitration agreement, or (3) the procedural rules which will apply*

in the arbitration. These three regimes depend on the choice, express or presumed, of the parties. In this case it is common ground that both the contract and the arbitration agreement are governed by English law. The procedural rules applicable to the arbitration are not rules derived from English law. On the contrary, the procedural regime is the comprehensive and sophisticated ICC rules which apply by virtue of the parties' agreement.

What then is the law governing the arbitration? It is, as Martin Hunter and Alan Redfern, International Commercial Arbitration, p. 53, trenchantly explain, a body of rules which sets a standard external to the arbitration agreement, and the wishes of the parties, for the conduct of the arbitration. The law governing the arbitration comprises the rules governing interim measures (e.g. Court orders for the preservation or storage of goods), the rules empowering the exercise by the Court of supportive measures to assist an arbitration which has run into difficulties (e.g. filling a vacancy in the composition of the arbitral tribunal if there is no other mechanism) and the rules providing for the exercise by the Court of its supervisory jurisdiction over arbitrations (e.g. removing an , arbitrator for misconduct).

If cl. 14 is read as specifying the law governing the arbitration; there is no inconsistency between cll. 13 and 14. Admittedly, the language is not felicitous: it provides for the exclusive jurisdiction of the English Courts "over.it", i.e. the agreement. Strictly, it should refer to the law governing the arbitration. This incongruity pales into insignificance, however, when compared to the unfortunate consequences of treating the arbitration clause in a non-domestic commercial agreement as pro non scripto. In my view there is no inconsistency between cll. 13 and 14, and both clauses are valid and binding."

48. Of course in this case Mr Grant QC for Mr Digby, does not suggest that as a result of the inconsistency both clauses "fall to the ground". He relies upon long-standing authority to say that one of the clauses must be chosen. I will turn to that argument later in this judgment.

49. Another case which dealt with competing dispute resolution clauses was *The Nerarno* [1994] 2 Lloyd's Rep 50. This was another decision which turned on the relationship between the terms of a charterparty and those of a related bill of lading. The bill cited English law and jurisdiction as well as giving precedence to the terms of the charterparty; whilst the charterparty provided for both English law and jurisdiction *and* dispute resolution in London pursuant to the Arbitration Acts, with English law to govern. Clarke J (as he then was) took the view at [54] that there was some overlap but no conflict:

"*The notion of English jurisdiction was not inconsistent with a submission to arbitration, if only because the English Court retained a supervisory jurisdiction over the arbitration which according to cl 36 was to take place in England. There was no reason to disregard the specific reference to the incorporation of the arbitration clause.*"

50. It is noteworthy that Clarke J arrived at the view that he did on the basis of his acceptance of the submission that the correct course was to try to give effect to all the provisions of the bill. Having accepted the incorporation of the arbitration clause, Clarke J was disposed to follow the lead given by Brandon J in *The Rena K* [1978] 1 Lloyd's Rep 545, insofar as it was

necessary "*to manipulate or adapt part of the wording of that clause in order to give effect to that intention*" (which I understand to be the intention to have an arbitration provision). It might be observed that Steyn J was attracted to the same judicial manipulation when in *Paul Smith* he resolved the "incongruity" so as to prevent the unacceptable alternative of the arbitration clause being treated as having not been written into the agreement by the parties.

51. My attention was also invited by the Claimants' counsel to the decision of Moore-Bick J (as he then was) in *Shell International Petroleum Co Ltd v Coral Oil Co Ltd (No.1)* [1999] 1 Lloyd's Rep 72. In that case a contract contained an English law clause which went on to provide that "any dispute under this provision shall be referred to the jurisdiction to the English Courts." There was a further clause which provided for "any dispute which may arise in contract or at law of or in connection with this agreement shall be finally and exclusively settled by arbitration…"

52. Having considered the decision of Steyn J in *Paul Smith*, which the learned judge felt, although helpful, turned on its own facts because of the different language appearing in the particular contractual provisions, Moore-Bick J went on to hold that when dealing with inconsistent provisions which ascribed jurisdiction "partly to the courts and partly to arbitrators", it was quite clear that the parties intended substantive disputes to be referred to arbitration even if the court was intended to have a residual jurisdiction over some kind of disputes about the proper law. Neither party put the case in that way before me.

