EASTERN CARIBBEAN SUPREME COURT

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHC(COM) 2023/0064

BETWEEN:

(1) NMH
(2) ATG

Claimants/Respondents

and

(1) PWT

First Defendant

(2) NKT

Second Defendant/Applicant

(1) PRT
(2) OOR
(3) URN
(4) HTL

Non cause of action Defendants

Appearances:

Mr. Ben Valentin, KC, with him, Mr. Andrew Trotter, Ms. Claire Goldstein, Ms. Isobel McNaught and Mr. James Petkovic for the Claimants.

Mr. Alex Hall Taylor, KC, with him, Mr. Dean Robson for the Second Defendant

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2026: April 29, July 8.

JUDGMENT

[1] **Wallbank J. (Ag.)**: This is the Court's judgment in respect of two applications filed by the Second Defendant on 26th August 2025.

[2] The first application has been referred to for convenience in these proceedings as the 'D Group/Dubai Property Application'. The second has been referred to for convenience as the 'Burden of Proof Application.'

[3] These applications were heard together, over one day, on 29th April 2026.

[4] The Claimants resisted both applications.

[5] For the reasons given below, both applications will stand dismissed.

[6] Before considering these applications, some procedural background is essential.

1. Procedural Background

1.1 Summary

[7] The Claimants are companies incorporated in the Dubai International Financial Centre. The Claimants are judgment creditors of the First Defendant, under a US$1.6 billion arbitral award made under the auspices of the International Chamber of Commerce sitting in the Dubai International Finance Centre on 20th March 2023 ('the Award').

[8] The Claimants claimed in their Statement of Claim, filed on 28th February 2025, that:

> "[The First Defendant] is a member of [a prominent clan] and a powerful and influential member of the Kurdistan community in Iraq."

[9] The Claimants obtained orders of this Court on 30th May, 2023 that:

(1) The Award be enforced and registered in this jurisdiction (the 'BVI');

(2) The Claimants be granted permission to enforce the Award; and

(3) Judgment be granted in the terms of the Award with interest.

[10] The First Defendant has not made any voluntary payment in settlement of the Award made against him, which remains outstanding.

[11] The Claimants attest that their claim concerns what they understand to be the largest fraud conducted in the history of the Kurdistan region of Iraq, by the First Defendant, who they say is a sophisticated international fraudster who uses nominees to hide his beneficial ownership of high value assets.

[12] The Claimants have identified a potential asset within this jurisdiction against which to enforce the award, namely the shares in a company incorporated in this jurisdiction, OS International Holding Limited ('the OS Shares').

[13] The Claimants believe that the OS Shares are beneficially owned by the First Defendant, although their registered legal owner is the Second Defendant.

[14] The Claimants claimed in their Statement of Claim, filed on 28th February 2025 that:

> "[The Second Defendant] is an individual resident in the Kurdistan Region of Iraq. [The Second Defendant] is the legal owner of 436 Class B shares in OS International Holding Limited (OS International), a BVI company with company number 1581276 (the Shares). Based on the matters set out below, it is to be inferred that [the Second Defendant] holds the Shares on trust for [the First Defendant]."

[15] The Claimants' purpose with these proceedings is to enforce the Award and recover the money that is due to them from the First Defendant.

[16] The First Defendant has asserted that he does not own, beneficially or legally, the OS Shares. The Claimants claim that he does. The Claimants say the Second Defendant holds the OS Shares on the First Defendant's behalf. The Claimants say this is of a piece with other assets which, according to them, the Second Defendant also holds for the First Defendant beneficially, including an ownership interest in a group of companies which can be called the 'D Group' and a real estate property in Dubai (the 'Dubai Property'). In this Judgment, when I refer to the First Defendant's or the Second Defendant's ownership of the D Group, this is to be understood as shorthand for ownership of that interest in the D Group and not of the entire D Group.

[17] The Second Defendant denies these claims, including that he owns the D Group and Dubai Property for the benefit of the First Defendant.

1.2 These BVI legal proceedings

[18] The material procedural history is as follows. There is considerably more, but which does not immediately concern us here. What follows is not merely an introductory overview. This procedural narrative, including what was done and when, is essential reading.

[19] The Claimants filed a Fixed Date Claim Form on **11th April 2023**, some three weeks after receiving the Award.

[20] In this, they sought orders for the recognition and enforcement of the Award against the First Defendant in this jurisdiction (the BVI).

[21] On 26th May 2023, the Claimants filed a **Third Affidavit of JPH** to support this claim and other interlocutory relief sought by the Claimants.

[22] In this Affidavit, JPH lays out a factual case that the First Defendant makes extensive use of nominees for the purpose of concealing his ownership interests in various assets (*cf*. paragraph 126), and that the First Defendant retains ownership/control of the D Group (*cf*. e.g. paragraph 130). In this Affidavit JPH does not directly speak to the Claimants' allegations that the First Defendant also owns the Dubai Property through the Second Defendant.

[23] This claim was heard on **30th May 2023** by this Court (by Mangatal J.) with only the Claimants in attendance by their legal practitioners. The Orders sought were made.

[24] Also on **30th May 2023**, the Claimants obtained a freezing order against the First Defendant in support of their claim for enforcement.

[25] The First Defendant filed an Affidavit on **22nd June 2023** in purported compliance with his asset disclosure obligations pursuant to the freezing order. He 'confirmed'

that he had no assets that fell within the description given in the freezing order. He asserted that:

> "6. In relation to Oilserv Holding Ltd, I confirm that **I disposed of my interest on 15 March 2010**. I no longer hold any shares or any other interest – **whether in my own name or not** and whether solely or jointly – in or through Oilserv Holding Ltd.
>
> 7. In addition, I confirm that I do not hold shares or any other interest – **whether in my own name or not** and whether solely or jointly – in or through Oilserv Oilfield Services (BVI) Limited, Oilserv Limited, OS International Limited, Oilserv Oilfield Services Ltd or Oilserv International Holding Ltd." (Emphasis added.)

[26] Some four months later, on **31st October 2023**, the Claimants filed an *ex parte* application seeking orders to join the Second Defendant to the proceedings, for a provisional charging order over the OS Shares, for permission to serve the Second Defendant outside of the jurisdiction, for a proprietary injunction in respect of the OS Shares against both the Second Defendant and the First Defendant, for a freezing order, and for disclosure orders pertaining to the shares and monies derived therefrom.

[27] This application of the Claimants was supported by a **Fourth Affidavit of JPH** filed on **31st October 2023**. In this, in addition to the Claimants' factual case that the Second Defendant holds the OS Shares as nominee for the First Defendant, JPH attests that the Second Defendant also holds shares in the D Group on behalf of the First Defendant (at paragraphs 33 to 35).

[28] At paragraph 35 JPH states the nub of the present matter:

> "35. The above is all important because if [the First Defendant] has used [the Second Defendant] as his nominee in relation to his interest in [the D Group] then this indicates that [the Second Defendant] is one of the people that [the First Defendant] uses for this purpose which makes it more likely that he is also holding his interest in OS International on behalf of [the First Defendant]."

[29] JPH also attests that the Second Defendant holds the Dubai Property on behalf of the First Defendant (at paragraphs 59 to 77).

[30] I heard that *ex parte* application on 28th November 2023 and granted the orders sought. So, on **28th November 2023**, the Claimants obtained a provisional charging order over the OS Shares, on the basis that they are beneficially owned by the First Defendant and amenable to enforcement of the Award. That order also joined the Second Defendant to these proceedings.

[31] The Claimants' application for the provisional charging order was necessarily brought on an *ex parte* basis. I say necessarily, because that is what the Eastern Caribbean Supreme Court Civil Procedure Rules (Revised Edition) 2023 ('CPR') requires:

(1) CPR 48.2(2) provides that '[t]he application is to be made without notice but must be supported by evidence on affidavit';

(2) CPR 48.5(1) provides that '[i]n the first instance the court must deal with an application for a charging order without a hearing…'.

[32] The Second Defendant is the registered owner of the OS Shares. He was served with the provisional charging order, enabling him to 'file objections to [the] provisional charging order' pursuant to CPR 48.8(2).

[33] BVI legal practitioners acting for the Second Defendant filed a Notice of Acting on his behalf on **15th December 2023**.

[34] Through them, the Second Defendant appeared at the first return date on **18th December 2023** of the *ex parte* orders made on 28th November 2023.

[35] On **22nd December 2023**, the Second Defendant filed an affidavit pursuant to the *ex parte* freezing order, confirming that he retains OS Shares, holding 436 Class B USD shares since 28 May 2010 and that '[t]here have been no further dealings with these shares since that date'.

[36] On **9th January 2024**, the Claimants filed an application for the provisional charging order to be made final.

[37] They did so on the bases that the First Defendant continued to owe the debt in respect of which the provisional charging order had been made and that the Claimants believe that the Second Defendant is holding the OS Shares on behalf of the First Defendant.

[38] **<u>The Claimants specifically relied upon the Third and Fourth Affidavits of JPH in support of this application to make the provisional charging order final</u>**.

[39] The parties then agreed certain extensions of time for the Second Defendant to file evidence and applications.

[40] On **2nd April 2024**, the Second Defendant filed an application seeking security for costs, in an amount of US$225,000, in respect of an application to set aside his joinder to the proceedings and service on him that he intimated he was filing separately. In the alternative, should that set aside application not succeed, he sought security in an amount of US$1,125,000 in respect of his costs of the claim.

[41] Later that day, after 4 p.m., and thus deemed to have been at 8.30 a.m. on **3rd April 2024**, the Second Defendant filed an application to set aside his joinder to the proceedings, and the permission to serve him outside of the jurisdiction, and to have the *ex parte* freezing order, proprietary injunction and provisional charging order against him discharged. He also sought an order that '[t]he application dated 8 January 2024 for a final charging order is dismissed'. For convenience I will refer to this application as the Second Defendant 'Set Aside Application'. One of the grounds for the Set Aside Application was that this Court lacks jurisdiction, by paragraph 15.

[42] The Second Defendant filed a Third Affidavit on **3rd April 2024** in support of his Set Aside Application. He stated at paragraph 4:

> "I make this affidavit in support of my application for discharge of the interim orders obtained against me, **<u>my objection to the provisional and final charging order applications</u>**, for setting aside the order permitting me to be served out of the jurisdiction, and for setting aside the order joining me to the proceedings." (Emphasis added.)

[43] I have emphasized that the Second Defendant himself stated that his Third Affidavit was made in support of his objection to the final charging order application. This is important. We will come back to this.

[44] The Second Defendant's Set Aside Application did not seek to **exclude from the Court's consideration** the Claimants' case that the Second Defendant owns the D Group and Dubai Property on behalf of the First Defendant. Instead, the Second Defendant, in his Third Affidavit, **chose to rebut with factual evidence** that part of the Claimants' case.

[45] The Second Defendant's Set Aside Application was heard some three months later on **9th July 2024** and judgment was rendered by this Court (by Webster J.) some seven months after this application was filed, on **31st October 2024**. By this judgment, the Court dismissed the Second Defendant's Set Aside Application, save in respect of the freezing order, which was discharged. The Court ruled that there was to be a trial in respect of the beneficial ownership of the OS Shares held by the Second Defendant and directed that there was to be a hearing at which directions would be given for pleadings, evidence, and other interlocutory matters in the trial.

[46] Materially, the judgment:

(1) rejected the Second Defendant's jurisdictional objections, confirming that CPR 48 was the appropriate procedure; and

(2) gave directions pursuant to CPR 48.8(4)(b) for pleadings, disclosure and evidence of the beneficial ownership issue raised on the Second Defendant's objection. CPR 48.8(4)(b) provides that the Court can, at the hearing of an application to make a provisional charging order final, 'give directions for the resolution of any objection that cannot be fairly resolved summarily'.

[47] The Second Defendant appealed the dismissal of his Set Aside Application. That appeal was itself dismissed by the Court of Appeal on **30th January 2026**, about one year and ten months after the Second Defendant had filed his Set Aside Application.

[48] In short, both this Court (by Webster J.) and the Court of Appeal held that:

(1) the Court was right to permit service of the proceedings out of the jurisdiction on the Second Defendant, and the Court therefore has personal jurisdiction over him; and

(2) in any case, personal jurisdiction is not required in order to make a charging order over shares within the jurisdiction, since that involves creating a proprietary right rather than an order *in personam*.

[49] On **20th February 2026**, the Second Defendant applied to the Court of Appeal for leave to appeal to the Privy Council, and the Claimants filed their submissions in opposition to that application on **6th March 2026**. As at the hearing date of the present applications (29th April 2026), that application remained outstanding.

[50] Since the dismissal of the Set Aside Application, the matter has progressed before this Court towards trial. In summary, it was agreed that the Claimants would file and serve their Statement of Claim by 28th February 2025; the Defendants would file and serve any Defence by 18th April 2025, and the Claimants would file and serve any Reply by 16th May 2025.

[51] The Claimants duly filed their Statement of Claim on **28th February 2025**.

[52] At paragraph 20 of the Statement of Claim, the Claimants alleged the following:

> "In addition to the shares in OS International, [the Second Defendant] holds or has held other assets on behalf of (including on trust for) [the First Defendant]:"

[53] At paragraph 20.1 the Claimants assert that the Second Defendant and his brother hold shares in the D Group of companies on behalf of the First Defendant.

[54] At paragraph 20.2 the Claimants assert that the Second Defendant holds the Dubai Property on behalf of the First Defendant.

[55] These allegations encapsulated in formal pleading terms the factual case that the Claimants had earlier laid out in JPH's Third Affidavit of **26th May 2023** and his Fourth Affidavit of **31st October 2023**. The Statement of Claim did not expand upon

the Claimants' claims in respect of the D Group and Dubai Property significantly or at all.

[56] Consequently, by the time the Claimants filed their Statement of Claim on **28th February 2025**, the Claimants' case on the Second Defendant's ownership, on the First Defendant's behalf, of the D Group and the Dubai Property, had already been laid out for the Second Defendant to address for well over a year. These claims were thus not new to the Second Defendant, nor to the First Defendant.

[57] Indeed, on **3rd April 2024**, some **eleven months before** the Statement of Claim was filed, the Second Defendant had already articulated in his Third Affidavit his objections to the charging order being made final and he had articulated his case rebutting the Claimants' allegations that he owns the D Group and the Dubai Property on behalf of the First Defendant. Put differently, as at **3rd April 2024**, the Second Defendant knew what the Claimants' claim was in respect of his alleged ownership as the First Defendant's nominee of the D Group and of the Dubai Property, and, by then, the Second Defendant had, with the assistance of BVI legal practitioners, worked out what to go on the Court's record as saying about it.

[58] On **28th April 2025**, i.e. slightly more than a year after the Second Defendant had filed his Third Affidavit on 3rd April 2024, he filed his Defence.

[59] In paragraph 1, the Second Defendant asserted that the Defence was 'filed without prejudice to jurisdiction'.

