Neutral Citation Number: [2020] EWHC 1261 (Ch)

Case No: BL-2019-001998

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building. Fetter Lane,
London EC4A 1NL

Date: 26/05/2020

Before:

CHIEF MASTER MARSH

- -

Between:

SATFINANCE INVESTMENT LIMITED	**Claimant**
- and -	
(1) INIGO PHILBRICK **(2) INIGO PHILBRICK LIMITED** **(3) 18 BOXWOOD GREEN LIMITED** **(4) ATHENA ART FINANCE CORP**	**Defendants**

- -
- -

Richard Edwards QC (instructed by **Signature Litigation LLP**) for the **Claimant**
Philip Shepherd QC and Zahler Bryan (instructed by **Boies Schiller Flexner (UK) LLP**) for the **4th Defendant**

Hearing dates: 17 March 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF MASTER MARSH

Chief Master Marsh:

1. This is my judgment on the application made by the fourth defendant ("Athena") to set aside the order made on 1 November 2019 by Roth J giving permission to serve Athena out of the jurisdiction in New York.

2. The claim concerns a valuable painting entitled 'Humidity' ("the Painting") by the New York artist Jean-Michel Basquiat who died in 1988 at the age of 27.

3. The claimant ("SIL") is incorporated in the BVI and managed from Montreux in Switzerland. Mr Boris Pesko is SIL's ultimate owner. His son, Aleksandar Pesko, is a UK citizen and lives in London. SIL owns real estate holdings in London and various art works and financial instruments. When referring to Mr Pesko in this judgment I am referring to Mr Aleksandar Pesko.

4. The first defendant, Inigo Philbrick, is a US citizen who is, or at least was, resident in Florida and London. He is the sole director of the second defendant ("IPL"). IPL was set up in April 2014 as a company incorporated in England and Wales with a registered office in London. It operated an art dealing business.

5. The third defendant ("Boxwood") is a company incorporated in Jersey. It is owned and controlled by Mr Philbrick and/or IPL. Until recently Boxwood had nominee directors from a service provider in Jersey named Valla Limited. However, Valla has terminated its arrangement with Mr Philbrick and IPL and Mr Philbrick is now the sole director of Boxwood.

6. The fourth defendant ("Athena") is a company incorporated in Delaware USA and carries on business in New York specialising in providing credit secured on works of art. Athena has no presence in England and Wales.

Background facts

7. Mr Philbrick and Mr Pesko met in 2013 moving in the same social circle in London. Mr Pesko says he had developed an interest in modern art and had recognised that it could be a suitable alternative investment class for SIL. Over a period of time, Mr Philbrick, through IPL, introduced to Mr Pesko seven works of art that were purchased by them as 'partners' and sold at a profit.

8. In August 2016, Mr Pesko and Mr Philbrick agreed to purchase the Painting jointly for $18.4 million and on 11 August 2016 they signed a document described as a 'Partnership Agreement'. (It is referred to in an invoice of the same date as a "Side Letter"). Under the Partnership Agreement:

   (1) SIL agreed to contribute US$12.2 million to the purchase of the Painting and IPL agreed to contribute US$6.2 million.

   (2) Of SIL's US$12.2 million contribution, US$3 million was treated as a senior loan by SIL to IPL. The senior loan was secured against the Painting and would be senior to IPL's US$6.2 million contribution.

   (3) SIL would hold "full title" to the Painting.

(4) Subject to SIL's full title, SIL and IPL would hold jointly the Painting and would share equally in any profit or loss.

(5) IPL would retain possession of the Painting and it would be kept at IPL's storage facilities in London or Zurich.

9. The Partnership Agreement does not specify a governing law. It was made in London and both Mr Philbrick and Mr Pesko were resident in London. The principal pointer to a legal system other than England is that the Painting was in New York at the time the agreement was made and the lex situs would naturally govern the transfer of title and the manner in which the title was held.

10. Mr Pesko was given a copy of a Bill of Sale dated 10 August 2016 for the Painting showing a purchase price of $18.4 million and IPL as the buyer of the Painting from SKH Management Corp of 1875 Lexington Avenue New York 10035. Mr Pesko noticed that the signature on the Bill of Sale was not attributed to anyone and he could not locate SKH Management Corp at the given address. He was later given a copy of an amended version of the Bill of Sale with SKH's address amended to its registered office and stating it was signed by a director. It seems likely both documents are forgeries. SKH Management Corp is a grocery firm in Philadelphia and the address given for SKH in New York has no obvious connection with the sale of valuable works of art. The core element of SIL's case is that a dishonest representation about the purchase price of the Painting was knowingly made by Mr Philbrick on behalf of himself and IPL which was relied on by SIL.