53. In *Ace Capital Ltd v CMS Energy Corporation* [2008] EWHC 1843 (Comm), Christopher Clarke J (as he then was) was presented with insurance policies which contained LCIA arbitration clauses and also Service of Suit clauses providing for submission to the Courts of a US state. I have derived no little assistance from the carefully constructed judgment delivered by the learned judge, containing as it does a helpful analysis of the relevant United States and English authorities.

54. As to the English cases on Mandatory arbitration and exclusive English jurisdiction clauses, Christopher Clarke J said this at [68] – [70]:

> **"**In ***Paul Smith v H & S International Holding Inc*** *[1991] 2 Lloyd's Rep 127 a licencing agreement contained, in Clause 13, a mandatory ICC arbitration clause in respect of "any dispute or difference ... concerning the construction of this Agreement or the rights or liabilities of either party hereunder". It also provided, in clause 14, that the Agreement should be interpreted according to English law and the English Courts should have exclusive jurisdiction "over it". Steyn, J., as he then was, rejected an interpretation that would have confined clause 14 to cases falling outside the scope of clause 13 on the basis that that would mean reading the relevant sentence of clause 14 as providing "subject to clause 13..", and that "the linguistic manipulation required and the unbusinesslike spectre of some disputes going to court and some to arbitration militate strongly against this interpretation". He resolved the problem by interpreting clause 13 as a self-contained agreement providing for the resolution of disputes by arbitration and clause 14 as specifying the lex arbitrii or curial law governing the arbitration and determining, inter alia, the extent of the court's supervisory jurisdiction. He did so even though the language of clause 14 (in particular the words "over it") was infelicitous. In* ***Axa Re v Ace Global***

Markets Ltd *[2006] 1 Lloyd's Rep 682 Gloster J reached a similar conclusion in a case where the jurisdiction clause was not exclusive.*

In ***Shell International Plc v Coral Oil Co Ltd*** *[1999] 1 Lloyd's Rep 127 the agreement contained, in Article 13, a provision that it should be governed and construed in accordance with English law and that "any dispute under this provision" should be referred to the jurisdiction of the English Court. Article 14 provided that any dispute in connection with the agreement should be settled by LCIA arbitration. Moore-Bick, J, as he then was, reconciled the two articles by reading Article 13 as requiring any dispute about the proper law to be referred to the English court with all other substantive disputes to be referred to arbitration. He declined to decide in vacuo whether any particular dispute would fall within the ambit of article 13 or 14.*

These cases all illustrate the principle that the contract must be read as a whole and every effort should be made to give effect to all of its clauses. The meaning of one clause may be affected by the content of other clauses in the agreement. A clause should not be rejected unless manifestly inconsistent with or repugnant to the rest of the agreement. It is only if this cannot successfully be done that the Court will treat a clause that has been specifically agreed as prevailing over an incorporated standard term: see also ***Chitty*** *Vol 1 12-078;* ***Pagnan Spa v Tradax Ocean Transportation SA*** *[1987] 2 Lloyd's Rep 342;* ***Indian Oil Corporation v Vanol Inc*** *[1991] 2 Lloyd's Rep 634.*"

55. And turning to the US cases he said this at [56]

"*As is apparent from the above, the bulk of US authority, particularly at the highest level, treats an arbitration clause and a Service of Suit clause as not inconsistent with each other, interpreting the latter as intended to ensure that the insurer/reinsurer is subject to personal jurisdiction in any one of the States for the purpose of, inter alia, enforcement of the award*"

56. Before leaving the US cases, one particular decision considered by Christopher Clarke J in my judgment deserves mention. At [32] – [34] reference was made to the position adopted by the court in *Ideal Mutual Ins Co v Phoenix Greek Ins Co* 1984 US Dist Lexis 15258 (S.D.N.Y. 1984):

"*A series of subsequent cases have followed Hart v Orion in holding that there is no inconsistency between a Service of Suit clause and an arbitration clause; that the purpose of such a clause is to ease the difficulties which the insured might encounter in establishing jurisdiction over a foreign, i.e. non US, insurer for enforcement purposes; and that the assent of the insurer to jurisdiction does not prevent him from raising a defence that he has a right to arbitrate the dispute.*

