



Neutral Citation Number: [2020] EWHC 1014 (Comm)

**Claim No. CL-2019-000250**

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

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

Date: 28 April 2020

Before:

**THE HONOURABLE MR JUSTICE BRYAN**

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Between:

**MAD ATELIER INTERNATIONAL B.V.**

**Claimant**

-and-

**MR AXEL MANES**

**Defendant**

**Jasbir Dhillon QC and Stewart Chirside**  
(instructed by **Mishcon de Reya LLP**) for the **Claimant**

**Graham Chapman QC** (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing dates: 10 and 11 March 2020

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**APPROVED JUDGMENT**

MR JUSTICE BRYAN:

**A Introduction.**

**A.1 The Applications**

1. The parties appear before the Court on the hearing of the application of the Defendant (“Mr Manès”). He applies to strike out, and/or for summary judgment in respect of, all of or part of the claims of the Claimant (“MAD International”) against him; alternatively, he applies for a case management stay (collectively the “Applications”).
2. The underlying dispute relates to the breakdown of a joint venture to develop a new brand and restaurant. In the English proceedings, MAD International alleges that Mr Manès breached a 2015 Joint Venture Agreement (the “JVA”). MAD International previously issued proceedings before the Paris Commercial Court to overturn a Share Transfer Contract in connection with this venture against two companies: the first company was owned wholly by Mr Manès, and the second company owned wholly by the first company.
3. In July 2018, the Paris Commercial Court gave judgment (the “Paris Judgment”) dismissing MAD International’s claim, which MAD International has appealed. The appeal is currently pending and a decision is expected in October 2020 (the “French Civil Proceedings”). In April 2019, MAD International issued English proceedings against Mr Manès for breach of the JVA, pursuant to an English jurisdiction clause (the “English Proceedings”).
4. Mr Manès seeks the following orders:
  - (1) An order striking out MAD International’s Claim Form and Particulars of Claim (dated 11 April 2019 and 10 April 2019 respectively) in whole or in part pursuant to CPR 3.4(2)(a) and/or (b), on the ground that they are an abuse of process because the facts and matters on which MAD International relies have already been heard before, and determined by, the Paris Commercial Court. Mr Manès contends that the abuse of process arises from the fact that the Paris Judgment gives rise to issue estoppels which preclude the pursuit of these proceedings (essentially, a res judicata

issue); alternatively, if there is no issue estoppel, the English Proceedings are an abuse of process in the wider sense. This is referred to as the “Abuse Application”.

(2) An order summarily dismissing the claims or some of the claims against Mr Manès pursuant to CPR 3.4(2)(a) and/or CPR 24.2 (the “Strike Out / Summary Judgment Application”):

(a) on the basis that MAD International has no real prospect of succeeding on those claims and there is no other compelling reason why the case should be disposed of at trial. This is on the basis that the Paris Commercial Court has already determined the facts and matters on which MAD International relies.

(b) Alternatively, if any of the claims are found not to be abusive, to strike out and/or summarily dismiss those claims.

(3) In the event that the claims are not struck out in their entirety and/or summary judgment is not given on the claims in their entirety:

(a) For a stay of these proceedings pending the final determination of the French Civil Proceedings (the “Case Management Stay Application”).

(b) Alternatively, an extension of the deadline for filing the Defence until 28 days following the hearing and determination of the Applications. I understand that this is not controversial between the parties.

5. I deal first with the background facts (A.2) and the law (B.1-B.6) before turning to address the Applications themselves.

## **A.2 The Background Facts**

6. Mr Manès was, in 2015, the executive chef at the “L’Atelier de Joël Robuchon” restaurant in Paris (the “Paris Restaurant”), which had previously been owned and controlled by the French chef, Joël Robuchon. In 2015, the Paris Restaurant was owned by MAD Atelier S.A.S. (“MAD Atelier”), which in turn was owned by

MA Développement S.A.S. (“MA Développement”). At all material times, Mr Manès was the owner and chairman of MA Développement.

7. Dream International Cooperatief U.A. (“Dream”) is ultimately owned and controlled by Dogus Holding A.S., which is the ultimate parent of a multinational group of companies with interests in the hotel and restaurant industries (the “Dogus Group”).

(1) The Joint Venture

8. In 2015, Mr Manès and the Dogus Group entered into a joint venture to develop an international franchise of restaurants under the “L’Atelier de Joël Robuchon” brand (the “Joint Venture”).

9. The Joint Venture was implemented in two stages. The first stage was as follows.

- (1) Mr Manès caused MAD International to be incorporated on 26 June 2015 to be the vehicle for the Joint Venture. On incorporation, MAD International was wholly owned by Ragnar Investments Limited (“Ragnar”), a Maltese company wholly owned by Mr Manès at the time.

- (2) Marc Padberg (“Mr Padberg”), a senior employee within the Dogus Group, was appointed as statutory director.

- (3) On 1 July 2015, MA Développement transferred its shares in MAD Atelier to MAD International for approximately €7.5m.

10. The second stage was as follows:

- (1) On 6 July 2015, Dream acquired 60% of the shares in MAD International from Ragnar for approximately €14.3m based on an enterprise value of approximately €27m.

- (2) On the same day, MAD International entered into the JVA with Mr Manès, Dream and Ragnar which set out the terms for, amongst other matters, the ownership and operation of the Paris Restaurant. The JVA is governed by English law, and provides for the courts of England to have

exclusive jurisdiction in relation to disputes arising out of or in connection with it.

11. The overall effect of the Joint Venture was to move MAD Atelier from the control of Mr Manès (through MA Développement), to the full ownership of MAD International, in which Dream held 60% of the shares.

12. There is a factual dispute as to what happened next:

(1) MAD International's case is that, during the first year, the Paris Restaurant performed well and there were no issues between the parties. The first time that any issues were raised was in an email dated 30 September 2016 from Mr Manès to Mr Akdag (a senior employee of the Dogus Group and a member of the Supervisory Committee appointed by Dream under the JVA).

(2) Mr Manès claims that the Joint Venture ran into difficulties and relations between Mr Manès and the Dogus Group deteriorated.

13. On 15 June 2016, Mr Manès wrote to MAD International, in his capacity as Chairman of MAD Atelier, giving notice of an annual general meeting of MAD Atelier (the "AGM") and enclosing various documents including MAD Atelier's annual accounts for the year ending 31 December 2015 ("2015 Annual Accounts"). In early July 2016, Mr Padberg received copies of a document purporting to be the minutes of this AGM signed by Mr Manès. Mr Padberg signed and returned them as requested on 7 July 2016.

(2) The 3 August 2016 Meeting

14. On 3 August 2016, there was a meeting in Paris (the "3 August Meeting") attended by Mr Padberg and Mr Manès.

15. Mr Padberg signed various documents (the "Share Transfer Documents") which had the effect of transferring MAD International's shares in MAD Atelier (the "Shares") to MA Développement for €3,096,698. It is not disputed that the following documents were signed:

- (1) A share transfer agreement between MAD International and MA Développement dated 3 August 2016, for the transfer of the Shares from MAD International to MA Développement for a consideration of €3,086,698;
- (2) A share transfer order dated 3 August 2016 transferring the Shares to MA Développement, and the corresponding CERFA form;
- (3) The minutes of the extraordinary general meeting on 3 August 2016 approving the transfer of the Shares to MA Développement; and
- (4) A valuation report valuing the Shares at €3,086,698 as at 30 June 2016.

16. There is a factual dispute as to how this meeting came about:

- (1) MAD International claims that, in a telephone call in mid-July 2016 between Mr Manès, Mr Padberg, Mr Beylik (Head of Audit at the Dogus Group) and Mr Akdag, Mr Manès informed Mr Padberg that, notwithstanding that he had already signed the AGM minutes, it was necessary under French law for him to be physically present in Paris to approve the 2015 Annual Accounts in the presence of MAD Atelier's statutory auditor.
- (2) Mr Manès claims that, as a result of the breakdown of the joint venture relationship, the parties had agreed that MA Développement would purchase the Shares and the 3 August Meeting was convened for the purpose of executing the necessary documents to give effect to this transfer. Mr Watts, in his second witness statement on behalf of Mr Manès, states that negotiations took place by telephone between Mr Manès and Mr Padberg in June 2015. The existence of such negotiations, and such alleged agreement, is very much in issue between the parties.

17. MAD International says that, at the end of the 3 August Meeting, Mr Padberg asked for copies of the documents he had signed but Mr Manès refused saying copies would be sent to him later. In fact, the documents were sent to him 4 months later (which is not contested by Mr Manès).

18. MAD International's case is that the share transfer represented a sale at a significant undervalue, on the basis that:

(1) MAD International had purchased the Shares from MA Développement for €7.5m only just over a year earlier on 1 July 2015.

(2) On 6 July 2015 Dream had paid €14.3m for a 60% shareholding in MAD International when MAD International's only valuable asset was the Shares.

(3) Nothing had occurred in the intervening period to justify any significant reduction in price.

19. On 29 September 2016, MAD International received a transfer of €4,963,572 from MA Développement. A few hours later Mr Manès sent an email to Mr Padberg stating that this payment had been made "according to the share transfer agreement" and included €3,086,698 "for the share price". Later the same day, Mr Manès sent a further email setting out a list of purported breaches of the JVA by MAD International.

20. On 5 October 2016, Rob Schmidt, management controller of MAD International, emailed Mr Manès confirming receipt of the funds on 29 September 2016 and asking for confirmation of how the sums had been calculated. Subsequently during October 2016, there were various emails between Mr Manès and executives within the Dogus Group, including an email dated 11 October 2016 in which Mr Akdag of the Dogus Group disputed the allegations of breach of the JVA and stated that the Dogus Group had no intention of discussing any potential sale of the Shares.

21. On 15 November 2016, the Dogus Group's solicitors, Clifford Chance, wrote to MAD Atelier and MA Développement asking for an explanation of the payment of €4,963,572 and stating that MAD International had not at any point consented to a sale of the Shares. On 24 November 2016, Lantourne & Associés replied on behalf of MA Développement and MAD Atelier refusing to provide the information requested. This was on the grounds that the Dogus Group was not a

party to the Share Transfer Documents or the JVA, so was not in a position to request copies of those documents.

22. On 1 December 2016, Mr Padberg wrote to Mr Manès stating that MAD International had not consented to any sale of the Shares and requesting copies of documents evidencing such consent. Mr Manès replied on 12 December 2016 enclosing copies of the share transfer agreement and share transfer order. On 20 December 2016, Mr Padberg wrote to Mr Manès stating that he had never intended to sign the Share Transfer Documents, on the grounds that the sale price of the Shares had never been negotiated or agreed; and that MAD International would never have agreed to sell the Shares for only €3,086,698 in all the circumstances.

### (3) The French Civil Proceedings

23. On 17 March 2017, MAD International issued the French Civil Proceedings against MA Développement and MAD Atelier in the Paris Commercial Court. The exact subject-matter of those proceedings is in dispute.

(1) In summary, MAD International alleged that Mr Padberg had not given valid consent for MAD International to enter into the Share Transfer Documents because he had been fraudulently induced to sign those documents on 3 August 2016.

(2) MAD International sought the following relief: a declaration that the share transfer on 3 August 2016 was void, an order for the return of the Shares, compensation for losses arising from the fraudulent transfer of the Shares, and an interim order for sequestration of the Shares and appointment of a provisional administrator over MAD Atelier's assets.

(3) It is disputed between the parties whether MAD Atelier or MA Développement made any counterclaims.

24. MAD International alleged that Mr Padberg had not given valid consent to the entry by MAD International into the Share Transfer documents, because pursuant to Article 1109 of the French Civil Code, his consent was "*given only in error,*



*extorted by violence, or obtained by fraud*". I understand that this required MAD International to prove the following: (1) "fraudulent manoeuvres" on the part of MA Développement; or, in the alternative, fraudulent non-disclosure; (2) an intent to deceive on the part of MA Développement; and (3) that in the absence of such fraudulent manoeuvres, MAD International would not have entered into the Share Transfer Documents.

25. MAD International's case in the French Civil Proceedings was that Mr Manès, as the representative of MA Développement and MAD Atelier, misled Mr Padberg as to two matters:

(1) MAD International alleged that Mr Manès misled Mr Padberg as to the true purpose of the 3 August Meeting, by (a) telling Mr Padberg that the AGM had had to be re-scheduled for 3 August 2016, and that at this meeting Mr Padberg would be asked to approve the 2015 Annual Accounts again which was necessary under French law; and (b) by two telephone calls taking place between Mr Manès and Mr Akdag and Mr Beylik and Mr Padberg, in which Mr Manès stated that the purpose of the 3 August Meeting was to approve the 2015 Accounts.

(2) MAD International alleged that Mr Manès misled Mr Padberg as to the nature of the documents he was asked to sign: (a) Mr Padberg believed that the documents he was being asked to sign were the 2015 Annual Accounts, and did not realise that they were the Share Transfer Documents, (b) Mr Padberg did not understand the documents because he did not speak French.

26. It is agreed by the French law experts that the Paris Commercial Court produced a judgment in three parts: (1) *commémoratif* (setting out the uncontested background facts underlying the dispute, the parties' claims and the grounds for those claims); (2) *motifs* (setting out the court's conclusions in relation to the contested facts and legal principles and the court's reasons for arriving at those conclusions); and (3) *dispositif* ("dispositive section") (setting out the court's decision in relation to the parties' claims).

27. The dispositive part of the judgment provides, amongst other matters:

“The court ruling [...] denies [MAD International] its request for the annulment of the Share Purchase Agreement, with regard to the sales of the shares of MAD Atelier of 3 August 2016 [...]

Denies the parties their other, broader or contrary requests [...] Dismisses the other, broader or contrary, requests of the parties”

28. According to Professor Lagarde (MAD International’s French law expert), the Paris Commercial Court reached the following conclusions in the *motifs* section (amongst others):

(1) The evidence provided by MAD International failed to discharge its burden of proof in establishing that Mr Manès committed fraud. In particular:

(a) The evidence provided by MAD International failed to discharge its burden of proof and was not sufficient for the Paris Commercial Court to find that Mr Manès had misled Mr Padberg about the true purpose of the 3 August Meeting; and

(b) The evidence provided by MAD International failed to discharge its burden of proof and was not sufficient for the Paris Commercial Court to find that Mr Padberg was unaware of the nature of the documents which he signed on 3 August 2016 because he did not speak French; and

(c) The evidence in relation to events after 3 August 2016 was not strictly speaking capable of proving the fraud alleged by MAD International, but it was more consistent with MA Développement’s and MAD Atelier’s case that an agreement had been reached on 3 August 2016.

29. Both of the parties have served expert reports in relation to French law which explain the meaning and effect of the Paris Judgment. Professor Lagarde for MAD International: “Lagarde-1” dated 8 October 2019, and “Lagarde-2”, a supplementary expert report served on 31 January 2020. Professor Boucobza for Mr Manès: “Boucobza-1” dated 19 December 2020.

30. On 15 May 2017, Mr Padberg filed a criminal complaint for fraud against Mr Manès in France. This complaint was dismissed for lack of evidence. On 2 January 2018, Mr Padberg filed a further criminal complaint against Mr Manès in France, to which MAD International was joined on 30 April 2018. The French investigating magistrate has informed the parties that her investigations in relation to this further criminal complaint are complete and to date Mr Manès has not been charged.
31. On 12 July 2018, the Paris Commercial Court handed down the Paris Judgment dismissing MAD International’s claim. MAD International is seeking to appeal the Paris Judgment and the appeal is pending, with a decision expected in October 2020.

