In The Supreme Court of Bermuda

CIVIL JURISDICTION

2021: No. 56

BETWEEN:

AML CREDITOR RECOVERY VEHICLE PTC **PLAINTIFF**

-and-

(1) MADISON PACIFIC TRUST LIMITED **DEFENDANTS**

(2) SHANDONG IRON & STEEL GROUP CO., LTD

(3) SHANDONG STEEL INTERNATIONAL INVESTMENT LIMITED

(4) SHANDONG STEEL HONG KONG RESOURCES LIMITED

(5) SHANDONG STEEL HONGKONG ZENGLI LIMITED

(6) MR CUI JURONG

(7) MR LI QUIANG

Before: **The Hon. Chief Justice Hargun**

Representation: **Camilla Bingham KC and Keith Robinson of Carey Olsen Bermuda Limited for the Plaintiff**

Justin Fenwick KC, Rhys Williams and Britt Smith of Conyers Dill & Pearman Limited for the 1st Defendant

Ben Valentin KC, Kevin Taylor and Tim Molton of Walkers (Bermuda) Limited for the 2nd to 5th and 7th Defendants

Warren Bank of Cox Hallett Wilkinson Limited for the 6th Defendant

Date of Hearing: **3 - 6 July 2023**

Date of Judgment: **17 August 2023**

JUDGMENT

HARGUN CJ

Service out of the jurisdiction under RSC order 11 rule 1(g) (the property gateway); under RSC order 11 rule 1(ff) (the company gateway); construction of the anti-assignment provisions in the umbrella agreement and the share charge agreement; whether the Fiona Trust approach to construction of arbitration/jurisdiction clauses applies to the construction of the anti-assignment clauses; construction of the exclusive jurisdiction clause contained in the umbrella agreement and the construction of the asymmetric jurisdiction clause in the share charge agreement

Introduction

1. By Order dated 18 February 2021, Mussenden J considered the Plaintiff's *ex parte* application and ordered that the Plaintiff has leave under RSC 1985, order 6, rule 7(1) to issue a Specially Endorsed Writ of Summons filed on 19 February 2021 ("**the Writ**") which is to be served out of the jurisdiction on the Defendants. By a further Order dated 27 January 2022, Mussenden J considered the Plaintiff's *ex parte* application and ordered that the Plaintiff has leave under RSC 1985, order 11, rule 1(1) to serve the Plaintiff's Writ out of the jurisdiction on the Defendants.

2. Over a period of four days the Court heard applications made by all the Defendants that the Orders dated 18 February 2021 and 27 January 2022 granting the Plaintiff leave to issue and to serve the Writ on the Defendants out of the jurisdiction be set aside on the various grounds which included the contentions that (i) the Plaintiff has not been validly assigned the claims it seeks to bring; and/or (ii) the claims against the First Defendant do not fall within any of the provisions of Order 11 rule 1; and/or (iii) the claims do not disclose a serious issue to be tried; and/or (iv) the Courts of Bermuda are not the appropriate forum for the trial of the Plaintiffs claims against the Defendants; and/or (v) the Plaintiff failed to give full and frank disclosure when seeking leave to serve out of the jurisdiction.

The Background

3. The identification of the parties and the background to these proceedings is set out in the Writ. African Minerals Limited ("**AML**") is a company registered under the laws of Bermuda on 29 January 2004 as an exempted company (having previously been incorporated on 26 March 1986 in Canada). Its business was formerly in mineral exploration and development. Prior to 16 April 2015, AML indirectly held significant interests in an iron ore mine (the "**Tonkolili Mine**") and related infrastructure projects in Sierra Leone, West Africa (the Tonkolili Mine, together with such projects, are referred to collectively as the "**Project**") through: (1) AML's 100% ownership of three companies registered in Bermuda, namely Tonkolili Iron Ore Limited ("**TIO**"), African Railways & Port Services Limited ("**ARPS**") and African Power Limited ("**AP**") (together, the "**Bermuda Holding Companies**"); and (2) the Bermuda Holding Companies' majority shareholding in three companies registered in Sierra Leone, namely Tonkolili Iron Ore (SL) Limited ("**TIO SL**"), African Railway & Port Services (SL) Limited ("**ARPS SL**") and African Power (SL) Limited ("**AP SL**") (the "**Operating Companies**").

4. Prior to 7 April 2015, AML's shares were admitted to trading on the Alternative Investment Market of the London Stock Exchange. Prior to its administration in March 2015, its main business and commercial activities were carried out from London at all material times.

5. By an application presented to the Chancery Division of the High Court of Justice in England on 26 March 2015, AML applied for an administration order on the basis that it was cash-flow and balance sheet insolvent and that its centre of main interest (COMI) was in England. Joint administrators of AML (the "**Administrators**") were appointed by the order of Mr Kevin Prosser QC (sitting as a deputy judge of the Chancery Division of the High Court of Justice, England and Wales) dated 26 March 2015 (the "**Administration Order**"). Pursuant to the Administration Order, the affairs, business and property of AML are managed by the Administrators.

6. It is contended in the Statement of Claim ("**SOC**") that by a Deed of Assignment dated 3 August 2020 (the "**Deed of Assignment**") between AML, the Administrators and the Plaintiff, AML Creditor Recovery Vehicle PTC (a private trust company incorporated in the Cayman Islands) ("**AML CRV**") in its capacity as trustee of the AML Creditor Recovery Trust, AML CRV was unconditionally, irrevocably and absolutely assigned all of AML's rights, title, interest and benefits in (amongst other things) the claims of AML set out in the SOC.

7. The First Defendant, Madison Pacific Trust Limited ("**MP**"), was incorporated as a public company limited by shares under the laws of Hong Kong on 22 June 2011. At all material times MP carried on business as a provider of corporate trustee, agency and company secretarial services in respect of restructuring and enforcement in Hong Kong.

8. The SOC refers to the Second to Seventh Defendants as the **Shandong Defendants**. The Second Defendant, Shandong Iron & Steel Group Co., Ltd ("**SISG**") is a company established

under the laws of the People's Republic of China (the "**PRC**") on 17 March 2008. SISG has at all material times been a company specialising in the smelting, processing and sale of steel and related commodities. SISG is partially owned by the Shandong Provincial Government State-owned Assets Supervision and Administration Commission. The Plaintiff contends that SISG was, at all material times, in control of the Third, Fourth and Fifth Defendants by virtue of its direct and indirect majority shareholding in them (as well as, amongst other things, their common directors and officers).

9. The Third Defendant, Shandong Steel International Investment Limited ("**SSIIL**") was at all material times 100% owned by SISG. SSIIL is a private company limited by shares incorporated under the laws of Hong Kong on 28 December 2011.

10. The Fourth Defendant, Shandong Steel Hong Kong Resources Limited ("**SSHR**"), was incorporated as a private company limited by shares under the laws of Hong Kong on 10 January 2012. It was at all material times 100% owned by SSIIL.

11. The Fifth Defendant, Shandong Steel Hongkong Zengli Limited ("**SSHZ**"), was incorporated as a private company limited by shares under the laws of Hong Kong on 9 February 2015. It was at all material times 100% owned by SSIIL.

12. The Plaintiff contends that within the Shandong corporate group, each of SSIIL, SSHZ and SSHR have at all material times been controlled by SISG, through (amongst other things, and in addition to SISG's direct and indirect shareholding set out above) their common directors and officers. In particular: (1) Mr Cui Jurong ("**Mr Cui**"), the Sixth Defendant, who was at all material times a director and Vice Chairman of SISG, as well as a director of each of SSIIL, SSHZ and SSHR; and (2) Mr Li Qiang ("**Mr Li**"), the Seventh Defendant, who was at all material times a Vice Director of the Finance Department at the head office of SISG, as well as a director of each of SSIIL, SSHZ and SSHR.

13. Pursuant to a subscription agreement dated 29 July 2011 between AML, the Bermuda Holding Companies, the Operating Companies and SISG (the "**Subscription Agreement**"), SISG agreed to acquire 25% of the share capital of each of the Operating Companies. The remaining 75% of the share capital in the three Operating Companies (i.e. TIO SL, ARPS SL and AP SL) was held by TIO, ARPS and AP respectively (subject to the Government of Sierra Leone's right to acquire a 10% beneficial interest in ARPS SL, which reduced ARPS's effective shareholding in ARPS SL to 65%), On the same day, AML and SISG (amongst others) entered into three shareholders agreements, one in relation to each of the Operating Companies. At all material times prior to 16 April 2015 AML held all of the issued share capital in each of the Bermuda Holding Companies.

14. Following completion of the Subscription Agreement: (i) on or around 29 March 2012, SISG novated its rights under the Subscription Agreement to SSHR; (ii) on 29 March 2012 Mr Cui was appointed a director of AML and remained a director of AML until 17 March 2015; (iii) in respect of TIO SL and ARPS SL Mr Cui and Mr Li were appointed as directors of each of these companies on or around 21 November 2012 and the Plaintiff contends that they remained as directors of each of these companies until, at least, the dates of the wrongful acts complained of in the SOC.

15. By an agreement dated 5 April 2013, Standard Bank of South Africa Limited ("**SBSA**") (as original lender) granted two of the Operating Companies – TIO SL and ARPS SL – a pre-export finance facility of US$250 million (the "**PXF Agreement**").

16. AML acted as parent guarantor in respect of the facility and, by way of security for the Operating Companies' borrowings, it executed charges over AML's shareholding in each of TIO and ARPS (the "**Bermuda Shares**") by two charges dated 5 April 2013 (the "**Share**

Charges"). Each of the Share Charges is governed by the laws of Bermuda and, the Plaintiff contends, contains a jurisdiction clause in favour of Bermuda.

17. It appears that the AML corporate group began experiencing financial difficulties from late 2013 for a number of reasons, including the significant decline in iron prices in late 2013 and the Ebola outbreak in Sierra Leone that commenced in March 2014.

18. In around September 2014, disagreements arose between AML and the Shandong Group as to (i) whether the Shandong Group had committed to releasing funds to alleviate the financial pressure facing the Operating Companies and (ii) whether (by an offtake agreement with Jianlong Group) AML had breached its obligation to permit the Shandong Group to offtake iron ore from the Project on "*most favoured treatment*" terms.

19. The Plaintiff says that that the Shandong Group declined to release funding to the Operating Companies and that TIO SL and ARPS SL accordingly defaulted on their repayment obligations under the PXF Agreement in November and December of 2014 and in January 2015. No enforcement action was taken or threatened by SBSA / the PXF Lenders in response to those defaults.

20. The Plaintiff asserts that various discussions took place between AML on the one hand, and the Shandong Group on the other hand, as to how the Operating Companies' financial position might be regularised. In particular, AML and the Shandong Group discussed a sale by AML to the Shandong Group of a further stake in the Bermuda Holding Companies. In parallel, with the encouragement of the Sixth Defendant and the Shandong Group, AML began to explore a sale to a third party, retaining Jefferies International Limited ("**Jefferies**") to assist in marketing a stake in the Project. Jefferies valued the Project in February 2015 at between US$394–833mm.

21. However, on 27 February 2015, shortly before the formal marketing process by Jefferies was due to commence, the Operating Companies and AML received a written notice of default and acceleration of all amounts due under the PXF Agreement. Unbeknownst to AML, the Plaintiff contends, the Fifth Defendant had just days earlier been incorporated by the Shandong Group and had promptly bought up all of the debt outstanding under the PXF Agreement. As a result, the Shandong Group was poised to enforce against the security granted in support of the PXF Agreement: the shares in the Bermuda Holding Companies and as part of that plan the Shandong Group was planning to sell the shares when its notice of demand was not met to the Fifth Defendant's sister company, the Fourth Defendant.

22. It is the Plaintiff's case that the Shandong Defendants appropriated AML's entire interest in the Project at a significant undervalue through a series of steps choreographed by the Sixth Defendant in breach of the fiduciary duties he owed to AML. In summary, the Plaintiff contends that:

(1) On 9 February 2015, the Fifth Defendant was incorporated as a vehicle through which to appropriate AML's interest.