Examples include ***Ideal Mutual Ins Co v Phoenix Greek Ins Co*** *1984 US Dist Lexis 15258 (S.D.N.Y. 1984). In that case there was a London arbitration clause and a Service of Suit clause. There the clause was to operate "in the event of the failure of the Reinsurers to pay any amount claimed to be due hereunder. It obliged the Reinsurers, at the request of the Reassured, to submit to the jurisdiction of any court of competent jurisdiction within*

the US and also to comply with all requirements necessary to give such Court jurisdiction and provided that "all matters arising hereunder shall be determined in accordance with the Law and Practice of such Court". The court said:

> *"... the arbitration clauses in these contracts retain their validity unless language compels the conclusion that the parties, having gone to the trouble of inserting a broad arbitration clause, intended to eviscerate the clause almost entirely by preceding it with a service of suit clause. But it is entirely possible to read these clauses in harmony, rather than in conflict with each other…… I am in entire agreement with the conclusion reached by the tenth circuit in Hart…, in which the court rejected an argument similar to the present plaintiff's. ... Confronted with the issue in this case, I do not hesitate to hold that the consents to jurisdiction contained in the service of suit clauses in these contracts are not fatally inconsistent with Phoenix's right to raise the affirmative defense of arbitration, once jurisdiction has been successfully invoked. In consequence, the service of suit clause cannot be read to constitute a waiver of the broad arbitration clauses*".

57. In reaching his conclusion on the application of the arbitration clause despite the existence of the service of suit provision, Christopher Clarke J observed at [80] – [84],

> "*Whilst Premium Nafta had not been decided when the policies in suit were written, English law was already moving in that direction. Lord Justice Bingham's observations in Ashville antedate the policies by ten years and Steyn, J's observations in Paul Smith by eight. In any event the principles expounded in Premium Nafta now form part of English law and are applicable to the interpretation of Article VI that I have to make.*
>
> *The arbitration clause in the present case does not exclude any particular grievances from arbitration. On the contrary it provides that all disputes arising under, out of, or in relation to the policy shall be arbitrated. In those circumstances the law's policy in favour of arbitration provides a strong impetus (i) not to read the Service of Suit clause as removing from the scope of arbitration, at the option of the assured, the sort of disputed claim most likely to arise under a policy, i.e. for payment; and (ii) to confine the clause so as to not to give the assured an option to have determined in any court of the Union the merits of disputes which the parties agreed to have determined by LCIA arbitration.*
>
> *Such an interpretation still leaves the Service of Suit clause with meaningful scope. It enables the assured to found jurisdiction in any US Court, including its home court, to declare the arbitrable nature of the dispute, to compel arbitration, to declare the validity of an award, to enforce an award, or to confirm the jurisdiction of US courts on the merits in the event that the parties agree to dispense with arbitration. Use of the clause for those purposes would not detract from the arbitration clause. The fact that the New York Convention should mean that there ought to be little difficulty in enforcing a London award in the United States does not mean that there is no benefit in having an acceptance of personal jurisdiction by Ace in each State of the Union.*
>
> *It is true that in Premium Nafta the House was concerned with the question whether an arbitration clause covered an issue of bribery, whereas here there is no dispute but that*

CMS' claim falls within the scope of the arbitration clause. But the principle of liberal interpretation in favour of arbitration encourages, as it seems to me, not only an expansive reading of what an arbitration clause includes but also a restrictive reading of any other clause which is said, notwithstanding an arbitration clause providing for all disputes to be referred to arbitration, to exclude particular disputes from arbitration (either generally or at one party's option), without expressly saying so. I note that in Moses H.Cone Memorial Hospital the US Supreme Court took a similar approach, I do not regard this approach as inappropriate because parties may validly contract on terms that give one or other or both of them a choice as to where their disputes are to be heard.

Such an interpretation would avoid the situation which could otherwise arise whereby the forum for determination of a particular issue could change from arbitration to court (with or without a jury) and back again – something that reasonable businessmen are not likely to have intended."