(4) The English Proceedings

32. MAD International sent a Letter of Claim to Mr Manès dated 8 November 2018 and a response letter was sent on behalf of Mr Manès dated 23 January 2019 (the “Response Letter”).
33. On 11 April 2019, MAD International issued these proceedings against Mr Manès pursuant to the English law and exclusive jurisdiction clause in the JVA, with Particulars of Claim (“PoC”). On 1 May 2019, Mr Manès made a request for further information under CPR Part 18. On 23 May 2019, MAD International served its Part 18 responses (the “Part 18 Responses”). On 7 June 2019, Mr Manès issued the Applications.
34. MAD International’s pleadings set out several alternative allegations of breach of the JVA against Mr Manès claiming damages in the sum of the undervalue of the shares sold to MA Développement. Additionally, MAD International claims that Mr Manès acted in repudiatory breach of the JVA, causing it further loss in the form of a lost business development opportunity.
35. MAD International’s allegations of breach of the JVA include the following:

**“J. MAD International’s Claims**

37. In breach of clause 2.8 of the JVA, Mr Manès failed to use his reasonable endeavours to promote and develop the business of the JV Group to [its] best advantage by: [...]

37.2 Causing , directly or indirectly, Mad International to agree to sell the Shares to MA Développement for only €3,086,698 in the circumstances described at paragraph 37.1 above [where Mr Manès knew or ought reasonably to have known that it was not in MAD International's or the JV Group's best interests or advantage to sell the shares at that price, which represented a substantial undervalue] and without any or any meaningful prior negotiation regarding the price of the Shares or the terms of the sale [...]

37.4 Failing to give the Board and/or Supervisory Committee of MAD International any or any adequate opportunity to be involved in any negotiations in order to increase the proposed sale price of the Shares and/or to obtain their own independent valuation of the Shares prior to the meeting on 3 August 2016.

38. Further or alternatively, in breach of clause 5.1 and/or Schedule 3 of the JVA, Mr Manès failed to procure or take all reasonable steps to ensure that the approval of the Board was sought and obtained prior to the approval and/or implementation by MAD International of a Reserved Matter, namely the sale of the Shares to MA Développement.

39. Further or alternatively, in breach of clause 5.3 and/or Schedule 3 of the JVA, Mr Manès failed to share details of a proposed matter or action which constituted a Reserved Matter, namely the sale of the Shares to MA Développement, of which he became aware promptly with the Supervisory Committee.

40. Further or alternatively, in breach of the Implied Term [that Mr Manès and the other parties to the JVA would at all times act in good faith in relation to the Joint Venture and co-operate with each other in the best interests of MAD International and the JV Group], Mr Manès failed to act in good faith in relation to the JVA and/or to cooperate with Dream in the best interests of MAD International by:

40.1 Failing to inform Dream and/or the Board and/or the Supervisory Committee and/or Mr Padberg of the true purpose of the meeting on 3 August 2016, namely to agree and/or execute a proposed sale of the Shares to MA Développement;

40.2 Failing to inform Dream and/or the Board and/or the Supervisory Committee in advance of the meeting on 3 August 2016 that MA Développement intended to offer and/or had offered to purchase the shares for €3,086,698;

40.3 Failing to give Dream and/or the Board and/or the Supervisory Committee any or any adequate opportunity to be involved in any

negotiation regarding the proposed sale price of the Shares and/or to obtain their own independent valuation [...]

40.4 Causing or permitting MA Développement to offer to buy the Shares at an undervalue [...] without the knowledge or approval of Dream or the Board or the Supervisory Committee as set out in paragraph 37 above [...]

41. Further or alternatively, in breach of clause 9.1 of the JVA, Mr Manès failed [...] to produce a first draft of the Initial Business Plan [...]

42. Further or alternatively, in breach of clause 14.2 of the JVA, Mr Manès transferred his legal interest in his entire shareholding in Ragnar to Mr Alcan [...] without the prior knowledge or written consent of Dream”.

36. MAD International pleads that they suffered loss and damage as a result of the aforementioned breaches, to the extent of the undervalue of the shares as set out in paragraphs 44 to 45 of the PoC:

“44. MAD International is entitled to be put back in the position it would have been in if Mr Manès had complied with his obligations under the JVA. If Mr Manès had informed Dream and/or the Board and/or the Supervisory Committee and/or Mr Padberg of the true purpose of the meeting on 3 August 2016, Mr Padberg would not have attended the meeting and/or would not have signed the Share Transfer Documents; or alternatively, he would not have done so without first notifying Dream and/or the Supervisory Committee, and obtaining approval from the Board for his attendance. MAD International will rely, *inter alia*, on the contents of Mr Padberg’s letter dated 20 December 2016 in this regard.

45. Further or alternatively, if Mr Manès had complied with his obligations under the JVA, Dream and/or the Supervisory Committee and/or the Board would have been notified of the proposed transfer of the Shares; the Board would not have approved the sale of the Shares to MA Développement for €3,086,986 or at all, and Mr Padberg would have acted in accordance with the Board’s wishes [...] Alternatively, if the Board would have agreed to a sale of the Shares to MA Développement, [they] would have been able to obtain their own independent valuation of the Shares and ensured that any sale of the Shares was for their full market value.”

37. MAD International additionally contends at paragraph 47 of the PoC that the above breaches of the JVA caused the JVA to be contractually terminated. Alternatively, it contends that even if no contractual termination occurred, Mr Manès after 3 August 2016 failed to devote all his time and attention to the business in breach of clause 7.3 JVA, thereby repudiating the contract (which was accepted when MAD International issued the French Civil Proceedings). MAD

International therefore additionally claims its losses flowing from this termination/repudiation, in the sum of its lost opportunity to develop the JVA business.

38. MAD International acknowledges (by its Part 18 Response, witness statements served in relation to the Applications and in its oral submissions) that it seeks to rely on the following (alleged) factual matters in the English Proceedings:

(1) That Mr Manès misled Mr Padberg as to the true purpose of the 3 August Meeting, and that Mr Manès did so at some point during the course of a telephone conversation in mid-July 2016. This is relevant to MAD International's allegations of breach in Paragraphs 37.2 and 40.5: that Mr Manès caused, directly or indirectly, MAD International to sell the shares to MA Développement.

(2) That Mr Padberg did not read or understand the Share Transfer Documents. This is relevant to MAD International's plea as one of several alternative factual scenarios in which Mr Manès' breaches of the JVA caused its loss (in that the Share Transfer Agreement would not have been signed, but for Mr Manès' breaches). There was some confusion over whether MAD International allege this in the English Proceedings. However as addressed in due course below, I am satisfied that MAD International does so.

(3) That events occurring after 3 August 2016 are more consistent with Mr Padberg not realising that a share transfer had taken place, rather than Mr Padberg knowing the true nature of the documents that he had signed (Paragraphs 28-34 PoC), which is part of the factual background to the claim.

39. Mr Manès contends that the core allegations in relation to MAD International's claims as to breach of clauses 2.8, 5.1, 5.3 of the JVA, and the Implied Term remain the same in substance as those advanced and dismissed in the French Civil Proceedings. I will refer to these claims as the "Allegedly Overlapping Claims". MAD International accepts that there is some factual overlap, but contends that

the above allegations as to Mr Manès' misleading and Mr Padberg's knowledge do not constitute the "core" of its English case.

40. Mr Manès accepts that some of MAD International's claims in the English Proceedings do not overlap at all with the issues in the French Civil Proceedings. These consist of the claims that Mr Manès breached clauses 9.1 and/or 14.2 of the JVA. I will refer to these claims as the "Remaining Claims". Mr Manès contends that these claims do not have a real prospect of success, whereas MAD International contends that they do.

## **B. The Applicable Legal Principles**

### **B.1 Summary Judgment – CPR r.24.2**

41. In order for it to be appropriate to strike out MAD International's claim or part of its claim on a summary judgment basis, it must be shown that MAD International has no real prospect of succeeding on the claim, and there is no other compelling reason why the case should be disposed of at trial. The burden of proving this is upon Mr Manès, as the applicant.

42. The principles applicable to determining whether a party has a real prospect of success are well-established, and not in dispute. They were summarised in *JSC VTB Bank v Skurikhin* [2014] EWHC 271 (Comm) at [15]:

“(1) The Court must consider whether the defendant has a 'realistic' as opposed to a 'fanciful' prospect of success, see *Swain v Hillman* [2001] 2 All ER 91, 92. A claim is 'fanciful' if it is entirely without substance, see Lord Hope in *Three Rivers District Council v Bank of England* [2001] UKHL 16 at [95].

(2) A 'realistic' prospect of success is one that carries some degree of conviction and not one that is merely arguable, see *ED & F Man Liquid Products v. Patel* [2003] EWCA Civ 472.

(3) The court must avoid conducting a 'mini-trial' without disclosure and oral evidence: *Swain v Hillman* (above) at p.95. As Lord Hope observed in the *Three Rivers* case, the object of the rule is to deal with cases that are not fit for trial at all.

(4) This does not mean that the Court must take everything that a party says in his witness statement at face value and without analysis. In some cases, it may be clear that there is no real substance in factual assertions which are made,

particularly if they are contradicted by contemporaneous documents, see *ED & F Man Liquid Products v. Patel* (above) at [10]. Contemporary activity or lack of activity may similarly cast doubt on the substance of factual assertions.

(5) However, the Court should avoid being drawn into an attempt to resolve those conflicts of fact which are normally resolved by a trial process, see *Doncaster Pharmaceuticals Group Ltd v. Bolton Pharmaceutical Co 100 Ltd* [2006] EWCA Civ 661, Mummery LJ at [17].

(6) In reaching its conclusion, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond (No. 5)* [2001] EWCA Civ 550, [19].

(7) Allegations of fraud may pose particular problems in summary disposal, since they often depend, not simply on facts, but inferences which can properly be drawn from the relevant facts, the surrounding circumstances and a view of the state of mind of the participants, see for example *JD Wetherspoon v Harris* [2013] EWHC 1088, Sir Terence Etherton Ch at [14].

(8) Some disputes on the law or the construction of a document are suitable for summary determination, since (if it is bad in law) the sooner it is determined the better, see the *Easyair* case. On the other hand, the Court should heed the warning of Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* [2012] 1 WLR 1804 at [84] that it may not be appropriate to decide difficult questions of law on an interlocutory application where the facts may determine how those legal issues will present themselves for determination and/or the legal issues are in an area that requires detailed argument and mature consideration, see also at [116].

[...]

(10) So far as Part 24.2(b) is concerned, there will be a compelling reason for trial where 'there are circumstances that ought to be investigated', see *Miles v Bull* [1969] 1 QB 258 at 266A. In that case Megarry J was satisfied that there were reasons for scrutinising what appeared on its face to be a legitimate transaction; see also *Global Marine Drillships Limited v Landmark Solicitors LLP* [2011] EWHC 2685 (Ch), Henderson J at [55]-[56]."

43. In some cases, the disputed issues are such that their conclusion largely depends upon the expert evidence relied on by each side. In such cases, an application for summary judgment will usually be inappropriate unless it is made after the exchange of the experts' reports and even then, in most cases, until after the experts have discussed the case and produced a joint statement (*Hewes v West Hertfordshire Hospitals NHS Trust* [2018] EWHC 2715 (QB), a clinical negligence claim, at [45]).



## **B.2 Abuse of Process – CPR r.3.4(2)(b)**

44. The court has the power to strike out a statement of case pursuant to CPR r.3.4(2)(b):

“(2) The court may strike out a statement of case if it appears to the court—

(b) that the statement of case is an abuse of the court’s process or is otherwise likely to obstruct the just disposal of the proceedings;”

45. Further, the court must consider that striking out is a proportionate response. Striking out must be supportive of the overriding objective. If the abuse of process can be addressed by a less draconian course, it should be (WB, 3.4.3): it is a remedy of last resort.

## **B.3 Issue Estoppel**

46. The doctrine of *res judicata* has various strands, two of which are relevant for present purposes: (1) issue estoppel; and (2) abuse of process. As was stated in *Virgin Atlantic Airways v. Zodiac Seats UK* [2014] A.C. 160, at [17]:

“res judicata is a portmanteau term which is used to describe a number of different legal principles [...] Fourth, there is the principle that even where the cause of action is not the same in the later action as it was in the earlier one, some issue which is necessarily common to both was decided on the earlier occasion and is binding on the parties [...] "Issue estoppel" was the expression devised to describe this principle [...] adopted by Diplock LJ in *Thoday v Thoday* [1964] P 181, 197-198”

47. A foreign judgment can give rise to issue estoppel: *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2)* [1967] 1 A.C. 853, 918B, 927G, 967B (Lords Reid, Hodson and Wilberforce). The conditions which must be satisfied in such a case are: (1) the judgment relied on as creating the estoppel must be (a) by a court of competent jurisdiction; (b) final and conclusive; and (c) on the merits; (2) the parties (or their privies) must be the same in both sets of proceedings; (3) there must be a clear determination of the issue by the judgment – it must not be merely collateral or *obiter* comment; (4) the issue in the later action must be the same as the issue decided by the judgment in the earlier proceedings: see *The Sennar (No. 2)* [1985] 1 W.L.R. 490, 499 (H.L.).

(1) Final and Conclusive / On the Merits

48. A foreign ruling is “final and conclusive” if the party asserting the estoppel can establish that the ruling cannot be relitigated in the foreign country in any new action between the parties, or their privies. The fact that a judgment or decision can be appealed does not prevent it from being final.

49. There was a dispute between the parties as to the precise criteria that must be met for a ruling to be final and conclusive. In this regard:

(1) Mr Manès contends that only the foreign *judgment* must be final and conclusive, as a matter of foreign law: then, English law is used to determine whether the particular *issues* that the court decided ought to bind the privies.

(2) MAD International contends that the foreign legal system must regard *the particular issues* relied upon as forming the English legal estoppel as having preclusive effect. On MAD International’s case, that foreign legal system must therefore either have a doctrine of issue estoppel which covers the issues raised, or have a doctrine which has precisely the same underlying basis and operation (i.e. refusing to re-hear a factual issue on account of the preclusive effect of a previous judgment).

(3) This dispute arose because it appeared to be common ground (in oral submissions) that France did not have a doctrine of “issue estoppel”, as only the operative parts of judgments constituted “res judicata”.

50. I consider that MAD International correctly states the position, for the following reasons.

51. Firstly, dicta in *Carl Zeiss* (itself the genesis of issue estoppel’s application to foreign decisions) indicate that the foreign country must treat the *individual issues decided* in each judgment as precluding reconsideration:

(1) At p. 919, Lord Reid stated:

“When we come to issue estoppel I think that, by parity of reasoning, we should have to be satisfied that the issues in question cannot be relitigated in the foreign country. In other words, it would have to be proved in this case that the courts of the German Federal Republic would not allow the re-opening in any new case between the same parties of the issues decided by the Supreme Court in 1960, which are now said to found an estoppel here. There would seem to be no authority of any kind on this matter, but it seems to me to verge on absurdity that we should regard as conclusive something in a German judgment which the German courts themselves would not regard as conclusive. It is quite true that estoppel is a matter for the lex fori but the lex fori ought to be developed in a manner consistent with good sense.

The need to prove whether West German law would permit these issues to be re-opened there appears to have escaped the notice of the appellants' advisers and your Lordships are left in considerable difficulty. On the one hand, there is always a presumption that the foreign law on any particular question is the same as English law unless the contrary is proved. On the other hand, it would be remarkable if German law had reached precisely the same stage of development on issue estoppel as the law of England has, and there are some indications in the German judgments that it has not. I have had an opportunity of reading the views of my noble and learned friend, Lord Wilberforce, on this matter. I do not dissent from them.”

