Case No: BL-2018-2614

Neutral Citation Number: [2020] EWHC 1489 (Ch)
IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

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

Date: 12/06/2020

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

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Between:

JOSEPH BENKEL **as trustee in bankruptcy of Eliezer Fishman**	**Claimant/ Applicant**
- and –	
(1) EAST-WEST GERMAN REAL ESTATE HOLDING **(2) MIRELLA ELENA HELBET**	**Defendants/ Respondents**

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Sam O'Leary (instructed by **Fieldfisher**) for the **Claimant**
James McWilliams (instructed by **Asserson Law Offices**) for the **Defendants**

Hearing dates: 4 June 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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 am on Thursday 12 June 2020.

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

INTRODUCTION

1. The Claimant (**Mr Benkel**) in this matter has brought two applications before the court. The first is by an Application Notice (the **Evidence Application**) dated 6 May 2020, which invites the Court to make an Order under the Taking of Evidence Regulation, [*Council Regulation (EC) No 1206/2001*] (the **ToE Regulation**) so as to secure the taking of evidence by a German Court from two German nationals, namely Markus Rese (**Mr R**) and Oliver Kreider (**Mr K**).

2. Mr Benkel's second application is set out in an Application Notice dated 22 May 2020 (the **Joinder Application)**: this seeks the addition of a new Defendant in these proceedings, a Mr Dikautschitsch (**Mr D**).

3. The Defendants do not oppose the Evidence Application though they express themselves to be deeply sceptical of the need for it. They also express a concern as to the impact that any order made in the Evidence Application might have on the arrangements for the substantive trial, which I am told is fixed for hearing in February 2021.

4. The Defendants do however oppose the Joinder Application on the basis that:

   a) the requirements of CPR r.19.2(2)(a) or r.19.2(2)(b) are not satisfied in this case, and

   b) that the joinder of Mr D would be contrary to the CPR r.1.2 overriding objective and should be refused in the exercise of the Court's discretion.

5. Although it seems that he has had notice of it, and unlike the position faced by the learned Deputy Judge in Molavi v Hibbert [2020] EWHC 121 (Ch), the proposed Defendant is not a party to this application. The Defendants point to communications received from Mr D which suggest that he will inevitably challenge any order that might be made by me bringing him into these proceedings.

6. Any challenge to the joinder of Mr D to these proceedings or to the jurisdiction of this court over him, will equally inevitably take a not insubstantial period of time to resolve. If Mr D is joined to these proceedings but he decides to participate with a conscientious approach to the requirements of the CPR, a wholly unlikely outcome on my view of the history of these proceedings, the case management consequences will nevertheless be material.

7. As the argument was presented to me, it became clear that the real issue between the parties was whether the consequences for the Defendants of the belated decision to seek a joinder of Mr D in terms of the postponement of the final disposal of the proceedings at trial, outweighed the benefit (as the Claimant sees it to be) of having the related claims involving Mr D determined at a trial involving all of the parties. It was on this issue that counsel directed a large part of their effort in seeking to assist the Court at the hearing of the Joinder Application.

THE PROCEEDINGS TO DATE

8. These applications emerge from what I have been told is the largest bankruptcy in Israeli history. In August 2016, the Israeli tax authorities presented a Petition to the Tel Aviv District Court seeking a bankruptcy order in respect of Mr Eliezer Fishman. Mr Fishman was declared bankrupt on 21 June 2017, and Mr Benkel was appointed trustee in bankruptcy that

same day. Mr Benkel claims that Mr Fishman's assets have, by virtue of his office, vested in him.

9. The Israeli bankruptcy proceedings were recognised by this Court as the foreign main proceedings, by virtue of an order of Mr Justice Nugee made on 7 December 2018.

10. Mr Benkel believes that Mr Fishman has substantial assets hidden outside Israel (particularly in Germany) which are held in the names of others who are (secretly) acting as nominee or trustee for Mr Fishman.

11. There are three entities at the heart of the claim:

    a) the First Defendant (**E-W UK**), which holds shares in,

    b) East-West Real Estate Germany GmbH (**E-W Germany**), which in turn is a partner in another German company,

    c) JURAG Chemnitz GmbH & Co KG (**JURAG**).

12. It does not seem to be disputed, by the current parties at any rate, that the other (controlling) partner in JURAG is Mr D, and that he and the Second Defendant (**Ms Helbet**) live together in Ibiza, with their daughter. It is also accepted that Ms Helbet is the sole member and director of E-W UK, a company limited by guarantee.

13. Mr Benkel alleges that the ownership structure that I have described, is nothing other than a sham, that is to say a pretence, because the true owner is Mr Fishman.