58. As I have already said, I have drawn enormous assistance from the reasoning set out in *Ace Capital*. With the greatest of respect to the learned judge, I consider the approach adopted by him to have been correct and to represent the appropriate lodestar for me albeit that I am confronted not with a service of suit clause but with a conflicting provision purporting to give jurisdiction to the English Court.

59. It need hardly be said that I am here involved in a process of construction of a contract. I therefore remind myself of the modern approach to that task as explained by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 W.L.R. 896, at [912]:

> "*Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.*"

60. And also *Arnold v Britton* [2015] AC 1619 at [15], where Lord Neuberger said:

> "*When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed,*

and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions […]".

61. In Volume one of the current (33RD) edition of *Chitty on Contracts*, the following view is expressed by the learned authors at [13.070] in regard to inconsistent terms of a contract:

> "*Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the purpose of the contract as gathered from the instrument as a whole and the available background, and that part which would defeat it must be rejected. The old rule was, in such a case, that the earlier clause was to be received and the later rejected; but this rule was a mere rule of thumb, totally unscientific, and out of keeping with the modern construction of documents. When considering how to interpret a contract in the case of alleged inconsistency, the courts distinguish between a case where the contract makes provision for the possibility of inconsistency and the case where there is no such provision. In the latter case the contract documents should as far as possible be read as complementing each other and therefore as expressing the parties' intentions in a consistent and coherent manner.*"

62. I was referred by Mr Grant QC to the decision in *Forbes v Git* [1922] 1 AC 256 but I do not see that as giving rise to any principle that precludes the approach taken by Christopher Clarke J in *Ace Capital*; and in any event, relying upon *ICS* also *Arnold*, I take the law as being consistent with the principles set out by the authors of *Chitty*.

The Holdings Application for a stay of the Counterclaim

63. The first issue requiring a decision from me is whether Holdings is deserving of an order staying Mr Digby's Counterclaim insofar as it pleads matters that concern his membership of Holdings. To reach a decision I must resolve a number of the issues that are central to the application and have an impact on a number of the other questions. The first question I turn to is did Holdings and MCP go too far when they embarked upon, as Mr Shephard QC described it, their "border skirmish". I have to look at the problem that they were faced with and what it was they did.

64. The Claimants say that the London proceedings were necessary because: (a) they felt, reasonably, that they only had a short period of time to gather evidence and instruct counsel; (b) the unlawful downloading of information had taken place in London and the threatened meeting was to be held from London; (c) ease of enforcement against Mr Digby was crucial; (d) there was a real concern that Mr Digby would not regard himself as bound by an order from the Guernsey Courts; and (e) because the commercial consequences for the Claimants of not

obtaining effective injunctions within the 10 day postponement period stipulated by Mr Digby would have been very serious indeed.

65. At paragraph 14 of his evidence in support of this application Mr Paydon, the Claimants' solicitor, explains the matter in this way:

> "*14. The primary reason for commencing legal proceedings in London was to obtain urgent injunctions to restrain further misuse of the confidential information unlawfully removed by the Defendant and from holding the meeting that he threatened to hold.*
>
> *15. The Claimants were given no real alternative but to begin legal proceedings in London. The Defendant, through his solicitors, Thomas Mansfield, was only prepared to give time limited undertakings not to misuse the Claimants' confidential information or not to proceed with the meeting of investors. By this letter Thomas Mansfield required the Claimants to issue High Court proceedings against the Defendant – see Thomas Mansfield's letter dated 30 March 2020 at pages 57 – 65.*
>
> *16. At the time the Defendant was domiciled and resident in London, as I am informed by James Osborne remains the case now.*
>
> *17. Accordingly, these proceedings were begun by the Claimants issuing an application against the Defendant seeking an urgent injunction restraining the use of the Claimants' confidential information, delivery up of the laptop and to restrain the Defendant from proceeding with the meeting of investors that he was threatening to hold. The injunction was granted by Mr Justice Trower on 08 April 2020 and was continued on the return date by the Order of Mr Justice Birss dated 23 April 2020. Copies of both Orders are at pages 66 - 85.*"