11. IPL produced an invoice addressed to SIL dated 11 August 2016 for US$12.2 million that referred to SIL acquiring a 66% share in the Painting. Payment under the invoice was to be made to IPL at its account at HSBC Bank. The invoice bears a note:

> "Partnership detailed in side letter dated 11 August 2016. Full title to be transferred from Inigo Philbrick Limited to SatFinance upon receipt of above balance. Zero rated for VAT as artwork in USA at time of sale."

12. SIL paid the sum due under the invoice in two tranches. SIL took no steps to obtain any security for the payment it made or for its share of the Painting.

13. The stated purpose of the Partnership Agreement was for the Painting to be sold at a profit. Over a period lasting between August 2016 and October 2019 Mr Philbrick told Mr Pesko that he was making efforts to sell it. In early 2019 the Painting was sent to an exhibition in Japan. At around the time of the hearing before Roth J on 1 November 2020, it was returned to New York where it remains in Athena's custody.

14. Mr Pesko says that on about 10 October 2019 Mr Philbrick confessed to him that the Painting had been used by Boxwood as collateral for a loan from Athena and Mr Philbrick provided Mr Pesko with a number of documents relating to that transaction. It also emerged that the Painting had in fact been acquired by IPL from a customer of Phillips Auctioneers LLC for US$12.5 million. Mr Philbrick told Mr Pesko there had been additional consideration in the form of two paintings and payment of US$2 million but no evidence of the additional consideration has been produced by him.

15. During the week commencing 14 October 2019 Mr Pesko took steps to instruct Grossman LLP in New York and Signature Litigation in London on behalf of SIL. On 24 October 2020 Mr Pesko was told by Mr Delahunty of Delahunty Fine Art of 21 Bruton Street London W1J 6QD that he had invested US$2.75 million to acquire a 12.5% interest in the Painting. Delahunty was not joined as a party to the claim when it was issued but their interest was referred to in Mr Pesko's witness statement that was before Roth J on 1 November 2019. Delahunty was added as a party to the claim by an order dated 19 May 2020.

Athena's interest

16. On 20 January 2017 IPL entered into a chattels mortgage with Athena that provided security for a facility agreement[1] of the same date. The chattels were four artworks that did not include the Painting.

17. On 31 March 2017 Boxwood entered into a Loan and Security Agreement ("the LSA") with Athena. The LSA is subject to the law of New York "… including all matters of construction, validity and performance …" and the LSA provides for the parties to submit to the non-exclusive jurisdiction of the Supreme Court of the State of New York and of the District Court of the Southern District of New York. Under the LSA Athena agreed to provide Boxwood with a revolving loan facility of up to US$10 million secured against the "Artwork Collateral Pieces". As at 31 March 2017, the five artworks did not include the Painting. However, the LSA permitted works to be added and it is common ground that at a later stage the Painting was added as collateral by an amendment to the LSA and that in 2018 the loan was increased by Athena to US$13.5 million.

18. Under the LSA:

    (1) Boxwood granted Athena a security interest in the collateral: clause 3.1.

    (2) The security interest is described as a continuing interest until all obligations are discharged: clause 3.3.

    (3) All artworks were to be stored at approved locations: clause 5.5.

    (4) Athena had a right to take possession of all items of collateral not already in its possession: clause 8.3.

19. A number of other associated security documents were executed at the same time as the LSA including a personal guarantee by Mr Philbrick, a corporate guarantee by IPL, a Promissory Note between Boxwood and Athena and an Agreement of Subordination and Assignment between Boxwood, Mr Philbrick, IPL and Athena.

20. Valla has responded to a disclosure order made in Jersey and provided SIL with a considerable number of documents from its records as Boxwood's corporate services provider. Some shed light on how the purported transfer of title in the Painting into Boxwood's name came about. It is relevant to note the following:

[1] The facility agreement is not available.