(emphasis added)

This indicates that the relevant comparison for the purposes of finality is the foreign law's view on preclusion regarding the issues decided by the German Democratic Republic's Supreme Court, not the judgment of the Supreme Court itself. In contrast, on Mr Manès' contention, an English court would give a finding of fact in a foreign judgment preclusive effect, even where that finding would have no such preclusive effect in the foreign legal system – this is the very “absurdity” that Lord Reid was referring to.

- (2) Lord Wilberforce agreed with Lord Reid (albeit that he disagreed on other issues as to the identity of parties):

“The textbooks are in agreement in stating that for a foreign judgment to be set up as a bar in this country it must be res judicata in the country in which it is given (see Dicey, Conflict of Laws, 7th ed., p. 1036; Cheshire Private International Law, 7th ed., p. 562). The chief authority cited for this is *Nouvion v. Freeman*. Generally, it would seem unacceptable to give to a foreign judgment a more conclusive force in this country than it has where it was given.

If the Stiftung represented by the Council of Gera were to attempt to commence another action in West Germany against the same defendants as were parties to the action they would, by the force of the previous judgment, be prevented from proceeding with it. Moreover, I think that it is for the defendant, who sets up the bar, to establish the conclusive character of the judgment.”

(emphasis added)

Here, Lord Wilberforce is making a similar point to Lord Reid: a foreign judgment should not be given more conclusive force in this country than in its country of origin.

(3) Lord Hodson stated as follows at p. 927C-E:

“It is for the defendants to show the estoppel and, to prove it, they must establish as a matter of German law that the judgment is final and conclusive. This they have failed to do by express evidence and, as my noble and learned friend, Lord Wilberforce, points out in his opinion, there are passages in the evidence which at least suggest the possibility of want of authority being relitigated in the German courts.”

Here, Lord Hodson commented specifically on the possibility of *want of authority* (i.e. the issue in respect of which the issue estoppel was being presented) being relitigated in the German courts, rather than the judgement as a whole being subject to re-litigation or reopening.

52. Counsel for Mr Manès contended that Lord Guest was of the view that the *judgment* relied upon in an estoppel must be res judicata in the country in which it was made, relying upon the following passages at 935C to 936A:

“The requirements of issue estoppel still remain (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final and (3) the proceedings in which the estoppel is raised or their privies. I have for the moment postponed the question whether issue estoppel, if valid in relation to an English judgment, applies to a foreign judgment. There is little doubt that the same question was incidentally decided in the West German action as arises in the present summons, namely, whether the Council of Gera have authority to raise the action in the name of the Carl-Zeiss-Stiftung.

I turn, therefore, at once to the question of finality. This is understood to mean "final and conclusive on the merits" of the cause (Dicey, Conflict of Laws, 7th ed., r. 196, p. 1052). The decision upon which the issue estoppel arises must itself be final in this sense. In other words, the cause of action must be extinguished by

the decision which is said to create the estoppel (see *Nouvion v. Freeman*, Lord Herschell: " It puts an end to and absolutely concludes that particular action." [...])

Another aspect of finality relates to the requirement that the decision relied upon as estoppel must itself be *res judicata* in the country in which it is made. This is made clear in *Nouvion v. Freeman* (See also Cheshire, *Private International Law*, 7th ed (1965) p. 562; Dicey' *Conflict of Laws* 7th ed. p.1036) It would, indeed, be illogical if the decision were to be *res judicata* in England, if it were not also *res judicata* in the foreign jurisdiction. I am not satisfied that the respondents have discharged the burden of proof upon them of establishing that the West German judgment is *res judicata* in West Germany. I would, accordingly, hold that the West German judgment is not final and conclusive and for these reasons does not create an estoppel.”

(emphasis added)

53. I consider that, read in context, Lord Guest was not intending to disagree with what was stated by Lord Wilberforce and Lord Reid. In this regard, Lord Guest understands finality to have two “aspects”. The first aspect is set out at 935C – that the cause of action is extinguished by the decision which is said to create the estoppel, putting an end to and absolutely concluding the action. This is more commonly known as the “on the merits” criterion. It is in relation to the *merits* criterion that Lord Guest makes reference to the cause of action being extinguished and the entire West German judgment. The second aspect is set out at 936A (“another aspect of finality [...]). This second aspect must mean something different to a judgment on the merits. Lord Guest sets out the principle animating the possibility of foreign judgment issue estoppel in a way that is very similar to Lord Reid: “It would, indeed, be illogical if the decision were to be *res judicata* in England, if it were not also *res judicata* in the foreign jurisdiction”.

54. Secondly, it was submitted to me in oral submissions by Graham Chapman QC, on behalf of Mr Manès, that Lord Diplock in *The Sennar No. 2* confirmed that English law on issue estoppel only requires the *judgment* to be final and binding as a matter of the foreign law, and does not require that law to have a doctrine of issue estoppel. He refers to the following passage in the judgment of Lord Diplock at pp 493-494:

“To make available an issue estoppel to a defendant to an action brought against him in an English court upon a cause of action to which the plaintiff

alleges a particular set of facts give rise, the defendant must be able to show: (1) that the same set of facts has previously been relied upon as constituting a cause of action in proceedings brought by that plaintiff against that defendant in a foreign court of competent Jurisdiction; and (2) that a final judgment has been given by that foreign court in those proceedings.

It is often said that the final judgment of the foreign court must be “on the merits.” The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has Jurisdiction to adjudicate upon an issue raised in the cause of action to which the particular set of facts give rise; and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate Jurisdiction although it may be subject to appeal to a court of higher Jurisdiction.”

55. It was submitted by Mr Chapman that this passage suggests that there does not need to be a mirroring of issue estoppel in the foreign jurisdiction: only that the determination of the foreign court on the *cause of action* must be one that satisfies the test. However, in this passage Lord Diplock is clearly referring to the “on the merits” aspect of the test, rather than finality *per se*. That this is so, is supported by the speech of Lord Brandon, in which he explicitly cited “all three of the requirements for the existence of such an estoppel laid down in the *Carl Zeiss* case” as being “fully satisfied” (*The Sennar No 2*, 500D). Nowhere in Lord Brandon’s speech is it suggested that the majority in *Carl Zeiss* were wrong in their exposition of the requirements for issue estoppel.

56. Thirdly, Mr Chapman submitted that issue estoppel is a matter for the *lex fori*, and is concerned with protecting the processes of the English court system - why, as a matter of principle, should a party holding a foreign judgment be worse off than a party holding an English judgment when seeking to enforce an issue estoppel?

57. I reject this submission. It is irrational to distinguish between finality in the judgment and finality in each issue for litigation. If it veers on absurd to recognise estoppel as arising from a foreign judgment if the foreign law would not regard such a judgment as being final, it must be equally absurd to estop an English court from hearing a particular issue where a foreign court would not consider that issue

to be binding. Further, not establishing a mirror-doctrine to issue estoppel in the foreign jurisdiction for finality before drawing from that foreign judgment would flout Lord Reid's notes of caution raised in *Carl Zeiss* (at 918C-D):

“In the first place, we are not familiar with modes of procedure in many foreign countries, and it may not be easy to be sure that a particular issue has been decided or that its decision was a basis of the foreign judgment and not merely collateral or obiter. Secondly, I have already alluded to the practical difficulties of a defendant in deciding whether, even in this country, he should incur the trouble and expense of deploying his full case in a trivial case: it might be most unjust to hold that a litigant here should be estopped from putting forward his case because it was impracticable for him to do so in an earlier case of a trivial character abroad, with the result that the decision in that case went against him.”

58. The court would be applying an English procedural rule (issue estoppel) to a foreign judgment. This also raises several practical issues. Such an approach would place preclusive reliance on parts of judgments which were never supposed to bear that weight in their home jurisdictions – there might be multiple judgments from the same foreign jurisdiction that determine an “issue” in different ways, because that country has no doctrine of issue estoppel. It may not be possible to determine whether a finding is the basis for the relevant foreign judgment or “collateral or obiter”, in isolation from the preclusive effect that the country does or does not give to each issue.

59. Fourthly, my conclusion is supported by the reasoning of Sales J (as he then was) in *Seven Arts Entertainment Ltd v. Content Media Corporation plc* [2013] EWHC 588 (Ch):

(1) In that case, Sales J refused an application for summary judgment in which a claimant sought to invoke issue estoppel to rely on a Canadian summary judgment on the ownership of copyright to certain films. He concluded that the defendant had a good arguable case that the judgment would not be treated as *res judicata* under Canadian law.

(2) At [43], Sales J held as follows:

“It is common ground that in order for an issue estoppel to arise in the courts in England by reference to a judgment of a court in a foreign jurisdiction (here, the Ontario Judgment), it is necessary to show not only that the requirements to establish an issue estoppel according to the law of the lex fori (England) are satisfied, but also that the issue in question would be treated as res judicata according to the law of that foreign jurisdiction: see *Carl Zeiss* [1967] 1 AC 853 , 919A-C (Lord Reid), 927C-D (Lord Hodson), 936A-B (Lord Guest), 949C-D (Lord Upjohn) and 969G-970A (Lord Wilberforce).” (emphasis added)

- (3) Of course, in that case there was no question as to whether a finding of fact *could* give rise to an issue estoppel as a matter of principle (as Canada clearly had an issue estoppel jurisdiction). However, importantly in my view, the court supported the use of expert evidence in determining how the principles of issue estoppel would be applied to the particular facts of the case by the foreign court. I consider this supports the conclusion that the English court should have regard to how a foreign legal system would treat the particular issue.

60. Fifthly, Lord Reid’s dictum in *Carl Zeiss* was applied by Stephen Furst QC (sitting as a Deputy Judge of the High Court) in *ZVI Construction Co LLP v. University of Notre Dame (USA)* [2016] Bus. L.R. 1311:

- (1) That case concerned whether a contractual clause, providing for a surveyor determining parties’ disputes, was validly invoked. The University of Notre Dame (“UND”) issued proceedings before a US District Court, and sought pre-judgment relief roughly akin to a freezing order. The District Court’s order (“the Memorandum and Order”) confirmed the surveyor’s determination and ordered an attachment. The Claimant, ZVI Construction Co LLP (“ZVP”) issued proceedings in England. UND contended, amongst other matters, that an issue estoppel arose in relation to the matters raised before the US Courts, which extended to the proper construction of the Dispute Resolution Procedure clause.
- (2) Stephen Furst QC decided that the District Court’s order was not “final”, for the following reasons:



“97. Following the decision in Carl-Zeiss (No. 2) the question is whether the courts in the United States would regard the confirmation order as final. This is a question which will be decided by the First Circuit Court of Appeals since ZVI has issued an appeal and the Court of Appeals has ordered ZVI to either move for voluntary dismissal of the appeal or show cause as to why the appeal should not be dismissed for lack of jurisdiction. It appears that the latter question turns on whether the District Court's decision is indeed final.

98. It would seem to me that whilst Mr Larson is probably right, namely that there is no real possibility of the District Court re-considering the confirmation order or the arguments leading to the making of that order, United States law would not regard the Memorandum and Order, let alone the confirmatory part of the Order, as final. Thus, in this respect, there is a real difference in United States law, between an order and a judgement and that, coupled with the fact that the Judge refused to enter judgement, strongly suggests that the District Court remains seized of all issues. The fact that the District Court is highly unlikely to alter its existing order, is not to the point. Issue estoppel is not just a question of substance; it is also a question of form. It is a serious and important doctrine which, potentially, deprives a party of an important right: to advance a point to support its position in any subsequent proceedings. The burden rests on the party seeking to set up the issue estoppel, UND, and for the reasons set out above, I find that that burden has not been discharged by UND. Accordingly, no issue estoppel arises”

61. Further the judge in the *ZVI* case (rightly in my view) confirms that the precise question which must be answered for the “final and binding” criterion is whether the foreign court would, as a matter of its own law and formally, treat the determination in the earlier judgment as precluding further consideration of the issues. The fact that the foreign court would as a matter of practice refuse to hear the second case on case management grounds does not suffice.

## (2) Privity of Interest

62. The parties to the original proceedings and the current proceedings must be the same for issue estoppel to operate as a defence, *unless* one of the parties to the previous proceedings has “privity of interest” with a party to the current proceedings. Most of the applicable principles are uncontroversial, although one area of dispute remains between the parties.

63. In terms of what is uncontroversial:

(1) Sir Robert Megarry VC formulated the test for privity in *Gleeson* at p. 515:

“Second, it seems to me that the substratum of the doctrine is that a man ought not to be allowed to litigate a second time what has already been decided between himself and the other party to the litigation. [...] I do not say that one must be the alter ego of the other: but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. [...]”

(2) In this regard, and as identified by the Court of Appeal in *Resolution Chemicals Ltd. v. Lundbeck* [2013] EWCA Civ 924 at [32], consideration is given to (a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party; and (c) against this background, whether it is just that the new party should be bound by the outcome of the previous litigation.

(3) The question of whether there is privity of interest also “*cannot be conditional upon the character of the decision*” i.e., it must take effect whether the relevant party wins or loses: *Gleeson v. J Wippell & Co* [1977] 1 W.L.R. 510, at 516A-B.

(4) Privity of interest is a “somewhat narrow” doctrine: *Gleeson* at p.515A.

64. There was a dispute between the parties as to the circumstances in which a controlling shareholder (in this case, Mr Manès) could be the privy to proceedings against his wholly-owned companies. In this regard Mr Manès relied on *Johnson v Gore-Wood* [2002] 2 A.C. 1, for the proposition that such a connection could either by itself establish privity, or was very likely to establish privity. However I do not consider that the mere fact that the relevant parties are subsidiary and controlling shareholder suffices to establish privity, and in addition privity is only established where the controlling shareholder *could have been joined* to the original proceedings.

65. The facts of *Johnson v Gore-Wood* were as follows. Mr Johnson wished to bring an action in negligence against solicitors, in connection with an improperly-exercised option to purchase land by the W Company (a subsidiary which was almost wholly owned by Mr Johnson). The W Company had previously sued the

solicitors in connection with the same negligence, and had settled the suit. One of the issues that the court had to determine was whether Mr Johnson's claim was an abuse of process.

66. Lord Bingham endorsed the test in *Gleeson*, and concluded that it was satisfied at p.32D:

“The first [argument] was that the rule in *Henderson v Henderson* did not apply to Mr Johnson since he had not been the plaintiff in the first action against GW. In my judgment this argument was rightly rejected. A formulaic approach to application of the rule would be mistaken. WWH was the corporate embodiment of Mr Johnson. He made decisions and gave instructions on its behalf. If he had wished to include his personal claim in the company's action, or to issue proceedings in tandem with those of the company, he had power to do so.”

(emphasis added)

67. I do not consider that the mere fact that someone is a 100% shareholder of a company makes them the company's privy. The conclusion that Johnson and W were privies was a concession, and was *obiter*. Its correctness was doubted by Lord Millett, and later by Lord Sumption in *Virgin Atlantic*. Lord Millett at p. 39 highlighted some of the problems with finding “privity” between a shareholder and his company:

“But Mr Johnson and the company are different legal persons, each with its own creditors, and that is a fact of critical significance. Mr Johnson's personal claims raised difficult issues not present in the company's action [...] It was not in the company's interest for his personal claims to be joined with its own much simpler claim, or for its case to be delayed until Mr Johnson's own case was ready for trial”

(emphasis added)

68. In *Virgin Atlantic*, *supra*, Lord Sumption noted at [25] that:

“[25] [...] The focus in *Johnson v Gore-Wood* was inevitably on abuse of process because the parties to the two actions were different, and neither issue estoppel nor cause of action estoppel could therefore run (Mr Johnson's counsel conceded that he and his company were privies, but Lord Millett seems to have doubted the correctness of the concession at p 60D–E, and so do I.”