66. I have already recited a great deal more of the relevant backdrop to the application to Trower J in earlier passages of this judgment. To all of this Mr Digby says the Claimants have brought far more of a claim than they needed to in England and the result is that they have waived their right to now go back to the Guernsey EJC. Mr Digby should now, it is argued, as a matter of course, be permitted to get on with the prosecution of his Counterclaim. Not only do the proceedings seek substantive relief which a mere "border skirmish" would not have introduced, but perhaps more importantly, in order to properly defend himself in response to the grounds giving rise to the claim to the injunctive relief, Mr Digby says he needs to be able to assert his side of the Gerald Edelman issue, and also make his case as to why he remains a member of Holdings and MCP. It will be recalled that the Gerald Edelman issue is a claim by Mr Digby that improper pressure was placed upon the accountants Gerald Edelman, or at any rate they were acting in a manner that was otherwise than disinterested as a result of instructions given to them by certain of the Claimants, such that they arrived at false valuation of Mr Digby's interests in the Claimants.

67. The crux of the point at issue is, as Mr Grant QC for Mr Digby argues, that in all fairness and order to properly meet the claim brought against him, Mr Digby must be permitted to raise matters surrounding his alleged expulsion and also the Edelman issues. Mr Grant QC says that Mr Digby's Counterclaim is merely a logical extension of that position. I have to say that I do

not agree with him. I am not going to hold that just because of the existence of clauses 25 and 28 of the Holdings LLPA and the MCP LLPA respectively, the Claimants were not entitled to seek the limited relief that they did in London, for the precise and carefully considered reasons that they did. If it is right, and I am not sure that it is, that prospective applicants are faced with a sharp dilemma such that if they misjudge the situation that they are in, on this basis *per se* and leaving to one side for one moment other arguments going to the waiver principle, they face losing the right to rely upon agreed forms of dispute resolution, in this instance I do not find that the Claimants did. In my judgment they brought proceedings to address the urgent problems they faced. My view in this respect is buttressed by reference to the Particulars of Claims which pleads a case based almost entirely on the laptop, convening a meeting and confidential information issues. There is no attempt to litigate all of the matters then or expected to be in dispute between the parties. It is helpful to consider the prayer for relief which in my judgment makes the position plain:

"*AND the Claimants claim:*

(1) An order that the Defendant:

(a) deliver up any hard copies of, and destroy any electronic copies of, the Confidential Documents and any other documents in his control containing any part of the Confidential Information, save for any such document which the Defendant reasonably requires for the purposes of resolving the Exit Dispute, and

(b) serve a witness statement confirming compliance with (a) and identifying any such document which he wishes to retain for the purposes of resolving the Exit Dispute.

(2) A permanent injunction restraining the Defendant from

(a) using or disclosing any of the Confidential Information other than for the purposes of resolving the Exit Dispute;

(b) contacting an or potential investors in connection with the Claimants' business and the Restructuring; and/or

(c) convening or procuring the convening of, or conduct or procuring the conduct of, in connection with the Restructuring.

(3) A declaration that the Defendant has no right power or entitlement to call a meeting of the Advisory Committee of investors of the Funds, and that any such meeting called or to be called by the Defendant for any of the purposes set-out in the letter of Thomas Mansfield dated 23 April 2020 was or would be invalid and unlawful.

(4) A declaration that the Laptop is the property of the Second Claimant.

(5) Damages.

(6) Interest pursuant to s35A of the Superior Courts Act 1981.

(7) Further or other relief as necessary."

68. I am also aware that Holdings has brought proceedings in Guernsey, leave to serve outside that jurisdiction being granted by an order of the Deputy Bailiff of 3 November 2020. These Guernsey proceedings seek relief in the form of declaration as to whether or not Mr Digby ceased to be a member of Holdings on the date that the Plaintiffs in that action say he was expelled, as well as an anti-suit injunction until the Guernsey proceedings are concluded.

69. In my judgment, by virtue of the English proceedings that they brought, the Claimants did not waive their right to rely upon the Guernsey EJC. There is no strong reason that I can fathom suggesting why I should not hold the parties to their bargain. It is certainly not provided by the existence of the proceedings brought in London which I accept were conceived and prosecuted for a limited and exigent purpose.