(2) On 26 February 2015, the Fifth Defendant took a novation of the PXF Lenders' rights and obligations under the PXF Agreement to the Fifth Defendant and thereby became the sole lender under the PXF Agreement.

(3) On 27 February 2015, the Fifth Defendant procured a notice of default to be issued, recording that the outstanding principal under the PXF Agreement was approximately US$166 million, on which interest of approximately US$750,000 was payable (the "**Outstanding Indebtedness**").

(4) The purpose of serving that notice was so that a demand could be served on AML, as parent guarantor under the PXF Agreement, for payment of the Outstanding Indebtedness, and such a demand was served on AML on the very same day, 27 February 2015.

(5) On 27 February 2015, the Fifth Defendant exercised its powers as sole lender under the PXF Agreement so as to instruct the security agent to appoint the First Defendant as its agent under the PXF Agreement to organise a sale of the Bermuda Shares (the "**Enforcement Sale**").

(6) Subsequently, on 4 March 2015, the First Defendant informed AML that it had been appointed as agent to the security agent under the PXF Agreement, and that it had been instructed to conduct the Enforcement Sale.

(7) Even before the First Defendant's appointment had taken effect, the First Defendant met with representatives of the Shandong Group and the Government of Sierra Leone on 15 February 2015, to take instructions as to the timeframe in which the sale was to be achieved, and the conditions to be imposed on prospective bidders.

(8) Between 12 April 2015 and 16 April 2015, the Fourth Defendant bid (in summary) such amount as was required to repay the Outstanding Indebtedness under the PXF Agreement. The Fourth Defendant was the sole bidder.

(9) On behalf of the Fifth Defendant, the First Defendant accepted the Fourth Defendant's bid and transferred the Bermuda Holding Companies' shares to the Fourth Defendant. The Shandong Defendants thereby appropriated AML's entire interest in the Project.

General Principles Relating to Service out of Jurisdiction

23. It is common ground that the general principles relating to service out of jurisdiction are set out in the judgment of Lord Collins in *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at [71]:

"On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or

counterclaimant) has to satisfy three requirements: Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1994] 1 AC 438, 453—457. ***First****, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e g Carvill America Inc v Camperdown UK Ltd [2005] 2 Lloyd's Rep 457, para 24.* ***Second****, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other: see Canada Trust Co v Stolzenberg (No 2) [1998] 1 WLR 547, 555—557, per Waller LJ a–affd [2002] 1 AC 1; Bols Distilleries BV v Superior Yacht Services (trading as Bols Royal Distilleries) [2007] 1 WLR 12, paras 26—28.* ***Third****, the claimant must satisfy the court that in all the circumstances the Isle of Man is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.* [emphasis added]

The Plaintiff's Right to Pursue the Claim

24. As noted earlier, the Plaintiff claims to bring its claims pursuant to the Deed of Assignment between the Plaintiff and AML. At paragraphs 4 and 5 of its SOC the Plaintiff states that it was "*unconditionally, irrevocably and absolutely assigned all of AML's rights, title, interest and benefits in (amongst other things) the claims of AML set out in this Statement of Claim*" and "*Where in this Statement of Claim [the Plaintiff] asserts an entitlement to damages or other relief which would otherwise have belonged to AML [the Plaintiff] does so pursuant to its rights under the Deed of Assignment*."

25. The Defendants argue that there has been no effective and valid assignment of AML's claims and therefore the Plaintiff does not have standing to bring these claims. The Defendants say that the PXF Agreement and each of the Share Charges contained clauses which prohibited assignment and therefore the Plaintiff does not have title to sue the Defendants. The Defendants submit that absent title to sue the Plaintiff cannot establish either that there is a

serious issue to be tried or that it has a good arguable case that the claims fall within one of the jurisdiction gateways. The Defendants argue that the claim therefore fails before it even gets to the first hurdle.

The Anti-Assignment Provisions

26. Clause 27.1 of the PXF Agreement provides that: "*No Obligor may assign any of its* ***rights*** *or transfer any of its rights or* ***obligations*** *in whole or in part under the Finance Documents.*" [emphasis added]

27. The "*Finance Documents*" are broadly defined and include the PXF Agreement and "*Security Documents*" which in turn include the Share Charges.

28. Clause 14.3 of each Share Charge states that "*The Chargor [i.e. AML] may not without the prior written consent of the Chargee assign or transfer all or any part of its* ***rights or obligations*** *under this Charge.*" [emphasis added]

29. Both the PXF Agreement and the Share Charges provide for a broad definition of the word '*right*' for the purposes of the above clauses. It extends to "*any right, privilege, power, immunity or other interest or* ***remedy of any kind.****"* [emphasis added]

30. Clause 4.5 of each Share Charge provides that:

> *"The Chargor further covenants that after the COF Discharge Date, save as otherwise permitted by the terms of the Finance Documents, it shall not without the prior written consent of the Chargee: […] [4.5.3] sell, transfer or otherwise dispose*

of the Charged Property or any part thereof or interest therein or attempt or agree to do so."

The Deed of Assignment

31. Clause 2.1 of the Deed of Assignment provides that: "*Subject to the terms of this Deed, the Assignor, acting by the Joint Administrators… unconditionally, irrevocably and absolutely assigns to the Assignee all of its rights, title, interest and benefits in and to the Enforcement Related Claims free and clear of all Security Interests and all other third party rights*."

32. The expression "*Enforcement Related Claims*" is defined in the Deed of Assignment as meaning:

> "*all of the Assignor's rights, claims and interests related to the events and circumstances that preceded the Assignor's entry into administration relating to a demand being made under a guarantee issued by the Assignor in respect of certain financial indebtedness of the Assignor's subsidiaries and the subsequent related security enforcement process, including but not limited to any claim under or in relation to any shareholders' agreement relating to any former subsidiary of the Assignor, any breach of fiduciary duty by any person who was or purported to be or acted in any manner consistent with being a director of the Assignor, any breach of duty by a mortgagee in relation to the security enforcement process, or any other contractual, tortious, breach of duty or other claim against any of Shandong Steel Hong Kong Resources Limited, Shandong Steel Hong Kong Zengli Limited, any other affiliate of Shandong, Madison Pacific Trust Limited or any of its affiliates ("Madison Pacific") in any capacity or any current or former officer, director, employee, consultant, agent, partner, member or shareholder of any entity affiliated with Shandong or Madison Pacific, including but not limited to Cui Jurong and Li Qiang*."

33. It appears to be common ground that the Plaintiff did not seek the consent of any relevant party to the PXF Agreement or the Share Charges to assign the claims sought to be assigned by the Deed of Assignment. The Plaintiff contends that the Defendants' submissions in relation to the validity of the assignment are misplaced since (i) the anti-assignment clauses in the PXF Agreement and the Share Charges expired in 2015; and (ii) on a true construction the anti-assignment provisions they do not embrace the claims now pursued by the Plaintiff in these proceedings.

34. Before considering these submissions made on behalf of the Plaintiff it is convenient to consider two preliminary issues: first, whether the Court has to decide this issue on a balance of probabilities or whether it is sufficient that the Court is satisfied that the Plaintiff's submission in this regard is arguable; and second, whether Defendants who are not the parties either to the PXF Agreement or the Share Charges are entitled to take the point that as a consequence of the anti-assignment provisions there has been no valid assignment of the claims sought to be pursued in these proceedings.

35. Ms Bingham KC submits that in relation to the issue whether the anti-assignment provisions are engaged in this case, the Plaintiff only has to establish at this stage of the proceedings that it is *arguable* that they are not, i.e. that the Plaintiff has a realistic prospect of establishing at trial that the clauses do not preclude the bringing of the present claims. Ms Bingham KC argues that to decide whether these clauses are engaged, the Court will first need to interpret them with the benefit of the full factual matrix in which the Share Charges and the PXF Agreement were concluded, and with the benefit of full submissions on the ramifications of the rival constructions contended for. Furthermore, once the Court has construed the clauses, it must characterise the claims made in these proceedings and ask whether they fall within the ambit of those clauses.

36. In *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 (PC), Lord Collins considered the appropriate approach for the court to take when questions of law going to the existence of the jurisdiction are raised at this stage of the proceedings and held at [81]:

> "*A question of law can arise on an application in connection with service out of the jurisdiction, and, if the question of law goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case: E F Hutton & Co (London) Ltd v Mofarrij [1989] 1 WLR 488, 495; Chellaram v Chellaram (No 2) [2002] 3 All ER 17, para 136.*"

37. The Court is not persuaded that in this case it should depart from its normal approach and refuse to decide the issue. It does not appear to the Court that the factual matrix, which is not already before the Court, is likely to have any material bearing on the proper construction of the anti-assignment clauses. The Court accepts Mr Valentin KC's submission that the characterisation of the claim merely involves reviewing the pleading and deciding whether, as pleaded, it falls within the anti-assignment clauses. The issue of construction of the anti-assignment clauses has been fully argued by Counsel over a period of four days and accordingly it is appropriate that the Court should determine this issue at this stage.

38. The Plaintiff also argues that the Defendants who are not the parties either to the PXF Agreement or the Share Charges should not be entitled to take the point that as a consequence of the anti-assignment provisions there has been no valid assignment of the claims sought to be pursued in these proceedings. It is said on behalf of the Plaintiff that the Shandong Defendants are strangers to the PXF Agreement and the Share Charges and as a consequence their attempt to rely upon the anti-assignment provisions is "*as misguided as it is opportunistic*."

39. In *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48, the Supreme Court considered the effect of the purported assignment of contractual rights in breach of the prohibition. At [66] Lord Hamblen and Lord Leggatt held:

> *"An analogy can be drawn with clauses which prohibit the assignment of contractual rights without the other party's consent. It is well established that a purported assignment made in breach of such a prohibition will be ineffective: see Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1993] 3 All ER 417, [1994] 1 AC 85. As Lord Browne-Wilkinson stated at [1993] 3 All ER 417 at 431–432, [1994] 1 AC 85 at 108 of his speech in that case:*
>
> > *'... the existing authorities establish that an attempted assignment of contractual rights in breach of a contractual prohibition is ineffective to transfer such contractual rights ... If the law were otherwise, it would defeat the legitimate commercial reason for inserting the contractual prohibition, viz, to ensure that the original parties to the contract are not brought into direct contractual relations with third parties.'"*

40. It seems to the Court that if the legal consequence of the purported assignment of contractual rights in breach of the prohibition is that it is "*ineffective*" as a matter of law, it must follow that it affects the title of the purported assignee to sue *any* party in respect of those assigned rights. In principle, the assignee's title to sue third parties in respect of the assigned contractual rights should not depend upon whether the defendants are parties to the agreement which contains the anti-assignment provision. Thus, in the present case, the First and Fifth Defendants are parties to the PXF Agreement and are in a position to rely upon the anti-assignment clause as contracting parties. However, the other Shandong Defendants are not parties to the PXF Agreement. The Court accepts Mr Valentin KC's submission that if on proper construction of the PXF Agreement the assignment is "*ineffective*" as a matter of law, it makes little commercial sense to say that the Plaintiff does not have the title to sue First and Fifth Defendants but does have the title to sue the other Defendants in respect of the same

contractual rights which were the subject matter of the assignment. Accordingly, the Court concludes that all the Defendants, whether or not parties to the PXF Agreement or the Share Charges, are entitled to dispute, if they are so advised, whether there has been an effective assignment of the contractual rights which are the subject matter of the present proceedings.