(1) On 20 March 2017 a services agreement was made between Boxwood and IPL under which any artwork owned by Boxwood could be held by IPL to the order of Boxwood.
(2) On 28 March 2017 Boxwood entered a consultancy agreement with Mr Philbrick to advise Boxwood on the acquisition of artwork.
(3) A services agreement was made between Boxwood and IPL (and amended on 30 March 2017) in relation to the purchase and financing of artwork.
(4) The LSA and associated documents were entered into on 31 March 2017.
(5) The Painting (described as "the large Basquiat") was referred to in an email from Robert Newland of Arcor (he is an associate of Mr Philbrick) to Athena dated 3 April 2017 as the "final work for the $10m facility". Athena was pressed by Mr Newland to complete its appraisal of the Painting so that the drawdown of the US$10 million could take place. Mr Philbrick was copied with these emails.

(6) On 7 April 2017 Mr Philbrick sent Mr Newland and Athena a transfer of title document between IPL and Boxwood that refers to an invoice dated 7 April 2017. The document states that "all right, title and interest" in the Painting was transferred to Boxwood for "good and valuable consideration".

(7) The invoice which is dated 6 April 2017 is for US$12.5 million and is addressed to Boxwood. It records that the painting was in the USA at the date of the invoice.

(8) On 7 April 2017 Boxwood made a Draw Request for US$3.25 million and an email from Athena to amongst others Mr Philbrick on the same date says "we [Athena] have funded the $3.25 draw". After deduction of Athena's expenses, US$3.245 million was received by Boxwood.

(9) On 10 April 2017 Boxwood paid US$3.235 million to IPL. This left the balance of US$9,265 million on the invoice from IPL to Boxwood outstanding as an informal loan between the two entities.

(10) On 17 April 2017 Athena gave notice that the Painting had been added to the collateral under the LSA.

(11) Boxwood's records include a letter from Mr Philbrick to the directors of Boxwood ratifying the decision of the directors to purchase the painting for US$12.5 million from IPL. Mr Philbrick is described in the letter as the sole beneficial shareholder of Boxwood.

21. Boxwood's intermediate position between IPL and Athena is significant in relation to the possibility of title being transferred by Boxwood to Athena. SIL contends that Boxwood was not a buyer in the ordinary course of business acting in good faith for the purposes of New York law.

The order for permission to serve out of the jurisdiction

22. There are three requirements for the grant of permission to serve out of the jurisdiction:

(1) In relation to the foreign defendant there must be a serious issue to be tried on the merits. The claim must have a real as opposed to a fanciful prospect of success.

(2) There must be a good arguable case that the claim falls within one or more of the gateways set out in paragraph 3.1 of CPR PD 6B. A good arguable case means that one side has "the better of the argument" than the other on the point.

(3) The court must be satisfied that in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute and that the court ought to exercise its discretion to permit service out of the jurisdiction. The task of the court is to identify the forum in which the case can most suitably be tried for the interests of all the parties and the end of justice.[2]

23. Roth J's order was made at a hearing at which SIL was granted injunctive relief to preserve the Painting. Permission to serve Athena out of the jurisdiction was based upon the ground set out at PD6B 3.1(3) ("the necessary or proper party gateway"):

> "3.1 The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where – […]
>
> (3) A claim is made against a person ('the defendant') on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
>
> (a) there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
>
> (b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.*"*

24. For the purposes of the first limb of this ground, Mr Philbrick and IPL are the 'anchor defendants'. The test the court should apply when considering whether to grant permission to serve out of the jurisdiction under this ground is not in dispute. In *Lungowe v Vedanta Resources Plc* [2019] UKSC 20 Lord Briggs at [20] summarised the elements the court must consider in the following way:

> "… the claimant must demonstrate as follows:
>
> i) that the claims against the anchor defendant involve a real issue to be tried;
>
> ii) if so, that it is reasonable for the court to try that issue;
>
> iii) that the foreign defendant is a necessary or proper party to the claims against the anchor defendant;
>
> iv) that the claims against the foreign defendant have a real prospect of success;

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[2] These three elements are uncontroversial: see *Altimo Holdings and Investment Ltd v Krygyz Mobil Tel Ltd* [2012] 1 WLR 1804 at [71] and [88] and *Erste Group Bank v VMZ Red October* [2015] EWCA Civ 379 at [25].

v) that, either, England is the proper place in which to bring the combined claims or that there is a real risk that the claimants will not obtain substantial justice in the alternative foreign jurisdiction, even if it would otherwise have been the proper place, or the convenient or natural forum."