70. Having found on the basis so far considered, that Holdings has not lost its right to enforce the Guernsey EJC, I now have to consider whether Mr Digby is entitled to persist with his counterclaim in the London proceedings. Mr Grant QC says that on any view and leaving aside the Guernsey EJC, there are extant proceedings in London and his client is entitled to counterclaim in them: whilst I do have a discretion to restrain that Counterclaim, I should not exercise it.

71. During argument my attention was invited to the decision of the Court of Appeal in *The High Commissioner of India v Ghosh* [1960] 1 QB 134. In that case the Plaintiff, unarguably benefiting from an immunity from suit, had begun an action for debt. A counterclaim was delivered seeking damages for an unrelated slander. When asked to restrain the counterclaim the Master and on appeal, McNair J, assented. In the Court of Appeal, Jenkins LJ explained the argument in this way at [140]:

> "*By that course of action it is undoubtedly true that they must be taken to have waived their immunity to a certain extent, and the extent of such waiver for the present purpose is this: By bringing their action in this country and submitting to the jurisdiction, the plaintiffs must be taken to have submitted to the jurisdiction not only for the purpose of having their claim adjudicated upon but also for the purpose of enabling the defendant, against whom they are prosecuting their claim, to defend himself adequately, and his adequate defence may include a claim or demand asserted by way of counterclaim. That does not, however, mean that the plaintiffs, having brought their action here, are thereby exposed to any sort of claim which the defendant may choose to raise against them by way of counterclaim, however far removed from the plaintiffs' cause of action the counterclaim may be*."

72. And in giving a judgment with which Morris and Ormerod LLJ. agreed, he said at [141]:

> "*Accordingly, I am of opinion that this counterclaim cannot be maintained unless it is shown to be, as regards the relief it claims, sufficiently connected with or allied to the subject-matter of the claim as to make it necessary in the interests of justice that it should be dealt with along with the claim. Dr. Ghosh has said all that could possibly*

be said in support of his contention, but I am at a loss to see how the subject-matter of the counterclaim, which is a claim for alleged slanders of the defendant by servants of the High Commissioner for India or the Union of India, has any material bearing at all upon the subject-matter of the claim, which in its primary form is simply a claim for money lent.

Accordingly, on the principles to which I have referred, this does not seem to me to be a counterclaim to which the High Commissioner for India and the Union of India must be taken to have submitted by bringing their action in these courts. The counterclaim clearly could not be maintained by independent action, and it is equally clear in my opinion that it cannot be brought into the present litigation on the ground that it is necessary to adjudicate upon the claims for slander in order to do justice on the claim in debt."

73. In my judgment the matters alleged by Mr Digby in his counterclaim do not need to be brought by a counterclaim: he can defend himself perfectly well if he needs to on those matters by way of his defence. To see the narrow set of proceedings brought by Holdings in the circumstances that I have outlined did not mean that there was a waiver by Holdings of its right to invoke the Guernsey EJC. In any event I do not see that it would be in the interests of justice to permit Mr Digby to now bring the counterclaims that he does.

74. I see a great deal of force on the facts and matters relied upon by the Claimants inasmuch as the injunctions granted by Trower and Birss JJ, were necessarily interlocutory until trial; the laptop computer was delivered up by Mr Digby; Mr Digby appears to accept that he himself had no right to call a meeting of investors; and it is unlikely that the question of the confidential character of the 13,000 documents downloaded by Mr Digby would justify continued litigation. These facts and matters provide a foundation to the argument that I accept, that it is Mr Digby who seeks by his Counterclaim to broaden the dispute by putting in issue the validity of his expulsion and the valuation of his share as an outgoing partner.

75. To have the matters covered by the counterclaim litigated in London risks fragmentation inasmuch as matters in the same dispute may be adjudicated in Guernsey litigation and arbitration; moreover there is a risk of different findings by different tribunals. It seems to me to be in all the parties' interests to close down one forum. Whether it is by exercise of the reasoning adopted by Jenkins LJ or a discretion arising under my case management powers, I am minded to accede to the Holdings application to stay the counterclaim against it.