Lifespan of the Anti-Assignment Clauses

41. The Court accepts Ms Bingham KC's submission that the lifespan of the anti-assignment clause 27.1 of the PXF Agreement ("*No Obligor may assign any of its rights or transfer any of its rights or obligations in whole or in part under the Finance Documents*") and clause 14.3 of each of the Share Charges ("*The Chargor may not without the prior written consent of the Chargee assign or transfer all or any part of its rights or obligations under this Charge*.") is a matter of construction in accordance with standard principles (as set out in *Wood v Capita Insurance Services Ltd* [2017] AC 1173 at [8]-[14]).

42. In relation to the PXF Agreement, Ms Bingham KC argues that as a result of the Fourth Defendant's acquisition of the Bermuda Shares on terms that it would repay the Outstanding Indebtedness, all debts outstanding under the PXF Agreement have been discharged. Accordingly, Ms Bingham KC contends that the PXF Agreement has come to an end.

43. In relation to the Share Charges, Ms Bingham KC argues that AML's covenant to pay under clause 2 has been discharged (as all Secured Obligations under the Finance Documents have been discharged), such that the security created under clauses 4 and 9 has come to an end under clause 10. The Bermuda Shares have been sold to the Fourth Defendant and no equity of redemption remains with AML under clause 10. Accordingly, Ms Bingham contends that the Share Charges have come to an end.

44. Given that the PXF Agreement and the Share Charges have come to an end, Ms Bingham KC submits that the anti-assignment provisions contained in those agreements have ceased to apply. Ms Bingham KC points out that the Share Charges in particular contain no indication that their terms are intended to continue after the point at which the Secured Obligations under the Finance Documents have been discharged and the security has been discharged, which occurred in in 2015.

45. In relation to the PXF Agreement Ms Bingham KC submits that: (i) the rights of the Borrowers under the PXF Agreement expired at the end of the Facility Period; (ii) the obligations on the Borrowers generally lasted only for as long as the Facility Period lasted, relying upon clauses 19 ("*The undertakings in this Clause 19 remain in force throughout the Facility Period*") and 20 ("*The undertakings in this Clause 20 remain in force during the Facility Period*"); (iii) where the parties wished to provide for the survival of obligations beyond the Facility Period, they did so expressly, relying upon (for example) clause 38.6; and (iv) in the absence of an express indication that the anti-assignment clause was intended to apply indefinitely, it ceased to apply at the end of the Facility Period.

46. Ms Bingham KC submits that the above analysis is supported by the English Court of Appeal's analysis in *ANC Ltd v Clark Goldring & Page Ltd* [2001] BCC 479. In that case a company, ANC, carried on business as a franchisor of a nationwide parcel collection and delivery service. It awarded franchises to two companies, Compass and Rapid, under the standard terms and conditions of its franchise agreement. The relevant anti-assignment clause (clause 16) was in the following terms:

> *"16.2 The Franchisee agrees that* ***the Agreement is personal to the Franchisee*** *and that neither the Agreement, nor the* ***beneficial rights of the Franchisee*** *may be voluntarily, involuntarily, directly or indirectly assigned or otherwise transferred by the Franchisee, without the prior written consent of ANC as hereinafter provided and any such attempted or purported assignment or transfer shall constitute a breach hereof and be void.* ***ANC agrees not unreasonably to withhold its consent***

to any proposed assignment or transfer provided that the Franchisee is then in compliance with all provisions of the Agreement and the proposed assignee or transferee shall execute a written acceptance of and undertaking to be bound by the Agreement, the then current edition of the Operators' Manual and all supplemental agreements to the Agreement signed by the Franchisee and to comply with all requirements imposed thereunder and shall:-

16.2.1 have procured that such persons as ANC shall reasonably require shall have signed Specified Persons' Undertakings

16.2.2 reimburse such administrative and professional costs and expenses incurred by ANC in processing the application for transfer as have previously been agreed by the Franchisee.

16.3 ***It shall not be unreasonable for ANC to withhold its consent to an assignment or transfer by the Franchisee where the proposed assignee or transferee or any person required to sign a Specified Persons' Undertaking pursuant to this clause is in competition with ANC or where in the reasonable opinion of ANC such assignment will prejudice the interests of ANC any Group Company or the Network****."* [emphasis added]

47. Both franchises were terminated and litigation ensued. ANC commenced proceedings against Compass alleging breach of contract and Compass duly counter-claimed against ANC. Rapid commenced proceedings against ANC alleging misrepresentation. Rapid went into creditors' voluntary winding up and assigned its right of action against ANC to the first defendant, which was to pay 60 per cent of sums recovered to Rapid. Compass ceased to trade and entered into a company voluntary arrangement. It assigned its interest in the counter-claim to the second defendant for a consideration of 50 per cent of net (uncharged) proceeds of the counter-claim. ANC, relying on the terms of clause 16.2 of the franchise agreement, challenged the validity of the assignments.

48. The Court of Appeal (Robert Walker LJ) upheld the finding of the deputy judge (Mr Ian Hunter QC) that the anti-assignment in clause 16 came to an end at the termination of the franchise agreement. It did so on two grounds.

49. First, it accepted the reasoning of the deputy judge that "*the quality of any franchise operation is crucially dependent upon the quality and effectiveness of each individual franchisee. It is for that reason that cl. 16.2 provides that the agreement is "personal" to the franchisee*", but after termination of the franchise agreement there was no need for the prohibition on assignment to continue and on the proper construction of clause 16.2 it did not survive termination (page 481 A-B). The Court of Appeal accepted the submission that the elaborate provisions contained in clauses 16.2 and 16.3 were intended to give a franchisee freedom to assign his franchise, provided that ANC was protected (against unfair competition as well as incompetence on the part of the assignee) by new enforceable undertakings being put in place. But once the agreement had come to an end, a prohibition on assignment of outstanding rights was unnecessary and served no useful purpose (page 484 D and G). The whole of clauses 16.2 and 16.3 are directed exclusively to the period when the franchise is a going concern (page 484 F-G).

50. Secondly, in construing clause 16 of the agreement, the Court of Appeal relied upon clause 15.4 which provided as follows:

> *"The expiration or termination of the Agreement, howsoever caused, shall be without prejudice to any obligation or rights on the part of either party which have accrued prior to such expiration or termination and shall not affect or prejudice any provision of the Agreement* ***which is expressly or by implication*** *provided to come into effect on, or* ***to continue in effect after, such expiration or termination*** *PROVIDED THAT in no circumstances shall the Franchise Fee be repayable by ANC to the Franchisee."*

51. Robert Walker LJ held that "*Clause 16 comes immediately after cl. 15.4, which states that terms shall continue after termination only if that is provided expressly or by implication. There is no express provision for continuation in cl. 16.2, and the submissions made by [both counsel] persuade me that the implication of such a provision would be contrary to the commercial purpose of the clause*" (page 484 G-H).

52. It appears to the Court that the grounds relied upon by the Court of Appeal in *ANC* for holding that the anti-assignment provision had come to an end upon the termination of the franchise agreement were fact-specific and exceptional and provide little assistance in the present case.

53. Mr Fenwick KC for the First Defendant relied upon the decision of Ramsey J in *Ruttle Plant Ltd v Secretary of State for the Environment and Rural Affairs* [2008] 2 All ER (Comm) 264. In that case, the defendant needed to carry out emergency work to contain and eradicate foot and mouth disease. It engaged F Ltd ("**F**") under a contract by which F was to provide labour, plant, materials and consumables. Clause 21.1 of the contract provided that F "*shall not assign or sub-contract any portion of the contract without prior written consent"* of the defendant. F invoiced the defendant for various amounts and the parties entered into a mediated settlement agreement, under which the defendant paid F a further sum of nearly £3 million. Following the settlement, F experienced financial difficulties. It claimed that the settlement agreement had been entered into under economic duress. That was denied by the defendant. Subsequently, F went into voluntary liquidation. The liquidator of F entered into a deed of assignment with the claimant and by the assignment, the liquidator purported to sell to the claimant his right to commence and continue to prosecute the proceedings on terms that the claimant would pay 33 per cent of any monies recovered in the action. The claimant accordingly commenced proceedings against the defendant, seeking the rescission of the settlement agreement on the basis that F had entered into it under economic duress. The defendant sought to strike out the claim arguing, *inter alia*, that the causes of action arising out of the contract could not be assigned by the liquidator to the claimant given the prohibition on assignment in clause 21.

54. In response the claimant submitted, *inter alia*, that clause 21.1 of the contract was not intended to prohibit an assignment of right to payment or other causes of action under the contract once it had finished providing the services required by the defendant. The claimant contended that this construction is supported by the following arguments:

> (1) That the prohibition in clause 21.1 states that F '*shall not assign or sub-contract'* and that the prohibition on sub-contracting could only apply during the period when F was supplying services. The prohibition against sub-contracting is therefore limited and there should be no distinction between assignment and sub-contracting.
>
> (2) That there is nothing in clause 21.1 to indicate that the prohibition on assignment should endure forever. This is to be contrasted with clause 17 which did contain a provision for that provision to continue to apply.
>
> (3) That there is no commercial purpose in having an indefinite prohibition on assignment. To the contrary, there are several reasons why a supplier who is in financial difficulty and owed substantial sums by the defendant should be able to assign the right to payment.

55. Ramsey J rejected the submission holding that to construe the contract as imposing a time limit on assignment in the absence of any express provision would need a clear indication that objectively such was the intention of the parties:

> *"[55] I do not consider that there is any reason to construe cl 21 as being limited in duration. At any time the right that may be assigned will vary and will depend on performance.* ***Once performance has ended, accrued rights will remain.*** *Over a period of time the remedies available will be subject to limitation.* ***To construe the contract as imposing a time limit on assignment in the absence of any express provision would, I consider, need a clear indication that objectively such was the intention of the parties****.*

> ...
>
> *[58] While there may be a commercial purpose in allowing for parties in financial difficulties to assign benefits after completion of the services, that is not what the parties provided for in the contract.* ***Rather they provided for a prohibition on assignment of the contract, which is a common provision where one party does not wish to deal with a third party it has not chosen to deal with as the other contracting party. That represents the commercial purpose for non-assignment clauses as expressed in the clause****."*[1] [emphasis added]

56. The Court respectfully agrees and adopts the reasoning of Ramsey J that: (i) to construe the contract as imposing a time limit on assignment in the absence of any express provision would need a clear indication that objectively such was the intention of the parties; and (ii) the prohibition on assignment in a contract is a common provision where one party does not wish to deal with a third party it has not chosen to deal with as the other contracting party.

57. As noted earlier, the ant-assignment provisions in the PXF Agreement and the Share Charges do not contain an express provision imposing a time limit on assignment and the prohibition expressly relates to "*rights*" of the Obligors, which is defined as including "*remedy of any kind*". Ms Bingham KC contends that nevertheless by looking at the other contractual provisions the Court can conclude that it was a common intention of the parties to impose a time limit on the assignment.

58. Ms Bingham KC relied upon clause 20 of the PXF Agreement which limits the undertaking of the Obligors to the Facility Period (which ended in April 2015) in relation to: (i) the prohibition of creating or permitting any security over their assets; (ii) the prohibition against disposal of any assets; and (iii) prohibition against other entities. Ms Bingham KC argues that if the Obligors are entitled to dispose of their assets after the Facility Period it would be

[1] As an additional ground Ramsey J also noted at [51] that: "*In any event, I consider that there would also be difficulties in applying with certainty a prohibition on assignment which came to an end on completion of the services*."

wholly inconsistent and uncommercial to construe the anti-assignment provisions as prohibiting assignment of accrued claims (an asset of the Obligors) after the Facility Period. Ms Bingham KC submits that it is only during the Facility Period that the Obligors have any commercial interest in prohibiting the assignment of the Borrowers' rights under the Finance Documents. Ms Bingham KC argues that all these covenants, including the anti-assignment provisions, are extracted to support the Lenders' rights of repayment and once repayment has been made the Lenders have no further concern about these covenants and the ability of the Borrowers to assign their rights, including accrued rights under the relevant agreements, to third parties.