(emphasis added)

69. Further, in subsequent cases controller-subsidary relationships have been found not to be, by themselves, sufficient to establish privity:

(1) *Standard Chartered (Hong Kong) Ltd v. Independent Power Tanzania Ltd* [2015] 2 Lloyd's Rep. 183, [2016] 2 Lloyds Rep. 25 C.A. ("SCB") concerned proceedings against SCBHK (a subsidiary of SCB) in England, pursuant to non-exclusive jurisdiction clauses. SCB had previously been sued by the same claimants in New York. A question as to whether issue estoppel in England could arise from those proceedings fell to be determined.

(a) At first instance Flaux J endorsed the test in *Resolution Chemicals*, and then found at [145] that:

"[145]: the corporate relationship and financial interest alleged cannot on any view be sufficient to establish privity of interest. The contrary conclusion would effectively drive a coach and horses through the doctrine of separate corporate personality and lead to piercing of the corporate veil, something which is not to be encouraged given the limited scope ascribed to the doctrine of piercing the corporate veil by the Supreme Court in *Prest v Petrodel Resources Ltd* [2013] 2 AC 415; [2013] 3 WLR 1."

(b) This conclusion was endorsed by the Court of Appeal. Longmore LJ stated at [30]:

"It may be that SCBHK and SCBMB had a general commercial interest in the outcome of the New York proceedings but that, on its own, is insufficient to make them privies to SCB."

(2) The fact that the party to the original litigation and the party to the present litigation are part of a group of companies under common control does not make them privies: *Resolution Chemicals*, at [50].

70. In *Johnson*, and in *SCB*, the court placed considerable importance on the fact that the company in the subsequent proceedings *could have been joined* to the original proceedings. Even if a shareholder's control could establish a relevant common interest in proceedings, it does not lead to the conclusion that the parties to the proceeding were in reality the same, unless the shareholder or company could have been joined to the earlier proceedings. In this regard:

(1) In *SCB*, Flaux J noted that SCBHK could not be “*in reality a party to the New York Proceedings*” because there was no jurisdiction to join them there as a defendant (at [145]). That conclusion was endorsed by the Court of Appeal: SCBHK were “*not available to be sued in New York*” (at [31]).

(2) Even in *Johnson v Gore-Wood*, the reason that Mr Johnson’s control made him W’s privy was that if he had wished to issue his own proceedings in tandem with the company’s, he could have done so. This was repeated by Lord Millett (albeit he doubted the correctness of the concession): “*He was in a position to decide when to pursue the two claims and whether to pursue them together or separately, and that is enough for present purposes*” (60D).

71. Finally, Lord Millett in *Johnson v Gore-Wood* called for the courts to exercise caution where the claimant in the second action is not the same as the first but is his privy (again, in the context of abuse of process):

“Particular care, however, needs to be taken where the plaintiff in the second action is not the same as the plaintiff in the first, but his privy. Such situations are many and various, and it would be unwise to lay down any general rule. The principle is, no doubt, capable in theory of applying to a privy; but it is likely in practice to be easier for him to rebut the charge that his proceedings are oppressive or constitute an abuse of process than it would be for the original plaintiff to do so.”

### (3) Clear Determination of the Issues by the Foreign Court

72. There must be a clear decision on the issue in question by the foreign court: *Good Challenger Navegante SA v. Mineralexportimport SA* [2004] 1 Lloyd’s Rep. 67, at [54] (C.A.). The English court must be cautious before deciding that the foreign court made a clear decision on the relevant issue because English courts are unfamiliar with modes of procedure in many foreign countries, and it may be difficult to see whether a particular issue has been decided or that a decision was a basis of a foreign judgment and not merely collateral or obiter: *Carl Zeiss (No. 2)*, *supra*, at 918; *Good Challenger*, *supra*, at [54].

(4) Same Issues Determined in both courts

73. The issue decided in the foreign court must be the same as the issue raised in the English proceedings – see Privy Council decision of *Rajah of Pittapur v Sri Rajah Garu* (1884) LR 12 Ind App 16 (and see *ZVI Construction v Notre Dame* at [89]).

**B.4 Abuse of Process: Collateral Attack / *Henderson v Henderson***

74. The English court has an inherent power to strike out any claim which constitutes an abuse of process. There are two aspects to the doctrine of abuse of process: collateral attack abuse and *Henderson v. Henderson* abuse (though ultimately the same broad, merits-based analysis is adopted in deciding whether there is an abuse of process).

(1) Collateral Attack

75. An abuse of process may arise where an allegation or claim is advanced in proceedings for the purpose of mounting a collateral attack upon a determination made in earlier proceedings by a court of competent jurisdiction, in the absence of issue estoppel. This was recognised in *Hunter v. Chief Constable of the West Midlands* [1982] A.C. 529. In this regard:

(1) In cases where there is no res judicata or issue estoppel, the power to strike out a claim for abuse of process is founded on two interests: the private interest of a party not to be vexed twice for the same reason and the public interest of the state in not having issues repeatedly litigated; *Michael Wilson & Partners Ltd. v. Sinclair* [2017] EWCA Civ 3, at [48(1)].

(2) If the parties to the later civil proceedings were not parties or privies to the earlier proceedings, there can still be an abuse of process. There may be such an abuse if the court must challenge the factual findings in the earlier action and: (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be re-litigated; or (ii) to permit such re-litigation would bring the administration of justice into disrepute: *Secretary of State for Trade and Industry v. Birstow* [2004] 1 Ch. 1 at [38]; *Michael Wilson* [48(4)]

- (3) It will be a rare case where the litigation of an issue which has previously been decided, but not between the same parties or their privies, will amount to an abuse of process (*In re Norris*, [26]; *Michael Wilson v Sinclair*, [48(5)]; cf. *Laing v Taylor Walton*, [25]). This indicates that there must be a “special reason” (or “positive reason”) contributing to the conclusion that there has been an abuse of process (*Bragg v Oceanus Mutual Underwriting Association (Bermuda) Ltd.* [1982] 2 Lloyd’s Rep. 132).
- (4) Particular caution is required where the party to the second action is not only *different* to the party in the first action, but the party in the first action was *involuntarily involved* in that action as a defendant, not as a claimant: *SCB*, Flaux J at [147].
- (5) There is no general rule preventing a party inviting the court to arrive at a decision inconsistent with that arrived at in an earlier case: *Michael Wilson, supra*, at [48(2)] and [94].
- (6) The burden is on the party alleging the existence of abuse of process to establish such abuse and the threshold which engages the court’s duty to act to prevent abuse of its process is a high one: *Michael Wilson*. at [87], [100]. There must be some “*special reason*” why the facts of the case make the determination in the current proceedings of the issue which has been determined in earlier proceedings an abuse of process, and the contention that the issue had been the subject of lengthy evidence and argument cannot amount to such “*special reason*”: *Bragg v. Oceanus*, at pp 138 – 139.

76. In order to determine whether there has been an abuse of process, the court must engage in a close, merits-based analysis of the facts, taking into account the relevant private and public interests: *Michael Wilson, supra*, at [48]. A summary of the factors taken into account by the court can be found in *Gazprom Export LLC v. DDI Holdings Ltd* [2020] EWHC 303 (Comm) at [37(vi)]:

“A number of considerations may be taken into account in order to determine whether there is such manifest unfairness or the allowance of the case to be run would bring the administration of justice into disrepute. Such

considerations are not closed and include: a) Whether the person wishing to advance the allegation had a reasonable opportunity to deal with the allegation in the earlier proceedings (*Hunter*; *Bragg v Oceanus*; *In re Norris*, para. 26; *St Vincent v Robinson*; *Ablyazov*, para. 48, 51). This consideration will arise especially if the person wishing to advance the allegation again was a party to the earlier proceedings (*Laing v Taylor Walton*; *Arts & Antiques v Richards*; *St Vincent v Robinson*). b) Whether the party advancing the allegation in the later proceedings was also the party advancing the allegation in the earlier proceedings (*Laing v Taylor v Walton*; *Arts & Antiques v Richards*; cf. *Conlon v Simms*, para. 146). ... e) Whether the earlier proceedings were before the most appropriate tribunal or between the most appropriate parties for the determination of the issue (*Bragg v Oceanus*). f) Whether the purpose of the party wishing to have the matter determined afresh was not the genuine purpose of obtaining the relief sought in the second action, but some collateral purpose (*Hunter*; *Bragg v Oceanus*). ... h) Whether the party now making the relevant allegation provided assistance, or funding, to one of the parties to the earlier proceedings.”

77. The fact that proceedings in England were commenced pursuant to a jurisdiction clause (particularly an exclusive one) means that it should be very rare for it to be an abuse of process to bring such proceedings, absent issue estoppel: *SCB Flux J* at [164].

## (2) *Henderson v Henderson*

78. An abuse of process may also arise where, in all the circumstances, a party is misusing or abusing the process of the court by *bringing a claim or raising a defence in later proceedings which should have been raised in earlier proceedings*: *Johnson v. Gore-Wood* at p 31.

79. This form of abuse of process, like the collateral attack doctrine, involves a broad, merits-based judgment which takes into account the public interest (that there should be finality in litigation, that a party should not be vexed twice in the same matter, and economy and efficiency in the conduct of litigation), the private interests of the parties, and also takes account of all the facts of the case.

80. It is not generally a bar to the operation of the abuse of process principle if the defendants in the later proceedings are different: *Aldi Stores Ltd. v. WSP Group* [2008] 1 WLR 748 at [6], [10] (C.A.). However, the fact that the defendants to the original action and to the present action are different makes it much less likely that



there will be an abuse of process than if the parties (or their privies) are the same in both sets of proceedings: *Aldi Stores Ltd.*, *supra*, at [6], [10].

(3) Abuse of Process in the absence of issue estoppel

81. There was a dispute between the parties as to whether abuse of process could exist, by reason of a collateral attack on a foreign judgment, in the absence of issue estoppel arising out of that foreign judgment. MAD International submitted that it could not, whilst Mr Manès submitted that abuse of process was a broad enough concept so that it could arise on the facts of a particular case even where there was no issue estoppel. As appears below, it is clear from the judgment of the Court of Appeal in *SCB* that there can be abuse even where there is no issue estoppel, but such cases will, in general, be rare, and any decision that a litigant is not entitled to have its dispute in the courts of the country permitted by the terms of the contract will be rarer still. In this regard:

(1) In *SCB*, at [164] Flaux J rejected the existence of a general principle that there could be an abuse of process by collateral attack on a foreign court's decision where there was no issue estoppel from the decision of that foreign court. He did so as he considered that such a principle would extend the conclusory effect of the decisions of foreign courts beyond the scope of issue estoppel in an impermissible manner:

“163. That brings me on to the third reason why there is no abuse of process. There is an obvious question mark as to whether, in the absence of an issue estoppel, it can be said that a collateral attack on the decision of a foreign court (even if the current proceedings were such a collateral attack, which they are not) is an abuse of process of this court or can be said to bring the administration of justice in this jurisdiction into disrepute.

164 [...]. Any such general principle would be far reaching and would extend the conclusory effect of decisions of foreign courts beyond the scope of the principles of res judicata estoppel in an impermissible manner. In my judgment, unless an issue estoppel can be established (which it cannot in the present case) the pursuit of proceedings in England, even if they involve some form of collateral attack on the decision of a foreign court, cannot amount to an abuse of the process of this court.”

(emphasis added)

- (2) The Court of Appeal in *SCB* endorsed the views expressed by Flaux J at [29] and [40], and gave further guidance about abuse of process at [41]:-

*“Abuse of process*

29. Flaux J decided that there was no abuse of process in SCBHK instituting proceedings because there was no estoppel arising from the New York proceedings begun by VIP and because, in the absence of an estoppel binding on SCBHK preventing it from suing in England, there was no applicable abuse in the English proceedings. There was no estoppel because SCB in New York was not the same party as SCBHK or SCBMB who were litigating in London nor were SCBHK or SCBMB to be treated as the privies of SCB for the purpose of any issue estoppel; in any event the issue litigated in New York (which country was the appropriate forum for VIP’s claim in tort against SCB?) was not the same issue as that arising in England (which country was the appropriate forum for SCBHK’s and SCBMB’s contractual claim against VIP under the Shareholder Support Deed and Charge of Shares?). The judge was in my opinion correct on both matters and was also right to hold that, in the absence of an estoppel, there was no abuse.

30. The requirements for issue estoppel are set out in *The Sennar (No. 2)* [1985] 1 WLR 490, 499

[...]

**(c) Collateral attack on judgment of Marrero J?**

40. If there is no issue estoppel, I cannot see that there is any question of an impermissible attack on the judgment of Marrero J [the relevant foreign proceedings]. The issue which he was considering is just not the same as the issue of where SCBHK's claim can be brought.

41. For much the same reasons, the submission that the judge failed to stand back from the detailed facts and ask himself the general question whether SCBHK's claim was abusive cannot be accepted. Of course, there can be abuse in circumstances in which there is no issue estoppel but such cases will, in general, be rare and any decision that a litigant is not entitled to have its dispute in the courts of the country permitted by the terms of the contract will be rarer still. The further one stands back from the detailed facts of this case, the less abusive it looks.”

(emphasis added)

**B.5 Case Management Stays**

82. The Court has a discretion to order a stay to await the outcome of foreign

proceedings in the exercise of its case management powers pursuant to s.49(3) of the Senior Courts Act 1981 and/or CPR r.3.1(2)(f). The principles relevant to the exercise of this discretion can be summarised as follows:

- (1) The court has a discretion to stay an action pending the resolution of a claim pending in another forum, but a stay should only be granted in “*rare and compelling circumstances*”: *Reichhold Norway ASA v. Goldman Sachs* [2000] 1 W.L.R. 173 at 186 (C.A.).
- (2) “*Exceptionally strong grounds*” are required to justify a stay on case management grounds where the parties have conferred exclusive jurisdiction on the English court: *Mazur Media Ltd v. Mazur Media GmbH* [2004] 1 W.L.R. 2966 at [69]-[70] (Lawrence Collins J); *Jefferies International Ltd v Landsbanki Islands HF* [2009] EWHC 894 (Comm) at [26]. The danger of inconsistent judgments is not a legitimate consideration amounting to exceptional circumstances and does not justify a stay in a case where the court has jurisdiction under the Brussels I Regulation Recast (“BIR”), especially exclusive jurisdiction: *Mazur, supra*, at [71].
- (3) The court’s power to stay proceedings cannot be used in a manner which is inconsistent with the Judgments Regulation: *Mazur, supra*, at [69]; *Jefferies, supra*, at [26]. A defendant should not be permitted “under the guise of case management, [to] achieve by the back door a result against which the ECJ has locked the front door”: *Skype Technologies SA v. Joltid Ltd* [2009] EWHC 2783 (Ch) at [22] (Lewison J).
- (4) A stay will not, at least in general, be appropriate if the other proceedings will not bind the parties to the action stayed or finally resolve all the issues in the case to be stayed, or the parties are not the same: *Klöckner Holdings GmbH v. Klöckner Beteiligungs GmbH* [2005] EWHC 1453 (Comm) at [21] (Gloster J).

## **B.6 The BIR**

83. Articles 29 and 30 of the BIR provide as follows:

“*Article 29*

1. Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.

[...]

#### *Article 30*

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.