25. It bears emphasis that the first and second stages set out in Lord Briggs' judgment in *Vedanta* are distinct, that they relate only to the anchor defendants and it is only if the court is satisfied about there being both a real issue to be tried, and that it is reasonable to try that issue, that the court should go on to consider whether the foreign defendant is a necessary and proper party. Further, whether England is clearly the proper place for the claim to be tried is an entirely separate hurdle for the claimant to surmount.

26. Mr Shepherd invited the court also to have regard to the judgment of Andrews J in *Gunn v Diaz* [2017] EWHC 157 (QB) at [86] in which she provides a summary of the principles that are applicable to an application made under paragraph 3.1(3):

> "i) The "necessary or proper party" gateway is anomalous, in that, by contrast with the other heads of jurisdiction, it is not founded upon any territorial connection between the claim, the subject-matter of the relevant action, and the jurisdiction of the English courts: *AK Investment* at [73];[3]
>
> ii) The prospect of proceedings having to take place in more than one jurisdiction will never be enough, in and of itself, to justify the joinder of a foreign defendant: *AK Investment*, per Lord Collins at [73], adopting the well-known dictum of Lloyd LJ in *Golden Ocean Assurance Ltd v Martin* [1990] 2 Lloyd's Rep 215 at 222:
>
> > "... caution must always be exercised in bringing foreign defendants within our jurisdiction under Order 11 r 1(1)(c). It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction."
>
> iii) The claimant must show that a claim is made against a defendant on whom the claim form has been or will be served (otherwise than in reliance on the "necessary or proper party" gateway). Service on that anchor defendant may be within the jurisdiction; outside the jurisdiction without permission if permission is unnecessary; or outside the jurisdiction with permission, if permission is required: *Alliance Bank JSC v Aquanta Corporation and others* [2012] EWCA Civ 1588 [2013] 1 All ER (Comm) 819, at [79].
>
> iv) The mere fact that defendant A is sued only for the purpose of bringing in B as a defendant is not fatal to the application for permission to serve B out of the jurisdiction, but it is a factor in the exercise of the court's discretion: AK Investment at [76] – [79], reiterated and applied in *Nilon Ltd and another v Royal Westminster Investments SA and others* [2015] UKPC 2, [2015] 3 All ER 372.

[3] *AK Investment CJSC v Krygyz Mobil Tel* [2011] UKPC 7

v) The court must first ask itself, viewed in isolation, (a) whether there is a real issue to be tried between the claimant and the anchor defendant on the merits, (i.e. one with a real, rather than fanciful, prospect of success) and (b), if so, whether it is reasonable for the English court to try that claim: *Erste Group Bank AG v JSC "VMZ Red October"* [2015] EWCA Civ 379 [2015] 1 CLC 706.

vi) The question whether it is reasonable for the English court to try the claim between the claimant and the anchor defendant is an objective one: it is not the same question as whether it was reasonable for the claimant to start proceedings against that defendant within the jurisdiction: *Erste Group Bank* at [48].

vii) If the anchor defendant has failed to acknowledge service or is not defending the claim, there is highly unlikely to be a real issue to be tried which it is reasonable for the court to try: a fortiori if the claimant has entered default judgment or summary judgment already, see *Erste Group Bank* at [78] and [136];

viii) It is only if both limbs of PD 3.3(1)(a) are satisfied that the court should go on to consider, under sub-paragraph (b) whether there is a good arguable case that B is "a necessary or proper party" to the claim between the claimant and A: *Erste Group Bank* at [38].

ix) The question whether B is a "proper party" to the claim against A is answered by asking: "supposing both parties had been within the jurisdiction, would they both have been proper parties to the action?" *AK Investment* at [87], (applying *Massey v Heynes & Co* (1888) 21 QBD 330); *Nilon Ltd* especially at [15]. B will be a proper party if the claims against A and B involve one investigation or there is a sufficient "common thread" between them."

27. Paragraph vii of the summary concerning the first limb of the test under the gateway at paragraph 3.1(3) requires some qualification. On hearing an application to set aside the grant of permission to serve out of the jurisdiction the extent to which the court may have regard to information that was not available when the application was first dealt with (either on paper or at a hearing) is limited. In *Erste Group Bank AG v JSC 'VMZ Red October'* [2015] at [44] Gloster LJ in giving the judgment of the court said:

> "The parties did not dispute the proposition that an application to set aside permission to serve out of the jurisdiction falls to be determined by reference to the position at the time permission is granted, not by reference to circumstances at the time the application to set aside is heard: see per Hoffmann J (as he then was) in *ISC Technologies v Guerin* [1992] 2 Ll Rep 430 at 434-435."