59. The Court is unable to accept this submission. It is understandable that clause 20 of the PXF Agreement limits the Obligors' undertakings to the Facility Period given that after the borrowings had been repaid the Lenders have no commercial interest in prohibiting the Borrowers from disposing of their assets or otherwise restricting their operations. However, the purpose of the anti-assignment provisions is not limited to preserving the assets of the Borrowers to ensure that the borrowings can be repaid. Unlike clause 20 anti-assignment provisions also seek to preserve the position that the Lenders are only required to deal with the Borrowers as the contracting parties. The Court is unable to accept the submission that once the money has been repaid, the Lenders have no interest in restricting the assignment of the Borrowers' accrued rights under the contract. The fact that the core obligations under the agreement have been performed does not mean that the agreement has come to an end. There may be accrued rights resulting from the way the contract was performed and may result in proceedings against one of the contracting parties. The Court accepts that the Lenders have a legitimate commercial interest in ensuring that, in the event the Borrowers assert accrued rights under the contract, the Lenders only have to deal with the borrowers and not with a third-party.

60. In the circumstances, the Court concludes that the anti-assignment clauses in the PXF Agreement and the Share Charges do not come to an end after the Obligors have repaid the monies to the Lenders and continue to apply in the context of the Deed of Assignment in this case.

Scope of the Anti-Assignment Clauses

61. Ms Bingham KC submits that the key issue of construction is the ambit of the word "*under*" in the phrases "*under the Finance Documents*" in the PXF Agreement and "*under [the Share Charge]"* in the Share Charges. On a natural and ordinary construction, the phrase "*under an agreement*" covers primary contractual obligations to perform, and secondary contractual obligation to pay damages in a case of non-performance. The words would not ordinarily cover tortious and equitable bare causes of action which were not contractual or even "*quasi-contractual*". Far less could they be said to do so in the strictly contractual context of a suite of financing arrangements.

62. Ms Bingham KC argues that the natural meaning of the words can be seen particularly clearly with regard to the Share Charges, in relation to Plaintiff's claims against the Defendants who were never parties to those Share Charges; and with regard to the PXF Agreement, in relation to Plaintiff's claims against the Defendants who were never parties to it. In each case, Ms Bingham KC submits, it is not a natural or sensible use of language to describe, for example, the Plaintiff's bare tortious cause of action in unlawful means conspiracy against, for example, the Second Defendant as a right "*under the [PXF Agreement]"* or "*under [the Share Charge]",* in circumstances where the Second Defendant has never been a party to either of those agreements and the Second Defendant's rights and obligations do not depend on it being so.

63. Ms Bingham KC referred to the House of Lords decision in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40 and submitted that although that case swept away the linguistic analysis in the specific context of arbitration and jurisdiction clauses (replacing it with a general presumption of what rational businessmen would have intended in such clauses), no such presumption applies in anti-assignment clauses, and the cases referred to at [11], in the judgment of Lord Hoffmann constituted useful body of precedent on what the words "*under the contract*" or "*under the agreement*" generally mean. At [11] Lord Hoffmann summarised the previous cases dealing with the construction of arbitration clauses:

> *"…Your Lordships were referred to a number of cases in which various forms of words in arbitration clauses have been considered. Some of them draw a distinction between disputes 'arising under' and 'arising out of' the agreement. In Heyman v Darwins Ltd [1942] 1 All ER 337 at 360, [1942] AC 356 at 399 Lord Porter said that the former had a narrower meaning than the latter but in Union of India v E B Aaby's Rederi A/S, The Evje [1974] 2 All ER 874, [1975] AC 797 Viscount Dilhorne ([1974] 2 All ER 874 at 885, [1975] AC 797 at 814), and Lord Salmon ([1974] 2 All ER 874 at 887, [1975] AC 797 at 817) said that they could not see the difference between them. Nevertheless, in Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd [1988] 2 Lloyd's Rep 63 at 67, Evans J said that there was a broad distinction between clauses which referred 'only those disputes which may arise regarding the rights and obligations which are created by the contract itself' and those which 'show an intention to refer some wider class or classes of disputes.' The former may be said to arise 'under' the contract while the latter would arise 'in relation to' or 'in connection with' the contract. In Fillite (Runcorn) Ltd v Aqua-Lift (1989) 26 Con LR 66 at 76 Slade LJ said that the phrase 'under a contract' was not wide enough to include disputes which did not concern obligations created by or incorporated in the contract. Nourse LJ gave a judgment to the same effect. The court does not seem to have been referred to Mackender v Feldia AG [1966] 3 All ER 847, [1967] 2 QB 590, in which a court which included Lord Denning MR and Diplock LJ decided that a clause in an insurance policy submitting disputes 'arising thereunder' to a foreign jurisdiction was wide enough to cover the question of whether the contract could be avoided for non-disclosure.*

64. It is to be noted that at least in the context of arbitration and jurisdiction clauses Lord Hoffmann in *Fiona Trust* held that the fine distinctions set out at [11] should no longer be regarded as the guide to construction of these clauses. At [12]-[13] Lord Hoffmann held:

> *"[12] I do not propose to analyse these and other such cases any further because in my opinion the distinctions which they make reflect no credit upon English commercial law. It may be a great disappointment to the judges who explained so carefully the effects of the various linguistic nuances if they could learn that the draftsman of so widely used a standard form as Shelltime 4 obviously regarded the expressions 'arising under this charter' in cl 41(b) and 'arisen out of this charter' in cl 41(c)(1)(a)(i) as mutually interchangeable. So I applaud the opinion expressed by Longmore LJ in the Court of Appeal (at [17]) that the time has come to draw a line under the authorities to date and make a fresh start.*
>
> *[13] In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction."*

65. In support of her contention that the modern approach to the construction of arbitration and jurisdiction clauses set out in *Fiona Trust* does not apply to the construction of the anti-assignment clauses Ms Bingham KC noted that the three leading practitioners' textbooks on assignment (*Guest on the Law of Assignment*, Fourth Edition; *Tolhurst on the Assignment of Contractual Rights*; and *Smith and Leslie: The Law of Assignment*, Third Edition) do not state that the construction of the anti-assignment clauses should follow the modern approach to the construction of arbitration and jurisdiction clauses mandated in *Fiona Trust*.

66. Ms Bingham KC further submitted that the draftsman of the PXF Agreement must be taken to have used the expression "*under*" the agreements deliberately since there are instances where the draftsman has used wider expressions such as "*in connection with*" the agreement. Thus, a "*Disruption Event*" in the PXF Agreement is defined as "*A material disruption to*

those payment or communication systems in connection with the Facility…" The central dispute between the parties in relation to the issue of construction is whether the approach to construction mandated by *Fiona Trust* applies in the context of the construction of anti-assignment clauses. In *Fiona Trust* Lord Hoffmann stated at [6] that the parties enter into arbitration agreements because they want the disputes decided by tribunal which they have chosen commonly on grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of arbitration and the un-obtrusive efficiency of its supervisory law. If one accepts that this is the purpose of an arbitration clause, Lord Hoffmann continues at [7], its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended, Lord Hoffmann asked, that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? Lord Hoffmann held that there was no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by another. A proper approach to construction therefore requires the Court to give effect, so far as language used by the parties will permit, to the commercial purpose of the arbitration clause.

67. Similar considerations apply in the construction of anti-assignment clauses restricting the ability of the contracting party to assign accrued causes of action. The primary purpose of such anti-assignment clauses is that the contracting party "*wishes to ensure that he deals, and deals only, with the particular [party] with whom he has chosen to enter into a contract*" per Lord Browne Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 105 E (see also Ramsay J in *Ruttle Plant Ltd v Secretary of State for the Environment and Rural Affairs* [2008] 2 All ER (Comm) 264 at [58] and Jefford J in *Aviva Investors Ground Rent Group GP Ltd v Shepherd Construction Ltd* [2021] EWHC 1921 (TCC) at [43]). If this is the commercial purpose of the anti-assignment clause relating to accrued rights, its construction must be influenced by whether the parties, as rational

businesspersons, were likely to have intended that only some of the causes of action arising out of the relationship were to be the subject of prohibition against assignment, whilst other causes of action could be assigned to third parties without any restriction. The Court accepts that there is no rational basis why contracting parties would agree to severance of the causes of action which arise out of the transaction so that a claim in respect of a breach of contract has to be brought by the original contracting party, but a claim arising out of some ancillary duty such as fiduciary duty of the agent, can be alienated. In that situation there would be two different claimants able to bring different claims in respect of the same subject matter without being required to do it together. The authorities cited by Mr Valentin KC and Mr Fenwick KC suggest that the *Fiona Trust* approach is indeed the appropriate approach in relation to the construction of anti-assignment clauses relating to the ability of the contracting party to assign accrued causes of action.

68. The Court of Appeal in *British Energy Power and Trading Limited v Credit Suisse* [2008] 2 All ER (Comm) 524 appears to have held that the *Fiona Trust* approach is appropriate in the context of the construction of anti-assignment clauses. The appeal concerned the true construction of clause 31 of the Share Option Agreement which provided:

> *"31. ASSIGNMENT*
>
> *31.1 No party may (nor purport to) assign or transfer, or declare a trust of the benefit of, or in any other way dispose of* ***any of its rights under this Agreement,*** *in whole or in part, without first having obtained the other parties' prior written consent, save that:*
>
> *31.1.1 the Buyer shall be entitled to make a Disposal to a Third Party in accordance with Clauses 32 to 35; and*
>
> *31.1.2 the Seller shall be entitled to assign and/or transfer all (but not part only) of its rights under this Agreement to BEH by way of security for the First Intercompany Loan Agreement.*
>
> *31.2 Subject to Clause 31.1.1, during the Close Period the Buyer may not enter into any agreement or other arrangement:*

31.2.1 that relates to the exercise of ***any of its rights under this Agreement****;"*

69. Before the Court of Appeal, it was submitted on behalf of certain banks that the expression "*rights under this Agreement*" in clause 31.2.1 means contractual rights and is a reference to the rights of the security agent as the options were granted to the security trustee and not to the banks. The Court of Appeal held that the question is however whether the expression "*rights under this Agreement*" includes the beneficial rights of the banks. The Court of Appeal held that there is no difficulty in holding that the language of clause 31.2.1 is wide enough to include the banks' beneficial rights. At [75] Sir Anthony Clarke MR considered the appropriate approach in relation to the construction of clause 31 and held:

> "*[75] The expression 'rights under the Agreement' is capable of being widely construed. Thus for example, albeit in the context of arbitration clauses, in Fiona Trust & Holding Corp v Privalov [2007] UKHL 40, [2007] 2 All ER (Comm) 1053, Lord Hoffmann, with whom the other members of the appellate committee agreed, said (at [11], [12]) that distinctions between disputes 'under' or 'relating to' or 'arising out of' or 'in connection with' a contract should be avoided.* ***It was there held that a claim to rescind time charterparties on the ground that they were induced by bribery was a claim 'under' the charterparties****.* ***The same approach is in our opinion appropriate in the present context, especially where, for the reasons we have given, the clause being construed was intended to benefit British Energy and to control both how the banks exercised their beneficial rights and how the security trustee exercised its legal right****."* [emphasis added]

70. The *Fiona Trust* approach to construction was also applied to an anti-assignment clause in *Burleigh House (PTC) Limited v Irwin Mitchell LLP* [2021] EWHC 834 (QB). In that case the Claimant, a British Virgin Islands company, brought a claim as permitted assignees of the Defendant's former client, Mr Baxendale-Walker. The terms of the retainer were set out in the signed engagement letter and the Defendant's standard terms and conditions. Clauses 15.11 and 17.3 of the standard terms and conditions provided:

> *Clause 15.11: "You may not assign all or any part of the benefit of, or your **rights and benefits under, the agreement** of which these standard terms and condition [sic] form part"; and*
>
> *Clause 17.3: "We accept instructions from you on the basis that services provided by [us] are provided solely for your benefit and we do not assume any liability to any person other than you in relation to the advice we give you…No person who is not a party to the agreement embodied in these standard terms and conditions and the relative covering letter(s) shall, in the absence of express provision to the contrary, have any right under the Contracts (Rights of Third Parties) Act 1999 to enforce any of its terms, but this does not affect any right or remedy of a third party which exists or is available other than under that Act".* [emphasis added]

71. The Claimant accepted that the anti-assignment provision at clause 15.11 of the Defendant's standard terms and conditions relates expressly to contractual rights. The main issue between the parties was whether the Claimant had a real prospect of showing that clause 15.11 permitted Mr Baxendale-Walker to assign his right to sue in tort.