MCP application for a stay of the Counterclaim

76. I will now address the question of whether Holdings and MCP are entitled to a stay of the Counterclaim brought against MCP pending a reference to arbitration. The first question I have to decide in this application is whether to give effect to the arbitration clause. If there is no agreement to arbitrate, it need hardly be said that s.9 of the Act cannot provide a basis for a stay of the Counterclaim.

77. I accept the Claimants' case that issues relating to Mr Digby's membership of and expulsion from MCP are governed by the MCP LLPA. The MCP LLPA is subject to English law (clause

27.1), and contains both an exclusive jurisdiction clause (clause 27.2) and a compulsory arbitration agreement (clause 28). What was agreed was this:

> "27.2. *The parties irrevocably agree that the courts of England have exclusive jurisdiction to settle any dispute or claim that arises out of or in connection with this agreement.*
>
> *28. Any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, or the legal relationships established by this agreement, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by refence into this clause.*"

78. It was not disputed before me that Mr Digby agreed to these provisions on numerous occasions. In the case of MCP, the relevant agreement was originally made on 7 July 2009, amended and restated on 1 February 2010, 29 May 2013, again on 25 April 2014, and yet again on 30 March 2017. On every occasion the agreement contained a compulsory LCIA arbitration clause.

79. I find it impossible to hold that the arbitration agreement was entered into for no good purpose. I would be very uneasy about adopting a course that would result in the evisceration of a clause designed to ensure that sophisticated business-people, engaged in the business of investment funds, could not resolve their dispute by arbitration when they have gone to some trouble to agree to that very course in their principal commercial agreement. I am not sure that it requires any judicial manipulation at all to give effect to what the parties must have intended and that is what I propose to do here. As I indicated earlier, and as was Christopher Clarke J in *Ace Capital*, I am drawn to the words of the Court in *Ideal Mutual* that is to say "*arbitration clauses retain their validity unless language compels the conclusion that the parties, having gone to the trouble of inserting a broad arbitration clause, intended to eviscerate the clause almost entirely by preceding it with a service of suit clause. But it is entirely possible to read these clauses in harmony, rather than in conflict with each other.*"

80. In my judgment the parties can be taken to have agreed to a separable arbitration agreement and I will give effect to it. As necessary, I will give effect to cl.27.2 inasmuch as the English court retains a supervisory jurisdiction over any arbitration. I thus do not find that the agreement to arbitrate is inoperative as contended by Mr Grant QC.

81. Having found that there is a valid agreement to arbitrate the next matter I have to reach a view on is whether the application under s.9 of the Act succeeds. It is necessary for me to consider the relevant provisions of s.9 of the Act:

> "*(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to*

the proceedings) apply to the court in which the proceedings had been brought to stay the proceedings so far as they concern that matter…

(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration is null and void, inoperative, or incapable of being performed."

82. Having had regard to the decision of Popplewell J in *Sodzawiczny v Ruhan* [2018] EWHC 1908 (Comm), I accept the proposition advanced by Mr Shepherd QC that if a matter falls within the scope of an arbitration agreement on its true construction, the court should stay the proceedings *pro tanto*, unless the court is satisfied under s.9(4) that the arbitration agreement is null and void, inoperative or incapable of being performed.

83. I also accept Popplewell J's formulation of a two-stage inquiry under s.9(1). First, the court must determine what the matter or matters are in respect of which court proceedings have been brought; secondly, the court must determine in respect of each such matter whether it falls within the scope of the arbitration agreement on its true construction

84. There appear to be two distinct limbs to the Counterclaim: the first is described by Mr Grant QC as the MCP Membership Issue; the second is in substance the Gerald Edelman issue. It is argued that neither amounts to a "matter" capable of falling within the scope of the arbitration agreement.

85. I have to say that it is not a very attractive argument to me to say that controversies as significant as Mr Digby's membership of MCP or the allegation that the accountants Gerald Edelman were wrongfully influenced to arrive a false, depressed, valuation of his interests are not matters that are susceptible to arbitration. If there is such an argument I am afraid that with the greatest respect to Mr Grant QC, I don't see it. He submits these issues do not have sufficient substance but it is my judgment hard to conceive which material ingredients of substance they lack.