28. This is followed by the citation of authorities in which the principle set out by Hoffmann J in *ISC Technologies v Guerin* has been applied both under the RSC and the CPR. It is clear from those decisions that the principle applies to all aspects of an

application for permission to serve out of the jurisdiction, not just forum conveniens.[4] Gloster LJ went on in *Erste Group Bank* to say at [45] that:

> "… permission which was rightly granted will not be discharged simply because circumstances have changed, although, as Hoffmann J observed in *ISC Technologies*, subsequent events may throw light upon considerations which were relevant at that time."

29. The role of the court on hearing an application to set aside an order for permission to serve out of the jurisdiction is not to rehear the application and decide the issue afresh. The subsequent court must consider on an objective basis whether permission was rightly granted, considering each of the three requirements, to the extent they are in dispute, with the benefit of full argument from the relevant parties. This is not a case in which Athena suggests that there was a failure to comply with the obligation to provide full and frank disclosure but it is inevitable that the subsequent court will be taken to evidence that was not available to the court on the first occasion the issue was considered. The court may have regard to that additional evidence and the events it describes but only for the purpose of properly interpreting the circumstances that pertained on the occasion when permission to serve out was granted. As I see it, the important point is not that the later court is asked to have regard to additional evidence, but that a change of circumstances is not a ground for setting aside the order.

30. In this case, Roth J's order was made at the very outset of the claim at a time when it was not known whether the anchor defendants would contest the claim and whether there would be a trial. By contrast, in *Erste Group Bank* the chronology of events was as follows:

- The claimant was able to serve the anchor defendants without permission on about 23 August 2012.
- On 7 September 2012 the deadline for them to file acknowledgments of service expired.
- It was not until 19 October 2012 that the application for permission to serve the other defendants out of the jurisdiction was made and permission was granted on 24 October 2012.
- On 14 December 2012 summary judgment was granted against the anchor defendants.
- On 31 January 2013 the third and fifth defendants applied to set aside permission to serve them out of the jurisdiction.
- Their application was heard on 17 June 2013.

31. It follows that Andrews J's summary of the principles to be derived from *Erste Group Bank* at vii in her summary must be read in light of the sequence of events in that

[4] By contrast, an application to stay a claim on the basis of forum non conveniens is dealt with on the basis of the circumstances prevailing at the time that application is heard.

case. By the time permission to serve out of the jurisdiction was granted, it was already clear that the anchor defendants did not intend to participate in the claim. They had failed to file an acknowledgement of service within the deadline under the CPR and a further 6 weeks passed before the application was granted without any steps being taken.

32. It is one thing, as Andrews J postulates in her summary, that at the time of the first hearing the anchor defendants have been served and have failed to acknowledge service after the permitted period has expired. The position may be different if there is no such unequivocal evidence of the anchor defendants' intention. And it also bears emphasis that the test is directed to whether there is a real issue to be tried against the anchor defendants. The court when it is dealing with the application is considering both the position as it finds it at that date and is also looking ahead to whether there will be a trial of real issues that concern the anchor defendants.

33. Some consideration is needed about what constitutes a trial for these purposes. In *Football Dataco Ltd v Smoot Enterprises Ltd* [2011] EWHC 973 (Ch) Briggs J (as he then was) considered the extent of the court's power to grant judgment in default where a reference had been made to the ECJ in another case in respect of the issue upon which the instant claim was based. Briggs J expressed the view at [16] that:

> "Default judgment is not, in any circumstances, a judgment on the merits. It is in that respect to be contrasted both with judgment after a trial and with summary judgment. The essential distinction between default judgment and a judgment on the merits is that the court is not when asked to give default judgment called upon to form any view about the merits of the claimant's claim, whether as a matter of fact or law."

34. Briggs J went on at [17] to instance a claim that involved an issue of construction and explained that the court was not required to express any view about the strength of the claimant's case on the issue of construction before approving judgment in default. It may be however that a claim in which the claimant seeks judgment in default that includes the grant of declarations is slightly different. The facts that are pleaded are assumed to be proved but whether the court should grant declaratory relief and, if so, in what form is a matter that involves some consideration of the merits of the claim.

The application to set aside Roth J's order

35. The application to set aside the order granted by Roth J is made on two alternative grounds. First, there is no real issue that it is reasonable for the court to try between SIL and Mr Philbrick and IPL. Secondly, that England is not clearly or distinctly the appropriate forum for the dispute. It is common ground that the burden of establishing these two factors lies on SIL. If SIL fails to establish either element, then the order must be set aside.