[60] In paragraphs 72 to 88, the Second Defendant responded to the Claimants' allegations contained in paragraph 20 of their Statement of Claim. The Second Defendant claimed not to understand the relevance of these allegations and stated that he would plead further to them upon receiving further and better particulars. In the event, he did not make a Request for Further Information ('RFI') in relation to the D Group and Dubai Property beneficial ownership allegations but on something else. His purported lack of understanding did not get in the way of him then setting out a detailed narrative for what he said was the explanation concerning his ownership of the D Group and the Dubai Property (very much as he had already

done in his Third Affidavit) and, markedly, added that '[t]he matters referred to are simply irrelevant'[1]. This is the first time he had formally taken the position that the D Group and Dubai Property ownership allegations are irrelevant to the issue of beneficial ownership of the OS Shares. In doing so, he directly contradicted the Claimants' position, as expressed in paragraph 35 of JPH's Fourth Affidavit, that those matters are relevant to the beneficial ownership issue in respect of the OS Shares.

[61] On **19th June 2025** the Claimants filed a Reply. In this, the Claimants doubled down on their claims concerning ownership of the D Group and the Dubai Property. They added allegations that the Second Defendant also owns another set of assets, the K Group, as nominee for the First Defendant.

[62] The Second Defendant has not filed a Rejoinder.

[63] On **8th July 2025** the Claimants applied to strike out, and/or for summary judgment upon, parts of the Defence in which the Second Defendant advanced a case on Iraqi law (the 'Strike Out Application').

[64] The background to this was that in his Defence, the Second Defendant pleaded (amongst other things) that even if he was a nominee for the First Defendant, he did not hold the OS Shares on trust as a matter of Iraqi law, because (i) Iraqi law does not recognise trusts (the 'Iraqi law objection'), and/or (ii) the Claimants' case on how such a trust arose does not work as a matter of BVI law (the 'trust case objection'). The Iraqi law objection was rejected by this Court (by Mithani J.) following hearing of the application on **5th March 2026**.

[65] On **15th July 2025** the Court held a Case Management Conference and gave directions. Materially, the Court ordered:

> "7. Any applications of [the Second Defendant], including as to jurisdiction and/or strike out of the Claimants' case shall be issued by **26 August 2025**.
> 8. The Claimants shall serve any evidence in response by 23 September 2025.

[1] At paragraph 72 of the Second Defendant's Defence.

9. [The Second Defendant] shall file and serve any evidence in reply by 7 October 2025.
10. Further management or the hearing of any such application may take place at the Second CMC ['CMC2'] provided for below.

11. The parties shall, by 4pm on 28 October 2025, give standard disclosure by serving lists of documents on the other parties.

16. There shall be a further case management conference listed on the first available date after 31 May 2026 with a time estimate of one day, at which the Receivership Application and any further applications, any disputes in relation to disclosure, the question of supplemental expert reports (see paragraph 24 below), the costs reserved (see paragraph 36 below), as well as any other matters of case management, may be considered further.

18. Each party shall by 4pm on 27 February 2026 file and serve signed witness statements of fact.
19. Each party shall by 4pm on 31 March 2026 file and serve signed witness statements of fact in reply.

37. The parties do have liberty to apply to the court for further directions."
(Emphasis added.)

[66] 26th August 2025 was a significant date in these proceedings, because that was the deadline given to the Second Defendant to file further applications, including as to jurisdiction and/or strike out.

[67] On **26th August 2025**, the Second Defendant made an RFI, to which the Claimants responded on **26th September 2025**. The RFI did not touch and concern the Claimants' case in relation to ownership of the D Group and the Dubai Property.

[68] The Second Defendant also filed **three applications** on 26th August 2025:

(1) the present D Group/Dubai Property Application;

(2) the present Burden of Proof Application; and

(3) an application to strike out the Claimants' case that the Shares are beneficially owned by First Defendant (the 'Trust Case Application'), contingent upon the eventuality that the Claimants would not respond to the RFI adequately. The Trust Case Application was therefore, by its very

nature, a pre-mature application. What is more, it is inherently difficult to see how this can properly be justified, as the Court's Order of 15th July 2025 gave the parties express liberty to apply for further directions, by paragraph 37.

[69] On **3rd November 2025**, the Second Defendant filed a further application seeking orders that would put off disclosure and the filing of witness statements of fact and expert evidence until the present D Group/Dubai Property and Burden of Proof Applications had been heard and determined. The rationale for this application was that the orders sought would reduce the scope of disclosure and evidence. The Claimants submit rather that the effect and the Second Defendant's purpose of these orders would have been to delay the entire proceedings.

[70] On **16th January 2026**, the Claimants provided disclosure. The Second Defendant did not do so.

[71] The Second Defendant's application of 3rd November 2025 was heard on **18th February 2026**. The Court, by Mithani J., refused the application to delay disclosure and evidence as sought by the Second Defendant. Instead, he extended the timetable for disclosure and evidence to ensure that all disclosure, witness statements and expert reports were served before CMC2. The case management directions were varied, *inter alia*, for the Second Defendant to give standard disclosure by **2nd April 2026**. The Court was informed at the hearing of this matter on **29th April 2026** that the Second Defendant had given such disclosure, which the Claimants were then evaluating. The Second Defendant's List of Documents, filed on 2nd April 2026, discloses one hundred (100) documents. His disclosure statement filed on 2nd April 2026 specifies this represents 'all documents which are directly relevant to the matters in question in the proceedings' following 'a reasonable and proportionate search' 'on the basis of matters as they currently stand', i.e., at 2nd April 2026. This is that the similar fact evidence is to be included.

[72] On **5th March 2026**, on the Claimants' application, this Court, by Mithani J., struck out the Second Defendant's reliance on Iraqi law (the 'Iraqi Law Strike Out Order'). The Second Defendant had contended that he could not hold the OS Shares on

trust for the First Defendant, because any trust would be governed by Iraqi law, which (he said) does not recognize trusts. In short, the Court found that BVI law applies, so that Iraqi law is irrelevant.

[73] The Trust Case Application, though, remains in abeyance.

[74] On **2nd April 2026**, the Second Defendant gave disclosure and inspection, and the Claimants similarly gave inspection.

[75] On 7th April 2026, this Court by Mithani J. refused leave to appeal against the Iraqi Law Strike Out Order.

[76] On 15th April 2026, the Court of Appeal granted the Second Defendant's further application for leave to appeal, directing that the appeal be expedited. The appeal was heard on an expedited basis on 2 June 2026 and judgment was reserved.

[77] On **23rd April 2026**, the Claimants and the Second Defendant served their lists of witnesses. For the Claimants, the witnesses of fact will be JPH and the Claimants' lead investigator, NB. For the Second Defendant, it will be the Second Defendant himself and his brother. The Second Defendant is not calling the First Defendant to give evidence, and the First Defendant, as a party, and indeed the First Defendant, is not putting himself forward to give evidence. This prevents cross-examination of the First Defendant on apparent inconsistencies in what the First Defendant has, according to the Claimants, said in relation to his ownership of D Group assets, compared with what the Second Defendant says.

[78] Witness Statements are due to be filed by 15th May 2026 and Reply Witness Statements by 5th June 2026. Expert Reports are due to be filed by 3rd July 2026. CMC2 is due to take place on 16th July 2026.

[79] The Claimants say that the Second Defendant has taken no steps to list the Trust Case Application - that application was issued eight months ago, and the Claimants responded to the RFI seven months ago. The Claimants say they have written to the Second Defendant about their concern that the application is being warehoused

in order to create what the Claimants call 'yet further disruption', but that they have received no response.

[80] I have related the procedural background in considerable detail, because the Claimants submit that I should dismiss both the D Group/Dubai Property and Burden of Proof Applications as an abuse of process. We will need to evaluate that submission in the context of the procedural history of this matter. The Claimants contend that the Second Defendant has filed these applications, not to have genuine issues resolved, but to obstruct the progress of the Claimants' claim to have the provisional charging order made final. Such obstruction would be brought about by causing a plethora of issues to be raised for determination – which takes time and costs – before trial of the claim itself, and, where decisions on such issues go against the Second Defendant, he would appeal them, taking even more time and costs.

[81] Whilst setting out the procedural background, it warrants observation that CPR 48.8 makes provision for the filing of objections to a provisional charging order (by CPR 48.8(1)). CPR 48.8(2) provides for who may file objections, and CPR 48.8(3) provides that '[t]he objection must be filed not less than 14 days before the hearing' (i.e. of the application to make the provisional charging order final). CPR 48.8 does not require any procedural complexity for the making and hearing of objections, which can be very simple. What we have here, however, is a set of objections by the Second Defendant which have the appearance of great complexity, when there is, really, only one factual issue: is the Second Defendant the beneficial owner of the OS Shares as he claims to be, or is it the First Defendant?

2 The D Group and Dubai Property Application

[82] With the D Group/Dubai Property Application, the Second Defendant seeks the following orders:

> "The Claimants' ("Cs") statement of claim at paragraphs 20 to 20.2.10 (including all sub-paragraphs) and paragraphs (including all sub-paragraphs) 46-54 of Cs' reply to my defence (the "Paragraphs"):
>
> a. are struck out; or

b. there is summary judgment granted in [the Second Defendant's] favour upon them; or
c. the proceedings in relation to the Paragraphs are stayed; or
d. Cs' proposed reliance on purported 'similar facts' as set out in the Paragraphs be ruled inadmissible and excluded from the trial.
e. Cs pay [the Second Defendant's] costs of the application and of the claims struck through, summarily determined or stayed and of any evidence ruled inadmissible and excluded from trial."

[83] In the Notice of Application, the Second Defendant cited the following grounds in support:

> "(1) The Paragraphs reflect Cs' attempt to rely upon two instances of alleged 'similar facts' to support their claim that he holds shares in OS International Ltd on trust for [the First Defendant].
>
> (2) The two 'similar facts' are:
>
> a. An alleged trust involving [the Second Defendant], his brother, and [the First Defendant] in respect of [the D Group], which operates in Iraq ("[the D Group]"); and,
>
> b. An alleged trust between [the Second Defendant] and [the First Defendant] over a Dubai residential property, which was transferred to [the Second Defendant] on 7 April 2023 ("Dubai Property").
>
> (3) Cs argue that these alleged relationships support an inference that [the Second Defendant] similarly holds the OS International shares on trust for [the First Defendant].
>
> (4) Cs' case requires the Court to:
>
> a. Find that a trust exists in relation to the [the D Group] and the Dubai Property;
>
> b. Accept these findings as probative and admissible in proving a trust over OS International shares; and,
>
> c. Infer from them that [the Second Defendant] holds OS International shares on trust for [the First Defendant].
>
> (5) [The Second Defendant] contends that Cs' 'similar facts' case is fundamentally flawed and invites the Court to strike out the Paragraphs. Alternatively, [the Second Defendant] seeks summary judgment, a stay of the proceedings in respect of them, or an order rendering the 'similar facts' case inadmissible such that they are excluded from the trial.
>
> (6) The grounds for seeking these orders are:

a. First, the Court lacks the jurisdiction, nor is it the appropriate jurisdiction, to make the necessary findings of fact regarding the alleged trusts relating to [the D Group] and the Dubai Property;

b. Cs' pleaded case discloses no reasonable prospect of success or compelling reason why the issue should go to trial, the evidence is weak and speculative; and,

c. Even if Cs' allegations were to be true (which is denied), the 'similar facts' evidence has no or minimal probative value to the issue in dispute in these proceedings, and instead risks unfairly prejudicing [the Second Defendant] in respect of that issue, as well as increasing the time, costs, complexity, length of trial, whilst distracting from the core issue in the case, unnecessarily."

[84] The Second Defendant filed an 8th Affidavit in support of this application.

[85] Learned Counsel for the Second Defendant characterized this application and the Burden of Proof Application as 'case management applications'.

[86] The Claimants fundamentally disagree on various levels.

2.1 The factual background

[87] The following factual background summary is instructive – I give this only to outline the general factual context for present purposes. None of this summary is to be taken as a finding of fact.

[88] The mechanics by which the Second Defendant came to become the legal owner of the OS Shares are broadly as follows.

[89] The First Defendant and AB were the original shareholders in an oilfield services company in Iraq ('Oilserv Iraq'). After the series of transactions briefly summarized below, the result saw the Second Defendant replacing the First Defendant in the ownership structure.

[90] On 15th September 2008, a BVI holding company ('Oilserv Holding') was incorporated as part of a corporate restructuring designed to accommodate an anticipated investment by BRC. Like Oilserv Iraq, Oilserv Holding was jointly owned

by the First Defendant and AB. The investment did not eventuate and the shares in Oilserv Iraq were not at that point transferred to Oilserv Holding.

[91] In 2009 to 2010, the First Defendant transferred his shares in the Oilserv companies to the Second Defendant, as follows:

(1) Oilserv Iraq, on 3rd December 2009;

(2) Oilserv Holding (which at this stage held no assets), on 15th March 2010 (the 'Oilserv Holding Share');

[92] The group was then restructured to bring the Second Defendant's purported interest in Oilserv Iraq under two layers of BVI holding companies (OS International and Oilserv Holding):

(1) On 26th May 2010, the shares of Oilserv Iraq were transferred to Oilserv Holding;

(2) On 28th May 2010, the Second Defendant was issued the Shares in OS International in place of his shares in Oilserv Holding. In particular:

a. the Oilserv Holding Shares were redeemed; in their place new Oilserv Holding shares were allotted to AB and the Second Defendant; and

b. those new Oilserv Holding shares were immediately transferred to OS International; in their place new shares in OS International were issued in the same proportions to AB and the Second Defendant.

[93] The central factual dispute in these proceedings concerns the circumstances in which the Second Defendant became the legal owner of 50% of Oilserv Iraq in December 2009. The Second Defendant says that he acquired his Shares in OS International beneficially, to reflect that historical acquisition.

[94] The Claimants infer that the Second Defendant was substituted for the First Defendant because the First Defendant's ownership interest created an obstacle to external investment because he is a member of the Kurdistan ruling family, and the purpose of the transfer of legal ownership of his interest to the Second Defendant was to purport to dissociate the First Defendant from OS International and its

subsidiaries (the Oilserv group) while retaining a beneficial interest, in order to facilitate such investment.

[95] The Second Defendant claims to have made an oral agreement with the First Defendant in June 2009 to purchase the First Defendant's shares in Oilserv Iraq for US$12.5 million. He says only US$6.25 million was to be paid, in cash, immediately, and the remainder was to be paid, in cash, by instalments.

[96] The Claimants pleaded in their Statement of Claim the following:

> "15. [The Second Defendant] has asserted that:
>
> 15.1. [the First Defendant] wished to sell his interest in Oilserv Iraq in 2009 because he needed cash for a construction project known as the [GT] Project in Kurdistan;
>
> 15.2. [the Second Defendant] was informed of the investment opportunity through his brother, said to be an acquaintance of [AB];
>
> 15.3. he thought it would be a good opportunity to get exposure into that industry, at a price that was cheap;
>
> 15.4. [the Second Defendant] agreed to purchase [the First Defendant's] 50% stake in Oilserv Iraq for $12.5 million on 21 June 2009;
>
> 15.5. half of that amount ($6.25 million) was paid upfront in cash and the remainder was paid in instalments over the two following years;
>
> 15.6. by the time [the First Defendant's] 50% share in Oilserv Holding was transferred to [the Second Defendant] in March 2010, Oilserv Holding was a company without any assets, and merely a dormant BVI company which was re-used to facilitate further investment."