72. The Defendant argued that clause 15.11 precluded assignment of Mr Baxendale-Walker's tortious cause of action because: (i) if there had been no contract, there would have been no common law obligations; (ii) the alleged tortious acts overlap entirely with the alleged breaches of contract; (iii) the Claimant's common law tortious claims arise "*under the agreement*" (i.e. the retainer) and so fall within clause 15.11; and (iv) this approach is consistent with the wording of clause 17.3. In making this submission the Defendant specifically relied upon the approach in *Fiona Trust* at [24]-[25]:

> *"24. The Defendant drew support for this interpretation of "under the agreement" from Fiona Trust & Holding Corp v Privalov [2007] Bus. L.R. 1719. In Fiona Trust, the parties had agreed that disputes arising "under" a charter should be referred to arbitration. The appellant's case was that the arbitration clause did not apply to its claim, which was for a declaration that the contract had been repudiated: it only applied to claims for breach of contract. Lord Hoffman rejected that contention. At [12] he considered that previous cases in which distinctions had been drawn*

between disputes "arising under", "arising out of", "under", "in relation to", "in connection with" or "under" a contract "reflect[ed] no credit upon English commercial law". Rather, at [13] it was held the construction of an arbitration clause should start from the assumption that the parties, as rational businesspeople, are likely to have Intended any dispute arising out of the relationship intoIch they have entered or purported to enter to be decided by the same tribunal; and "very clear language" would be needed to show a contrary intention.

25. Applying this approach to the retainer in this case, the Defendant argued that (i) as a matter of interpretation, there was simply no distinction between the prohibition of the assignment of claims arising "under", "out of" or "in relation to" the retainer; (ii) "very clear language" would be needed to create different regimes for a client's contractual and tortious claims, especially, as here, where all the claims concern concurrent and identical rights, acts, omissions and losses, and no such language is present; and (iii) the interpretation advanced by the Claimant – that the parties had intended that clients could assign tortious claims – was entirely uncommercial and undesirable.

73. In accepting this submission, the court (Deputy Master Hill QC) adopted the approach in *Fiona Trust* at [34]:

"*34. Clause 15.11 on its face precluded assignment of the right to sue in contract. In my view the Claimant does not have a real prospect of showing that it did not also preclude assignment of the right to sue in tort. I consider that the Defendant is right to argue that the broad scope of clause 15.11 must be borne in mind when interpreting it.* ***Application of the Fiona Trust principle dictates that "rights…under…the agreement " in clause 15.11 includes tortious rights. I accept the Defendant's arguments as to why permitting the tortious rights to be assigned would be uncommercial and undesirable. On that basis, per Fiona Trust, it is to be assumed that the parties would not have intended such consequences without clear language to that effect, and there is none.*** *The fact that those tortious rights can exist in some cases absent a contract is irrelevant, because here there was a contract, and because the issue here is the extent to which those acknowledged tortious rights could be assigned. I do not consider that the Claimant's arguments as to the limits of Lenesta assist."* [emphasis added]

74. In *Aviva Investors Ground Rent Group GP Ltd v Shepherd Construction Ltd* [2021] EWHC 1921 (TCC), considering the proper approach to be taken in the context of the construction of anti-assignment clauses, Jefford J held at [43]:

> *"…In this instance, if the clause is capable of different meanings, commercial common sense very much militates in favour of a construction which captures causes of action in tort.* ***There is no reason why the parties would prohibit the assignment of causes of action in contract without consent but leave the possibility of assignment of causes of action in tort untrammelled****."* [emphasis added]

75. Having regard to the reasoning in *Fiona Trust*, *British Energy* and *Burleigh House*, the Court accepts that anti-assignment clauses in the PXF Agreement and the Share Charges are not confined to contractual rights and are to be given a wide commercial interpretation in accordance with the above authorities. The Court has already noted that the contractual definition of "*rights*" in the anti-assignment clauses is in the widest terms: "***any right****, privilege, power, immunity or* ***other interest or remedy of any kind.***" [emphasis added]

76. As Mr Valentin KC rightly contended, under the *Fiona Trust* approach, a non-contractual claim will fall within the scope of an exclusive jurisdiction clause where there is a sufficiently close connection with the contract. Thus, in *Macquarie Global Infrastructure Funds 2 Sarl v Gonzalez* [2020] EWHC 2123 (Comm), Jacob J held at [53]:

> *"[t]here used to be, as is well known, case-law which drew narrow distinctions between words such as, "arising under", and, "arising out of", and matters of that kind. But all that was swept away in Fiona Trust, and the starting point is as I have indicated it, and I must take into account the wide wording that has been used.* ***Such wording will ordinarily extend not simply to claims which are contractual and allege breach of express or implied terms of the contract, but also to non-contractual disputes, provided that there is a sufficient connection with the contract****."* [emphasis added]

77. In *Eastern Pacific Chartering Inc v Pola Maritime Inc* [2021] 1 WLR 5475, Patricia Robertson QC (sitting as a deputy judge of the High Court), held that this may include claims arising solely in tort:

> *"37 The language "in connection with" is naturally to be read as, if anything, wider than arising under", or variants on that phrase. Taking a broad and common sense approach to construing the clause, as I am enjoined in Fiona Trust to do, a tort claim may be said to arise "in connection with" the charter not only where there are parallel claims in tort and contract (as, for example, for breach of a duty of care) but* ***also where the claim arises solely in tort but is in a meaningful sense causatively connected with the relationship created by the charter and the rights and obligations arising therefrom****.*
>
> *38* ***The connection here lies in the fact that steps taken by the claimant specifically in order to secure its claims under this charter are alleged to have been tortious and to have caused the defendant loss.****"* [emphasis added]

78. The Court accepts Mr Valentin KC's submission that applying the *Fiona Trust* approach to the construction of the anti-assignment clauses, all of the Plaintiff's claims against the Shandong Defendants arise under the PXF Agreement and/or the Share Charges for this purpose:

> (1) The claim for inducing breach of equitable duties is premised upon the First Defendant's alleged breach of its duties, which arose pursuant to its appointment as Chargee under the Share Charges and the enforcement action taken under the PXF Agreement. Further, the claim is premised upon the alleged conflict of duties owed as Chargee (under the Share Charges) and as agent and security agent (under the PXF Agreement).
>
> (2) The claims for unlawful means conspiracy and dishonest assistance allege that the Defendants engaged in a conspiracy and assisted Mr Cui's alleged breach of fiduciary duty (respectively), by exercising their contractual rights under the PXF Agreement (in issuing the demand on AML) and/or procuring the First Defendant's exercise of its rights under the PXF Agreement and Share Charges (in organising

the sale of the Charged Shares). The unlawful means alleged also include the First Defendant's breach of its duties, described above.

(3) The claim for vicarious liability is for Mr Cui and Mr Li's alleged acts as set out above.

79. The Court also accepts Mr Fenwick KC's submission that applying the *Fiona Trust* approach to the construction of the anti-assignment clauses, all of the Plaintiff's claims against the First Defendant arise under the PXF Agreement and/or the Share Charges for this purpose:

(1) The Plaintiff's claim for wilful or grossly negligent breach of equitable duties against the First Defendant is predicated on its assertion that: (i) AML had an interest in the Bermuda Shares; (ii) which interests it charged under the Share Charge; (iii) AML was consequently entitled to the equity of redemption; (iv) the First Defendant owed duties in equity under Bermudian law to AML when taking enforcement action under the PXF Agreement and the Share Charges; and (v) the First Defendant acted in breach of those equitable duties in forcing the sale of the shares under the Share Charges giving rise to a cause of action in favour of AML.

(2) The effect of clause 27.1 of the PXF Agreement and clauses 14.3 and 4.5.3 of the Share Charges is that the Plaintiff was not entitled to transfer either its interest in the Bermuda Shares (to the extent the Plaintiff relies on any such interest) or any rights under the PXF Agreement and the Share Charges which included any claims or entitlement to damages AML had against the First Defendant in relation to the sale of the Bermuda Shares.

(3) The non-assignment clauses were sufficiently widely drafted and are to be construed to cover the conspiracy claim in tort in which the Plaintiff alleges that steps were taken under the PXF and Share Charges resulting in AML suffering damage in the form of the loss of the Bermuda Shares which AML had charged under Share Charges, alternatively the surplus AML would have received in a '*proper sale process'* under the Share Charges.

80. For the reasons set out in paragraphs 78 and 79 above, the same result follows in relation to the Sixth Defendant, Mr Cui.

81. In the circumstances, the Court concludes that causes of action pleaded by the Plaintiff against the Defendants in the SOC are causes of action which could not be assigned having regard to clause 27.1 of the PXF Agreement and clause 14.3 of each of the Share Charges. Accordingly, to the extent that the Deed of Assignment purports to assign these causes of action to the Plaintiff, such an assignment is "*ineffective*". The end result is that the Plaintiff lacks the title to sue in respect of the cause of action pleaded against the Defendants in the Writ.

82. The Court notes that Ms Bingham KC maintains that even if the Court concludes that the assignment was ineffective, the Plaintiff can still remedy the position and can continue with these proceedings. In this regard the Plaintiff relies upon clause 9.2 of the Deed of Assignment which provides:

> "*If any assignment purported to be made pursuant to this Deed is or becomes illegal, invalid or unenforceable in any respect under any law of any jurisdiction, and subject to Clause 4.2, the Assignor agrees to negotiate in good faith with the Assignee an alternative mechanism pursuant to which the Assignee may acquire or otherwise obtain the benefit of the Enforcement Related Claims*."

83. Ms Bingham KC indicated that it may be possible for the Plaintiff to have AML, acting through its Administrators, to join the current proceedings and remedy any potential ineffectiveness of the existing Deed of Assignment. No such application is before the Court at this time and the Court will consider any such application when made by the Plaintiff.

84. Having regard to this conclusion and bearing in mind the possibility that this matter may go further, the Court will deal briefly with other issues raised at the hearing.

The Issue of Notice of Assignment

85. Further or alternatively, the Defendants contend that even if the purported assignment was not rendered ineffective by the anti-assignment clauses the assignment was not valid because the Plaintiff failed to give the Defendants adequate notice of the alleged assignment.

86. Clause 2.3 of the Deed of Assignment required Notice to be given in the form of Schedule 1 to the Deed. The Notice attached to the Deed provided for it to be signed by both the assignor and the assignee. However, the Plaintiff relies on a Notice of Assignment ("**Notice**") which prima facie does not comply with the requirements of the Deed of Assignment because it was only signed by the Plaintiff. The Plaintiff accepts that it did not send a Notice in the form contained in Schedule 1 to the Deed of Assignment.

87. The Plaintiff's position is that it does not matter that the Notice was only signed by the Plaintiff. It contends that: (i) the Joint Administrators, AML and the Plaintiff entered into a letter agreement dated 10 February 2021 by which they agreed that they could vary the form of the notice that had to be given; and (ii) the Plaintiff, the Joint Administrators and AML agreed that the Plaintiff could make certain amendments to the Notice, including that only the Plaintiff need sign the Notice.