2. Where the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.”

84. Pursuant to Article 30, in order for two sets of proceedings to be “related”, they must be capable of being heard and determined together in the same court in the same country *Euroeco Fuels (Poland) Limited v. Szczecin and Swinoujscie Seaports* [2019] EWCA Civ 1932 at [46]-[53].

85. Mr Manès has not made any application to have the English Proceedings stayed on the basis that either Article 29 or Article 30 of the Judgments Regulation is applicable.

#### **C. Application of the Legal Principles to the Facts**

86. In this section of the judgment, I address matters relating to the claims that Mr Manès contends constitute an “overlap” between the English and French Civil Proceedings (which I will refer to as the “Allegedly Overlapping Claims”). More specifically, I address:

(1) In section C.1: whether an issue estoppel arises from the matters found in the Paris Judgment in relation to these proceedings.

(2) In section C.2: whether MAD International's claims in these proceedings constitute an abuse of process.

(3) In section C.3: whether either the Allegedly Overlapping Claims or the Remaining Claims should be determined summarily on the basis that they do not disclose a real prospect of success on their merits.

(4) In section C.4: whether MAD International's claims should be struck out.

(5) In section C.5: whether, in the absence of any strike out, MAD International's claims should be stayed on case management grounds.

### **C.1 Issue Estoppel in relation to Allegedly Overlapping Claims**

87. Mr Manès contends, in essence, that the Paris Judgment gives rise to an issue estoppel in relation to the following three issues:

(1) That Mr Manès (acting for and on behalf of MA Développement and MAD Atelier, and himself), misled Mr Padberg as to the true purpose of the 3 August Meeting and the true nature of the documents that Mr Padberg was asked to sign.

(2) That Mr Padberg did not understand the documents that he was asked to sign at the 3 August Meeting.

(3) That the events following the 3 August Meeting assist in proving the existence of the fraud.

88. For the reasons I have identified below, I do not consider that the French Civil Proceedings result in an issue estoppel in respect of any of the aforementioned issues, because they do not meet any of the conditions set out in the *Sennar No.2*. Specifically:

(1) The decision of the Paris Commercial Court on the above points is not final or conclusive;

(2) The parties to both proceedings are not privies;

(3) The issues set out above by Mr Manès were not issues concluded by the court, but comments on the state of the evidence; and

(4) The issues in the English Proceedings are significantly broader than the issues in the French Civil Proceedings.

Each of these conclusions, in of itself, means that no issue estoppel arises from the Paris Judgment. I address each of these matters below.

(1) Finality of the Paris Commercial Court Judgment

89. It is clear that the reasoning of the Paris Commercial Court is not “final and conclusive” for the purposes of issue estoppel. First, I understand it to be common ground that there is no equivalent doctrine to issue estoppel as a matter of French law. Secondly, therefore, under French law, where a fact is found by the Paris Commercial Court and it does not appear in the *dispositif*, the re-litigation of that fact is not prevented by the preclusive effect of that judgment. Thirdly, the existence of French courts’ practice in exercising the discretion to stay proceedings (as advanced in the evidence of Professor Boucobza) does not render the decision final and conclusive. Fourthly, I do not consider that the French courts *would* always exercise a discretion to stay proceedings and fifthly, I do not consider that the English court lacks jurisdiction to hear any issues regarding the Share Transfer Contract (a view expressed by Professor Boucobza).

90. The relevant articles of the French Civil Code and the Code of Civil Procedure are as follows:

“Article 1355 (formerly Article 1351) of the French Civil Code:

“The authority of *res judicata* applies only with respect to the what was the object of a judgment. It is necessary that the thing claimed must be the same; that the claim be based on the same cause; that the claim be between the same parties and brought by them and against them acting in the same qualities.”

Article 480 Code of Civil Procedure:

“The judgment which decides in its operative part the whole or part of the main issue, or one which rules upon the procedural plea, a plea seeking a plea of non-admissibility or any other interlocutory application, will, from the time

of its pronouncement, become *res judicata* with regard to the dispute which it determines”

91. First, I understand it to be common ground between the experts on French law that there is no doctrine of “issue estoppel” in France, and that there is no mirror-image doctrine in which a finding of fact in issue on the critical path by one judge will have preclusive effect on future judges’ ability to rehear the issue, where that fact is not contained in the *dispositif* of the judgment.

(1) The evidence of Professor Lagarde in Lagarde-1 is that *res judicata* attaches only to the operative part of the decision ([43]), and that there can be no “implied operative part of the judgment” or *res judicata* “implicitly decided” ([45]). References to the court’s findings in the body of the judgment are only allowed to enlighten the scope of the operative part of the judgment – they are not relevant if the operative part of the judgment is clear ([47]). The operative part of the Paris Judgment makes no mention of the court’s findings in relation to any of the issues, and is perfectly clear ([53]). Therefore, if MAD International were to bring a new civil claim in France against the parties to the French Civil Proceedings claiming a different remedy or based on a different cause of action, MAD International would not be prevented from re-litigating any of the issues in the new proceedings. Further, Professor Lagarde’s evidence is that there is no principle of “issue estoppel” in the sense that the party must bring all its claims for remedies on the same factual/legal basis in the same proceedings.

(2) In Boucobza-1, Professor Boucobza does not seek to contend that parts of the judgment which are in the conclusory section are in fact “negative *res judicata*” (i.e. the above principle), though he does mention that they are a “necessary basis” or a “logical precondition” for the operative part of the judgment. In his second report Professor Lagarde rejects this as irrelevant (at [23]).

(3) In the event, Mr Chapman accepted, during the course of his oral submissions, that issue estoppel does not exist, as a doctrine, in France.

(4) Insofar as there was any disagreement between the experts on the scope of *res judicata* in French law (which in any event was not maintained on behalf of Mr Manès in oral legal submissions), I prefer the evidence of Professor Lagarde that no doctrine equivalent to issue estoppel exists. Professor Boucobza in his first report made submissions on the *Cesareo* case, and on what he referred to as “positive *res judicata*” (at [78]). However, Professor Lagarde (in Lagarde-2) strongly, and in my view rightly on the evidence before me, considered the existence of positive *res judicata* as a “largely theoretical concept only” which does not reflect the state of French law as it currently stands ([26]-[30] Lagarde-2).

92. Secondly, I consider that for foreign findings on a particular issue to be “final and conclusive” for the purposes of issue estoppel in English law, that foreign legal system must view further consideration of the issues identified as being *precluded* by virtue of the decision in the foreign judgment. In French law, the particular findings of fact relied upon by Mr Manès are found in the *motifs* section of the judgment, which does not give rise to *res judicata* as a matter of French law.

93. I was also presented with evidence by MAD International that the relevant issues are not final or binding as a matter of French law because French law does not recognise *res judicata* as arising between different parties. Professor Lagarde’s evidence at [55]-[58] of his first report is that Mr Manès would not be regarded under French law as being in privity with MAD Développement and MAD Atelier for the purposes of the French *res judicata* principle. This is supported by an extract from a global study of the case-law of the Court of Cassation. This does not appear to be disputed by Professor Boucobza (see, for example, at [74], [93] and [94]): he agreed that “*the established principle of the identity of the parties adopted by French case-law may be applied strictly in this case, particularly since it is he who claims the benefit of res judicata*”. This is another, independent reason why the French judgment is not “final and binding” as a matter of French law.

94. Thirdly, I consider that even if a mirror-image doctrine to issue estoppel in the foreign jurisdiction is *not* required by English law, the relevant French legal



provisions on declining jurisdiction are insufficient, even on Professor Boucobza's characterisation, to meet the criteria required for issue estoppel. In any event, I do not consider that Mr Boucobza's views accurately reflect the position as a matter of French law.

95. The applicable provision of the Civil Procedure Code ("CPC") is Article 101 which provides:

"Article 101

If there is such a connection between cases brought before two separate courts that it is in the interests of good justice to have them heard and judged together, one of the courts may be asked to decline jurisdiction and to transfer knowledge of the case to the other court as it stands."

(emphasis added)

96. Professor Boucobza was of the opinion that, in practice, a French court would never re-hear the factual allegations under a different remedy because it would always exercise its right to decline jurisdiction and transfer the case to the original court, because there would be a strong connection with the first case, pursuant to Article 101 of the CPC. Professor Lagarde accepted that the court had power to decline jurisdiction, but he rejected the suggestion that the French court would always decline jurisdiction or that that would be the "*only option*" - in particular where the two disputes did not have the same remedy.

97. I do not consider that the application of Article 101 CPC gives rise to an issue estoppel. This is for the following reasons:

(1) The discretion to decline jurisdiction (as explained by Professor Boucobza) is based on factual connection between the two proceedings: it is not based upon the preclusive effect of a particular judgment.

(2) Article 101 only confers a discretion on the court: it does not automatically prevent a court from reconsidering the issue. For the reasons set out above in the *ZVI Construction* case, even where there is no real possibility of the foreign court reconsidering the factual matters determined or the arguments in the order, those factual matters may still not be regarded as

having been “finally decided” for the purposes of issue estoppel. Issue estoppel is as much a question of form as it is of substance, being an important doctrine which potentially deprives a party of an important right. At its highest, Professor Boucobza’s view is that as a matter of practice, French courts would always use their discretion under Article 100-102 CPC to stay proceedings on any claims based on the same factual allegations but with different remedies on connectedness grounds, awaiting the determination of the first court on those facts (i.e. the Court of Appeal). However, the very fact that this is a *discretion* means that the court does not consider itself *bound* by the previous factual findings – it can stay its present determination of the factual findings in order to achieve certain aims in the proper administration of justice, but it can also go ahead.

98. Fourthly, and in any event, based on the evidence before me I do not consider that even in fact or as a matter of practice, the court second seised in France would *always* stay proceedings in the way described by Professor Boucobza. I prefer the view expressed by Professor Lagarde in Lagarde-2 in relation to Article 101 CPC, namely that declining jurisdiction under this Article is *always merely an option* for the courts: they have a broad discretion as to whether to stay a case, and this discretion is rarely interfered with by superior courts (see [38] of Lagarde-2).

99. In this regard, and to the extent that it is necessary to prefer the opinion of one expert on French law over the other, I consider that Professor Lagarde has the more relevant experience in pronouncing on matters of French evidence and procedure which are in point in relation to the issues under consideration. He specialises in civil procedure and evidence, he is a partner in a law firm, and he has been admitted to the Paris Bar. In contrast, Professor Boucobza is not a member of the French Bar or a practitioner, nor does he profess to have particular expertise in French procedural law: his specialisation is a different one, namely international commercial litigation and arbitration. In such circumstances I consider that the views expressed by Professor Lagarde should be given greater weight having regard to his specialisation and practical experience, and that where their views differ (as in relation to this aspect of French law), his evidence is to be

preferred. Further, again, the relevant parts of Lagarde-2 are supported by relevant French law decisions, and domestic legal works.

100. Further, I consider that the reasoning of Professor Boucobza's report on connectedness is flawed. Professor Boucobza concludes at [111] of his report that "the only option in France that will be available to the second court would be to stay the proceedings pending the outcome of the first set of proceedings because res judicata would prevent the second court from hearing the arguments on deceit and fraud that have already been heard by the first court". This conclusion clearly relies on "res judicata" applying to these proceedings under French law, so is inconsistent with his earlier admissions that res judicata does not apply in a different-party situation. This inconsistency arises again in [110]: "there is identity of cause in the factual sense between the claims, and it is only artificially that a difference of purpose (remedy sought) would be established by MAD International linking its claims to another contract, namely, the JVA. The principle of negative res judicata would prohibit this". Further, Professor Boucobza states at [110]: "in any event the court second seised cannot rule on these questions without the parties to the first proceedings being sued before it": he does not cite any French doctrinal works or authority in support of this proposition.

101. Fifthly, Professor Boucobza suggests that another issue facing the "court second seised" is that it would lack jurisdiction to hear the relevant factual disputes in determining whether there was a breach of the JVA. Specifically, he posits that the English court "does not have jurisdiction to hear questions relating to the Share Transfer Contract submitted to the Paris Commercial Court [...] this Share Transfer Contract [...] does not include any clause conferring jurisdiction or applicable law". This expression of opinion is beyond his expertise as a French law expert. For this reason, Professor Lagarde did not comment on it in his supplemental report ([34]). Professor Boucobza's conclusion is also wrong. By virtue of the jurisdiction agreement in Clause 38 of the JVA, the English court may deal with disputes which arise out of or in connection with the JVA's "subject-matter". This subject-matter includes the operation of the Paris Restaurant (defined as "the business" in Clause 1.1 of the JVA). The Share Transfer Contract (at least arguably) concerns the operation of the Paris

Restaurant, and in any event matters concerning the Share Transfer Contract are within the wide breadth of the jurisdiction clause in the JVA.

102. Finally, I would also add that a stay on the grounds that the court second seised has no jurisdiction is quite clearly not the same thing as a judgment having a preclusive effect: no issue estoppel can arise from this.

103. For the reasons identified above (both individually and cumulatively) I am satisfied that the decision of the Paris Commercial Court is not final or conclusive.

(2) Privity of Parties

104. Mr Manès relies upon four matters in support of his contention that he is a privy to MAD Atelier and MA Développement: that he was the controlling shareholder of the companies involved in the French Civil Proceedings; that the dishonesty alleged in those proceedings was his dishonesty and fraud; that he was facing the same allegations in French criminal proceedings; and that he gave written witness evidence and made representations at the French Civil Proceedings.

105. I am satisfied that Mr Manès was not privy to the action against MA Développement and MAD Atelier in France. This is an independent reason for rejecting the contention that an issue estoppel arises in this case. I set out my reasons below.

106. Firstly, the fact that Mr Manès is 100% shareholder of MA Développement, which in turn owns MAD Atelier, does not give him a sufficient interest in the French Civil Proceedings against those companies for the purposes of *Gleeson*. It gives him a mere financial and commercial interest in the outcome of the French Civil Proceedings, which is not sufficient (or particularly persuasive, in the absence of other factors) in establishing privity for the reasons I have set out above at [62] to [71] above.

107. Secondly, and importantly, Mr Manès could not have been joined to the French Civil Proceedings. Those proceedings were concerned with the reversal of the Share Transfer Agreement, to which he was not a party. This is an important

factor in relation to privity, where the main contention relied on is control over a party to the original proceedings: the fact that in *Johnson v Gore-Wood*, Mr Johnson *could* have been joined to the earlier proceedings through his connection with W appeared to be the main reason why Lord Bingham considered Mr Johnson's control over that company to be important (32D). The company and Mr Johnson both had similar tortious causes of action against the defendant solicitors. In *SCB*, both Flaux J (at [146]) and Longmore LJ (at [31]) placed considerable emphasis on the fact that there was "no jurisdiction" to join SCBHK as a defendant to the New York proceedings. Further, even if Mr Manès *could* have been joined to the French Civil Proceedings, the fact is that he was not so joined by the Claimants (*SCB* at [31]). The Paris Commercial Court noted that there was no tort claim brought by MAD International against Mr Manès (p.18 of the Paris Judgment).

108. Thirdly, MA Développement and MAD Atelier's involvement before the Paris Commercial Court was involuntary (as defendants). Therefore, the note of caution raised by Lord Millett in *Johnson v Gore-Wood* with regards to privity applies to an even greater extent here. In *SCB*, Flaux J drew attention to this at [147] "*In my judgment, that need for caution is all the greater where the claimant in the second action, here SCBHK, is not only a different party to SCB but SCB was involuntarily involved in the first action in New York as a defendant, not as a claimant.*"

109. Fourthly, Mr Manès contended that his *involvement* in the French Civil Proceedings, and the allegations made against him, was sufficient to give him a relevant interest in those proceedings, and make him in reality party to those proceedings. That contention does not bear examination and I reject it for the following reasons:

- (1) Mr Manès' involvement in the French Civil Proceedings is not surprising: it is his purportedly fraudulent conduct which was in issue, so he had all the relevant knowledge to instruct French counsel and/or to give relevant witness statements. A similar factor was rejected in *SCB* by the Court of Appeal at [32] for the same reason.