[97] The Second Defendant, in his Defence, broadly corroborated this summary. He added that the backdrop to the transaction was a worsening economic situation in Iraq in 2008, with the First Defendant requiring funding in early 2009 for a large construction project known as GT, and with the transaction being paid for in cash, on account of general mistrust of the Iraqi banking system and as is customary in Iraq. The Second Defendant pleaded that the oral agreement was subsequently memorialized in a formal written document, in accordance with an Iraqi legal/corporate procedure. The Second Defendant pleaded a considerable amount of other details that flesh out his narrative.

[98] The Claimants say, in brief overview, that:

(1) It is thoroughly implausible that the First Defendant and the Second Defendant reached an entirely oral agreement in respect of such a sale, or that it was paid for in cash payments of which there is no record;

(2) In any case, the Second Defendant does not have the means to make the US$12.5 million payment;

(3) That price was a massive undervalue for a company whose value ran into the several hundreds of millions of dollars both shortly before and shortly after the sale, and at a pivotal point when the Kurdish oilfield services market was booming. There is no plausible reason for the First Defendant to have made such a bargain;

(4) The Second Defendant has been unable to account for a dividend of about US$13.3 million, which the Claimants infer was simply paid to the First Defendant;

(5) The Second Defendant also has (on his own account) no industry experience, and there is no reason for him to purchase such an interest, or for the First Defendant to sell it to him;

(6) The structure of the investment is also uncommercial if the Second Defendant were a genuine investor;

(7) The purchase is unsupported by any contemporaneous documents, other than two formal documents created by the very individuals alleged to have been involved in the transfer; and has been the subject of conflicting accounts.

[99] The Claimants do not, however, content themselves with reliance only upon the implausibility of the Second Defendant's explanations. The Claimants in addition wish to rely on evidence that the Second Defendant acted as a nominee for the First Defendant in respect of other assets as well.

[100] The Claimants pleaded at paragraph 20 of their Statement of Claim that '[i]n addition to the shares in OS International, the Second Defendant holds or has held other assets on behalf of (including on trust for) the First Defendant, before going on to

claim that the Second Defendant and his brother hold shares in the D Group as trustees for the First Defendant, and that the Second Defendant holds the Dubai Property on trust for the First Defendant.

[101] The Claimants say that the Second Defendant and his brother each nominally hold a company in the D Group as a nominee for the First Defendant.

[102] The Claimants urge that there are various public reports and an academic article indicating the First Defendant's interest in the D Group. Two separate sources have advised the Claimants that the Second Defendant's brother is simply the First Defendant's 'right-hand man' or 'porter', who acts as a 'front'. A former Iraqi MP has publicly stated: 'before he was a tractor driver, now he is a billionaire, very close to [the First Defendant]'.

[103] The Claimants say that their investigations indicate that the Second Defendant's family is not independently wealthy or have any significant business associates sufficient to be the genuine owner of a D Group company, other than their connection with the First Defendant. The Claimants observe that all of the pursuits on which the Second Defendant relies are themselves connected to the First Defendant and/or the D Group.

[104] The Claimants also rely on the implausibility of the Second Defendant's own position. The Claimants point out that much like the Second Defendant's purported agreement to purchase the OS Shares, the Second Defendant says he reached an oral agreement with his brother to divide the companies between them at a short meeting on an unspecified date in 2021. He claims to own his D Group company beneficially by reference to (i) a letter and licences apparently relating to projects from over 15 years ago, none of which have anything to do with D Group (and which appear to be linked to the First Defendant as well) and (ii) letters of recommendation for D Group companies which do not even mention the Second Defendant. He exhibits formal documents relating to the D Group companies' incorporation and share transfers which confirm only that the Second Defendant and his brother hold the legal interest in the D Group companies.

[105] The Second Defendant pleaded in his Defence at paragraph 72 that he did not understand the relevance of the Claimants' case that he legally owns the D Group and the Dubai Property on behalf of the First Defendant. He denied that the First Defendant has any ownership in the D Group. The Second Defendant did not plead in his Defence how he came to be a legal owner of the D Group. The Second Defendant pleaded that the BVI Court lacks jurisdiction, or is not a suitable jurisdiction, to decide the ownership of corporations registered and operating in Iraq between individuals domiciled in Iraq. Inconsistent with his assertion that he does not understand the relevance of the Claimants' D Group and Dubai Property claims, he pleaded that his ownership of the D Group is irrelevant to the issue as to beneficial ownership of the OS Shares.

[106] In addition, the Claimants say that the Second Defendant also holds a valuable apartment in Dubai as nominee for the First Defendant (the 'Dubai Property'). The Claimants observe that:

(1) The First Defendant transferred the Dubai Property to the Second Defendant on or around 7th April 2023, only some **<u>two and a half weeks</u>** after the Award had been entered against the First Defendant on 20th March 2023;

(2) The First Defendant asserted that he had received 'no cash consideration' for the transfer. That was contradicted by the Second Defendant, who later claimed to have paid – some **<u>ten months</u>** after the property transfer – US$432,000 in respect of the property;

(3) The Second Defendant gives the highly implausible explanation that the property transfer was (mostly) in consideration of public construction works performed between 4 and 5 years earlier;

[107] The Second Defendant, in his Defence, pleaded a narrative, with considerable particularity, that the Second Defendant received the Dubai Property in part settlement of an outstanding debt owed by the First Defendant for construction works previously carried out for the First Defendant by a group of companies of

which the Second Defendant is the registered shareholder, the K Group, at a location called B Village.

[108] The Second Defendant denies holding either of those assets as a nominee and has pleaded to this effect in his Defence.

[109] The Claimants say that they do not seek any **relief** in relation to the Dubai Property or the D Group.

[110] They also say that they do not need to demonstrate that **as a matter of law** a trust arose in respect of them.

[111] Rather, the Claimants contend that they simply rely on those features of the case as establishing similar facts. The fact patterns in relation to the OS Shares and the Dubai Property/D Group bear striking similarities: for example, a common understanding that the Second Defendant would hold assets for the First Defendant's benefit and act in accordance with his directions in relation to them; the existence of contradictory explanations which have changed over time; a lack of documentation (and implausible explanations for that lack of documentation); an uncommercial arrangement; and implausible accounts of the consideration used for the transaction.

[112] The Second Defendant D Group/Dubai Property Application seeks to avoid any consideration at trial of the similar fact evidence on which the Claimants wish to rely, on three bases:

(1) The Second Defendant asserts that the Court 'lacks the jurisdiction, nor is it the appropriate jurisdiction' to make findings of fact in relation to the D Group or the Dubai Property, and on that basis seeks to stay that part of the case. This appears to divide into objections based on (i) the so-called '**Moçambique** rule',[2] and (ii) *forum non conveniens*.

[2] The rule in British South Africa Company v Companhia de Moçambique et al. [1893] AC 602.

(2) The Second Defendant asserts that the Claimants' pleaded case discloses no reasonable prospect of success, and applies to strike out those paragraphs, or for summary judgment on them.

(3) The Second Defendant asserts that the 'similar facts' have 'no or minimal probative value to the issue in dispute', and risk 'unfairly prejudicing' the Second Defendant, and increasing the time, cost and complexity of the trial.

[113] The Second Defendant developed his position as follows.

(1) If the Court cannot practically or lawfully determine the truth of whether the D Group or the Dubai Property are held on trust for the First Defendant, their probative value collapses. In this case, the Court either does not have jurisdiction or is not the appropriate jurisdiction to determine these matters. It was not until the fully pleaded case of the Claimants was known that it was clear what was being alleged against the Second Defendant in respect of a trust and why the D Group and Dubai Property are said to be relevant to the issues in dispute.

(2) But even if the Claimants can surpass that considerable hurdle of proving the truth of their allegations and that the court can be and is the appropriate forum in which to determine them, the question is how does the Second Defendant holding assets on trust for the First Defendant in different circumstances help prove or assist the Court in determining whether the Second Defendant holds the OS Shares (and, following the Claimants response to RFI, the shares in Oilserv Holding also) on trust for the First Defendant?

(3) It is not worth the considerable cost or time required to prove foreign law and facts to resolve all these issues at trial – it is grossly disproportionate to any potential benefit that might result. At present these allegations are also just based on innuendo and supposition that is raised for prejudicial reasons and without any actual evidential substance. Accordingly, these allegations should be struck out, alternatively stayed, or excluded from the trial.

[114] The Second Defendant's learned Counsel urges that the admissibility of similar fact evidence in civil cases is governed by the principles set out by the House of Lords in **O'Brien v Chief Constable of South Wales Police**[3]. There is a two-stage approach:

(1) Probative stage: to be admissible the evidence must be logically probative of an issue in the case. Evidence is 'logically probative' if, assuming provisionally it is true, it makes the matter which requires proof more or less probable (see **O'Brien** [3]-[4], and [53]).

(2) Discretion stage: the court may nevertheless decline to admit such evidence. **O'Brien** emphasized that the court must balance the potential probative value of the similar fact evidence against the burden and prejudice to the other party. Factors that must be considered in the balance would usually include, (i) time and cost of disclosure, (ii) lengthening of trial, (iii) stress and prejudice to parties, (iv) loss of documentation and fading recollections, and (v) proportionality and expedition, as well as (vi) the avoidance of side issues which will unbalance the trial and 'make it harder to see the wood from the trees', see **O'Brien** at [6] and [56].

[115] Subsequent reported case law applying the decision in **O'Brien** has on the whole excluded reliance on such evidence. For example, **JP Morgan Chase Bank v Springwell Navigation Corporation**;[4] **Claverton Holdings Ltd v Barclays Bank PLC**;[5] **BGC Brokers LP v Tradition (UK) Limited**;[6] **Christoforou v Christoforou**,[7] **Peter Sharp & Son (a firm) v Gea Farm Technologies (UK) Limited**;[8] **Primafacio Limited v Tres Canopia Limited**.[9]

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[3] [2005] UKHL 26.
[4] [2005] EWCA Civ 1602.
[5] [2015] EWHC 3603 (Comm).
[6] [2019] EWHC 3588 (QB).
[7] [2020] EWHC 1196 (Ch).
[8] [2022] EWHC 64 (Ch).
[9] [2023] EWHC 430 (Comm).

[116] The Second Defendant argues that the Claimants' similar fact case lacks 'probative value' to the beneficial ownership of OS International. The Second Defendant puts his argument as follows.

[117] Alleged similar facts only have 'probative' value to decide the actual matters in dispute between the parties if the Court has the jurisdiction to decide them as a matter of fact.

[118] In order to succeed (and for the case to have any probative value) the Claimants will have to prove their case in relation to D Group and the Dubai Property. Mere suspicion or deciding the matter 'incidentally' as the Claimants seem to contend (a suggestion that is in any event not clear) is insufficient. In effect the Claimants appear to be asking the Court just to take account of the fact that they have made the similar fact allegations without actually having to decide them. That is not permissible and would be unfairly prejudicial to the Second Defendant.

[119] The similar facts raised require the BVI Court to determine that:

(1) the D Group is a legal entity subject to a trust in favour of the First Defendant in Iraq (a jurisdiction that otherwise does not acknowledge the separation of legal and beneficial ownership); and

(2) the registered title of the Dubai Property does not reflect its true ownership and is also held on trust for the First Defendant.

[120] The Second Defendant urges that the BVI Court lacks jurisdiction over both these matters. The Iraqi and Dubai courts have jurisdiction, governed by their respective laws. Moreover, in relation to the Dubai Property specifically, the rule in **British South Africa Company v Companhia de Moçambique**[10] bars the BVI court from adjudicating matters to the extent that it concerns the title to, or the right to possession of, foreign land.

[10] [1893] AC 602 HL.

[121] Even if jurisdiction existed to determine those issues relating to the D Group and Dubai Property, the BVI is not the appropriate or convenient forum to adjudicate them.

[122] That is because:

(1) the D Group and the Dubai Property have no connection with the BVI – they are situated in Iraq and Dubai respectively;

(2) the parties, insofar as it concerns issues relating to the D Group and Dubai Property, have no connection with the BVI and are not subject to the jurisdiction of the BVI Court in respect of them;

(3) the governing law is not BVI law but Iraqi or Dubai law – the BVI Court should be cautious before deciding to determine issues of fact applying foreign law principles;

(4) all the relevant parties are domiciled and located in Iraq;

(5) all the relevant witnesses and documents are in Iraq or Dubai;

(6) the courts in Iraq and Dubai can resolve these disputes and indeed have already been asked to do so in the case of the Dubai Property by the Claimants, where the Dubai courts have struck out the Claimants' claim to void the transfer and obtain an order for re registration of the Dubai Property in the First Defendant's name and dismissed the Claimants' appeal;

(7) all the relevant documents will be in Kurdish or Arabic; and

(8) the time and cost required to litigate these issues far outweighs their relevance and probative value to the core dispute in this case – namely the alleged trust(s) in relation to the shares in OS International (and Oilserv Holding).

[123] The Second Defendant argues that the evidence relied upon by the Claimants to prove their similar fact case is weak and speculative. He contends that even if the Court finds jurisdiction or deems BVI the convenient forum, the evidence has no real prospect of success. It is not probative—and, in any event, its weakness should weigh heavily in the Court's discretion so as to decide to exclude it.

[124] In respect of the D Group the Second Defendant argues as follows. He says that the Claimants are relying upon the following:

(1) ICC arbitration award findings in **2023** – which are said to conclude that the First Defendant has an 'ownership interest' in the D Group (see paragraph 20.1 of the statement of claim);

(2) Selected and unparticularized 'press reports' and 'publications', which apparently state the First Defendant has 'an interest' in the D Group (see paragraph 20.1.1 of the statement of claim, and JPH's 5th Affidavit, paragraphs 64-74);

(3) Various media reports, articles, Facebook posts, etc. drawn from yellow press and media outlets in Iraq or from the internet which the Claimants attempt to rely on as evidence to challenge legally established ownership (see JPH's 12th Affidavit, paragraphs 17-18 and 23, and the Second Defendant's 11th Affidavit, paragraphs 8-10);

(4) An interview to a magazine with the First Defendant in **2016** where he refers to 'owning a share' in 'Family Mall', a 'touristic project on Mount K…', and a 'steel factory' – which the Claimants invite the court to infer are assets of the D Group (see paragraph 20.1.2 of the statement of claim, and JPH's 5th Affidavit, paragraphs 73.1 to 73.3);

(5) A former Iraqi MP's statement on Facebook from 9th May 2020 that the Second Defendant's brother was a tractor driver but is now unexplainably wealthy (see paragraph 20.1.2 of the statement of claim, and paragraph 132 of JPH 3rd Affidavit);

(6) An assertion by the Claimants, without evidence, that the Second Defendant and his brother are not independently wealthy (see paragraph 20.1.4 of the statement of claim);

(7) An assertion by the Claimants that it is 'implausible' that the Second Defendant and his brother would agree to split the two D Group companies between them in 2021 (see paragraph 20.1.5 of the statement of claim); and

(8) An assertion by the Claimants that the Second Defendant has 'not provided any documentary evidence' to confirm he owns D Group beneficially (see paragraph 20.1.6 of the statement of claim).