88. However, the Defendants complain that the Plaintiff has not provided any documentary evidence of the alleged subsequent agreement or when and how it is alleged to have been agreed. Moreover, the Defendants say that even if such an agreement was reached the argument is hopeless because the letter of agreement (10 February 2021) between the Plaintiff

and the Joint Administrators that is relied on by the Plaintiff as varying the Deed of Assignment postdates the Notice sent to MP (3 February 2021).

89. The Defendants say that to the extent that AML contends that in the absence of a valid assignment its claims can proceed on the basis that the assignment was valid in equity, for the claim to be brought on that basis the Plaintiff should have joined AML to proceedings but has not done so. The Defendants further say that the position in Bermuda is that if a party does not possess standing to bring proceedings at the time a Writ is issued "*that is a fatal flaw for the validity of the claim*" relying upon *East Bank Consultants v Ferigo* [2016] SC (Bda) 88 Civ (Kawaley CJ); and *James AL Peniston trading as East Bank Consultants v Gaythorne Gibbons* [2017] SC (Bda) 28 Civ (Hellman J).

90. For the reasons set out below the Court would not have held that the assignment was not valid because the Plaintiff failed to give the Defendants adequate Notice of the alleged assignment.

91. First, the Court accepts Ms Bingham KC's submission that under the general law, a valid *legal assignment* is effected when notice is given, irrespective of by whom it is given. As with the equivalent English provision, section 19(d) of the Supreme Court Act 1905 provides that a legal assignment takes effect when "*express notice in writing has been given to the debtor*". Notice does not have to be given by any particular person: *Bateman v Hunt* [1904] 2 KB 530 at 538, Stirling LJ; *Guest on the Law of Assignment* (4th ed) at [2-31]. Notice in this case complied with the statutory requirements of section 19(d) of the Supreme Court Act 1905.

92. Second, the contractual provision in relation to the Notice cannot reasonably be interpreted as making the whole assignment conditional on the assignor joining in giving notice. The Court accepts Ms Bingham KC's submission that on a reasonable interpretation of the Deed the intention was to effect an immediate and unconditional assignment. The following

provisions of the Deed make it clear that the purpose of the document is to give effect to the parties' prior agreement to assign the Enforcement Related Claims:

> (1) Recital (F) of the Deed provides: "*In connection with a scheme of arrangement relating to the Assignor and sanctioned by the High Court of England and Wales by an order dated on or around 27 July 2020,* ***the Assignor has agreed to assign to the Assignee the Enforcement Related Claims on the terms of this Deed***." [emphasis added]
>
> (2) Clause 2.1 of the Deed provides: "*Subject to the terms of this Deed, the Assignor, acting by the Joint Administrators (exercising their powers under paragraphs 59 and/or 60 of Schedule B1 and paragraphs 2, 9, 12 and/or 23 of Schedule 1 of the Insolvency Act 1986),* ***unconditionally, irrevocably and absolutely assigns to the Assignee all of its rights, title, interest and benefits in and to the Enforcement Related Claims free and clear of all Security Interests and all other third party rights***." [emphasis added]
>
> (3) Clause 2.4 of the Deed provides: "*The Assignor and the Assignee acknowledge and agree that the assignment of the Enforcement Related Claims by the Assignor to the Assignee as effected by this Clause 2* ***is intended to constitute an irrevocable absolute transfer of legal and equitable title thereto and not to constitute the creation of a Security Interest over or in respect of the same***." [emphasis added]

93. The Court accepts Ms Bingham KC's submission that the words "*Subject to the terms of this Deed"* in clause 2.1 of the Deed do not render the assignment conditional on the performance of all the terms of the Deed. The expression simply means that the assignment is "*on the terms of this Deed*" or "*in accordance with the terms of this Deed."*

94. Third, the Court accepts that clause 2.3 of the Deed, stipulating that AML would join in giving notice, had been revoked before the notice was given. The Court was referred to a letter from the Joint Administrators of AML to the Plaintiff dated 23 June 2023 confirming this position.

95. Fourth, the Court accepts Ms Bingham KC's submission that even if the notices were ineffective to assign the claims at law as the Defendants contend, the claims were nonetheless validly assigned in equity where no such notice is required: *Re City Life Assurance Co Ltd* [1926] Ch 191 at 220, per Warrington LJ; *Guest on the Law of Assignment* (4th ed) at [3-69].

96. In relation to the Defendants' contention that, if the assignment only took effect in equity, AML should have been joined to the claim, Ms Bingham KC points out that the UK Supreme Court acknowledged in *Roberts v Gill & Co* [2011] 1 AC 240, "*there are in practice very many cases in the modern era in which equitable assignees proceed to recover a debt assigned to them in equity without joining the assignor*": at [127], Lord Clarke. The rule that an assignor should be joined "*will not be insisted upon where there is no need, in particular if there is no risk of a separate claim by the assignor*": *Raiffeisen Zentralbank Österreich AG v An Feng Steel Co Ltd* [2001] QB 825 at 850, per Mance LJ. The Court respectfully adopts this position. In this case the Court would not have insisted that AML should be joined as a party to these proceedings as there is no realistic risk of a separate claim being pursued by the assignor.

97. The Court also wishes to confirm that the effect of the lack of service on the Sixth Defendant would be to render any such assignment valid in equity only and the lack of notice would not be fatal in relation to these proceedings. In this regard Mr Bank, for the Sixth Defendant, referred the Court to the decision of Hellman J in *James AL Peniston trading as East Bank Consultants v Gaythorne Gibbons* [2017] SC (Bda) 28 Civ which in turn cites the earlier decision of Kawaley CJ in *East Bank Consultants v Ferigo* [2016] SC (Bda) 88. These two cases need to be considered with care as regrettably no argument was addressed to the Court in support of the proposition that the lack of notice in accordance with section 19(d) of the Supreme Court Act 1905 may still leave the assignment valid in equity. The Court was not shown the UK Supreme Court decision in *Roberts v Gill & Co* [2011] 1 AC 240 or the UK

Court of Appeal decision in *Raiffeisen Zentralbank Österreich AG v An Feng Steel Co Ltd* [2001] QB 825, cited at paragraph 96 above.

Jurisdiction Clauses

98. There are two relevant jurisdiction clauses: one in the PXF Agreement and another in the Share Charges. The PXF Agreement (which is governed by English law) contained the following jurisdiction clause:

> *"41.1 Jurisdiction*
>
> *(a) The courts of England have exclusive jurisdiction to settle any dispute arising out of, or in connection with, this Agreement or any non-contractual obligations connected with this Agreement (including a dispute regarding the existence, validity or termination of any Finance Document) (a Dispute).*
>
> *(b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will dispute to the contrary.*
>
> *(c) This clause 41.1 (Jurisdiction) is for the benefit of the Finance Parties only. As a result, no Finance Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Finance Parties may take concurrent proceedings in any number of jurisdictions."*

99. Clause 18 of the Share Charges (which are governed by Bermuda law and which the Plaintiff relies on) provided as follows:

> *18.1 This Charge shall be governed by, and construed in accordance in all respects with, the laws of Bermuda.*
>
> *18.2 The Chargor hereby irrevocably and unconditionally agrees for the exclusive benefit of the Chargee that the Courts of Bermuda shall have jurisdiction to hear and determine any suit, action or proceeding and to settle any dispute arising out*

of or in connection with this Charge and for such purposes irrevocably submits to the jurisdiction of such Courts.

18.3 The Chargor irrevocably waives, now and in the future, any objection to the Courts of Bermuda having jurisdiction to hear and determine any proceedings on the grounds that such Courts are inappropriate or an inconvenient forum.

18.4 Nothing contained in this Clause shall limit the right of the Chargee to take proceedings with respect to this Charge in any other Court of competent jurisdiction nor shall the taking of any such proceedings in one or more jurisdictions preclude the taking of proceedings in any other jurisdictions, whether concurrently or not.

100. The Plaintiff relies upon clause 18.2 of the Share Charge. The Court accepts Mr Valentin KC's submission that a purported assignee cannot invoke a forum selection clause where the contract in question contains an anti-assignment clause which has not been complied with (relying upon *Chitty on Contracts* (34th ed.) at §34-042, "*if the right to assign the contract in which the arbitration clause is contained is taken away or restricted, then the right to claim arbitration will be similarly circumscribed*", and *Cockett Marine Oil DMCC v ING Bank NV* [2019] 2 Lloyd's Rep 541 at [53]). In light of the Court's earlier ruling that the assignment of the cause of action relied upon in these proceedings is "*ineffective*" the Plaintiff is not in a position to rely upon clause 18.2 of the Share Charge. However, given that this matter may go further, the Court will consider the position on the basis that the Plaintiff is entitled to rely upon clause 18.2 of the Share Charge.

101. Ms Bingham KC contends that the Plaintiff had no choice as to where to bring its claim for breach of the First Defendant's equitable duty as mortgagee. The Plaintiff had to bring that claim before the Bermudian Court because it was contractually obliged to do so by clause 18 of each of the Share Charges.

102. Ms Bingham KC argues that Clause 18 is an asymmetric jurisdiction clause such as are classically encountered in banking documentation. The intention in such a clause is that the chargor/guarantor can only sue in the nominated jurisdiction. That is, from the

chargor/guarantor's perspective it is an exclusive jurisdiction clause. Use of the word "*exclusive*" is not necessary or determinative, the parties' intention being gathered from construction of the clause as a whole in its proper context (relying upon *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588 at 593, per Steyn LJ, as he then was).

103. Ms Bingham KC submits that in circumstances where AML, as a Bermudian company, was already subject to Bermudian jurisdiction, clause 18 was intended to confer exclusive jurisdiction, in the sense that AML was only entitled to sue in Bermuda. That intention is underscored by the mandatory language deployed: "*...the Courts of Bermuda shall have jurisdiction to hear and determine any suit, action or proceeding and to settle any dispute arising out of or in connection with this Charge...*" (Share Charges, clause 18.2).

104. The Court is unable to accept the premise of Ms Bingham KC's argument that the Plaintiff *had to* bring that claim before the Bermudian Court because it was contractually obliged to do so by clause 18 of each of the Share Charges. This premise may have some force if the Court was *only* dealing with clause 18 of the Share Charges (as was the case in the two cases relied upon by the Plaintiff: *Continental Bank* and *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc* [2017] 1 WLR 3497). But this argument completely ignores the exclusive jurisdiction provision contained in clause 41.1 of the umbrella agreement, the PXF Agreement, to which AML and the First Defendant are parties. Clause 18 of the Share Charges and clause 41 of the PXF Agreement both form part of the same overall transaction - the Share Charges were a condition precedent of the PXF Agreement. Both provisions in clause 41 of the PXF Agreement and clause 18 of the Share Charges have to be construed together. The Court does not consider that there is any necessary inconsistency in the two provisions.

105. Clause 41.1 of the PXF Agreement is drawn in the widest terms: "*The courts of England have* ***exclusive jurisdiction*** *to settle* ***any dispute arising out of, or in connection with, this Agreement*** *or* ***any non-contractual obligations connected with this Agreement*** *(including a*

dispute regarding the ***existence, validity or termination of any Finance Document****) (a Dispute).”* Both AML and the First Defendant are parties to the PXF Agreement and therefore bound by its terms. The term “Finance Document” includes Security Documents which in turn include the Share Charges.

106. Clause 41.1(c) provides that, despite the existence of the exclusive jurisdiction clause in 41.1(a), no Finance Party (which includes the First Defendant) shall be prevented from taking proceedings relating to a dispute in any other courts with jurisdiction. It is common ground that asymmetric jurisdiction clauses are common in financial transactions. The meaning and effect of such clauses is a matter of construction but commonly the effect of such clauses is the borrower submits to a particular jurisdiction whereas the lender can sue wherever it can. As Sir Geoffrey Vos C has recently stated in *Punjab National Bank (International) Ltd v Srinivasan* [2019] EWHC 3495 (Ch) at [59]: "*[i]nternational borrowers […] understand full well that commercial lenders reserve the right to sue in multiple jurisdictions, particularly when they need to enforce against real property overseas. That does not mean that the court can simply ignore the parties' agreement to a main jurisdiction of choice – in this case England*".