14. On 7 December 2018, Nugee J granted the Claimant's application for a proprietary injunction for the preservation of the shares held by E-W UK in E-W Germany, and also the membership interest of Ms Helbet, in E-W UK. Nugee J also appointed receivers over E-W UK's shares in E-W Germany. The injunction was continued by Ms Julia Dias QC sitting as a Judge of the High Court on 29 January 2019.

15. Mr O'Leary, who appeared before me on behalf of Mr Benkel, suggests that E-W UK far from being a company without valuable assets as attested to by Ms Helbet in that company's September 2017 and 2018 accounts, holds shares in E-W Germany a company which (Ms Helbet must know) was and is owed substantial amounts under numerous loan transactions involving, inter alios, Mr D and Mr K.

16. The substantive proceedings, turning on the facts that I have described, were issued by Mr Benkel in December 2018. The Particulars of Claim were filed on 20 December 2018; and the Defence was filed on 6 February 2019. Following an amount of procedural activity, the detail of which is not important for this judgement, the Case Management Conference (**CMC**) took place on 20 February 2020, before Deputy Master Hansen. The Deputy Master gave a number of case management directions including those necessary for the fixing and conduct of the trial. For reasons that will become clear later in this judgment, these are all important dates.

17. By his Amended Particulars of Claim dated 6 March 2020, and served in accordance with the February Order of the Deputy Master, Mr Benkel seeks:

    a) declarations from the Court that Ms Helbet holds her shares in E-W UK and that E-W UK holds its subsidiary EW Germany, on trust and as nominee for Mr Fishman; and

b) an order for the transfer of the shares in EW Germany to him.

18. The Defendants deny that any assets or interests are held by them for Mr Fishman. It is their case that following its incorporation, E-W UK acquired all of the shares in EW Germany from its previous owners, which included Mr Fishman's children, Mr K and another. Ms Helbet's plans for the company are explained at paragraph 9 of her Amended Defence of 3 April 2020:

> "*It is averred that Ms Helbet has no experience of real estate ownership or management, and has no known connection with Germany or the United Kingdom, other than by her directorship of E-W UK and E-W Germany and by virtue of her relationship with Mr Dikautschitsch with whom she intended to carry on business involving minor property construction and refurbishment projects in Germany.*"

THE EVIDENCE APPLICATION

19. The ToE Regulation, for so long as it remains in force, gives this Court the power, when it is dealing with civil or commercial matters, to request a competent court of a European Union Member State (but not Denmark) to take evidence for use in judicial proceedings. Requests are transmitted directly by the Court before which the proceedings are ongoing, to the Court that is invited to take the evidence.

20. The procedure in this jurisdiction for making an application under the ToE Regulation is set out in CPR 34.23. Rule 2 provides that the Court may order the issue of a request to a Court in the Member State Court where the proposed deponent "is". CPR r. 34.23(3) goes on to set out that if the Court makes an order for the issue of a request, the party who sought the order must file various documents including a draft Form A as set out in the annex to the ToE Regulation.

21. I agree with Mr O'Leary that the relevant criteria for the making of an Order under the ToE Regulation are satisfied in this case, because:

a) the present matter is a civil/commercial matter;

b) the request is to be made for evidence to be taken by the Landgericht Chemnitz, a competent court in the Free State of Saxony within the Federal Republic of Germany - a Member State of the European Union; and

c) so far as I can judge from the materials before me, the purpose of the request is to obtain evidence which is intended for use in the present proceedings.

22. Mr O'Leary has helpfully put before the Court draft Form A "requests" in relation to both Mr K and Mr R, explaining the nature of these proceedings, the questions to be asked of each witness, the circumstances in which a witness may refuse to testify, the required use of communications technology and, in the case of Mr K, the documents which are to be inspected.

23. In order to persuade me to exercise my discretion to make the Order, my attention has been invited to Mr Benkel's second witness statement of 5 May 2020, which Mr O'Leary submits explains why it is that Messrs R and K are likely to have relevant evidence to give in respect of numerous issues of significance in these proceedings. He submits that Mr Benkel's evidence gives good grounds for believing that there is conflicting evidence, upon which Mr R and Mr K can shed helpful light, as to:

a) the assets and liabilities of E-W Germany;

b) when the shares in EW Germany were acquired by E-W UK;

c) the social and commercial relationships between, amongst others, Ms Helbet, Mr D, Mr Fishman, Mr R and Mr K;

d) who controlled of E-W Germany after the date of transfer of shares to E-W UK; and

e) Mr Fishman's interests in real estate within Germany more generally.