(9) An assertion by the Claimants that the D Group consists of at least eight companies, having only properly identified two, being the companies owned by the Second Defendant and his brother. The Claimants attempt to rely on unsubstantiated and uncorroborated LinkedIn profiles in an attempt to broaden the connection (see paragraph 8.2 of JPH's 12th Affidavit).

[125] The Second Defendant contends that the Claimants' claims are speculative and lack any evidentiary weight. There is no realistic prospect of the Claimants persuading this Court that the Second Defendant was a trustee for the First Defendant in relation to the D Group and there was a 'common understanding' to this effect from the facts the Claimants plead. Nor is there any realistic prospect of them then being able to rely on this to prove the Second Defendant is a trustee in relation to OS International. There is no demonstrable or pleaded connection between the two, other than that the Claimants allege (not based on actual evidence) that there is a trust in relation to both. There is no compelling reason why these issues should proceed to trial. This is for the following reasons:

(1) First, these pleaded facts concern entirely unrelated events and entities many years after the issue of shares in OS International, and of Oilserv Iraq and Oilserv Holding. The potential relevance of unconnected events, business and entities well after the time relevant to the ownership of Oilserv is limited, if any exists at all. Moreover, the Claimants' case seems to be based upon the evidence of NB obtained during the arbitration proceedings (see paragraph 34 of JPH's 4th Affidavit and JPH's 3rd Affidavit at paragraphs 8-14, 129-135). However, the arbitration award makes clear that this evidence was unreliable and not being relied upon by the Claimants, nor by the Tribunal (see section H of the ICC award dated 20th March 2023, at paragraph 35). The Claimants have not presented any different or more cogent evidence, thus the issues with that evidence raised

in those proceedings, namely the unlawful methods used to obtain it, the unreliability of statements of anonymous and confidential sources and rumours, and the unjustified redaction of evidence apply equally here. The Claimants have not attempted to provide independent evidence or verification of what has been said and therefore this evidence suffers from the same flaws that led the Claimants themselves to abandon reliance on it before. It is, in short, wholly unreliable and incomplete evidence based on supposition, inference and unclear sources on which no (or at least no safe and probative) reliance can be placed.

(2) Second, the Award is subject to the rule in **Hollington v Hewthorn & Co Ltd**[11] that has been codified in the Evidence Act 2006 which states at section 90:

> "Subject to subsection (2), and sections 91 and 92, evidence of the decision in legal or administrative proceedings is not admissible to prove the existence of a fact that was in issue in the legal or administrative proceedings."

The Award is not binding on the Second Defendant nor the BVI Court and involved a separate dispute between the Claimants and the First Defendant to which the Second Defendant was not a party and is entirely unrelated. It would be unfair to the Second Defendant were it to be used against him in these proceedings. In any event, the award made in that arbitration is not direct evidence of the facts that the Claimants must prove. It is merely an opinion of a tribunal on the limited evidence provided to it at that time, in relation only to the issues that were before the tribunal, not involving the Second Defendant in any way, and does not in any event make findings relevant to what the Claimants must now prove. The findings are also prejudicial in character, based upon there having been no evidence from the Second Defendant before the tribunal, and reliance on it should be

[11] [1943] 1 KB 587.

struck out, or ruled inadmissible at trial in accordance with the rule in **Hollington v Hewthorn**.

(3) Third, the Claimants' case that there are third-party ‘press reports’ and ‘publications’ which suggest the First Defendant has an interest in the D Group is impermissibly vague and is by its very nature weak second-hand hearsay evidence without any disclosed source or evidential basis. By reference to the press reports exhibited in JPH's 5th Affidavit, there is no real prospect of successfully persuading the BVI Court that the Second Defendant and his brother are trustees for the First Defendant, and at some point (unspecified by the Claimants) that there was a common understanding they would be in relation to the D Group on the strength of the Claimants' selection of alleged press reports or publications without citation in those reports of where their information came from. Some of the articles only refer to ‘[the D Group]’ (what entity is being referred to is not known) being ‘under the supervision’ of ‘[the First Defendant]’. It is not clear what that is intended to mean, or where that information comes from. No underlying source material or evidence is provided, so the articles should be seen as, at best, as purely speculative opinion or puff and not evidence. There is no good reason why a trial should take place on this issue based upon this evidence and pleading.

(4) Fourth, in respect to a single interview with the First Defendant in 2016 where he is asked ‘what are those projects in which you have shares?’ to which he responds ‘K Telecom, the Touristic Project on Mount K, we have a steel factory, we have a share in Family Mall, and shares in other projects’, the Claimants simply assume these ill-defined and non-specific assets are assets of the D Group, but have not provided any evidence of this connection. This interview alone is not proof (i) that the assets referred to are owned by the D Group, and (ii) that this means the brothers are trustees for the First Defendant in relation to them. It is unclear what ‘share’ is intended to mean in that interview and neither the Second Defendant nor his brother are responsible for the statements of the First Defendant, who

has been proven to be dishonest. Conversely, the Second Defendant has no reason to lie about the First Defendant's involvement in the D Group, if he had one.

(5) Fifth, it is fanciful that the BVI court will find as a fact that the Second Defendant and his brother are trustees in relation to the D Group and therefore that this proves necessarily that the Second Defendant is a trustee for the First Defendant in relation to OS International on the strength of a Facebook post by a disgruntled MP talking about his brother, and particularly one who has since been censured by the Kurdish legislature. The content of the Facebook post does not even mention the ownership of the D Group and relates to the Second Defendant's brother rather than him. This allegation has no real prospect of success, no relevance, and should be struck out.

(6) Sixth, a bare assertion by the Claimants that the Second Defendant is not independently wealthy has no reasonable prospect of successfully persuading this court that he is a nominee in respect of the D Group companies and therefore that he is a trustee in relation to OS International. He should not have to prove his wealth or how he came by it simply to displace an unfounded inference. In any event, he has explained his ownership of several projects and entities in addition to the D Group and the K Group, see paragraphs 69-96 of the Second Defendant's 3rd Affidavit. The Claimants' assertion seems to be based solely upon the evidence of NB obtained during the arbitration proceedings, which has complete lack of reliability.

(7) Seventh, the assertion that the Second Defendant has not provided any documentation to prove his ownership of the D Group companies is simply false – he has disclosed his ownership of shares (see paragraphs 80-81 of the Second Defendant's 3rd Affidavit, and exhibit ZS-3). There is no assertion these company documents are fraudulent or false. The presumption should be that they are genuine and reflect his ownership. The Claimants are alleging that the Second Defendant and his brother do not

own the D Group to prove that he must be a trustee in relation to OS International. It is for the Claimants to prove their allegation, not for the Second Defendant to disprove it. The Claimants are inviting the drawing of an adverse inference when the Second Defendant has already disclosed his ownership interest in the D Group companies and they have not been able to challenge it. There is no realistic prospect of the Claimants successfully persuading the court to draw an adverse inference in these circumstances and this paragraph should be struck out or summarily determined in the Second Defendant's favour at this stage to avoid unnecessary time and expense being spent addressing it.

(8) Eighth, as regards the Claimants' assertions concerning the scope and composition of the D Group, they allege that they 'understand' that the Second Defendant 'nominally' owns the shares in DGT (one of the two 'D Group' companies that they identify). They do not provide the basis or source of that understanding or any evidence for having reached it. That allegation is incorrect and it is telling the number of times that the Claimants have alleged a nominee relationship without having provided any evidence of it.

[126] In respect of the Dubai Property, the documents relating to the sale and registration of the Dubai Property have been disclosed and are, in any event, the subject of proceedings in Dubai brought by the Claimants. Those documents are:

(1) A construction contract between the First Defendant and the K Group;

(2) An agreement that payment for the Dubai Property will be partly paid by set-off of the debt owed under the construction contract;

(3) A formal title document from authorities in Dubai evidencing the transfer of the Dubai Property from the First Defendant to the Second Defendant;

(4) A receipt from K Group confirming settlement of the construction debt;

(5) A receipt from the First Defendant confirming settlement of the balance of the purchase of the Dubai Property.

[127] The Claimants do not directly allege that these documents are fraudulent or a sham or importantly, as they would need to, that the Second Defendant is a party to that alleged fraud or sham. Instead, by way of their reply, the Claimants assert that 'it is to be inferred' that certain of the documents were a sham. There is no substantive basis for asserting that or making that inference.

[128] Instead of impugning the documents which negative the existence of a trust, the Claimants instead seek only to invite the court to 'infer', despite the title registered in Dubai, that a trust has arisen in respect of the Dubai Property. There is again no basis for that. Impermissibly, by way of reply, and for the first time the Claimants suggest at some point (which they do not specify) there was a 'common understanding' the Dubai Property would be held on trust for the First Defendant, such that the First Defendant is still the beneficial owner of the Dubai Property, despite what the documents show was the intention of the parties and the legal effect of the transfer of the property. They do not plead how they claim to know about such a common understanding or any basis for such knowledge. Without directly pleading the documents are fraudulent or a sham, and without providing any evidence or particulars for the alleged 'common understanding', the documents stand for themselves and there is no basis on which to 'infer' any trust.

[129] This position of the Claimants in these proceedings and this Court stands in contrast to the case being pursued in Dubai, where the Claimants seek to void the transfer and obtain an order for its re-registration in the First Defendant's name - a claim that is incompatible with the existence of any common understanding or trust between the Second Defendant and the First Defendant.

[130] Even if this Court were to find that it had jurisdiction to determine issues of ownership of foreign law that arise in respect of the Claimants' case, any issue relating to the question of title to land in Dubai is governed by the **Moçambique** rule and therefore the Court lacks the jurisdiction to resolve these issues in any event. The Claimants' proceedings in Dubai were struck out and the Claimants' appeal to the highest court in Dubai was dismissed. The Second Defendant has proceedings ongoing in the DIFC in which he seeks a declaration that the purchase of the Dubai

Property was lawful and that he holds good title. In order for the Claimants to obtain a finding from this Court that the ownership recorded on the Dubai property register does not reflect the actual ownership position, the Court will need to establish jurisdiction and find that these documents relating to the sale of the property are fraudulent or a sham.

[131] The Claimants' lack of a pleaded case and evidence to impugn the documents, and the lack of any specificity for the newly alleged 'common understanding' means there is simply no reasonable prospect that the Court will hold a trust has arisen. There is no reason for the case to proceed to trial on this point. If the documents are not said to be fraudulent or a sham, they demonstrate, as set out on their face, an intention to transfer title for consideration and the subsequent transfer of title in accordance with that agreement, there cannot be any basis on which the Court can 'infer' they do not reflect the reality of the situation and that a trust exists.

[132] In relation to paragraph 49.2 (and sub-paragraphs) of the Claimants' Reply, the Claimants plead new issues in relation to the K Group, including remarkably, that the K Group is also held as a nominee for the First Defendant. It is inappropriate for the Claimants to plead new factual and legal allegations in this manner and by way of Reply, and the reasons which apply in relation to striking out the allegations made in respect of the D Group, apply *mutatis mutandis* to the allegations made in respect of the K Group. To the extent new facts have been raised for the first time by way of reply, the Second Defendant has not had an opportunity to plead to them, something which is also highly inappropriate and impermissible.

[133] The Second Defendant argued that the required balancing exercise clearly points towards exclusion.

[134] He submitted that even if the Court accepts jurisdiction over matters concerning the D Group and Dubai Property, applying the **O'Brien** factors and related case law, it should still exclude the evidence, which lacks probative value to the issues in dispute.

[135] The central issue in this claim is whether the Second Defendant holds OS International shares (and also, following the Claimants' response to RFI, the shares in Oilserv Holding) on trust for the First Defendant, which the Second Defendant denies. The alleged trusts over the D Group and the Dubai Property are unrelated and could only have arisen years after the OS International transfers. The Claimants suggest that the alleged trust over the OS International shares was meant to conceal the First Defendant's involvement from potential investors. There is no evidence that the alleged trusts over the D Group or the Dubai Property served the same or any related alleged purpose.

[136] The tangential and indirect events and inferences relating to the D Group and the Dubai Property, where there is no evidence that the alleged trusts (assuming the Claimants can even prove that they did arise) in those cases arose for the same reasons in the case of OS International (and now Oilserv Holding), are of limited weight in proving the allegation that the Second Defendant is trustee for the First Defendant in relation to OS International shares (or the Oilserv Holding shares). Whereas the potential for unfair prejudice to be caused to the Second Defendant in canvassing and resolving these unrelated issues of ownership of assets abroad far outweighs their probative value to the purpose of the trial.

[137] The need would be for the court to resolve all the disputed issues of fact and argument at trial on the alleged D Group and the Dubai Property trusts, and the burden of admitting this evidence would fall on the Second Defendant at trial. The extra time, cost, resources, and stress imposed on him is considerable and unjustified. It is also disproportionate to any likely benefit to be gained for the reasons set out above, and contrary to good case management and the overriding objective as a result.

[138] With specific reference to the **O'Brien** factors, the key points, according to the Second Defendant, are as follows:

(1) The trial will be substantially longer if evidence concerning the D Group and the Dubai Property is admitted. The combined scope of these unrelated issues is greater than the scope of the central issues in dispute. The

evidence that the parties will be required to give, along with the additional time taken to cross-examine them on that evidence, risks doubling the length of the trial. Not only will this be burdensome to the parties (and unfairly prejudice third parties) but it will also waste valuable court time and resources. Worse, the Court will have to grapple with Dubai and Iraqi law which will consume further time.

(2) Including the evidence on the D Group and the Dubai Property will occasion additional stress and prejudice to the parties which is unjustified given the substantial further evidence that will be necessary on these issues and the corresponding elongated trial which will require the Second Defendant to be present in the BVI for far longer than would otherwise be necessary. Further, the Claimants' position is causing stress and prejudice to third parties. In relation to the D Group, the Claimants' allegations include a trust having arisen between the Second Defendant's brother and the First Defendant. As explained above, this has got nothing to do with the dispute in these proceedings but implicates the Second Defendant's brother into proceedings which have nothing to do with him.