86. It would also be difficult to argue with the proposition that the Clause 28 arbitration agreement has a very broad compass: it applies to "*any dispute*" which "*arises out of or in connection with*" the MCP LLPA including "*any question regarding…the legal relationship established by this agreement*".

87. At all events I am satisfied that the Counterclaim issues fall within the agreement to arbitrate. I do not accept that by bringing the limited and specifically targeted injunction proceedings that the Claimants are prevented from relying upon s.9 of the Act. I would not hold that they went so far as to waive any right to invoke the clause inasmuch as I do not hold there to have been a clear and unequivocal election (see: *In The "Kanchenjunga*" [1990] 1 Lloyd's Rep 391, per Lord Goff); no steps in the Counterclaim proceedings appear to have been taken, and I observe that in s.9(1) there is clear reference to a counterclaim which presupposes that a claim

can exist which later gives rise to a counterclaim to which the right to seek a referral to arbitration is retained, that claim notwithstanding.

88. If Mr Digby's case were to be put as a contractual repudiation by the Claimants of the arbitration agreement, then applying the reason explained by Beatson J (as he then was) in *Dubai Islamic Bank PJSC v PSI Energy Holding Co BSC & Others* [2011] EWHC 1019 (Comm) at [49] *et seq*, with which I am in complete agreement, I do not consider the proceedings that have been brought in London as sufficient to evidence an intention to renounce the obligation to arbitrate. Moreover such cannot be inferred where there is a clear reason evident for the bringing of the proceedings, as in my judgment there clearly is in this instance.

89. Nor do I accept given my findings on the character of the proceedings brought by the Claimants on the one hand, and the nature of the counterclaim on the other, that the Counterclaim cannot be taken to be a matter for the purposes of the Act because the relevant matter is the claim itself. In this respect I am in complete agreement with the approach taken by Popplewell J in *Ruhan*. The question is does the dispute fall within the ambit of the arbitration agreement and in my judgment it does.

90. In light of the views I have expressed on the validity of the arbitration agreement, it follows that I do not see grounds for refusing the application for a stay pursuant to the provisions of s.9(4) of the Act.

91. I am satisfied that the Claimants are entitled to a stay of the Counterclaim under s.9 of the Act, and I am prepared to grant that application.

92. Mr Grant QC has also urged me to consider the fragmented appearance of the dispute resolution landscape were I to make the orders sought and see matters coming before the courts of Guernsey and also arbitrators. The avoidance of a multiplicity of proceedings covering the same matters and disputes is undoubtedly a curial virtue and an objective that I ought to have very much in mind. Unfortunately as has been remarked elsewhere, it is sometimes not possible to arrive at an outcome other than allowing parties to litigate their disputes in the manner that they have agreed. The one forum that the parties here never agreed to was London. The assistance of the English courts was asked for in what I have found were a special and limited set of circumstances. I do not take the view that this step alone allows Mr Digby to be freed of the obligations as to dispute resolution that he freely entered into. He needs in my judgment to go very much further than invoke concerns of fragmentation in order to achieve that ambition.

93. The outcome of the recent proceedings in Guernsey also has a bearing upon this line of argument. Having considered many of the arguments recited in this judgment, as well as a range of practical and other factors relevant to the proceedings before her, in her judgment handed down on 16 March, the Deputy Bailiff arrived at the conclusion that Guernsey is clearly and distinctly the appropriate forum for the trial of a case which turns on whether or not Mr Digby ceased to be a member of Holdings on the date he is alleged to have been expelled. I observe that the Deputy Bailiff was of the view that the mere commencement of the English proceedings by the Claimants did not render the Guernsey EJC "obsolete"; I further take note of the fact that, citing *Donohoe* and also dicta of Popplewell J, as he then was, in *Monde Petroleum SA v Westernzagros Limited* [2015] EWHC 67 (Comm), so far as the Deputy Bailiff

was concerned, giving effect to a clear agreement as to jurisdiction was an important principle that, allied to the practical matters identified by her, led to the conclusion that fragmented proceedings did not prevent the action proceeding in Guernsey.

94. I will hear counsel on the form of the order and any other consequential matters although it is to be hoped that an agreed draft can be submitted to the court.