- (2) There was some dispute over whether Mr Manès made oral submissions in the French Civil Proceedings. The Paris Commercial Court mentioned a certain fact in its motifs as “stated by Mr Axel MANÈS during the oral hearing”. Mr Manès’ counsel relied on this during the hearing to show that Mr Manès appeared before the Paris Court and/or gave written witness evidence. I understand that Mr Manès did not give oral evidence or make any oral submissions to the Paris Commercial Court: he also did not provide a written witness statement. The above reference in the motifs is to the fact that at the hearing on the merits, the Paris Commercial Court asked a question to which Mr Manès responded personally. I do not consider this to be of any relevance. As already noted, the giving of evidence, the making submissions, or the giving of instructions to the relevant legal representatives at the French Civil Proceedings would not have made Mr Manès the privy of MA Développement or MAD Atelier.
- (3) As to the fraud allegations made against Mr Manès: the fact that those allegations were made against him does not give him some sort of heightened interest in the proceedings that he would not have had if the allegations made had been merely of breach of contract or negligence. It is not uncommon for fraud to be alleged against witnesses who are not party to the proceedings (e.g. fraud alleged against the director of a company).
- (4) Finally, I do not consider that the fact that separate criminal proceedings are under way in France against Mr Manès makes Mr Manès a privy. It is true that there is a criminal complaint against Mr Manès concurrently with the civil proceedings, and that MAD International were joined to those proceedings. However, the criminal and civil claims are not substantively linked, and there is no evidence before me that a determination in the French criminal proceedings will have an effect on the appeal process in the French Civil Proceedings.

(3) Matters relied upon were not the subject of a clear decision on the relevant factual issues

110. On a consideration of the expert evidence before me as applied to the judgment of the Paris Commercial Court, I do not consider that the Paris Commercial Court made any conclusive findings of fact as to whether Mr Manès misled Mr Padberg as to the purpose of the 3 August Meeting, or to the effect that Mr Padberg failed to understand the meaning of the documents he was signing. Therefore, there are no clear decisions on the relevant factual issues: only collateral comments. This is an independent reason to find that there was no issue estoppel.

111. It is MAD International's case that the Paris Commercial Court only reached certain conclusions in the "motifs" section of its judgment on whether MAD International had established to the requisite standard that Mr Manès committed a fraud on Mr Padberg. Professor Lagarde's evidence is that the French Court's conclusion only amounts to MAD International having failed to prove its case - it does not mean that the French Court accepted the French defendants' factual case that MAD International had freely consented to the transfer of its shares. He explains that this stems from the fact that (at Lagarde-1, [23]), *"in French law there is no concept of making findings of fact on the balance of probabilities and when faced with two contrary assertions, the judge cannot simply accept which one he considers to be the most likely one [...] he must express certainty on the findings of fact which form the basis of his decision"*. This is referred to as a "system of quasi-certainty". The burden of proof is essentially the "risk of evidence" - who fails to obtain their remedy if there is uncertainty at the end of proceedings, or doubt about the contested facts (quoting Professor Lardeux).

112. Professor Boucobza suggests that the reasoning followed in the Paris Judgment leads to the conclusion that there were no fraudulent manoeuvres prior to the signing of the Share Transfer Contract. In law, the burden was on the claimant (MAD International) to prove the elements of fraud or deceit that it alleged. The court did not have to rule on anything other than the question of whether the fraud/deceit was well-grounded or not established. This means that "legally" the fraud or deceit is not recognised – there was no need for the Paris

Court to state expressly in a positive way that there was no fraud or deceit ([33] Boucobza-1 at [33]).

113. I am satisfied that Professor Lagarde's evidence accurately states the position in French law. This is for four main reasons:

114. First, Professor Lagarde's views are well-supported by French legal materials: Professor Lagarde's view of the "system of quasi-certainty" is supported by references to the work of a French professor (Professor Lardeux), and two cases of the Court of Cassation (at [23] and [24]). In Lagarde-2, he also refers to the supportive views of Professor Goubeaux and Roland and Boyer. The relevant extracts are provided in the report in English translation. There is little engagement by Professor Boucobza with these sources other than to question the premises of Professor Lagarde's argument as a matter of logic.

115. Secondly, when expressing a contrary view, Professor Boucobza cites little by way of authority in support of his view. First, he cites a Court of Cassation case for the proposition that "*since a judge cannot refuse to rule on the basis of the inadequacy of the evidence provided to him by the parties without committing a denial of justice*", he concludes that "*the judge must instead dismiss the case of the party who bears the burden of proof, after having possibly ordered the appropriate investigative measures or having invited the parties to produce useful evidence.*" By "case", Professor Boucobza appears to mean the entirety of the factual allegations proposed by the party with the burden of proof. However, a finding that the burden of proof was not met is no more than that – it justifies a finding that the burden of proof was not met. It does not lead to the conclusion as to what the particular facts were. A judge may decline to make factual conclusions because they lack sufficient evidence to be certain.

116. The second case cited by Professor Boucobza supports the proposition that the Court of Cassation has consistently ruled out the making of a new application on the same claim based solely on new evidence, which he claims tends to undermine Professor Lagarde's views, which "suggest that a claim dismissed for insufficient evidence could later return to the judge with new evidence since their opponent's hypothesis was not established" ([47] Boucobza-1). I do not consider that this is a



fair characterisation of Professor Lagarde’s views. In any event it is perfectly possible for a legal system to decide, for the sake of legal certainty, that the same remedy cannot be applied for multiple times, even where the first dismissal of that remedy was based on a failure to come up to proof, and there is no concrete finding in favour of the party opposing the remedy.

117. Further, I do not consider that Professor Boucobza’s reliance on the maxim “*idem est non esse aut non probari*” (the right claimed does not exist, because not being able to prove that right amounts to not having that right) is apt or in point. I prefer the evidence of Professor Lagarde at [10] that a legal matter (the nullity of the share transfer) cannot be upheld if the factual issue on which the claim is based (the alleged fraud) is insufficiently proved. This does not mean that when a particular fact is not proved, the court must conclude that the fact does not exist and the opposite fact has been established.

118. Thirdly, there is a difference between the experts in relation to the relevance of the fact that the Paris Commercial Court refused to grant MAD Atelier’s claim. In his first report Professor Lagarde considers that his view of what the French court determined is supported by the fact that “*the Paris Commercial Court expressly refused to grant MAD Atelier’s claim*” to the effect that the 3 August 2016 agreement was valid ([31] and [34]). This is based on the court’s recital at pages 8-9:

“MAD Atelier SAS requested the court in its latest iteration of its claims to:

On the merits of the claims

- FINDING that the sale of the shares in MAD Atelier SAS on 3 August 2016 took place in full observation of provisions of the Articles of Association of MAD Atelier SAS
- FINDING that MAD Atelier International BV has given its consent to the sale of the shares in MAD Atelier SAS on 3 August 2016.

Therefore,

- DENY all claims, objectives and assumptions of MAD Atelier International BV [...]

119. In the operative part of the judgment the French Court merely dismissed MAD International's claim on the nullity of the transfer of the shares and its claim for compensation; it did not grant MAD Atelier's "claim" for a declaration or "finding" that MAD International had validly given its consent. Further, the French Court stated that it "denies the parties their other, broader or contrary requests" (emphasis added) which were not referred to in the operative part of the judgment.

120. I am not convinced that this point takes MAD International's case much further. Professor Boucobza's view (Boucobza-1 at [50] ff) is that it is not possible to draw any inference from this denial, because MAD Atelier did not make a substantive counterclaim, and because such a counterclaim would serve no practical purpose: the Share Transfer Agreement was valid and binding until it was overturned under French law. Professor Lagarde accepts that the French court may have thought MAD Atelier's request, in the form of a declaration, was unnecessary because the transfer of the shares was *prima facie* valid.

121. Fourthly, and without prejudice to the above conclusion that the Paris Judgment only found that MAD International had not met the standard of proof in its case on fraud, some of the conclusions reached by the French court were not on the critical path of any relevant conclusions. In this regard:

(1) The court makes some comments on events transpiring after 3 August 2016, but it also clearly states that those facts are "by their very nature unfit to prove the alleged fraud", and can only "enlighten the Court on the circumstances of the dispute". The comments that follow are clearly not an essential part of the court's reasoning.

(2) I do not consider that the French court's decision to exclude the evidence of Mr Akdag, Mr Beylik and Ms. Ipenburg-Westerman leads to the conclusion they are totally unreliable. The Paris Commercial Court excluded the witnesses because they were "closely linked in a professional or personal capacity to the Claimant; whereas they thus do not offer sufficient guarantee of independence and objectivity that can be taken into

account”. It did not hear the evidence at all, and it did not make any specific conclusions about their credibility beyond their status as “closely linked” to the Claimant. An English court would not exclude *factual* witness evidence simply on the basis of a lack of independence as a matter of status: this does not go to a matter which would be considered by the English courts in a trial of the English action.

122. Finally, I note that MAD International relies in its skeleton argument on the case of *Berkeley Administration Inc. McClelland* [1995] I.L.Pr. 201, as being a case in which Hobhouse LJ also reached the *obiter* conclusion that findings in the *motifs* section of a Paris commercial court judgment were no more than collateral comments. In my view, this case does not assist in the determination of this issue. In this regard:

- (1) *McClelland* concerned an issue estoppel arising from French civil proceedings as to whether parallel English proceedings constituted an abuse of process.
- (2) MAD International submit that Hobhouse LJ concluded that the *motifs* section was merely collateral at [85]-[86], and that this was merely an observation by him on an issue not for determination. Mr Manès submits that Hobhouse LJ was in fact in the minority on this, and that Dillon LJ and Stuart-Smith LJ came to the opposite conclusion (that the *motifs* section of such a judgment were part of the “ratio” and were not collateral comments). I was referred, in particular, to the following paragraphs in the judgment: Dillon LJ at [32]-[33] and [40] and the concurring judgment of Stuart-Smith LJ at [42]-[43], [46] and [51]-[53].

(a) At p 212, Dillon LJ stated:

“32. the French court would never take on itself to decide that the commencement of proceedings in the English court or the making an application in the English court was an abuse of process of the English court.

33. But to consider whether the French Civil Proceedings were an abuse of process, the French court necessarily had to consider the

underlying question. The underlying question on whether the claim that Maccorp had been trading unfairly by misusing, for its own ends, confidential information as to the Paris properties was a genuine claim, or a spurious claim.

[...]

[40] It follows that I would allow this appeal and would hold that the respondents are precluded by issue estoppel [...] from maintaining to the full the case that has been put forward in the statement of contentions”

(b) At pp 216-217, Stuart-Smith LJ turned to the judgment of the French court, and sets out an extract that it appears came from the *motifs* section, and concluded from this that the French court decided that *both the proceedings in England and France* were an attempt to stifle the unlawful competition in France, based on malice and a lack of bona fide belief.

(c) At p 225, Hobhouse LJ stated:

“[85] But, to adopt the approach of my Lord Dillon LJ, to the judgment of Wright J [a judgment in the English proceedings]. I consider that those statements by the French Court were observations upon the state of the evidence not the determination of issues. It is trite to say that issue estoppel only arises from the determination of an issue by a court, not from observations made about evidence or other collateral matters.

86 [...] I prefer the view that [...] the observations in the Paris court about what happened in London were merely observations which were relevant but not the determination of any issue which was actually before the Paris Court”

(emphasis added)

(3) It does not appear from the judgment that the Court of Appeal considered (or were asked to consider) whether findings in the *motifs* section of the judgment could ever constitute anything more than collateral comments *as a matter of French law*. None of the judges refer to any expert evidence on French law. Indeed, all three judges adopted what might be regarded as a distinctly English approach to analysing the French court’s judgment, examining whether particular factual findings were “necessary” to the

determination in the *dispositif*, rather than looking at the content of the *dispositif* itself. Most clearly, at [85], Hobhouse LJ applied the same approach to the French judgment as did Dillon LJ “to the judgment of Wright J”.

(4) In any event, I do not consider that this decision takes the issues before me any further. Ultimately foreign law is a question of fact, and is to be determined in accordance with the expert evidence before the court.

#### (4) Same Issues

123. There is some overlap between the factual allegations in the French Civil Proceedings and the allegations contained within the Particulars of Claim before this Court. This aspect is dealt with in greater detail in the context of abuse of process in Section C.2 below. For the reasons there identified I am satisfied that the issues in these proceedings are not the same issues as in the French Civil Proceedings and, indeed, are significantly broader.

#### Conclusion on Issue Estoppel

124. In relation to the issues in respect of which Mr Manès contends that the Paris Judgment gives rise to an issue estoppel I am satisfied that the French Civil Proceedings does not give rise to any issue estoppel because, for the reasons that I have given: (1) The decision of the Paris Commercial Court on such issues is not final or conclusive; (2) The parties to both proceedings are not privies; (3) The issues identified by Mr Manès were not issues concluded by the court, but rather comments on the state of the evidence, and (4) The issues in the English Proceedings are significantly broader than the issues in the French Civil Proceedings. Each of these is, in and of itself, fatal to the contention that an issue estoppel arises from the Paris Judgment, and I find that no issue estoppel arises.

## **C.2 Abuse of Process in relation to Allegedly Overlapping Claims**

### **(1) Parties' Contentions**

125. Mr Manès' primary case was that I should strike out the claim for abuse of process on the basis that MAD International is issue-estopped from bringing the majority of its claims. I have already rejected that contention in Section C.1 above. Mr Manès submitted, in the alternative, that even if MAD International is not issue-estopped, nevertheless the Court can and should find that the proceedings are abusive in what are said to be the following cumulative circumstances:

- (1) The Claimant brought multiple proceedings in two jurisdictions in respect of the same subject-matter: namely, claims which rely on the same core factual allegations, which both require the same factual enquiry into the events leading to, and of, 3 August 2016.
- (2) The claims in France have been dismissed and MAD International was not there deprived of an opportunity to advance its case.
- (3) If MAD International's French appeal proceedings succeed, the majority of the claims in England fall away, and there would at least be a significant impact on damages in England if the Share Transfer Agreement were unwound.
- (4) Mr Manès also submitted that the procedural conduct of MAD International in these proceedings was abusive.

126. Mr Manès' counsel did not make separate submissions on collateral attack and *Henderson v Henderson* abuse of process – he pointed out that abuse of process is a broad merits-based enquiry as to all of the circumstances, and this applies to each form of abuse of process. He also did not contend that all the allegations contained in MAD International's statement of case were an abuse of process. He acknowledged that the particulars relating to clause 9.1 and clause 14.2 were not abusive as they contained allegations which were not traversed in the French Civil

Proceedings. However, he submitted that the allegations in those paragraphs had no real prospect of success and as such they should be struck out.

127. For its part, MAD International submits that its statement of case is not abusive for the following reasons:

(1) There can be no collateral attack on the Paris Judgment, because there was no issue estoppel from that foreign judgment in relation to the claims advanced in its Particulars of Claim.

(2) The issues contained in the Particulars of Claim are much broader than the issues before or determined by the Paris Commercial Court.

(3) Most of the claims for breach of contract do not fall away if the appeal in the French Civil Proceedings succeeds.

(4) Mr Manès is not privy to the French Civil Proceedings, which is a strong factor militating against any finding of abuse of process.