(3) The D Group and the Dubai Property are side issues which will unbalance the trial and 'make it harder to see the wood from the trees'. In particular:

a. The relevant events occurred years after the alleged trust(s) over the OS International (and Oilserv Holding) shares arose in 2009 – the agreement between the Second Defendant and his brother to split the two D Group companies between them occurred in 2021 and the Dubai Property was transferred in 2023;

b. A number of allegations relating to the D Group do not even concern the Second Defendant. They concern the First Defendant's relationship with the Second Defendant's brother from which the Claimants seek to draw adventurous inferences;

c. The allegations concerning K Group – principally that it is to be inferred that it is also held by the Second Defendant as a nominee for the First Defendant – further cloud the issues in dispute, being allegations for which there is no cogent evidence and from which the Claimants seek to draw unsustainable inferences. As explained above, they were introduced by the Claimants in their Reply which is inappropriate in itself.

d. The same applies to the allegations that 'it is to be inferred' that various documents concerning the purchase of the Dubai Property were a sham, which again were introduced by the Claimants in their Reply and for which they have provided no evidence. There is no sustainable basis for that allegation at all.

(4) Trial of the D Group and Dubai Property issues in the BVI would be grossly disproportionate. Even if the Court considered that it did have jurisdiction to decide these issues, the Claimants are asking the Court to go on a journey into the wilderness and decide issues for which the Claimants' evidence is innuendo and supposition; which have no connection to the BVI; which are governed by foreign law; for which all the relevant witnesses are in Iraq or Dubai; and (in the case of the Dubai Property) for which the Claimants have already run a different case in a foreign court and lost. The time and cost of doing so will be considerable and out of all proportion to the probative value of the issues, and in any event will not assist the Court in determining whether the Second Defendant holds his shares in OS International (and Oilserv Holding) on trust for the First Defendant.

[139] The Second Defendant thus invites the Court to strike out, stay or exclude the Claimants' case and evidence on the D Group and Dubai Property on the basis that it is similar fact evidence that lacks probative value or the prejudice outweighs its evidential assistance to the Claimants' primary claims and/or to summarily determine those aspects of the case in the Second Defendant's favour at this stage on the basis that there is no realistic prospect of the Claimants succeeding on them.

2.2 The Claimants' perspective

2.2.1 Abuse of Process

[140] The Claimants argue that whichever way the D Group/Dubai Property Application is framed, it amounts to another attempt at a jurisdiction challenge. The first basis is overtly concerned with jurisdiction; the second with whether the Claimants' case raises a serious issue to be tried; the third is partly premised upon the first two. The Claimants urge that those points were, or could and should have been raised on the Second Defendant's first failed jurisdiction challenge. It is abusive for him to advance them again now.

[141] The Claimants rely upon familiar principles on abuse of process restated for example in the English Court of Appeal decision in **Koza Limited v Koza Altin Işletmeleri AS** [12] – parties must bring forward all their arguments at the first opportunity; it is an abuse of process to take them serially when they could and should have been (or were) made earlier. The Court's power is founded on (i) the private interest of a party not being vexed twice, and (ii) the public interest in not having issues repeatedly litigated. The crucial question, say the Claimants, is 'whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before'. The Claimants remind the Court that the principles 'apply to interlocutory applications as much as they do to final hearings', and there is 'no general principle that the applicant in interlocutory hearings is entitled to greater indulgence'.

[142] Moreover, say the Claimants, where the Court has already found that a claim raises a serious issue to be tried, and the defendants have had a full opportunity to advance arguments in relation to the merits, it is abusive to apply to strike out or for summary judgment on the same basis: **Harrington and Charles Trading Co Ltd v Mehta**.[13] Further, where a point has been conceded, a party must show a material change of circumstances to raise it again: **Chanel Ltd. v FN Woolworth & Co Ltd**.[14]

[143] In relation to *forum conveniens* specifically, the Claimants urge that 'applicants for a stay ought to make such requests promptly', relying upon **Rettro Investive Inc v**

[12] [2021] 1 WLR 170 (CA) at §§30-42 and [2021] EWHC 2131 (Ch) at §132.
[13] [2023] EWHC 2420 (Ch) at §§83-110.
[14] [1981] 1 WLR 485 (CA) at 492-493.

ABI Bank Ltd[15] and **Renova Industries Limited v Emmerson International Corporation**.[16]

[144] The Claimants point out that they had set out their basis for their position on the beneficial ownership issue, including that the Second Defendant was similarly acting as a nominee in respect of the Dubai Property and the D Group as long ago as **31st October 2023**, when they applied to join the Second Defendant and for permission to serve him outside of the jurisdiction. Moreover, the Second Defendant then brought his jurisdiction challenge in these proceedings **over two years ago**, as part of his Set Aside Application dated **2nd April 2024**.

[145] The Claimants point out that the **Moçambique** rule was never raised on the Second Defendant's jurisdiction challenge, at any stage.

[146] As regards *forum conveniens*, the Claimants point out that the Second Defendant's evidence specifically referred to the question of appropriate forum but did not advance any *forum non conveniens* point. His skeleton argument for the hearing of his jurisdiction challenge in this Court specifically did not advance any independent *forum conveniens* challenge. His jurisdiction challenge was dismissed by this Court on 31st October 2024. Webster J. (Ag.) noted at paragraph [47]: 'There was no serious suggestion that the BVI is not clearly and distinctly the appropriate forum for the trial of the application'. On appeal, the Second Defendant did seek to take a *forum conveniens* point. The Court of Appeal recorded at paragraph [41] of its judgment that '[The Second Defendant's] position is that the BVI was not 'clearly and distinctly' the appropriate forum for a trial against [the Second Defendant]. His appeal was dismissed on 30th January 2026.

[147] As regards the merits, the Claimants observe that the Second Defendant has already argued that the Claimants' case – and the allegations in relation to the D Group and Dubai Property specifically – raise no serious issue to be tried. The Second Defendant's evidence in support of his jurisdiction challenge argued at some length that he is not a nominee for the First Defendant in respect of the D

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15 ANUHCV 2012/0692 (unreported, delivered 31st August 2015) at §25.

16 (BVIHCM 2013/00160 (unreported, delivered 15th April 2021) at §§101, 121-122 (Wallbank J. (Ag.)).

Group or the Dubai Property. Webster J. (Ag.) heard argument on that question, at a hearing that lasted a day and involved a hearing bundle running to nearly 4000 pages. He was satisfied that the Claimants' case raised a serious issue to be tried that the Second Defendant was a mere nominee. Indeed, as Webster J. (Ag.) noted, the Second Defendant had conceded that the Claimants' case raised a serious issue to be tried. That finding was upheld by the Court of Appeal: at paragraph [48] of its judgment.

[148] The Claimants observe that the Second Defendant's application for leave to appeal to the Privy Council is pending, but he does not pursue any issue in relation to *forum conveniens*, or serious issue to be tried.

[149] The Claimants observe further that their Statement of Claim was served on 28th February 2025, nearly 14 months ago. The Second Defendant pleaded a Defence, including in relation to the D Group/Dubai Property issues, without ever taking the present point or seeking a stay.

[150] The Claimants urge that there is no change of circumstances which warrants the Second Defendant's further application for a stay at this late stage. The points taken on the D Group/Dubai Property Application could and should have been raised on his jurisdiction challenge in April 2024. The Second Defendant's application comes six months after the Statement of Claim was served, and after he has pleaded his Defence. It is abusive, say the Claimants, for him to attempt another bite at the cherry. Rejecting the application on the grounds of abuse would have the advantage of minimising the prospect of further disruption to these proceedings through an appeal.

2.2.2 Jurisdiction

[151] Addressing the Second Defendant's latest jurisdiction argument, the Claimants observe that the Second Defendant says that the **Moçambique** rule precludes the Court from determining whether the First Defendant has any interest in the Dubai Property. That, submit the Claimants, is wrong: the rule does not prevent (i) considering issues in relation to foreign property which arise incidentally, or (ii)

making orders *in personam* against the Second Defendant (insofar as, contrary to the Claimants' case, such orders are necessary). In this regard, the Claimants invoke **British South Africa Co v Companhia de Moçambique**[17] itself, as well as **St. Pierre v. South American Stores (Gath & Chaves Ltd.)** [18] where Scott LJ explained (at 397):

> "By these words I understand him [Lord Herschell in **Moçambique**] to have meant that it is the action founded on a disputed claim of title to foreign lands over which an English Court has no jurisdiction, and that **where no question of title arises, or only arises as a collateral incident of the trial of other issues, there is nothing to exclude the jurisdiction**" (Emphasis added.)

[152] Similarly, the Claimants observed that in **Hamed v Stevens**,[19] Lloyd Jones LJ (as he then was) referred to the passages in **Moçambique** and **St Pierre** above and concluded (at paragraph 14): 'it has long been established that, before the **Moçambique** rule can apply, the proceedings must raise directly the issue of title to foreign land'. That, say the Claimants, is not the case here.

[153] The Claimants point out that this limit on the **Moçambique** rule was applied to a dispute about beneficial ownership of a property in Jamaica, in the context of a succession dispute in **Heslop v Heslop**.[20] The claimant executor contended that a property owned as joint tenants was held on resulting trust for the deceased. Having summarized the decision in **Hamed** (at paragraph 37), the Court explained that the rule was not offended by determining the beneficial ownership issue in the context of that dispute (at paragraph 52):

> "The proceedings do not involve any determination of rights *in rem*. They do not assert a property right which is by its nature enforceable against third parties and they do not purport to bind strangers/third parties. For instance, no possession order, effective against the world at large, is sought (and none could be granted by this court). Neither is any order directed to the Jamaican Land Registry claimed (ditto). The court is only asked to resolve a dispute between those before it, the proceedings being

[17] [1893] AC 602 at 626.
[18] [1936] 1 KB 382.
[19] [2013] EWCA Civ 911.
[20] [2021] EWHC 2957 (Ch).

> based on an alleged personal (trust) relationship between the Claimant and the Defendants."

[154] The Claimants submit that in light of these clear statements of the principle, the present case is *a fortiori* (i.e. even more obviously permissible). The proceedings do not directly concern title to the Dubai Property. Indeed, that is not the Claimants' case, and they have not even sought such a finding in Dubai: rather, their case (upheld by the Dubai Court on the facts at first instance) is that the property was transferred by the First Defendant to the Second Defendant to put it beyond the reach of creditors and the transfer is liable to be reversed. In these proceedings, the Claimants simply rely on the similar fact pattern, of the First Defendant using the Second Defendant to keep assets under his control but not in his name and beyond the reach of creditors, to support their case that the Second Defendant is a nominee for the First Defendant in respect of the OS Shares.

[155] The rule in **Moçambique** does not apply to personal property, so the issue of beneficial ownership of the D Group is unaffected by that rule.

[156] In any event, say the Claimants, the Court has power to enforce personal obligations in respect of property abroad, against defendants over whom it has personal jurisdiction. In **Hamed** the Court of Appeal also identified the 'long-established exception to the **Moçambique** rule' that 'an English court may, as between parties before it, give an *in personam* judgment to enforce contractual or equitable rights in respect of immovable property situated in a foreign country': at paragraph 19 and **Dicey, Morris & Collins on the Conflicts of Laws** (16th edn., Sweet & Maxwell, 2025) §24.037.

[157] The Claimants observe that the Second Defendant then contends that the Court should decline to determine the 'issues relating to the D Group (Iraq) and the Dubai Property (Dubai)', on the basis that this Court is not the appropriate forum.

[158] The point is misconceived, say the Claimants. These proceedings are concerned with resolving the Second Defendant's objection to the provisional charging order. The only Court which can resolve that dispute is the BVI Court. That does not appear

to be in dispute. The Second Defendant does not now seek to stay the entire proceedings, or the Claimants' final charging order application, or his own objection to the provisional charging order which remains in place. Rather, he seems to be suggesting that there should be a stay in respect of a particular issue arising in the context of that application.

[159] This, say the Claimants, misunderstands the nature of *forum conveniens*. That doctrine provides a basis on which the Court may (i) decline to grant permission to serve a claim out of the jurisdiction, or (ii) stay a claim which is served within the jurisdiction as of right. Defendants may pursue a *forum non conveniens* argument in parallel to a jurisdictional objection based on the **Moçambique** rule: e.g. **Hamed** at paragraph 4; **Heslop** at paragraph 57. **<u>But that was because both objections were raised to resist jurisdiction in respect of the claim generally</u>**. *Forum conveniens* has no application to part of a claim. On the contrary, '[t]he concept behind the phrases 'the forum' and 'the proper place' is that the court is looking for a single jurisdiction in which the claims against all the defendants may most suitably be tried': **Lungowe v Vedanta Resources plc**.[21] The defendant may rely on connections between aspects of a claim and another jurisdiction to assert that the claim **<u>as a whole</u>** is more closely connected to another forum. What the defendant may not do is **<u>slice and dice</u>** the proceedings in order to sever off those parts of the claim which it asserts are more closely connected to another jurisdiction.

2.2.3 'No serious issue to be tried'

[160] The Second Defendant next asserts that the Claimants' position in relation to the Dubai Property and the D Group raises no serious issue to be tried and should be struck out or summarily dismissed. This, say the Claimants, is hopeless. The Claimants' position in relation to the D Group and Dubai Property (summarized above) raises factual issues that can only be determined upon disclosure, evidence and cross-examination. Indeed, their position in relation to both issues has been vindicated in other *fora* – in an arbitration relating to ownership of the D Group, and

[21] [2019] 2 WLR 1051 at §68.

in a decision of the Dubai Court of First Instance in a judgment given on 15th January 2024, in which that court ordered the transfer of the Dubai Property from the First Defendant to the Second Defendant to be unwound on the basis that it was a transaction defrauding creditors. That decision was overturned on appeal, acknowledge the Claimants, but they say it was not overturned on its facts.

[161] The Claimants observe that the Second Defendant raises various criticisms of each piece of evidence in an effort to establish that there is no serious issue to be tried, but, say the Claimants, their case is necessarily inferential - circumstantial evidence is more than the sum of its parts, and 'it is best to avoid compartmentalizing particular points relied upon, or treating points in 'silos', or adopting a piecemeal approach to evidence relied upon': **Lakatamia Shipping Co Ltd v Su**.[22]

2.2.4 Admissibility

[162] The Claimants note that the Second Defendant asserts that the similar fact evidence on which the Claimants rely is not admissible or should be excluded. But, the Claimants urge, the court made clear in **Virginia Aimable v Lubeco 1991 Ltd**[23] that it will be reluctant to deal with admissibility of evidence in advance of trial, and that the question turns on the weight or probative force of the evidence, and impact on the trial length and expense: see at paragraphs 22-23. It endorsed the comment by Mummery LJ that 'In general, disputes about the admissibility of evidence in civil proceedings are best left to be resolved by the judge at the substantive hearing of the application or at the trial of the action': **Beazer Homes Limited v Stroude**.[24]

[163] The Claimants submit that similar fact evidence (or 'tendency evidence') is admissible where the previous act and the circumstances in which it was done are 'substantially and relevantly similar and relevant': **Evidence Act**, **2006**[25] sections 95-96.

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[22] [2021] EWHC 1907 (Comm) at §§59-66.
[23] SLUHCV 2014/0805 (unreported, delivered 5th January 2017).
[24] [2005] EWCA Civ 265 at §9.
[25] Act no. 15 of 2006.