36. Mr Shepherd, who appeared for Athena, submits that the evidence points clearly to Mr Philbrick having disappeared and IPL having ceased to operate by the time of the hearing on 1 November 2019. As a consequence, he submits, they cannot be anchor defendants for the purposes of service out of the jurisdiction because at the time of the hearing they had no intention of participating in these proceedings. He relies in part on the fact that they have played no part in the claim and that SIL is applying for

judgment in default. There will never be a trial of the claim against them and, therefore, there was no real issue to be tried concerning the anchor defendants.

37. Mr Shepherd also submits that SIL is unable to discharge the burden of showing that England is clearly the appropriate jurisdiction in which to try the claim.

SIL's claim

38. SIL's claim is based on the premise that the Partnership Agreement was made between SIL and IPL (not with Mr Philbrick personally). If the Partnership Agreement is looked at in isolation, there might be real doubt about whether IPL was a contracting party. IPL is not mentioned anywhere in the agreement which is stated to be made between SIL and Mr Philbrick. And Mr Pesko and Mr Philbrick signed it in their own names without attributing their signature to the relevant corporate entity.

39. On the face of the agreement, which is clearly informal in its drafting, it appears to be made between SIL and Mr Philbrick (not IPL); but the drafting is uneven. The agreement refers to "SatFinance" and "AP" interchangeably but only refers to "IP" and not IPL. It states that:

(1) That Mr Pesko and Mr Philbrick intend jointly to purchase the Painting.

(2) That the sums SIL will pay and the loan by SIL are payable to Mr Philbrick.

(3) "… AP and IP agree …" followed by the arrangements as to ownership and title.

40. SIL's pleaded case about the identity of the parties to the Partnership Agreement is not crystal clear. No case is made about the identity of the parties on the proper construction of the agreement. However, the invoice from IPL to SIL which bears the same date as the agreement can be considered with the agreement. Mr Edwards makes the forensic point that it is contrary to Athena's interests to assert that Mr Philbrick was the purchaser since its case depends upon IPL acquiring title to the painting. In any event, I am satisfied there is a real prospect of SIL establishing that the parties to the agreement were SIL and IPL. If there is a point to be made about the way in which SIL's case is pleaded, it is one that is easily cured or clarified.

41. SIL's case in summary is that:

(1) "Full title" to the Painting had the effect of transferring legal title to the Painting to SIL with the beneficial title to be shared between SIL and IPL equally, save that IPL's share was charged as security for the Senior Loan.

(2) IPL acted as SIL's agent and Mr Philbrick was responsible for its performance and therefore they both owed fiduciary duties to SIL (as set out in paragraph 13 of the particulars of claim).

(3) IPL in fact purchased the Painting for USD 12.5 million pursuant to a private buyer agreement dated 27 July 2016 and that accordingly SIL's contribution to the purchase price was not 66% as Mr Pesko believed but over 97%.

(4) IPL and Mr Philbrick made a representation about the purchase price that they knew to be false and SIL was induced to enter into the Partnership Agreement in reliance on it.

(5) IPL is precluded from claiming any equitable interest in the Painting and any equitable interest that IPL would otherwise be able to assert is held on constructive trust for SIL.

(6) Under New York Law a security interest such as that purportedly granted by Boxwood to Athena in the Painting is enforceable only if the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party: Uniform Commercial Code 9-203(b)(2).

(7) Boxwood did not have any rights in the Painting or any power to transfer rights in the Painting to Athena.

(8) IPL had no rights it could transfer and even if it did such a transfer was expressly prohibited by the terms of the Partnership Agreement.

(9) Under New York law, IPL had limited power to transfer SIL's rights but only to a buyer in ordinary course of business: UCC 2-403(2). A buyer in ordinary course of business means a person that buys in good faith without the knowledge that the sale violates the rights of another person in the goods and does not include a person that acquires goods as security for a money debt: UCC 1-201(b)(9).

(10) SIL applies for declaratory relief concerning title to the Painting and Athena's lack of interest or security, injunctions restraining dealing with the Painting and delivery up and damages.