(5) There is no general rule against apparently inconsistent judgments on the facts as amounting to an abuse of process (*Michael Wilson* at [42]).

(6) The exclusive jurisdiction agreement in favour of England means that proceedings in this country were clearly contemplated by the contracting parties (and as such are not abusive).

(7) As to *Henderson v Henderson* type abuse, MAD International could not have brought these allegations in the French Civil Proceedings due to the exclusive jurisdiction clause in the JVA, and the absence of identity of interest is a powerful factor against a finding of abuse of process.

### Discussion

128. In the sections that follow I have noted where a point is of particular relevance to collateral attack or *Henderson v Henderson* type abuse; where a point is relevant to both, I have referred to “abuse of process” generally.

(1) The French Civil Proceedings Do Not Give Rise to Issue Estoppel

129. I have already concluded that the French Civil Proceedings do not give rise to any issue estoppel. This is a powerful factor against a finding of abuse of process:

(1) If the English proceedings involve some form of collateral attack on the decision of a foreign court, but there is no issue estoppel from that foreign court's judgment, this will generally not amount to an abuse of process: see *SCB Flaux J* at [164], and the Court of Appeal at [40].

(2) Even if there can be an abuse of process in the absence of an issue estoppel on the facts of a particular case, this will be rare as recognised by Longmore LJ in *SCB* at [41]: “*of course there can be abuse in circumstances in which there is no issue estoppel, but such cases will, in general, be rare and any decision that a litigant is not entitled to have its dispute in the courts of the country permitted by the terms of the contract will be rarer still*”. For the reasons set out below I do not consider that Mr Manès has established that these proceedings are to be regarded as an abuse.

(2) Issues in English Proceedings Broader than French Civil Proceedings

130. As addressed below, the issues that arise for determination by the English court in these proceedings are markedly wider than the issues which were before the Paris Commercial Court. As a preliminary point, however, it is important to bear in mind my earlier conclusion above that the Paris Judgment did *not* actually make any binding conclusions on factual issues (which are all located in the motifs section, not in the dispositif section): they only made collateral comments. This is, in of itself, a strong reason why the English proceedings do not amount to an abuse – indeed it is artificial to talk of issues which were not determined as being “re-litigated”. However, even if there were determinations on those issues, for the reasons set out below there are only two issues in common between the French and English Proceedings: and those issues are not appropriately characterised as the “core allegations”. I will identify the parties’ respective contentions, followed by my conclusions on the matter.



131. Mr Manès contends that the core allegations remain the same in substance as those advanced and dismissed in the French Civil Proceedings, for two reasons. Firstly, MAD International’s claim is purportedly premised on an allegation that Mr Padberg was misled by Mr Manès as to the purpose of the 3 August Meeting. Secondly, MAD International’s case on causation is purportedly premised on the fact that Mr Padberg did not understand the documents he was signing. MAD International accepts that these allegations are relevant to some of its particulars of breach. However, it contends that those allegations are not the “core” of the English Proceedings not least because there are several alleged breaches which are independent of any such matters.

132. I am satisfied that the factual allegations covered in the English proceedings are significantly broader than in the French Civil Proceedings.

133. First, there are a number of independent claims which do not require MAD International to establish that Mr Manès allegedly misled Mr Padberg as to the purpose of the 3 August Meeting, or that Mr Padberg did not understand the documents. In this regard:

(1) The misleading and misunderstanding allegations help establish breach in relation to two of MAD International’s breach allegations:

(a) Breach of clause 2.8 JVA (failing to use reasonable endeavours to promote and develop the business of the JV Group, at [37] PoC). These allegations are relevant to how Mr Padberg “caused” MAD International to agree to sell the shares without any meaningful prior negotiations ([37.2]).

(b) Possible breach of the obligation to act in good faith at [40] PoC. This is a “mixed” breach, in that some of the sub-paragraphs are affected by the allegations ([40.1], [40.5] and tangentially [40.6]) but the others are not.

(2) Mr Manès’ alleged breaches of clauses 5.1 and 5.3 JVA have nothing to do with Mr Manès misleading Mr Padberg as to the purpose of the 3 August

Meeting. They relate to a **failure to inform** persons other than Mr Padberg of the (proposed/envisaged) sale: namely, the Board and the Supervisory Committee and such breaches **precede** the events of 3 August 2016.

(3) Further, there is an independent breach in [47] POC: that one of the foregoing breaches caused the JVA to be terminated automatically, or (failing that) Mr Manès after 3 August 2016 failed to devote all his time and attention to the Business in breach of Clause 7.3 JVA, in repudiatory breach of the JVA. Again, this has nothing to do with the purported misleading of Mr Padberg.

(4) There are two more breaches (of clauses 9.1 and 14.2) which Mr Manès accepts are independent at the breach stage, though he claims that they produce no independent head of loss.

134. Secondly, it was submitted by Mr Chapman, on behalf of Mr Manès, that it is not possible to divorce the allegation that Mr Manès failed to inform the Board, the Supervisory Committee, or Dream as to the true purpose of the meeting from the allegation that Mr Manès misled Mr Padberg as to the true purpose of the meeting - it is said that the failure to inform only goes anywhere if those parties had already been materially misled about the meeting's purpose. I disagree with Mr Chapman's reading of the PoC alongside the Part 18 Response. If Mr Manès had failed to tell Dream, the Board, or the Supervisory Committee *anything* about the meeting (not just misleading them about its purpose), that would still have been a breach, because the need to inform them of a share transfer under Clause 5.1 and/or 5.3 and/or Schedule 3 of the JVA was a positive obligation. Misleading Mr Padberg is a separate breach, and is one of the allegations of how Mr Manès "caused" MAD International to enter into the transaction (breach at [37.2] PoC; Part 18 Request at 3.1). However, the failures to tell Dream, the Board and the Supervisory Committee are also independent breaches and independent causes of the transfer – had they been informed then on MAD International's case the transfer would not have occurred (indeed the 3 August Meeting would never even have taken place).

135. Thirdly, it is not necessary for MAD International to establish that Mr Padberg failed to understand the transfer documents in order to establish that the above breaches caused loss in the English proceedings.

(1) MAD International will rely on the allegation that Mr Padberg did not understand the documents that he was signing, as I have noted. However, this is in order to prove *one* of its causation theories at [44] PoC: “if Mr Manès had informed Dream/the Supervisory Committee/the Board and/or Mr Padberg of the true purpose of the meeting, [then] Mr Padberg would not have attended the meeting and/or would not have signed the Share Transfer Document”. This particular theory of causation does not require Mr Padberg to have misunderstood the documents in order for loss to be established. Some of the factual scenarios pleaded by MAD International have nothing to do with Mr Padberg’s understanding. For example, if Mr Manès had informed Dream/the Board/the Supervisory Committee about the true purpose of the meeting then it is MAD International’s case that Mr Padberg would not have attended the meeting, or he would not have signed the transfer documents because Dream/the Board/the Supervisory Committee would not have allowed him to attend (as, for the reasons set out below), they would not have approved of the share sale.

(2) In this regard, MAD International are running another case on causation at [45] PoC: that if Mr Manès had complied with his positive obligation to inform Dream, the Supervisory Committee or the Board **of the upcoming sale**, they would not have approved the sale of the shares, or the Board would not have agreed to the shares at an undervalue. Again, none of this requires MAD International to establish that Mr Manès misled Mr Padberg about the purpose of the meeting.

136. Fourthly, the conclusion that the English Proceedings are significantly broader than the French Civil Proceedings is significant because (in the absence of privity), abuse of process by collateral attack will only arise in rare cases. Such a rare case arises where it would be manifestly unfair to a party in the later proceedings that the same issues should be re-litigated, or this re-litigation would

bring the administration of justice into disrepute (*Bairstow* at [38] and *Michael Wilson* at [48(3)], cited above). That is not this case.

137. Even if there is any “re-litigation” of issues (despite my observations on that above), it is not right to characterise matters as a re-litigation of the same core issues, as such issues are not the core issues in the English proceedings for the reasons that I have identified, and the issues in the English proceedings are also significantly broader than those in the French Civil Proceedings. In such circumstances it is not manifestly unfair to a party in the later proceedings that the issues litigated in the French Civil Proceedings should also be litigated in these proceedings, nor would such litigation here bring the administration of justice into disrepute (*Bairstow* at [38] and *Michael Wilson* at [48(3)], cited above). Nor would it be appropriate to strike out those matters which overlap as they are relevant to other unrelated allegations which lead to breach of the same contract. Similarly, Mr Padberg not understanding the documents is just one of several ways in which MAD International could establish causation.

*(3) The majority of the claim does not fall away on the resolution of the appeal in the French Civil Proceedings*

138. It is also not accurate to say that the majority of the claim “falls away” after the resolution of the appeal in the French Civil Proceedings.

(1) In France, the claim is for the transfer of the shares back, and damages flowing from that. Whether the transaction was at an undervalue may also be the subject of the appeal court’s enquiry, if it decides that the share transfer is fraudulent. If MAD International succeeds in its French appeal, the share transfer will be unwound, and it may receive damages.

(2) In England, there are several independent claims for *breach*, which do not rely on proving that Mr Manès misled Mr Padberg, or that Mr Padberg did not understand the documents.

(3) The majority of MAD International’s losses in the English Proceedings will not be affected by the unwinding of the Share Transfer Agreement by the Paris Appeal Court:

- (a) The independent breach in [47] PoC relates to the termination and/or repudiation of the JVA. It comes with a separate form of loss (namely, the lost opportunity to develop the joint venture business). The extent of this loss has not yet been determined, but MAD International's case is that its loss is in the region of at least €10 million.
- (b) The breaches which relate to the 3 August Meeting allegations lead to a different head of loss: sale of the shares at an *undervalue* which is set out at [45] and [46] PoC. This loss is quantified as "at least around €4.4 million" in [46] PoC. This is the loss that could be affected by an unwinding of the share transaction in France.

139. Further, Mr Manès contended that MAD International had failed to set out in correspondence how both the French and the English proceedings could go along simultaneously with such overlapping issues. In my view, this contention takes Mr Manès nowhere - MAD International is not obliged to set out a plan for case-managing both proceedings, particularly in circumstances where no issue estoppel arises from the French proceedings. In any event proceedings involving (some) of the same parties in more than one jurisdiction with some overlapping issues is not uncommon, and not inherently abusive.

*(4) Mr Manès is not privy to the French Civil Proceedings*

140. For the reasons I have already set out above in Section C.1, Mr Manès is not privy to the earlier French Civil Proceedings. In circumstances where there is neither privity nor issue estoppel there is very limited scope for establishing that the English Proceedings are an abuse of process: see *SCB Flaux J* at [161].

*(5) Exclusive Jurisdiction clause in the JVA*

141. The JVA pursuant to which the English Proceedings are brought contains an exclusive jurisdiction clause in favour of England. In *SCB* this was a strong indication that there was no "manifest unfairness" in relitigating particular issues in later proceedings. This is because the claimants were effectively being "*held to their contractual bargain as regards jurisdiction*" – (*SCB* at [162]). In the present case, there is an *exclusive* jurisdiction agreement in favour of England in the JVA:

it is even more apparent that there can be no manifest unfairness in MAD International bringing proceedings against Mr Manès in the only jurisdiction contractually available to them.

*(6) No prima facie presumption that proceedings with overlapping factual issues are an abuse*

142. I also bear in mind that there is no prima facie presumption that new proceedings which cover issues that have been decided in prior proceedings are an abuse: *Michael Wilson* at [48(2)] and accordingly it is necessary to look at whether factors exist which would lead to the conclusion that the proceedings are an abuse. For the reasons I have set out above, I am satisfied that there are no compelling factors in this case which would justify a conclusion that MAD International's English proceedings are an abuse of process.

*(7) No Henderson v Henderson Abuse of Process*

143. Nor do I consider that there was any *Henderson v Henderson* type abuse of process in the present case. Whilst this was not the main basis for Mr Chapman's abuse of process arguments, I heard submissions from Mr Dhillon on behalf of MAD International in relation to the same. For reasons I have set out above, Mr Manès is not privy to the earlier proceedings against MAD Atelier and MA Développement. Absence of identity of interest is not in itself a bar to *Henderson v Henderson* abuse of process – however, it is a powerful factor against the existence of such an abuse. Furthermore, the gravamen of the wrong in *Henderson v Henderson* abuse of process is bringing a claim in later proceedings which could and should be brought in the earlier proceedings. That is simply not the case here - MAD International could not have brought any claims against Mr Manès pursuant to the JVA in France due to the existence of the exclusive jurisdiction agreement.

### Conclusion

144. In the above circumstances I am satisfied, and find, that the English Proceedings are not an abuse of process. Specifically, (1) there is no collateral attack on the Paris Judgment, because there was no issue estoppel from that

foreign judgment in relation to the claims advanced in in MAD International's Particulars of Claim; (2) the issues contained in the Particulars of Claim are much broader than the issues before or determined by the Paris Commercial Court; (3) most of the claims for breach of contract would not fall away if the appeal in the French Civil Proceedings succeeds; (4) Mr Manès is not privy to the French Civil Proceedings (which is a strong factor militating against any finding of abuse of process); (5) there is no general rule against apparently inconsistent judgments on the facts as amounting to an abuse of process (*Michael Wilson* at [42]); and (6) the exclusive jurisdiction agreement in favour of England means that proceedings in this country were clearly contemplated (and as such were not abusive). Taking such factors individually and collectively the English proceedings are not an abuse. It is not manifestly unfair to Mr Manès that issues litigated in the French Civil Proceedings should also be litigated in these proceedings, nor would such litigation here bring the administration of justice into disrepute. Equally, and for the reasons I have given, there is no *Henderson v Henderson* type of abuse in the present case.

### **C.3 Summary Judgment on the Merits**

145. Mr Manès applies for summary judgment in respect of the claims on two grounds:

- (1) that the Allegedly Overlapping Claims have no real prospect of success on account of issue estoppel arising from the French Civil Proceedings (considered and rejected above) *or* because they fail due to a lack of causation;
- (2) the “Remaining Claims” should be summarily dismissed for want of causation. The Remaining Claims are that Mr Manès breached clause 9.1 JVA by failing to produce a first draft of the Initial Business Plan; and clause 14.2 JVA by transferring his legal interest in his entire shareholding in Ragnar to Mr Alcan without the prior knowledge or written consent of Dream.

146. Further, Mr Manès in oral submissions referred to a third possible ground (as identified below), the substance of which was not properly explained in the skeleton argument, the Application Notice, or any of the Witness Statements served in evidence.

147. I consider that each of the claims have a real, that is more than merely fanciful, prospect of success in the circumstances, and for the reasons, set out below. Accordingly Mr Manès' application for summary judgment/strike out also fails.

*(1) The Allegedly Overlapping Claims*

148. I am satisfied that the Allegedly Overlapping Claims have a real prospect of success.

149. First, for the reasons I have set out above, I have concluded that the French Civil Proceedings do not give rise to an issue estoppel. Even had it not been possible to reach that conclusion at this stage, for the purpose of his summary judgment application, Mr Manès would have to establish that the estoppel's existence was so clear and certain that there was no serious issue to be tried regarding an estoppel between the parties. It is readily apparent, having regard to the expert evidence as to French law that I have considered above, that this is not the case, and that there would have been (had it not been appropriate to reach a conclusion on issue estoppel), on any view, at least a serious issue to be tried.

150. Secondly, I am also satisfied that the Allegedly Overlapping Claims stand a real prospect of success in the context of the issues that arise in relation to causation:

(1) Mr Manès contended that MAD International did not make any allegations in the present proceedings that Mr Padberg failed to understand the documents, so their claims stood no prospect of success because they would inevitably fail on causation.