[164] The Claimants point out that the Second Defendant does not appear to dispute that the evidence that he acted as nominee in respect of other assets would come within this provision. However, the Court retains a discretion to exclude evidence where its probative value is 'outweighed by the danger of unfair prejudice or confusion' (section 123), or in the exercise of case management powers (CPR 29.1).

[165] The Claimants observe that evidence of what happened on one occasion may make more or less probable the events alleged to have occurred on another occasion. If a rational, objective and fair-minded person would have paid attention to events of an apparently similar character, 'it would require good reasons to deny a judicial decision-maker the opportunity to consider it': **O'Brien v Chief Constable of South Wales Police**.[26]

[166] The question whether there are any good reasons will turn on the facts of the case. In favour of admitting the evidence, 'the importance of doing justice in the particular case is a factor the judge will always respect'. Its significance will be assessed on the basis that it is true: **O'Brien** at paragraph 5. Common arguments against admission include (i) the distortion of the trial with collateral issues, and (ii) the burden of admitting the evidence, including in time and cost. In the end the 'overriding purpose will be to promote the ends of justice': at paragraph 6. Although similar fact evidence will inevitably extend the trial length and increase costs, that is not a determinative factor which should lead to the exclusion of such evidence: **Primafacio Limited v Tres Canopia Limited**.[27]

[167] The Claimants observe that the Second Defendant complains that the admission of the similar fact evidence in this case would result in undue 'extra time, cost, resources, and stress': Second Defendant's 8th Affidavit at paragraph 28. But the Claimants invite the Court to see the Second Defendant's application as an attempt by him artificially to narrow the scope of inquiry at trial in order to improve his prospects of resisting the charging order. The Claimants submit there is no basis for doing so:

[26] [2005] 2 AC 534 at §§4-6.

[27] [2023] EWHC 430 (Comm) at §24.

(1) The evidence is highly probative. The central question in this case is whether the Second Defendant holds assets as a nominee for the First Defendant. The evidence regarding the D Group companies and the Dubai Property show him doing precisely that.

(2) The Claimants are judgment creditors of the First Defendant with an unpaid debt of over US$1.6 billion. The OS Shares against which they seek to enforce in these proceedings are understood to be worth in the region of US$100 million. The Claimants necessarily have to build an inferential case. Excluding the evidence would cause significant prejudice to the Claimants.

(3) It is far from clear that the admission of the evidence would result in any extra costs at all. The Second Defendant has inexplicably delayed this application until six months after the Claimants' Statement of Claim and has not taken any steps to expedite it. As a result, the parties have already completed disclosure and will serve witness statements in little over two weeks from this hearing; quite possibly, before judgment on this application is given, and certainly before any appeals are resolved.

(4) Further, the Second Defendant did apply to delay disclosure until after the hearing of this D Group/Dubai Property Application, on the basis that 'the scope of disclosure and evidence for Trial could be very materially affected by the outcome of' this application'[28]. That was rejected by the Court (by Mithani J.), ordering that disclosure take place before this hearing, by the directions Order of 18th February 2026.

3. Discussion

3.1 Abuse of Process

[168] The Claimants contend that the D Group/Dubai Property Application and the Burden of Proof Application should be dismissed as an abuse of process. I will here address that contention in relation to the D Group/Dubai Property Application.

[28] Blampied 2 §19.

[169] The fundamental principles in relation to interlocutory applications are summarized in the English Court of Appeal case of **Koza Limited v Koza Altin Işletmeleri AS**.[29] English Court of Appeal cases are not binding upon this Court but provide guidance as to the law, which, ordinarily, this Court will follow. For convenience, I will refer to these as the '**Koza** principles'.

[170] The principles have already been summarized in brief above, in the segment setting out the Claimants' main arguments. But a closer look is instructive.

[171] At paragraph 30, Popplewell LJ, giving the judgment of the court, laid out the fundamental proposition:

> "In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536C Lord Diplock described the abuse of process jurisdiction as the inherent power which any court of justice must possess to **prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to the litigation before it, or would bring the administration of justice into disrepute amongst right-thinking people**." (Emphasis added.)

[172] At paragraph 31, Popplewell LJ recalled that the principles in relation to *res judicata* are also fundamental to application of the courts' abuse of process jurisdiction:

> "In *Henderson v Henderson* 3 Hare 100 Sir James Wigram V-C said at pp114—115:
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>> In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, **the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward**, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. **The plea of *res judicata* applies**, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a

[29] [2021] 1 WLR 170 (CA) at §§30-42 and [2021] EWHC 2131 (Ch) at §132.

judgment, **but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time**." (Emphasis added.)

[173] Then at paragraph 42, Popplewell LJ wrote this:

"The *Henderson* and *Hunter* principles apply to interlocutory hearings as much as to final hearings. Many interlocutory hearings acutely engage the courts duty to ensure efficient case management and the public interest in the best use of court resources. Therefore, the application of the principles will often mean that if a point is open to a party on an interlocutory application and is not pursued, then the applicant cannot take the point at a subsequent interlocutory hearing in relation to the same or similar relief, **absent a significant and material change of circumstances or his becoming aware of facts which he did not know and could not reasonably have discovered** at the time of the first hearing. This is not a departure from the **principle** in *Johnson v Gore Wood & Co* [2002] 2 AC 1 that **it is not sufficient to establish that a point *could* have been taken on an earlier occasion, but a recognition that where it *should* have been taken then, a significant change of circumstances or new facts will be required if raising it on a subsequent application is not to be abusive**. The dictum in *Woodhouse v Consignia plc* [2002] 1 WLR 2558 that **the principle should be applied less strictly in interlocutory cases** is best understood as a recognition that because interlocutory decisions may involve less use of court time and expense to the parties, and a lower risk of prejudice from irreconcilable judgments, than final hearings, it may sometimes be harder for a respondent in an interlocutory hearing to persuade the court that the raising of the point in a subsequent application is abusive as offending the public interest in finality in litigation and efficient use of court resources, and fairness to the respondent in protecting it from vexation and harassment. **The court will also have its own interest in interlocutory orders made to ensure efficient preparations for an orderly trial irrespective of the past conduct of one of the parties, which may justify revisiting a procedural issue one party ought to have raised on an earlier occasion**. There is, however, **no general principle that the applicant in interlocutory hearings is entitled to greater indulgence; nor is there a different test to be applied to interlocutory hearings. In every case the principles are** those identified in paras 30—40 above, the application of which will reflect **that within a single set of proceedings, a party should generally bring forward in argument all points reasonably available to him at the first opportunity, and that to allow him to take them serially in subsequent applications would generally permit abuse in the form of unfair harassment of the other party and obstruction of**

> **the efficacy of the judicial process** by undermining the necessary finality of unappealed interlocutory decisions." (Emphasis added.)

[174] In the present case, we are dealing with an interlocutory application. It is also notable that the Court's Order of 15th July 2025 expressly permitted the Second Defendant to file further applications, including as to jurisdiction and/or strike out, by 26th August 2025. That, it should further be noted, was an Order made upon the first Case Management Conference.

[175] It could thus be said that the Second Defendant was expressly permitted to bring his D Group/Dubai Application when he did, on 26th August 2025.

[176] Learned Counsel for the Second Defendant went further and urged that the D Group/Dubai Property Application (and the Burden of Proof Application) was a case management application, in that acceding to it would reduce the issues for trial, with concomitant reductions in time, costs, additional work in giving disclosure and preparation of evidence.

[177] This omits to factor in that the Order of 15th July 2025 did not disapply the **Koza** principles, nor permit the applications as an exception to them.

[178] I do not believe I have been taken to anything which shows that the Court ruled that any jurisdiction or strikeout application the Second Defendant intended to make would not offend the **Koza** principles, or that the Second Defendant should be permitted, exceptionally, to make that application anyway.

[179] Now, as we have seen, the Second Defendant filed his D Group/Dubai Property Application on 26th August 2025.

[180] I have set out in considerable detail the material procedural history, precisely so that it can be seen whether the Second Defendant brought forward his points in the D Group/Dubai Property Application at the first opportunity.

[181] The Claimants had laid out their arguments and evidence (i.e., their case) in relation to the alleged similar fact circumstances concerning the Second Defendant's ownership of the D Group and the Dubai Property, and indeed the totality of their

case in relation to the charging order, in JPH's Third Affidavit of **26th May 2023** and his Fourth Affidavit of **31st October 2023**, taken together.

[182] On **3rd April 2024**, the Second Defendant articulated in his Third Affidavit his objections to the provisional charging order being made final. He there also substantively answered the Claimants' case that the Second Defendant owns his ostensible interest in the D Group and the Dubai Property on behalf of the First Defendant. On the charging order procedures provided for in the CPR, the Court could have proceeded to determination of the Claimants' application to make the provisional charging order final.

[183] But on that date, 3rd April 2024, as was undoubtedly in principle his right, the Second Defendant filed an application seeking to set aside the Claimants' claim involving him - his Set Aside Application. In this, he advanced a broad range of objections to many parts of the Claimants' claim. These were mainly of a procedural nature, as well as one objection as to the Court's jurisdiction.

[184] But he did not raise the arguments he would later introduce with his D Group/ Dubai Property Application in an attempt to exclude the Claimants' similar fact case.

[185] As we have seen, it would be some ten months later, on **31st October 2024**, that the Set Aside Application would be disposed of by this Court, with its almost total rejection and dismissal. The one 'successful' part of the Set Aside Application was dismissal of the freezing Order (with liberty to renew a freezing order application), not because there had been anything wrong with the freezing order *per se*, but because it was effectively duplicative of the proprietary injunction which the Court maintained.

[186] Even after **31st October 2024**, the Set Aside Application remained looming over the claim, with the Second Defendant's appeal, which was disposed of on **30th January 2026**, about one year and ten months after the Second Defendant had filed his Set Aside Application. The Second Defendant is seeking to appeal that result further to the Judicial Committee of the Privy Council.

[187] It can thus be seen that the Claimants have been 'vexed' since **3rd April 2024** – over two years now – by the Second Defendant's Set Aside Application and continue to be 'vexed' by it. If that were not enough, the Second Defendant added another layer of 'vexation', on 26th August 2025, with his D Group/Dubai Property Application.

[188] Now, it is true that the D Group/Dubai Property Application raises different points from the Set Aside Application. That is so, even in respect of the Second Defendant's jurisdiction arguments. In that sense, it cannot be said that the Claimants have been vexed twice with the same arguments. But, as **Henderson v Henderson**[30] made clear, that is not the test. The test is whether the same subject of litigation might have been brought forward earlier, exercising reasonable diligence, but was not brought forward.

[189] I am satisfied that the points the Second Defendant makes with his D Group/Dubai Property Application were available to him to take as part of his Set Aside Application filed on 3rd April 2024.

[190] The Claimants' Statement of Claim filed on **28th February 2025** did not materially change their case on ownership from that already included in JPH's Third and Fourth Affidavits. The Statement of Claim did not introduce new matters. It cannot be said that the Statement of Claim somehow changed things, such that the D Group/Dubai Property Application arguments could only arise after the service of that pleading – indeed, the Second Defendant does not make that argument.

[191] In the event, the Second Defendant did not file his D Group/Dubai Property Application immediately after the Claimants filed their Statement of Claim. The Second Defendant next filed his Defence, on **28th April 2025**. He waited another four months before filing his D Group/Dubai Property Application, on 26th August 2025.

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[30] 3 Hare 100 at 114—115 (Sir James Wigram V-C).

[192] The only discernible reason why the Second Defendant says (through Counsel) that he did not make his D Group/Dubai Property Application earlier was because he did not understand the Claimants' case in relation to the D Group and Dubai Property.

[193] I do not accept that submission, for the following reasons:

(1) Although the Second Defendant had pleaded at paragraph 72 of his Defence that he did not understand the relevance of Claimants' D Group/Dubai Property case and would plead further to it following receipt of further and better particulars, he

   a. Answered the Claimants' case substantively, in detail, in his Defence, as he had done in his Third Affidavit earlier;

   b. Did not serve a Request for Further Information concerning the Claimants' D Group and Dubai Property case, but a Request for Further Information on a different aspect of the overall claim;

   c. Pleaded at paragraph 72 of his Defence that the Claimants' case that he also owns the D Group and Dubai Property on behalf of the First Defendant is 'irrelevant', thereby indicating that he was sufficiently able to understand the Claimants' case to be able to discern its purported irrelevance.

(2) When the Second Defendant laid out his substantive case concerning the Claimants' D Group and Dubai Property case in his Third Affidavit and Defence, the Claimants did not reply to say that the Second Defendant had misunderstood their case;

(3) The Second Defendant has been represented all along by well-known, highly experienced BVI legal practitioners who could surely explain the Claimants' case to him if required;

(4) On the Second Defendant's own case, he is not a simple manual worker, but a successful, substantial businessman in his own right;

(5) There is no evidence from the Second Defendant's legal practitioners, or from any other source, that the Second Defendant is intellectually or mentally feeble or incapable;

(6) The Second Defendant appears to be no stranger to litigation, and in particular, he appears to have been involved in extensive litigation concerning the Dubai Property in Dubai which concerned the same or similar issue, namely whether he holds the Dubai Property on behalf of the First Defendant.

[194] The Second Defendant could and should have raised his D Group/Dubai Property Application points at the same time as his Set Aside Application, on **3rd April 2024**, but he did not do so.

[195] There was no significant change in circumstances, nor new facts between 3rd April 2024 and 26th August 2025, nor exceptional circumstances, to justify the making of this application.

[196] I am conscious that the *res judicata* principles are to be less strictly applied in respect of interlocutory applications. The uppermost objective is, of course, to manage cases in such a way as to ensure a fair and just determination of the triable issues.

[197] However, permitting applications such as the D/Dubai Property Application would allow the Second Defendant to make objections and force his opponents and the Court to deal with them on a serial basis, which is a form of unfair harassment deprecated in **Koza**.[31] It is oppressive for a party to be put to the trouble, time and expense of having to litigate issues on a serial basis when issues can be grouped together and determined on a single occasion. Litigating in a serial manner obstructs the efficacy of the judicial process by adding significantly to (a) the work needed to be done; and (b) delay, before the matter finally comes to trial and/or finality after opportunities for appeal. A separate, subsequent application obviously creates a further opportunity for an appeal, with the further delay that such appeal(s) entail(s).

[198] The burden of additional work can be compensated for in costs (although the money for paying lawyers and other professionals needs to found and diverted for this purpose first before a costs recovery can be made from the other side), but nothing

[31] Koza Limited v Koza Altin Işletmeleri AS [2021] 1 WLR 170 (CA) at paragraph 42.

can recover the time needed to be taken to do such work. That time could have been otherwise employed. The effluxion of time is all the more important where, as here, the Claimants continue to be kept out of the money due to them under the Award: justice delayed is justice denied.