107. The Court agrees that where parties have agreed an exclusive jurisdiction clause the courts should give effect to that bargain absent strong reasons for departing from it (per Lord Bingham in *Donohue v Armco Inc* [2002] 1 All ER 749 at [24]). In *Cape Ventures SAC Limited v CC Private Equity Partners* [2009] SC (Bda) 49 Civ, Kawaley J stated that it was the strong legal policy under Bermuda law to give effect to enforcing exclusive jurisdiction clauses wherever reasonably possible to do so.

108. The Court agrees with the submission of Mr Fenwick KC and Mr Valentin KC that on the proper construction of the agreements and the jurisdiction clauses the Plaintiff's claims fall within the scope of Clause 41 of the PXF Agreement, which is the umbrella agreement and consistent with Clause 18 of the Share Charges, and therefore the Plaintiff was obliged to

bring its claims in England and Wales and is not entitled to bring its claims in Bermuda. The Court accepts that the proper construction of the clauses requires that if AML seeks to bring a claim which arises out of or in connection with the PXF Agreement then that claim is subject to the exclusive jurisdiction clause of the PXF Agreement because:

(1) The PXF Agreement and the Share Charges both form part of the same overall transaction - the Share Charges were a condition precedent of the PXF Agreement. The clauses therefore need to be constructed as forming part of the same overall scheme with the PXF Agreement as the umbrella agreement.

(2) Clause 41 of PXF Agreement conferred exclusive jurisdiction on the English Courts in respect of disputes "*arising out of*" or "*in connection with*" the PXF Agreement. The clause provided that disputes covered by the clause included both non-contractual disputes and disputes concerning the Finance Documents (which included the Share Charges).

(3) However, Clause 41.1(c) provided that the Finance Parties (which included the First Defendant) could bring proceedings in any other court with jurisdiction.

(4) One jurisdiction in which the Finance Parties could bring proceedings pursuant to that carve out was Bermuda by reason of Clause 18 of the Share Charges.

(5) Therefore Clause 18 provided that AML agreed for Finance Parties' benefit that (i) the Courts of Bermuda would have (non-exclusive) jurisdiction in respect of disputes arising out of or in connection with the Share Charges and (ii) AML would waive any objection to the Courts of Bermuda having jurisdiction over disputes which fell within the scope of the Clause, i.e. if the Finance Parties brought a claim in Bermuda AML could not object on jurisdiction grounds.

(6) However, consistent with the scheme of the agreements, Clause 18 did not confer exclusive jurisdiction on the Bermuda Courts in relation to disputes under the Share Charges or provide that the Finance Parties (as opposed to AML) submitted to the jurisdiction of the Courts of Bermuda.

(7) Clause 18 was therefore an asymmetric jurisdiction clause in the Finance Parties' favour by which AML unilaterally submitted to the jurisdiction of Bermuda. This meant that if the Finance Parties brought a claim in Bermuda arising out of or in connected with the PXF Agreement in relation to the Share Charges AML could not object on jurisdiction grounds. However, it did not mean that AML could insist on suing the Finance Parties in Bermuda - AML was bound by the exclusive jurisdiction clause in the PXF Agreement.

(8) Accordingly, even if the Plaintiff has been assigned AML's claims in relation to what the Plaintiff has called "*Shandong Plan to appropriate the Bermuda Shares*", that claim had to be brought in England because both the equitable duties claim and the conspiracy claim against MP are disputes "*arising out of*" or "*in connection with*" the PXF Agreement.

109. Ms Bingham KC argues that in the event the Court were to conclude that Bermuda is not clearly or distinctly the appropriate forum for resolution of the parties' dispute, it may nevertheless permit the proceedings to go forward if satisfied that P acted reasonably in commencing proceedings here, and in permitting the limitation period to expire in other jurisdictions, relying upon the speech of Lord Goff in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 at 483-484:

> *"Let me consider how the principle of* forum non conveniens *should be applied in a case in which the plaintiff has started proceedings in England where his claim was not time barred, but there is some other jurisdiction which, in the opinion of the court, is clearly more appropriate for the trial of the action, but where the plaintiff has not commenced proceedings and where his claim is now time barred. Now, to take some extreme examples, suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would*

be that the plaintiffs claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction. Indeed a strong theoretical argument can be advanced for the proposition that, if there is another clearly more appropriate forum for the trial of the action, a stay should generally be granted even though the plaintiff's action would be time barred there. ***But, in my opinion, this is a case where practical justice should be done. And practical justice demands that, if the court considers that the plaintiff acted reasonably in commencing proceedings in this country, and that, although it appears that (putting on one side the time bar point) the appropriate forum for the trial of the action is elsewhere than England, the plaintiff did not act unreasonably in failing to commence proceedings (for example, by issuing a protective writ) in that jurisdiction within the limitation period applicable there, it would not, I think, be just to deprive the plaintiff of the benefit of having started proceedings within the limitation period applicable in this country****. This approach is consistent with that of Sheen J. in* The Blue Wave *[1982] 1 Lloyd's Rep. 151.* ***It is not to be forgotten that, by making its jurisdiction available to the plaintiff—even the discretionary jurisdiction under R.S.C., Ord. 11—the courts of this country have provided the plaintiff with an opportunity to start proceedings here; accordingly, if justice demands, the court should not deprive the plaintiff of the benefit of having complied with the time bar in this country.****"* [emphasis added]

However, in an earlier passage, Lord Goff said, at p. 483:

"*suppose that the plaintiff allowed the limitation period to elapse in the appropriate jurisdiction, and came here simply because he wanted to take advantage of a more generous time bar applicable in this country****; or suppose that it was obvious that the plaintiff should have commenced proceedings in the appropriate jurisdiction, and yet he did not trouble to issue a protective writ there; in cases such as these, I cannot see that the court should hesitate to stay the proceedings in this country, even though the effect would be that the plaintiff's claim would inevitably be defeated by a plea of the time bar in the appropriate jurisdiction.****"* [emphasis added)]

110. Ms Bingham KC urges the Court to hold that the Plaintiff did not act unreasonably in commencing proceedings in Bermuda having regard to the connecting factors with this jurisdiction, including the Plaintiff's belief that Bermuda was the place where all Defendants can be joined to a single set of proceedings, with the conspiracy being made the subject of a single factual enquiry. Ms Bingham KC complains that no matter *where* the Plaintiff issued proceedings, the practical reality is that Defendants would have sought to challenge

jurisdiction as their first line of "defence" to the claims. For example, had the Plaintiff commenced proceedings anywhere but Bermuda, the First Defendant would have complained that suit was brought in breach of the Share Charge jurisdiction clauses. Indeed, Ms Bingham KC points out, that the Shandong Defendants have carefully hedged their bets as to whether, on their own case, the appropriate forum was England, Hong Kong, or indeed the PRC.

111. Ms Bingham KC urges the Court that to the extent that the Court finds that the Plaintiff has raised triable issues, for example, regarding the Sixth Defendant's breaches of fiduciary duties, and the other Defendants' dishonest assistance in those breaches, it should be slow as a matter of public policy to shut those claims down without investigation: it is in the interests of justice generally, and a matter of particular concern to the Bermudian courts, that allegations credibly levelled against directors of Bermudian companies should be scrutinised, especially where, as here, it is said that the misconduct in question has occasioned damages on a large scale.

112. Further or alternatively, Ms Bingham KC submits that if the challenges are to be allowed, the Defendants should be required to undertake not to rely on a defence of limitation if proceedings in relation to the claims now brought are pursued elsewhere, a course advocated for by Lord Goff in *The Spiliada* and what defendants frequently do on *forum non conveniens* applications as the price of obtaining a stay (*Dicey* (16th ed) at [12-112]). Ms Bingham KC relies upon *BMG Trading Limited v AS McKay and Azov Shipping Co* [1998] ILPr 691, where the Court of Appeal stayed English proceedings in favour of Ukrainian proceedings on condition that the defendant undertook not to invoke Ukrainian time bar provisions, and noted that if the Ukrainian court nonetheless applied the time bar provisions, it would be open to the claimant to apply to lift the stay (at [37], Phillips LJ (as he then was)).

113. The Court has found that on the proper construction of the agreements and the jurisdiction clauses the Plaintiff's claims fall within the scope of Clause 41 of the PXF Agreement, which is the umbrella agreement and consistent with Clause 18 of the Share Charges, and therefore the Plaintiff was obliged to bring its claims in England and Wales and is not entitled to bring

its claims in Bermuda. When the Plaintiff commenced the Bermuda proceedings it was appreciated by the Plaintiff that this was one possible construction of the agreements. Indeed, the Plaintiff advised the Court at the *ex parte* hearing that this was one possible construction the Defendants may seek to advance before this Court. In its written submissions at paragraphs 38 to 41, the Plaintiff submitted to the Court that whilst the Defendants may argue that these claims fall within the exclusive jurisdiction of the English courts, as provided for by clause 41 of the PXF Agreement, "*applying a broad, purposive and commercially-minded approach, those claims are much more closely connected to the Share Charges than the PXF Agreement*". The Plaintiff submitted:

> *"38.* ***For completeness, the Plaintiff accepts that there exists a counter argument that its claims against the First Defendant might fall within the jurisdiction clause in the PXF Agreement****. However, it is submitted that this counterargument is incorrect. As has been set out above at paragraph 37, the claim against the First Defendant plainly falls within the wording of the Bermudian jurisdiction clauses of the Share Charges.*
>
> *40. Where a claim potentially falls within two inconsistent jurisdiction clauses, the correct approach was summarised in BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA [2019] EWCA Civ 768 at [68] per Hamblen LJ:*
>
> > *"68. In the light of the guidance provided by these authorities, so far as relevant to the present case I would summarise the approach to be as follows:*
> >
> > *(1) Where the parties' overall contractual arrangements contain two competing jurisdiction clauses, the starting point is that a jurisdiction clause in one contract was probably not intended to capture disputes more naturally seen as arising under a related contract: [citations omitted].*
> >
> > *(2) A broad, purposive and commercially-minded approach is to be followed - [citations omitted]*
> >
> > *(3) Where the jurisdiction clauses are part of a series of agreements they should be interpreted in the light of the transaction as a whole, taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme: [citations omitted].*

(4) It is recognised that sensible business people are unlikely to intend that similar claims should be the subject of inconsistent jurisdiction clauses: [citations omitted].

(5) The starting presumption will therefore be that competing jurisdiction clauses are to be interpreted on the basis that each deals exclusively with its own subject matter and they are not overlapping, provided the language and surrounding circumstances so allow: [citations omitted]."

(6) The language and surrounding circumstances may, however, make it dear that a dispute falls within the ambit of both clauses. In that event the result may be that either clause can apply rather than one clause to the exclusion of the other [citations omitted]."

41. Although the principles expressed by Hamblen LJ in BNP Paribas SA have not been expressly applied by the Bermudian courts, the Plaintiff submits that they should nonetheless guide the approach. ***Applying that approach, the claims against the First Defendant clearly fall within the jurisdiction clause of the Share Charges, and not the jurisdiction clause of the PXF Agreement****:*

(a) The claims against the First Defendant are, in summary, that:

(i) it breached its equitable duties as mortgagee when selling the Bermuda Shares charged under the Share Charges. Those duties arose out of the relationship created by the Share Charges and are subject to an exclusion clause contained in the Share Charges; and

(ii) it was a party to an unlawful means conspiracy to sell the Bermuda Shares to the Shandong Group in the Enforcement Sale at an undervalue, where the unlawful means alleged include the First Defendant's breach of its equitable duties as mortgagee set out above.