(2) However, it is clear that MAD International *are* contending in the English Proceedings that Mr Padberg did not understand the documents,



notwithstanding the errors in Mr Rimmington's witness statement. One of the allegations in [44] PoC is that if Mr Manès had informed Mr Padberg of the true purpose of the meeting, Mr Padberg would not have signed the Share Transfer Documents. This contains the common-sense proposition that Mr Padberg did not understand the Share Transfer Documents that he *did* sign. In particular, the pleadings at [44] refer to the contents of the letter of 20 December 2019, in which Mr Padberg explains that he did not understand the signed documents. Mr Manès contended that whilst the pleadings did set out the contents of this letter earlier at [33], they did not mention what Mr Padberg alleges now about his own mistaken belief. However, the PoC at [44] clearly plead reliance on the *contents* of that letter, not just its outline in the PoC. Mr Manès submits that he is entitled to rely on the statement of Mr Rimmington. However, I am satisfied that what was stated there was stated in error, and did not accurately reflect MAD International's pleaded case (supported by a Statement of Truth). Ultimately it is to the statements of case that regard is to be had in circumstances where the evidence before me is that Mr Rimmington made an error in his witness statement.

- (3) In any event it is well arguable that MAD International's case on breach of contract *would not* fail as a matter of causation if they did not allege that Mr Padberg failed to understand the documents. As already addressed, there are independent, and prior, breaches of contract alleged (in failing to notify the Board etc) with their own potential causative potency.

## *(2) The Remaining Claims*

151. Mr Manès contended that the PoC in the English Proceedings failed to plead that MAD International suffered any particular separate loss as a result of the clause 9 / clause 14.2 breaches, and that those breaches only exist to further evidence Mr Manès' breach of the implied term of good faith. Further or alternatively, it is contended that to the extent that the Remaining Claims are maintainable, they stand or fall with the Allegedly Overlapping Claims.

152. MAD International contended that these breaches do have a real prospect of success, proof of loss is not required to establish a breach of contract, and it was not accepted that no loss flowed from such breaches.

153. I am satisfied that the Remaining Claims do have a real prospect of success. First there are pleaded losses attached to the breach of clauses 9 and 14.2 which are the same as the losses which allegedly stem from breach of clause 2.8, and/or the implied term of good faith. In this regard:-

(1) As to breach of Clause 9: failure to draft the Initial Business Plan is relevant to and evidence of Mr Manès' failure to use reasonable endeavours to promote and develop the JV Group business under Clause 2.8 and/or the implied term of good faith. Further, the lack of an Initial Business Plan prevented MAD International from being able fully to develop the JV Group business to the extent envisaged by the JVA. These breaches all result in losses that contribute to the overall loss of MAD International's opportunity to develop the joint venture (set out at [48] PoC).

(2) As to the breach of Clause 14.2: Mr Manès' failure to retain his shareholding is also part of the obligation to promote and develop the joint venture in the best interests of MAD International and the JV Group. This is part of, and relevant to, his obligations under Clause 2.8, and the implied term of good faith. These breaches all contributed to the overall loss of MAD International's opportunity to develop this joint venture (set out at [48] PoC).

(3) Precisely what flows from what breach of contract (in terms of "lost development opportunity") will ultimately be a matter for determination at trial.

154. Secondly, even if it could be demonstrated that there was no specific loss flowing from the breach of clauses 9.1 and 14.2, this is not a reason to strike out a claim for breach of contract / grant summary judgment in respect of the same. In this regard:

(1) In claims for breach of contract, nominal damages are still available even if no substantial damages are claimed, or if substantial damages are claimed, but not proved at trial. All that needs to be pleaded is a viable breach of contract – see *Chitty on Contracts* at 26-010.

(2) It is well-established (contrast the position in tort) that loss is not an essential ingredient of a cause of action for breach of contract. Each of the allegations of breach of contract is properly arguable. The fact that damages may be small or nominal is not itself enough to strike out a claim or to grant summary judgment in respect of it – see *Shaw v Leigh Day* [2017] EWHC 825 (QB) at [36], [42] and [45]-[47].

*(3) Other Alleged Grounds for Summary Judgment*

155. In his oral submissions Mr Chapman stated that his client maintained a case “in full” for summary judgment on the merits, aside from the case set out above in relation to causation, and that his client maintained his case on summary judgment on the merits by reference to the matters set out in Mr Watts’ first witness statement. This case was not referred to at all in Mr Manès’ Skeleton Argument.

156. What was stated at paragraph 43 of Mr Watts’ first witness statement was that “Mr Manès will contend that such claims [the Remaining Claims] are not reasonably arguable or stand no real prospect of success because: (a) there is no real prospect of showing that Mr Manès has breached the terms of the JVA as alleged and/or [...]. I refer in this regard to the Response Letter.”

157. The Response Letter does not set out any grounds on which the Remaining Claims, or the Allegedly Overlapping Claims stand no real prospect of success. Instead, it lists around seventeen alleged independent defences on the merits in relation to each of the alleged breaches of contract. Further, none of these grounds are set out in detail in the Application Notice, which only mentions that any claims not found to be abusive have no reasonable prospects of success because they do not “amount to breaches of the JVA”. Mr Chapman did not attempt to argue before me all seventeen alleged defences – rather he referred only to a point of construction in relation to breaches of clauses 5.1 and 5.3 of the JVA.

158. The reality is that the approach adopted by Mr Manès meant that MAD International had little opportunity to respond to the summary judgment grounds which Mr Chapman raised in oral submissions, because it was wholly unclear from the Application Notice, the supporting witness statements or the skeleton argument *why* it was argued that the pleaded matters did not disclose a breach of contract. In particular, it would not have been possible to know that the aforementioned “construction point”, out of all seventeen alleged substantive defences in the Response Letter, would be the matter pursued at the hearing. Rather it might well have been thought that an initial “scatter-gun approach” had been narrowed down by the time of the hearing (a not uncommon occurrence).

159. Paragraph 2(3) of PD 24 provides that:-

“(3) The application notice or the evidence contained or referred to in it or served with it must –

(a) identify concisely any point of law or provision in a document on which the applicant relies, and/or

(b) state that it is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or issue or (as the case may be) of successfully defending the claim or issue to which the application relates”

160. The purpose of this provision is to ensure that it is clear as to each basis on which the application is made. I do not consider that the approach adopted by Mr Manès complied with paragraph 2(3) of PD 24 in relation to the seventeen alleged defences including the point of construction in relation to breaches of clauses 5.1 and 5.3 of the JVA.

161. In circumstances where MAD International has not had a fair opportunity to address the same, I did not consider it appropriate to determine such point of construction on the current summary judgment application of Mr Manès, and dismiss the current application. I do so in circumstances where MAD International undertook, in its oral submissions, not to take any point that Mr Manès could not in future renew this part of his application for summary judgment, and Mr Manès was ultimately content for this to be the position, in the

event that MAD International's claims survived strike-out or summary judgment based on issue estoppel and/or strike-out for abuse of process.

**C.4 Conclusion on Application to Strike Out the Allegedly Overlapping Claims on the basis of Summary Judgment or Abuse of Process**

162. For the reasons set out above, I am satisfied that the French Civil Proceedings do not create any issue estoppel against issues raised in the English Proceedings and that the English Proceedings are not an abuse of process. Accordingly, Mr Manès' Applications that the proceedings brought by MAD International should be struck out as an abuse of process are dismissed. Equally I am also satisfied, for the reasons that I have identified, that MAD International's claims have a real prospect of success and accordingly Mr Manès' Applications for strike out/summary judgment on the basis that they disclose no real prospect of success and/or are an abuse, also fail and are dismissed.

**C.5 Case Management Stay in relation to Allegedly Overlapping Claims**

163. Mr Manès' final application is for a case management stay pending final determination of the French Civil Proceedings.

164. I have already identified the applicable legal principles, which were largely common ground, at Section B.5 above. A case management stay should only be granted in rare and compelling circumstances; exceptionally strong grounds are required to justify such a stay where the parties confer exclusive jurisdiction on the English court, and such exceptional circumstances normally do not include the danger of inconsistent judgments. More specifically (but again in summary), the court has a discretion to stay an action pending the resolution of a claim pending in another forum, but a stay should only be granted in "rare and compelling circumstances": *Reichhold Norway ASA v. Goldman Sachs*, supra at 186. "Exceptionally strong grounds" are required to justify a stay on case management grounds where the parties have conferred exclusive jurisdiction on the English court: *Mazur Media Ltd v. Mazur Media GmbH* [2004] 1 W.L.R. 2966 at [69]-[70] (Lawrence Collins J); *Jefferies International Ltd v Landsbanki Islands HF* [2009] EWHC 894 (Comm) at [26]. The danger of inconsistent judgments is not a

legitimate consideration amounting to exceptional circumstances and does not justify a stay in a case where the court has jurisdiction under the BIR, especially exclusive jurisdiction: *Mazur*, supra, at [71]. A stay will not, at least in general, be appropriate if the other proceedings will not bind the parties to the action stayed or finally resolve all the issues in the case to be stayed, or the parties are not the same: *Klöckner Holdings GmbH v. Klöckner Beteiligungs GmbH* [2005] EWHC 1453 (Comm) at [21] (Gloster J).

165. Mr Manès submits that the following amount to exceptionally strong grounds that, it is said, justify a case management stay: a purported substantial overlap between the issues and factual enquiry in the two sets of proceedings; that part of the claims in the English proceedings are affected by the outcome of the French Civil Proceedings; and that Mr Manès must otherwise defend himself against in substance the same allegations in two different jurisdictions. Mr Manès also contends that MAD International has failed to explain in correspondence how, as a matter of case management, the English and the French Civil Proceedings could be pursued simultaneously.

166. MAD International submits that such matters (even if made out) do not amount to exceptionally strong grounds (or indeed strong grounds) and that a case management stay is not appropriate on established principles as applied to the actual facts of the case. They draw attention to the fact that the JVA contained an exclusive jurisdiction clause in favour of England with the result that a case management stay would detract from the bargain made by the parties. They also rely upon the following further matters: factors which are in the nature of *forum non conveniens* do not establish the exceptional circumstances needed for a case management stay; a case management stay would subvert Articles 29 and 30 of the BIR; the proceedings in France and England concern different claims with different parties, and a stay would cause significant delay to the English proceedings.

167. In considering whether or not to grant a stay, I proceed upon the assumption that Mr Manès has failed to establish his case on abuse of process and summary judgment (as is indeed the case).

168. Mr Manès has not demonstrated that there are exceptionally strong grounds for a stay, and I do not consider that the present case is an appropriate case for a case management stay. I have reached this conclusion for six reasons.

169. Firstly, MAD International's claims in the English proceedings are brought pursuant to the JVA, which contains an exclusive jurisdiction clause in favour of England. In such circumstances exceptionally strong grounds are required justifying a case management stay. This is for two reasons:

(1) Parties should generally be held to their contractual bargain that England is the only jurisdiction to hear the claims: *Standard Chartered Bank and National Westminster Bank v Utrecht-America Finance* [2001] Lloyd's Rep Bank 285, endorsed in *SCB* by Flaux J at [129] and [131]. Both of those cases concerned *non-exclusive* jurisdiction clauses in favour of England: the argument against granting a stay is even stronger in the present case, as the JVA contains an exclusive jurisdiction clause, so the contracting parties do not even contemplate any proceedings outside England under the JVA.

(2) A case management stay should not be used to undermine the effect of Article 25 BIR in giving the English court jurisdiction. This argument relates to Mr Manès' contention that he should not face the increased costs and danger of inconsistent judgments which he contends exist because he is facing the same factual allegations in two separate jurisdictions. These are factors that one could rely on to displace an exclusive jurisdiction clause in a *forum non conveniens* context: such factors cannot be relied upon where (as here) Article 25 designates England as having jurisdiction: doing so would amount to using the court's inherent power to stay proceedings on case management grounds inconsistently with the BIR: see *Mazur Media*, at p.2983 ([69]-[70]), Lawrence Collins J. In any event, Mr Manès makes no application to challenge the English court's jurisdiction pursuant to the relevant Articles: he has accepted that he cannot (because of Article 25) challenge jurisdiction established by an English choice of

court clause on *forum non conveniens* grounds. I do not consider that the very same grounds would justify a case management stay.

170. Secondly, I consider that the granting of a case management stay in the present case would subvert the operation of Articles 29 and 30 BIR. Those Articles provide for the circumstances in which claims within the EU must be stayed (because they are the same cause of action with the same parties), or may be stayed (because they are related actions). Mr Manès has not made any applications under those Articles to stay proceedings no doubt because the requirements of Article 29 are not satisfied (the parties are not the same); and those of Article 30 are not satisfied (because the claims under the JVA cannot be heard and consolidated with proceedings in France due to the exclusive English jurisdiction clause).

171. Thirdly, neither Mr Manès nor MAD International will be bound, in the English Proceedings, by the conclusions in the French Civil Proceedings as a matter of issue estoppel: the French Civil Proceedings will not finally resolve the issues between the parties to the English Proceedings for the reasons set out above and the claims in the English proceedings are significantly broader than the claims brought in the French Civil Proceedings. Both of these are powerful reasons militating against the grant of a case management stay – see Gloster J in *Klöckner Holdings GmbH v. Klöckner Beteiligungs GmbH* [2005] EWHC 1453 (Comm) at [21(iv) and (v)].

172. Fourthly, there is no risk of double recovery by MAD International in practice. If the French appeal courts were *first* to uphold the appeal and reverse the Share Transfer Agreement, and the English Court decides *later* to award damages against Mr Manès, then the English Court would no doubt take into account the fact that the shares had been returned to MAD International in calculating damages. Alternatively, if the English court were *first* to decide to award damages for the undervalue, and French appeal courts (including the Court of Cassation) *later* decided to uphold the appeal and reverse the Share Transfer Agreement, I understand that MAD Atelier and MA Développement would be able to put



forward, on enforcement, the contention that MAD International had already recovered some of its losses from Mr Manès directly in the English Proceedings.

173. Fifthly, the length of any stay of the English Proceedings would be uncertain. The outcome of the Paris Appeal Court's decision is likely to be known by around October 2020, but both parties have an appeal as of right to the French Court of Cassation in relation to any points of law. Such an appeal could take up to three years. The availability of the appeal and the time estimates were not substantively contested by Mr Manès either in his skeleton argument or in the course of oral submissions. Therefore, staying proceedings would not be in keeping with the overriding objective to deal with cases "*expeditiously and fairly*" (CPR r.1.1(2)(d)). I consider this to be a factor of particular importance in circumstances where England is the *only* forum in which MAD International can obtain relief for purported breaches of the JVA. In circumstances where the parties agreed to an exclusive jurisdiction clause, the objective common intention of the parties must also have been that the English court would progress claims under the JVA expeditiously rather than staying such proceedings for a lengthy period of time pending any possible outcome of foreign proceedings.

174. In the above circumstances, this is not one of those cases where there are "rare and compelling circumstances" justifying a stay, and Mr Manès has not discharged the burden that is upon him to demonstrate that there are "exceptionally strong grounds" justifying a stay on case management grounds set against the backdrop of the parties having conferred exclusive jurisdiction on the English court. Accordingly, the application for a case management stay is refused.

#### **D. Conclusion**

175. In the above circumstances, and for the reasons that I have given, Mr Manès' Applications fail, and are dismissed.

176. I trust that the parties will be able to agree the terms of the Order to reflect the outcome of the Applications before me, and any consequential matters including as to costs.