[199] The D Group/Dubai Property Application, filed on 26th August 2025 and not earlier on 3rd April 2024, was calculated to delay the proceedings, at least in the sense of tending to do so. The Claimants say this was a deliberate purpose on the part of the Second Defendant. I recognize why they say that: if, as they maintain, he owns the OS Shares on behalf of the First Defendant, the Second Defendant's and the First Defendant's interests would be served by making it as difficult, costly and lengthy as possible for the Claimants to obtain a final charging order over the OS Shares, in circumstances where the Claimants have not yet succeeded in making any, or any meaningful, recovery yet from the First Defendant. The Court, at this point before the trial of the matter, cannot go thus far to rule that this is the Second Defendant's and the First Defendant's strategy. It suffices for the Court to recognize, as I do, that the D Group/Dubai Property Application amounts to unfair harassment and, when seen in the round, obstructs the efficacy of the judicial process by putting the opponent to additional work and time, and extending the process out unnecessarily.

[200] The Second Defendant submits that his D Group/Dubai Property Application, if granted, would improve the efficacy of the judicial process, by slimming it down considerably. We will look more closely at this submission in the next segment of this judgment. It suffices here to note that this argument is misplaced, in circumstances where the Second Defendant's D Group/Dubai Property Application was made too late to avoid having to plead a full Defence to the Statement of Claim (he filed his application after filing his Defence) and the application came on for hearing after he had given disclosure and had already filed his list of witnesses.

[201] I am persuaded that the Court should, in the exercise of its discretion, refuse the D Group/Dubai Property Application and dismiss it as an abuse of process that unfairly harassed the Claimants and obstructs the judicial process.

3.2 Exclusion of similar fact evidence

[202] Since I have determined the D Group/Dubai Property Application on the basis that its bringing on 26th August 2025 was an abuse of process warranting its dismissal, my observations that follow in relation to the substance of the Second Defendant's application to exclude similar fact evidence are *obiter*.

[203] Had I not dismissed the D Group/Dubai Property Application as an abuse of process, I would have done so for the following reasons.

3.2.1 O'Brien principles

[204] We have seen that when a court considers whether to exclude similar fact evidence, the English House of Lords case of **O'Brien v Chief Constable of South Wales Police**[32] propounds a two-stage approach:

(1) The probative stage: to be admissible the evidence must be logically probative of an issue in the case. Evidence is 'logically probative' if, assuming provisionally it is true, it makes the matter which requires proof more or less probable (see **O'Brien** [3]-[4], and [53]).

(2) The discretion stage: the court may nevertheless decline to admit such evidence. **O'Brien** emphasized that the court must balance the potential probative value of the similar fact evidence against the burden and prejudice to the other party. Factors that must be considered in the balance would usually include, (i) time and cost of disclosure, (ii) lengthening of trial, (iii) stress and prejudice to parties, (iv) loss of documentation and fading recollections, and (v) proportionality and expedition, as well as (vi) the avoidance of side issues which will unbalance the trial and 'make it harder to see the wood from the trees', see **O'Brien** at [6] and [56].

[205] Counsel pointed out at the hearing that there are apparently no written judgments of the Eastern Caribbean Supreme Court where **O'Brien** has been considered.

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[32] [2005] UKHL 26.

[206] The 'similar fact evidence' in this case consists of the Claimants' contention and evidence in support of it that, because the Second Defendant holds an ownership interest in the D Group and the Dubai Property on behalf of the First Defendant, this renders it more likely that the Second Defendant holds the OS Shares on behalf of the First Defendant. This is so, because such ownership by the Second Defendant on behalf of the First Defendant would be part of a pattern.

[207] In this case, learned Counsel for the Second Defendant argued that the Claimants' purported similar fact evidence is not logically probative and even if it were, none of the discretionary factors lean towards inclusion of the similar fact evidence.

[208] Going to the first, probative stage of the **O'Brien** test we can see that this has two components:

(1) The Court has to assume the evidence to be true. It does not matter for the purposes of the test that it may not be true, nor that the evidence is unsupported or presently weak.

(2) Then, the Court has to assess whether that evidence makes the matter which requires proof more or less probable.

[209] It can be seen that the first stage entails a conceptual narrow inquiry, based upon an assumption that the evidence is true. This conceptual inquiry also implies an assumption that the evidence is properly before the court, i.e., admissible and that the Court has jurisdiction to determine the substantive issue in dispute which it concerns. That is because at this first stage, the Court is only concerned with whether the similar fact evidence sought to be relied upon, if true, makes the matter which requires proof more or less probable.

[210] If the Court answers this question in the affirmative, it moves to the second stage of considering and weighing factors that inform the exercise of the Court's discretion whether or not to exclude the evidence.

[211] The Second Defendant relies upon the **O'Brien** test. However, he does not clearly differentiate the first from the second part of the inquiry.

[212] The Second Defendant begins his approach by asserting that if the Court cannot practically or lawfully determine the truth of whether D Group or the Dubai Property are held on trust for the First Defendant, their probative value collapses; in the present case, the Court either does not have jurisdiction or is not the appropriate jurisdiction to determine these matters.

[213] In my view, issues concerning jurisdiction do not come into the first stage of the **O'Brien** test. The first stage is concerned only with whether the evidence in question is 'logically probative' in the sense of making the matter which requires proof more or less probable. If the evidence sought to be relied upon is not logically probative, the evidence can immediately be excluded with no need to proceed to the second, discretionary, stage. To take an obvious, extreme example: if the Claimants wish to rely upon evidence that both the Second Defendant and the First Defendant habitually drink coffee every morning, this fact pattern would have no logically probative value whatsoever of the Claimants' allegations that the Second Defendant owns assets on the First Defendant's behalf; it can safely be excluded.

[214] Issues of jurisdiction come, in my view, into consideration at the second, discretionary, stage of the **O'Brien** test. This involves a balancing exercise between the logically probative value of the evidence, as evaluated at the first stage of the test, with factors which weigh for and against its inclusion. Such factors are open-ended and depend upon each case.

[215] The Second Defendant does not explicitly anchor his jurisdiction arguments into the first stage of the test (although that is how they could be understood). I will consider them as part of the second stage.

[216] In respect of the first stage, the Second Defendant's factual argument distills down to his contention that the circumstances surrounding his ownership of the OS Shares are different from his ownership of the D Group and the Dubai Property, and these are also separated in time by many years. He observes that the relevant events concerning the D Group and the Dubai Property occurred years after the alleged trust(s) over the OS International (and Oilserv Holding) shares arose in or around 2009 – the agreement between the Second Defendant and his brother to

split the two D Group companies between them occurred in 2021 and the Dubai Property was transferred in 2023.

[217] The Second Defendant's approach is, to use a term used by the Claimants, to 'slice and dice' the factual circumstances and then to invite the Court myopically to see only disconnected pieces.

[218] To continue the analogy, the Claimants on the other hand urge the Court to stand back and keep firmly in sight the whole piece.

[219] In my view, the Claimants' broader view is to be preferred. This is supported by the English High Court case of **Lakatamia Shipping Co Ltd v Su**.[33] The point is that if the Second Defendant holds other assets on behalf of the First Defendant, this tends to make it more likely that he also holds the OS Shares on the First Defendant's behalf. The converse is also true; if there is no other incidence of the Second Defendant holding assets on behalf of the First Defendant then there would be less reason to suppose that he is doing so in relation to the OS Shares.

[220] This is not complicated. I do not think for one moment that the Second Defendant does not understand this. I think it is telling that although he has claimed not to understand this, he has not been able, or not seen fit, to articulate what it is about this that he does not understand. Moreover, he decided not to make a Request for Information on the point that would dispel his purported lack of understanding, which would have been the obvious procedural step to take.

[221] I am satisfied that the Court should answer the first stage of the inquiry in the affirmative: if the Second Defendant holds his ownership of the D Group and/or the Dubai Property on the First Defendant's behalf, this increases the likelihood that he also does so in respect of the OS Shares.

[222] Moving to the second stage, it is perhaps convenient to deal with the Second Defendant's jurisdiction objections. These fall into two different categories.

3.3 Jurisdiction objections

[33] [2021] EWHC 1907 (Comm) at §§59-66, in particular paragraph 63..

[223] The first is that the Second Defendant invokes the **Moçambique** rule to contend that this BVI Court does not have jurisdiction to determine disputes over title to real estate situated in another jurisdiction. The Claimants answer this objection with reference to authority, **St. Pierre v. South American Stores (Gath & Chaves Ld.)** [34] and **Heslop v Heslop**,[35] which support a proposition that the **Moçambique** rule does not prohibit determination by a different court (i.e., here the BVI Court) of issues concerning who the beneficial owner is of real property situated abroad for purposes of determining issues properly before that different court. The same can be said here. The determination whether the First Defendant is the beneficial owner of the Dubai Property is ancillary to the issue whether the First Defendant is the beneficial owner of the OS Shares. It is permissible under the **Moçambique** rule for the BVI Court to determine both in such a way.

[224] The Second Defendant's second jurisdiction objection concerns both the D Group and the Dubai Property. He argues that the BVI is not the *forum conveniens* for determining who is their beneficial owner, as the various connecting factors firmly point away from the BVI and towards Iraq. That appears to be a formidable objection, but it evaporates when one recalls (as the Claimants invite the Court to do), that those beneficial ownership issues are ancillary, indeed subordinate, issues to the main dispute before this Court, namely whether the First Defendant beneficially owns the OS Shares, being shares in a BVI company – for which this Court is clearly the *forum conveniens*, i.e. the appropriate forum.[36] In the search for the appropriate forum, it is not unusual for some of the issues to be more closely connected to a different jurisdiction. That does not stop the court which, overall, is the most suitable forum for determination of the dispute as a whole from fairly dealing with those issues more closely connected to a different jurisdiction.

[225] The Second Defendant objects that:

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[34] [1936] 1 KB 382.
[35] [2021] EWHC 2957 (Ch).
[36] See e.g. *The Spiliada* [1987] AC 460 line of authorities.

(1) all the relevant parties concerned with the beneficial ownership of the D Group and the Dubai Property are domiciled and located in Iraq;

(2) all the relevant witnesses and documents are in Iraq or Dubai;

(3) all the relevant documents will be in Kurdish or Arabic; and

(4) the time and cost required to litigate these issues far outweighs their relevance and probative value to the core dispute in this case – namely the alleged trust(s) in relation to the shares in OS International (and Oilserv Holding).

[226] When one stands back, it becomes apparent that these objections are formulaic, in the sense of being typical objections always raised in international litigation. A moment's reflection shows that they have little or no force in the present case. Taking these in turn:

(1) The Second Defendant has already set out his substantive case in relation to ownership of the D Group and the Dubai Property in his Third Affidavit filed on 3rd April 2024 and in his Defence filed on 28th April 2025. Both these filings preceded the filing of his D Group/Dubai Property Application on 26th August 2025. There would appear to be no need for him to reach out to any further 'relevant parties' in Iraq. The Second Defendant leaves it unclear who or which further 'relevant parties' need to be approached, and indeed, what for.

(2) The Second Defendant has already filed his List of Witnesses. He has already decided to call only his own brother and himself. Not even the First Defendant. There will accordingly be no need, nor difficulty in finding and securing the cooperation of witnesses based overseas.

(3) The same goes for documents. He has already given disclosure, on 2nd April 2026, pursuant to the Court's order for standard disclosure dated 18th February 2026.

(4) The Second Defendant's objection that all the relevant documents will be in Kurdish or Arabic carries little weight, in circumstances where (a) the number of documents the Second Defendant has expressly relied upon to

support his narrative in his Third Affidavit and Defence is very small, a mere handful (out of, ultimately, a relatively small total of 100 documents he has disclosed); (b) the amount ultimately in dispute is high – the Claimants have advanced a figure of about US$100 million for the value of the OS Shares; (c) the Second Defendant is, on his own case, an independently wealthy individual, such that the cost of translating some documents is very unlikely to be prohibitive; (d) it is usual litigation practice in this Court for a relevance triage to take place upon inspection, with the parties identifying which documents do and do not reasonably require translation, such that translation can normally be restricted to the most material documents.

(5) The Second Defendant's objection over time and cost must similarly be viewed in the context that this is a high value dispute, which, moreover, is important for both sides. It is important to the Claimants, because the First Defendant has kept them out of the money (upwards of some US$1.6 billion) that he has been found to owe them. It *should* be important to the Second Defendant if, as he maintains, he is the legal and beneficial owner of the D Group and the Dubai Property, because the result of the present litigation could see him deprived of that ownership interest.

(6) The Second Defendant's objection over time and cost also rings hollow in circumstances where he has deliberately embarked upon a process of serial litigation that was calculated to trammel the Claimants' pursuit of recovery with delays, multifold opportunities to appeal the outcome of deliberately separated applications, and a rolling burden of litigation work and legal costs. He clearly did not think that litigating in such a constantly intensive manner was disproportionate in terms of time and cost. Now, suddenly, when it involves close and sensible scrutiny of his claim to hold both the legal and beneficial ownership of the D Group and the Dubai Property, he contends that to do so would be disproportionate. I do not accept that argument and I reject his double standard.

(7) Moreover, at no point has the Second Defendant said he is facing lack of means to conduct these proceedings in a manner commensurate with the

amounts at stake and their importance to the parties. Indeed, it is not clear to me that much more work would need to be done for the issues in dispute to be tried: pleadings are closed; the parties have given disclosure and inspection of documents; the parties have identified their witnesses – two for the Claimants and two for the Second Defendant; the parties have already set out their cases in relation to the D Group and Dubai Property at least twice – in Affidavit evidence from both sides and in formal pleadings; the main issues have already been identified and joined. The most probable difference would appear to come down to the length of cross-examination of the witnesses of fact. While, obviously, it would be inconvenient for the Second Defendant and his brother to have to spend more time attending the trial than if the D Group/Dubai Property similar fact evidence was to be excluded, this is a weak consideration where excluding such evidence would deprive the Claimants of logically probative evidence.

[227] The Second Defendant urges that the similar fact evidence the Claimants wish to rely upon is weak, speculative, and largely inadmissible as hearsay from unidentified sources. He urges that it has no real prospect of success. The Claimants counter this with the good point that it is usually better to leave assessment of evidence, including its admissibility, credibility and weight, for trial, once the witnesses have given their evidence and all documents disclosed pursuant to the parties' duty of continuing standard disclosure. I agree.