(b) ***Applying a broad, purposive and commercially-minded approach, those claims are much more closely connected to the Share Charges than the PXF Agreement****."* [emphasis added]

114. The actions complained of in these proceedings took place during the period February to April 2015 and the Bermuda proceedings were commenced just prior to the expiry of the limitation period on 19 February 2021. Despite the fact that it was appreciated by the Plaintiff, as outlined above, that a possible construction of the relevant agreements was that the present claims were covered by the exclusive jurisdiction clause in favour of the English courts as

contained in clause 41 of the PXF Agreement, the Plaintiff took no action to preserve its position in England by issuing a protective writ (as envisaged by Lord Goff in *Spiliada*). No cogent explanation has been provided to the Court as to why the Plaintiff failed to take such an obvious step to preserve its position in relation to the limitation period under English law. In these circumstances the Court is unable to conclude that the Plaintiff has acted reasonably. Accordingly, the Court, in the exercise of its discretion, does not consider it appropriate to require an undertaking from the Defendants that they will not rely on a defence of limitation, which would not be available to them in these proceedings, in relation to any proceedings which are commenced by the Plaintiff against the Defendants in England.

Good Arguable Case on Jurisdictional Gateways

115. In light of the Court's ruling in relation to the issue of assignment of the accrued cause of action and the exclusive jurisdiction provision in clause 41.1 of the PXF Agreement, the issue whether the claims come within any of the jurisdictional gateways under RSC order 11 rule 1 does not arise. However, had the Court ruled otherwise, the Court would have allowed service out of the jurisdiction on the following basis.

The Property Gateway

116. RSC order 11 rule 1(g) provides that leave to serve out may be granted where "*the whole subject- matter of the claim relates to property located within the jurisdiction*". The Bermuda Shares are property located within Bermuda, because the Bermuda Holding Companies are registered in Bermuda and their share registers are located there: *Akers v Samba Financial*

Group [2017] AC 424 at [19], Lord Mance, applied in *Wong v Grand View PTC et al* [2022] Bda LR 59 at [367]. The same is true of AML.

117. In *In re Banco Nacional de Cuba* [2001] 1 WLR 2039 {JAB2/33}, Lightman J construed a CPR provision which was identically worded and held at [33] that "*on its proper construction the rule cannot be construed as confined to claims relating to the ownership or possession of property. It extends to any claim for relief, whether for damages or otherwise, so long as it is related to property located within the jurisdiction. This construction vests in the court a wide jurisdiction*". Accordingly, a claim seeking damages on the basis that shares located in the UK had been sold at an undervalue so as to defraud creditors was held to be within the gateway. Similarly, the current English equivalent of the gateway has been held to extend to breaches of fiduciary duty involving secret commissions in connection with the acquisition of artwork in England: *Simon v Taché* [2022] EWHC 1674 (Comm) at [152]-[153].

118. In *Joliet 2010 Ltd v Goji Ltd* [2012] SC (Bda) 69 Com, Hellman J expressly approved *Banco Nacional* and applied the same test to gateway (g): at [66]-[67] in permitting service out for claims for breach of directors' duties and minority oppression, on the basis that they "*related to*" shares located in Bermuda.

119. The Court would have accepted Ms Bingham KC's submission that applying those principles, there is a good arguable case that each of the claims "*relates to*" the Bermuda Shares:

    (1) The claim against the First Defendant for breach of a mortgagee's equitable duty alleges the wrongful sale of shares located in the jurisdiction, as in *Banco Nacional*.

    (2) The same is true of the claims against the Second to Seventh Defendants for inducing the First Defendant's breach of equitable duty, because the property wrongfully sold was located in the jurisdiction.

(3) The claim against the Sixth Defendant for breach of fiduciary duty arises from his role in AML (whose shares are located in Bermuda);and therefore as in *Joliet 2010* it "*relates to*" shares located in Bermuda

(4) The same is true of the claims against the Second to Fifth and the Seventh Defendant for dishonestly assisting the Sixth Defendant's breach and vicarious liability for his wrongdoing.

(5) The claim against the First to Seventh Defendants for unlawful means conspiracy relates to the Bermuda Shares, because the means used to effect the conspiracy was a breach of fiduciary duty in respect of the Bermuda Holding Companies, and the result was an interference with Plaintiff's property rights in the Bermuda Shares.

120. Accordingly, the Court would have accepted Ms Bingham KC submission that each of the claims against all the Defendants may be brought through this gateway, or through this gateway in conjunction with the proper party gateway.

The Company Gateway

121. RSC order 11 rule 1(ff) provides that leave to serve out may be granted where "*the claim is brought against a person who is or was a director, officer or member of a company registered within the jurisdiction.. .and the subject matter of the claim* ***relates in any way*** *to such company.. .or to the status, rights or duties of such director, officer, member or partner in relation thereto.*" [emphasis added]

122. The Sixth Defendant was a director of AML (which is registered in Bermuda) and the Fourth Defendant became a shareholder of TIO and ARPS pursuant to the Enforcement Sale.

123. The Court would have accepted Ms Bingham KC's submission that there is a good arguable case that some of the claims against these Defendants satisfy the broad connecting test of not simply relating, but relating "*in any way*", to those companies:

> (1) The claim against the Sixth Defendant for breach of fiduciary duty falls within the gateway, because the subject matter relates to the "*duties of such director*".
>
> (2) More generally, the subject matter of all of the claims against the Fourth, Sixth and Seventh Defendants "*relates in any way to such company*". The damage sustained by reason of each of the claims is the misappropriation of the Bermuda Shares from AML.

124. The Court accepts that insofar as any one of the Fourth, Sixth, and Seventh Defendants is properly brought before the Court under gateway (ff), that Defendant can serve as an "*anchor defendant*" to those claims. The remaining Defendants can be brought in as "*proper parties*" to those claims.

Serious Issue to be tried

125. In light of the Court's ruling in relation to the issue of assignment, this issue does not arise. However, had the Court ruled otherwise in relation to the issue of assignment the Court would have found that there was a serious issue to be tried in relation to the pleaded causes of action.

126. In coming to this view, the Court has been guided by the proper approach as outlined by the UK Supreme Court in *Okpabi v Royal Dutch Shell plc* [2021] 1 WLR 1294, per Lord Hamblen JSC at [22]:

> *"Where, as will often be the case where permission for service out of the jurisdiction is sought, there are particulars of claim**, the analytical focus should***

be on the particulars of claim and whether, on the basis that the facts there alleged are true, the cause of action asserted has a real prospect of success. *Any particulars of claim or witness statement setting out details of the claim will be supported by a statement of truth. Save in cases where allegations of fact are demonstrably untrue or unsupportable, it is generally not appropriate for a defendant to dispute the facts alleged through evidence of its own. Doing so may well just show that there is a triable issue."* [emphasis added]

127. The principal claims which are pleaded in the SOC are first, breach of equitable duties on the part of the First Defendant as mortgagee under the Share Charges. There is no dispute between the parties that by 31 March 2015 the First Defendant had been appointed as chargee under the Share Charges (and as security agent under the PXF Agreement). The Share Charges effected a mortgage over the Bermuda Shares: by the Share Charges AML charged the entirety of its legal and beneficial right, title and interest in the Bermuda Shares, and AML retained the equity of redemption. In the circumstances, the First Defendant owed AML the equitable duties owed by a mortgagee to a mortgagor. These duties are set out at paragraph 54 of the SOC:

> *"54. In the circumstances, MP owed Bermudian law duties in equity to AML at ail material times after being appointed as security agent and chargee ("MP's Duties"), including in particular (amongst others):*
>
> *(1) A duty to exercise its power of sale in good faith;*
>
> *(2) A duty to exercise its power of sale for the purpose of protecting the security or recovering the debt secured by the Share Charges;*
>
> *(3) A duty to take reasonable precautions, due diligence or care to obtain the best price reasonably obtainable for the Bermuda Shares;*
>
> *(4) A duty to determine the value of the Bermuda Shares;*
>
> *(5) A duty to expose fairly and properly the Bermuda Shares to the market and advertise them in order to bring them to the attention of prospective buyers and obtain the true market price;*

(6) A duty to consider obtaining specialist and/or expert advice on the method of sale, the steps which ought to be taken to make the sale a success, and/or a valuation of the Bermuda Shares (including the amount of the reserve if the sale is to be conducted by auction) and, depending on the circumstances, to obtain such advice;

(7) A duty to choose a time of sale in good faith; and

(8) A duty to delay the sale process if required in order to comply with the duties set out above and/or to achieve the best price reasonably obtainable for the Bermuda Shares."

128. The SOC sets out at paragraphs 57 to 64 the particulars of how these duties were breached by the First Defendant. The Court is satisfied that the SOC sets out a serious issue to be tried by the Court.

129. The second claim against the First Defendant is for unlawful means conspiracy. The Plaintiff has pleaded the basis on which the existence of the conspiracy is to be inferred (SOC paragraphs 74-78) and the relevant unlawful means are set out at paragraph 79, including the First Defendant's breach of its duties as equitable mortgagee and Sixth Defendants breach of his fiduciary. Assuming the truth of those averments, the Court is satisfied that there is a serious issue to be tried as between the parties.

130. In relation to the claims against the Shandong Defendants, the first claim is for unlawful means conspiracy with the participation of the First Defendant (SOC paragraph 77ff) alternatively without it (SOC paragraphs 80-84). The case is that the participants conspired to appropriate the entirety of AML's interest in the Project at a significant undervalue.

131. The second claim advanced against the Shandong Defendants is that they dishonestly assisted the Sixth Defendant's breaches of fiduciary duties owed to AML (SOC paragraphs 86-89). It is pleaded that: (a) Mr Cui, the Sixth Defendant, was a director of AML throughout the

relevant period and up until 17 March 2015; (b) the duties Mr Cui owed to AML are set out at SOC paragraph 68; (c) the particulars of breach are at paragraphs 69-72.

132. The third claim against the Shandong Defendants is that they are vicariously liable for the tortious wrongs of their officers and directors, the Sixth and Seventh Defendants, and for the dishonest assistance of the Seventh Defendant (SOC paragraph 94).

133. The fourth claim alleges that the Shandong Defendants induced the First Defendant's breaches of its duties and are accordingly liable individually and jointly in tort (SOC paragraphs 90-93). The Court is satisfied, had the Court ruled otherwise in relation to the issue of the assignment, that there is a serious issue to be tried by the Court in relation to these causes of action.

Material Non-Disclosure

134. The Defendants contend that the Order giving leave to serve out to be set aside on the basis that the Plaintiff failed in its duty to pay full and frank disclosure at the *ex parte* hearing leading to the grant of the Order.

135. The Court agrees with Mr Fenwick KC and Mr Valentin KC that the issue of the non-assignment provisions in the PXF Agreement and the Share Charges should have been highlighted to the Court at the *ex parte* hearing. However, the Court accepts the submission made on behalf of the Plaintiff that any such failure was inadvertent and not deliberate. Accordingly, the Court would not have set aside the Order giving leave to serve out on the ground of material non-disclosure.

Conclusion

136. In light of the Court's determinations in relation to the issue of assignment (having regard to clause 27.1 of the PXF Agreement and clause 14.3 of each of the Share Charges), and the issue of jurisdiction (having regard to clause 41.1 of the PXF Agreement and clause 18 of the Share Charges), the Court directs that the present proceedings in this Court be stayed, and the Plaintiff be at liberty to pursue these claims against the Defendants in England, if so advised. Having regard to the Court's rulings in relation to the issue of assignment under the PXF Agreement and the Share Charges, and the issue of jurisdiction, having regard to clause 41.1 of the PXF Agreement and clause 18 of the Share Charges, the Court sets aside the Order dated 27 January 2022 giving leave, under RSC order 11 rule 1, to serve the Plaintiff's Specially Endorsed Writ of Summons out of the jurisdiction on the Defendants.

137. The Court will hear the parties in relation to the issue of costs, if required, and/or any other matter arising as a consequence of this Judgment.

Dated this 17th day of August 2023

NARINDER K HARGUN
CHIEF JUSTICE