Ground 1 of the application

42. Athena does not dispute for the purposes of its application that SIL is able to show that there is a serious issue to be tried between itself and Athena and that SIL has a real prospect of success. Ground 1 of the application concerns the first element of the gateway under paragraph 3.1(3) which breaks down into two issues. First, that there is a real issue to be tried between the claimant and the anchor defendants and secondly that it is reasonable for the court to try that issue. It is now clear that neither IPL nor Mr Philbrick will play any part in this claim. They have both been served with the claim pursuant to the alternative means order made by Roth J and neither they nor Boxwood have responded. SIL has applied for judgment in default and that application will be heard shortly.

43. Athena contends that the emphasis under this gateway is directed to the trial of the claim. It is not merely that there is a real issue between the claimant and the anchor defendants, or that there is a real issue that is reasonable for the claimant to pursue. It is that there is a real issue to be *tried*.

44. There is a clear distinction between a change of circumstances on the one hand and subsequent events that cast light on considerations that were relevant at the time permission was granted on the other. An obvious change of circumstances to which

the court may not have regard is the proposed joinder of Delahunty to the claim. Similarly, SIL's application for judgment in default is a change of circumstances and irrelevant unless it can be taken as shedding light on the position at the date permission to serve out of the jurisdiction was granted.

45. The position at that date can be seen from the evidence that was placed before Roth J and his judgment. Mr Bushell's first statement dated 30 October 2019 accurately described Mr Philbrick as a US national who resided in London and Miami. Mr Bushell's evidence is cautious where he says, based on information provided by Mr Pesko, that "… Mr Philbrick currently resides at Flat 3, 17 Grosvenor Square, London W1K 6LB <u>when in London</u>" [my emphasis]. He was not saying Mr Philbrick was in London at the time the application was made for interim relief. Indeed, Mr Bushell's statement goes on to provide grounds for seeking an order for service on Mr Philbrick by alternative means namely by email. He provided two email addresses for Mr Philbrick that had been used by Mr Philbrick in communications with Mr Pesko in the previous two weeks. He then said:

> "There is therefore reason to believe that email sent to these addresses will come to Mr Philbrick's attention whereas documents posted to him may not do so if he happens to be away at the time or if he has changed his address without Mr Pesko's knowledge."

46. I draw from this evidence that Mr Pesko did not know whether Mr Philbrick was in London at the time the application was made and, importantly, there was some reason to believe that he might not be. It later transpired that the address provided in this statement about Mr Philbrick's address was incorrect.

47. In a statement made on 26 February 2020, Mr Bushell dealt with a suggestion made on behalf of Athena that Mr Philbrick was not resident in the UK. He explains in paragraph 14 of that statement the period of Mr Philbrick's connection with the UK and that he had lived in London since 2010. He then said that Mr Philbrick moved to 43 Green Street, Mayfair in 2018 following the break up of his relationship with his partner. He then added:

> "In the interests of completeness, Mr Pesko informs me he does not know where Mr Philbrick is at present. Mr Pesko informs me that there is some credible suggestion, via social media, that he is currently in Japan. However, at the time these proceedings commenced Mr Philbrick was to Pesko's knowledge still living at the flat in Green Street, albeit dividing his time between London and Miami. His business required him to retain his residence in London and also he needed to be here in order to spend time with his young daughter."

48. The evidence that was provided for the hearing of Athena's application does not pinpoint when Mr Philbrick left London. He (and IPL) had received notice of default from Athena's lawyer on 14 October 2019 and he had confessed to Mr Pesko that he had misled him about the purchase price of the Painting and that it had been used as security for a loan from Athena. Furthermore, Mr Philbrick would have been aware that he and IPL were likely to face a claim by Guzzini Properties Ltd ("Guzzini") concerning a work by Rudolf Stingl "Untitled 2012" which IPL had used to obtain finance both from Guzzini and SIL. A claim in rem was later issued in the Supreme

Court of the State of New York County of New York on 30 November 2019 and on 13 December 2019 SIL applied to be joined as a party to that claim.

49. There is near contemporaneous evidence of Mr Philbrick's residence and IPL's business address in London in Mr Bushell's second statement. On 4 November 2019 IPL's gallery at 22 Davies Street, London W1 was closed and a sign was left on the door for deliveries to be made to IPL's registered office which is nearby. A visit to Mr Philbrick's residential address at 43 Green Street, London W1 did not elicit any response and the claim documents were posted through the letterbox the following morning.