[228] The Claimants also accuse the Second Defendant of employing here his 'slice and dice' approach as well. The Second Defendant seeks to isolate and analyze the admissibility, provenance (or lack thereof), timing, and weight of individual factual components of the Claimants' case, to arrive at a conclusion that the Claimants have no viable case in respect of the D Group and Dubai Property issues. Whilst I can see that, as matters stand, the Claimants' similar fact case, though conceptually highly probative, has a number of difficulties, these might be cured at trial through oral evidence. Equally, the trial judge can be expected to stand back and take the Claimants' case in the round, and to form a view as to the reliability of all the

witnesses. The trial judge's task, ultimately, will be to determine, on a balance of probabilities, whether the Second Defendant holds his legal interests in the OS Shares, and on an ancillary issue basis, in the D Group and Dubai Property, on behalf of the First Defendant. The trial judge will have to decide whether all the indicators and reports that the First Defendant continues to own interests in those assets happen, on a balance of probabilities and when seen in the round, to be wrong. That approach is fundamentally different from the 'slice and dice' approach. The former entails taking a global view, on a balance of probabilities, at trial, of all the evidence and of the witness evidence, to draw rationally sensible, real-world inferences. The 'slice and dice' approach entails attributing zero, or near zero, worth to individual, presently apparently problematic pieces of purported evidence, adding them all together, now, before trial, and reaching the conclusion now, before trial, that the purported evidence has zero, or near zero weight, on the basis that zero plus zero plus zero etc. equals zero. The Claimants' case is essentially inferential. To pre-empt in-depth consideration of their case by excluding their D Group and Dubai Property similar fact evidence (or purported evidence) would, in my respectful judgment, risk doing the Claimants a serious injustice.

[229] The Second Defendant has submitted that to allow in the similar fact evidence would risk losing 'sight of the wood for the trees'. I take the view that it is precisely the exclusion of the similar fact evidence which risks the Court, at trial, losing sight of the 'wood' if these 'trees' are now removed from it. It is not in the First Defendant's and the Second Defendant's interests for the Court to have before it the whole picture, but this is in the interests of justice.

4. Burden of Proof Application

[230] The Second Defendant's Burden of Proof Application was also filed on 26th August 2025.

[231] The Notice of Application stated that the Second Defendant seeks an order that 'the burden of proving the existence of the alleged trust at trial and that the charging order should be made final lies with the Claimants'.

[232] The grounds for this application were briefly stated in the Notice of Application:

> "(1) It is unclear whether, by paragraph 4.3.1 of Cs' Reply to [the Second Defendant's] defence, Cs are merely asserting the generally accepted (but not invariable) rule that an objecting party has the onus to show why an interim charging order should not be made final, or whether they are contending the burden of proof at trial of the trust and beneficial ownership issue should fall on [the Second Defendant].
>
> (2) If, by paragraph 4.3.1 of Cs' Reply to [the Second Defendant's] defence, Cs are asserting that [the Second Defendant] bear the burden of proof both at the trial of their trust claim and in resisting the charging order, this is objected to for the following reasons:
>
> a. It is unfair and prejudicial for [the Second Defendant] to be required to prove a negative and disprove the existence of a trust that Cs themselves allege exists and which is denied by [the Second Defendant], particularly as [the Second Defendant] is a third party unconnected to the judgment debt.
>
> b. Cs' claim contradicts the presumption that beneficial ownership follows legal title, which in this case is registered in [the Second Defendant's] name.
>
> c. The burden at trial should firmly be on Cs to prove the existence of their alleged trust and to displace the presumption from [the Second Defendant's] legal ownership of the shares that [the Second Defendant] is also the beneficial owner of them.
>
> (3) It is prudent to clarify this issue ahead of trial and it is in the interests of the parties and the Court to do so, as it will affect the disclosure, evidence and approach to be taken to the trial in due course."

[233] The Second Defendant filed a Ninth Affidavit in support of this application. This was a very short affidavit, which repeated the grounds of the application and added the following:

> "14. I do not accept that, in the circumstances of this case and as the legal owner of the shares, I bear any burden of demonstrating why the interim charging order should be made final.
>
> 15. It is in the interests of the parties and the Court to have certainty on this issue, long before the matter comes to trial, as it will affect the disclosure, evidence and approach to be taken in due course."

[234] On 5th September 2025, the Claimants filed a Notice of Opposition to this application, indicating that they would set out the grounds for their opposition in their submissions in due course. The Claimants thereby correctly signaled that the application fundamentally concerns a question of law.

[235] In the Second Defendant's skeleton argument for the hearing of the application, filed on 27th April 2026, his Counsel submitted the following:

> "Whilst **[the Second Defendant] ultimately contends that the burden of proof will not be of consequence** given the substantial evidence showing he is both legal and beneficial owner of the OS International Shares, it is important for clarity that this issue is resolved at this stage, while case preparation is still ongoing, so as to define and confine the work that may be involved." (Emphasis added.)

[236] His Counsel went on:

> "18. Determining this issue now will materially assist in (i) focusing witness evidence/statements which are due to be exchanged on 15 May 2026; (ii) scoping expert evidence, reports for which are due to be exchanged on 3 July 2026; and (iii) determination of whether there is any legitimacy in the Claimants' invitations for the court to 'infer' matters or draw 'adverse inferences' in their favour and against [the Second Defendant].
>
> 19. For completeness, [the Second Defendant's] position is that the evidence shows he is both legal and beneficial owner, **rendering the need to rely on the burden of proof to resolve the matter ultimately unnecessary**. Nevertheless, a clear ruling that the Claimants must prove any case contrary to the Beneficial Ownership Presumption, and that it is for the Claimants to prove that a charging order should be made final, will be of great assistance to the parties and the Court in preparing for trial." (Emphasis added.)

[237] Learned Counsel for the Second Defendant included in his skeleton argument submissions on the law relating to burden of proof. In doing so, they identified an apparent tension between the Second Defendant's position that he is entitled to a presumption that the beneficial ownership of shares follows the legal ownership and that the Claimants have the burden of proving that he holds the OS Shares on trust for the First Defendant, and, on the other hand, the Claimants' position that the

burden of proof is on the Second Defendant to show that the provisional charging order should not be made final.

[238] The Claimants also included submissions on the law relating to burden of proof in their skeleton argument, arguing that the Second Defendant's views on this are ‘oversimplified and contrary to authority’. But the Claimants also, and primarily, had procedural objections to the application.

[239] The Claimants argued that the Second Defendant's application simply invites the Court to determine an issue in the case before trial, without grappling at all with the approach the Court will take to preliminary issues.

[240] They submitted that the leading guidance on the correct approach was set out by Neuberger J (as he then was) in **Steele v Steele**,[37] setting out ten factors to consider. They observed that in **Steele**, the key considerations are that:

(1) The issue would not dispose of any of the case. Whatever presumptions apply, it is not likely to have any practical impact on the outcome. As has been restated many times, presumptions are ‘the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts’: **Rothschild v De Souza**.[38]

(2) No efficiency would be gained. The Second Defendant's application asserted that it would affect disclosure and evidence, but disclosure has already been given, and witness statements are due in only two weeks’ time (after the present hearing date). In any case, the Second Defendant would not be relieved from disclosure obligations merely because he does not bear the burden of proof.

(3) Conversely, it is likely to derail the trial. It is likely to result in one- or other-party seeking permission to appeal, especially given it is a question of law. As experience in this litigation has shown already, there is no prospect that the appeal would be heard and determined in time for the trial to commence in 9 months’ time (much less any further appeal). The Second Defendant is

[37] [2001] CP Rep 106.
[38] [2018] EWHC 1855 (Fam) at §4.

already seeking to derail the trial with two appeals (one to the Court of Appeal, the other to the Privy Council). He has offered no justification for his delay in making the application.

[241] The Claimants concluded their skeleton argument on this application with the following:

> "[The Second Defendant's] Burden of Proof Application seeks to generate a preliminary issue which, if appealed, would derail the trial. The Court is respectfully invited to decline to determine that issue in advance of trial; or if it is determined, to follow the established authority indicating that the burden of proof lies with the objector. It would be especially undesirable to venture at this stage into determining whether and how the burden is discharged by presumptions of law (on either side). Such determinations are better left for trial."

[242] The Claimants furthermore urged that the Second Defendant's burden of proof application is an abuse of process and should also be dismissed on that ground.

4.1 Discussion

[243] The Second Defendant's learned Counsel did not present the Burden of Proof Application as if it were an application for the Court to determine a preliminary issue at trial. Rather, they presented it as a case management application that would enable trial preparation to be more focused and streamlined. They go to some lengths to submit that the burden of proof is **not likely** to be an issue for trial. They do so with their submissions that '[the Second Defendant] ultimately contends that the burden of proof will not be of consequence' and that '[the Second Defendant's] position is that the evidence shows he is both legal and beneficial owner, rendering the need to rely on the burden of proof to resolve the matter ultimately unnecessary'. The Second Defendant is thereby trying to deflect questions of burden of proof from being reserved for trial, and to have them firmly anchored into the case management phase of the proceedings.

[244] Issues concerning burden of proof are however quintessentially matters for trial. They go to whether a particular party has satisfied whatever burden might be on it

in order to satisfy the Court on a particular point. The Second Defendant runs a positive case that burden of proof is unlikely to be an issue at the trial in the present case, although he does not go so far as to rule that out entirely.

[245] What he nonetheless seeks to do is to remove burden of proof issues from the trial, and have the Court rule on them, ostensibly for case management benefits.

[246] The Second Defendant avoids presenting the burden of proof application as an application for determination of a preliminary issue. That, though, is what the burden of proof application in effect is, as the Claimants submit.

[247] The Claimants contend that the application needs to be considered against the enquiry identified in the English High Court case of **Steele v Steele.**[39] There, Neuberger J. was addressing a question whether limitation should be determined as a preliminary issue. Even though limitation arguably applied, and would dispose of one matter in dispute, he declined to determine this as a preliminary issue, reserving it for its usual treatment at trial. Neuberger J. identified the following ten considerations:

(1) 'The first question the court should ask itself is whether the determination of the preliminary issue would dispose of the case or at least one aspect of the case.'

(2) 'The second question that I think the court should ask itself is whether the determination of the preliminary issue could significantly cut down the cost and time involved in pre-trial preparation or in connection with the trial itself.'

(3) 'Thirdly, if, as here, the preliminary issue is an issue of law, the court should ask itself how much effort, if any, will be involved in identifying the relevant facts for the purpose of the preliminary issue. The greater the effort, self-evidently the more questionable the value of ordering a preliminary issue.'

(4) 'Fourthly, if the preliminary issue is an issue of law, to what extent is it to be determined on agreed facts? The more the facts are in dispute, the greater

[39] [2001] CP Rep 106.

the risk that the law cannot be safely determined until the disputes of fact have been resolved.'

(5) 'Fifthly, where the facts are not agreed, the court should ask itself to what extent that impinges on the value of a preliminary issue.'

(6) Would 'determination of the preliminary issue cut down the flexibility at trial'.

(7) 'Seventhly, the court should ask itself to what extent there is a risk of the determination of the preliminary issue increasing costs and/or delaying the trial. Plainly, the greater the delay caused by the preliminary issue and the greater any possibility of increase in cost as a result of the preliminary issue, the less desirable it is to order a preliminary issue.'

(8) 'Eighthly, the court should ask itself to what extent the determination of the preliminary issue may be irrelevant.'

(9) 'Ninthly, the court should ask itself to what extent is there a risk that the determination of a preliminary issue could lead to an application for the pleadings being amended so as to avoid the consequences of the determination.'

(10) 'Tenthly, the court should ask itself whether, taking into account all the previous points, it is just to order a preliminary issue.'

[248] The Claimants submit, with reference to these ten questions, that in this case, the key considerations are that:

(1) The issue would not dispose of any of the case. This engages with the first question. Whatever presumptions apply, it is not likely to have any practical impact on the outcome. This engages with the second question.

(2) No efficiency would be gained. This also engages with the second question.

(3) Conversely, it is likely to derail the trial. This engages with the seventh question.

[249] It has to be borne in mind that the Burden of Proof Application is not an application for the Court to decide whether or not an issue should be determined as a preliminary issue. Therefore, and it warrants stating this clearly, the Court is not required to apply the ten-question **Steele** test. But those questions are not hyper-

specialized to preliminary issue applications; they merely embody commonsense. Some of the ten questions target pre-trial case management issues: questions two, six, seven and nine.

[250] The second question (whether the determination of the preliminary issue could significantly cut down the cost and time involved in pre-trial preparation or in connection with the trial itself) puts into sharp focus the Second Defendant's stated purpose behind the burden of proof application.

[251] This discloses an immediate problem for him. The hearing of this application comes after pleadings have closed, disclosure has been given and witness statements are due to filed very shortly. The bulk of the work involved with these steps has already been done or has probably already been done. This indicates that determining the legal issues raised by the application would not significantly cut down the cost and time involved with pre-trial preparation or in connection with the trial itself.

[252] There is a further problem for the Second Defendant. His learned Counsel submitted that determining the burden of proof issues at this stage would assist in defining the scope of expert evidence. This is all very well, but it is a hopelessly vague assertion. The Second Defendant's learned Counsel did not identify which particular area or areas of expert evidence would be affected by a ruling on burden of proof issues, nor how. This is a serious flaw in the Second Defendant's argument.

[253] It is the alleged case preparation benefits which underpin the application, or at least its stated purpose. But we can see immediately that:

(1) any such benefits as there might have been have largely been overtaken by the progress of the case in terms of close of pleadings, disclosure and imminent exchange of witness statements; and

(2) the benefits for expert evidence have been insufficiently particularized.

[254] In short, there is, in my respectful judgment, no sufficient case management utility made out by the Second Defendant upon this application.

[255] The eighth question (to what extent the determination of the preliminary issue may be irrelevant) is not strictly a case management focused question, but it is pertinent. The Second Defendant's learned Counsel twice in his skeleton argument adverted to the likelihood that issues of burden of proof would be irrelevant at trial. He is correct in this regard, in my respectful opinion. Where there would appear to be no utility to determining the burden of proof issues for case management benefits, it would appear to me most appropriate to dismiss the application as pointless.

[256] I accept that burden of proof issues might still be relevant at trial. Whether that will be so will become clear at the trial. Indeed, questions as to who has the burden of proof and on what issues are typical legal issues for a trial. It is generally most convenient for these to be determined one time, together with all the other legal and factual issues for trial. They can, eventually, then also be addressed on appeal, one time. That is equally the case here.

[257] A particularly significant factor in the present case is that the parties have been placed under an obligation of 'standard disclosure'. As CPR 28.1(4) provides, both sides are required to disclose directly relevant documents, which are documents '(a) the party with control of the document intends to rely on it; (b) it tends to adversely affect that party's case; or (c) it tends to support another party's case'. This means neither side can withhold documents to take tactical advantage of presumptions. If it is that at trial, after proper standard disclosure, it remains relevant to decide which party has the burden of proving a particular issue, that determination can be made having regard to the state of the evidence, both oral and on directly relevant documents. That would generally and indeed almost always be better than to attempt, at this point, a conceptual exercise. In my respectful judgment I would therefore, in the alternative, dismiss the application as premature.

5. Disposition

[258] For these reasons, and in these circumstances, both the D Group/Dubai Property and Burden of Proof Applications stand dismissed.

[259] Since the general rule is that costs follow the event, the Claimants will have their costs of these applications, to be assessed if not agreed within 21 days.

[260] I take the opportunity to thank both sides' learned Counsel for their assistance.

Hon. Justice Gerhard Wallbank, KC
High Court Judge (Acting)

By the Court

Registrar