50. Roth J was informed at the hearing on 1 November 2019 that formal notice of the application had not been given to the defendants, but copies of the documents filed with the court had been sent to them. It appears that the documents were sent by email to IPL and Mr Philbrick. In the course of hearing submissions Roth J noted that SIL had applied for permission to serve Mr Philbrick at IPL's business address and indicated that service at that address was appropriate given that Mr Philbrick dealt with Mr Pesko from that address. There was no discussion about why service by email was required although that forms part of the order for service by alternative means that was made.

51. Roth J's judgment dealt with the claim against Mr Philbrick and IPL relatively briefly. He stated at paragraph 9 of his judgment that there was a strong case against them and that there was a "very real issue to be tried with the first two defendants". No consideration was given at that stage to whether the anchor defendants would in fact seek to defend the claim and it is not suggested that SIL believed on 1 November 2019 that Mr Philbrick had absconded or intended to do so. The necessary and proper party gateway was dealt with on the basis that that was a real issue to be tried.

52. I would only add that in paragraph 4 of his judgment, Roth J stressed that the hearing was "effectively, an ex parte application on notice because it was notified to the defendants only a few days ago and three clear days' notice had not been given. Therefore, any order granting permission [to serve out of the jurisdiction] that I make is subject to the absolute right of a defendant to apply to set it aside."

53. It is clear from the decision of the Court of Appeal in *Erste Group Bank* that the court is entitled to review evidence that sheds light on the situation at the date permission is granted but not to a change of circumstances. It is now clear that Mr Philbrick and IPL will play no part in this claim and SIL is applying for judgment in default. The failure to file acknowledgements of service by Mr Philbrick and IPL and the application for judgment in default are both events that mark a change of circumstances and it is not permissible for Athena to rely on them as such. What Athena seeks to do, however, is to demonstrate by relying on information about Mr Philbrick's circumstances at the time of the hearing before Roth J that with hindsight there was never going to be a contested claim involving the anchor defendants.

54. It is now known that:

(1) Mr Philbrick had been involved in fraudulent activity both in connection with the Painting and other artistic works.

(2) His activities had either come to light or were about to come to light by 1 November 2019. On any view he knew his fraudulent conduct would be revealed.

(3) He did not respond to notice of the hearing on 1 November 2019.

(4) There was doubt about whether he was in London on the date of the hearing, hence the need for permission to serve him by email.

(5) He had either disappeared by that date or was about to do so within a matter of days.

55. SIL has to show that it had at 1 November 2019 a good arguable case that there was a real issue to be tried that it was reasonable to try; or, put another way, that it had the better of the argument on those points. It seems to me that had the position, as it is now understood, been known on 1 November 2019 SIL would not have been able to discharge the burden placed upon it. The order giving permission to serve out of the jurisdiction was made on the assumption that there was a real issue to be tried as against Mr Philbrick and IPL. The need for there to be a real issue to be tried is central to this gateway and is a prerequisite to considering whether the foreign defendants are necessary and proper parties. If there is to be no trial of issues concerning the anchor defendant, and it is clear the claim will go by default, the claimant is unable to pass through the gateway.

56. It seems to me that the facts in this case are unusual because it is possible to apply subsequent events and interpret the position as at the date permission was granted with reasonable certainty.

57. In my judgment, it makes no difference that the claimant is required to issue an application for judgment in default because it seeks declaratory relief. The hearing of that application, even if the foreign defendant is invited to attend, is not a trial of the claim for the reasons explained by Briggs J in *Football Dataco v Smoot Enterprises*.

Forum conveniens

58. Having concluded that SIL has failed to establish a good arguable case concerning paragraph 3.1(3) it is strictly unnecessary for me to deal with forum conveniens. I observe briefly that there are strong connections with New York:

(1) The subject matter of this claim is a Painting that is held in New York and it has only been held in London for a short period since it was acquired in 2016. At the time of the hearing before Roth J it was assumed the Painting was in Japan.

(2) Boxwood entered into an agreement with Athena that provides for non-exclusive New York jurisdiction and for New York law to be applied.

(3) Athena is based in New York and any witnesses that it needs to call to give evidence reside in the USA.

(4) The issues of New York law have involved marked differences of view between the experts employed by the parties and although they could be

resolved by an English court based upon expert evidence it is preferable they are dealt with in New York.

(5) The need for a unitary judgment from an English court does not provide a trump card.

59. Had it been necessary to do so, on the assumption that SIL was able to satisfy the requirements of paragraph 3.1(3), and having regard to the position of all the parties to the claim, I would not have concluded that England was obviously the most appropriate jurisdiction.

Conclusion

60. The order made by Roth J will be set aside.