24. I have also seen two schedules which detail the questions that it is proposed will be asked of Mr R and Mr K. It is immediately apparent from the way in which the questions have been prepared that they are designed to go to the very issues that are central to the matters in issue in these proceedings. Having clear answers from both Messrs R and K on what their relationship was with the central characters in this case will be of invaluable assistance to the court; as will hearing how they describe the corporate governance, lending and asset holding position of the German entities in light of all of the other evidence that it appears has been assembled hitherto. In my judgment Mr O'Leary is right to point to the need for further questions to be asked on matters where the evidence currently appears conflicting.

25. During the hearing of the Evidence Application, insofar as he needed it, Mr O'Leary sought my permission for two minor amendments to be made to Form A; and also for modest changes to be made to two of the questions in the schedules to which I have referred. There was no opposition to this request, and I was content to agree to the changes.

26. On the basis of the facts and matters set out in Mr Benkel's second witness statement of 5 May 2020, and in particular the matters explained in detail in paragraphs 38 to 51; and given that the essence of the controversy in these proceedings is the extent to which others such as Mr R and Mr K controlled assets (in Germany) on behalf of Mr Fishman, I am prepared to make an Order for evidence to be taken from Mr R and Mr K.

THE JOINDER APPLICATION - RELEVANT LAW

27. CPR 19.2 (2) provides as follows:

"The court may order a person to be added as a new party if –

(a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or

(b) there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

28. In **Molavi v Hibbert** at [47] Mr John Kimbell QC, sitting as Deputy High Court Judge said this:

> "There is no inherent or general discretion to add a new party to existing proceedings. **In re Pablo Star** [2018] 1 WLR 738 at [47] Sir Terence Etherton MR put it very simply:

> *"CPR r 19.2 confers a discretion on the court to join a party if the conditions in rule 19.2(2)(a) or (b) are satisfied".*

The two limbs are different and independent. Even if one or other (or both) are satisfied, the addition of a party does not follow automatically. The use of the word 'may' in the first line shows that the court must stand back and exercise an overall discretion even if [emphasis added] one or other (or both) of the threshold criteria are satisfied.

The power to add a party to existing proceedings is essentially a case management decision. An order will only be made if it would further the overriding objective in the concrete circumstances of the case. This is clear from **In Re Pablo Star** at [60], in which the following was said:

> *"In considering whether or not it is desirable to add a new party pursuant to CPR r 19.2(2) the lodestars are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the overriding objective in CPR Pt 1."*

The starting point for any application ought to be to identify which of the two limbs in CPR 19.2 (2) is being relied upon."

29. Later at 56, the Deputy Judge added:

> In **re Pablo Star**, the Court of Appeal held in [48] that the first limb of CPR19.2(2) should be interpreted as containing two conditions: (1) the new party can assist the court to resolve the matters in dispute in the proceedings and (2) it is desirable to add the new party to achieve that end". The Court of Appeal also stated that CPR 19.2(2) ought to be given a wide interpretation. The words "in dispute" ought to be read as "in issue".

30. Turning to CPR 19.2(2)(b), the Deputy Judge (at [64] helpfully set out the tests to succeed in this way:

a) For an applicant to succeed with an application under CPR 19.2(2)(b), three conditions must be met: (1) an issue must be identified between the proposed new party and an existing party (2) the issue must be connected to the matters already in dispute in the proceedings (3) it is desirable to add the new party so that the court can resolve the issue identified in condition (1).

b) As to Condition (1) it is clear that it is not necessary for the issue between the new party and the existing party to be a cause of action: see **XYX v Transform Medical Group** [2014] EWHC 4056 at [22], in which a number of authorities are cited to the this effect.

c) Condition (2) is the critical condition. The issue between the existing and the proposed new party must be *connected to* the matters already in issue in the proceedings. The nature of the required connection is not prescribed. In some cases, the connection will be in the form of an overlap of factual evidence between the existing proceedings and issue with the proposed new party – see, for example, **Dunlop Haywords (DHL) Ltd. v Erinaceous Insurance Services Limited** [2009] EWCA Civ 354 at [88].

d) In other cases, the connection is that the new party is concerned in with the outcome in some way such that it is desirable to have all parties connected to the dispute before the court in one set of proceedings so that they are bound by the outcome. This was the case for the excess insurers proposed to be added as defendants in **Dunlop Haywords (DHL) Ltd. v Erinaceous Insurance Services Limited** [2009] EWCA Civ 354 at [89].

31. As the Deputy Judge later observed, and I agree with him, the question of connection is clearly a matter to be resolved on the facts of each individual case.

32. In sum, the way in which I should approach the Joinder Application seems to me to have been well and comprehensively explained by the learned Deputy Judge. I see no reason for proceeding in any different way.

33. One further passage in the Molavi decision is in my judgment worthy of attention and it highlights again the importance which the learned Deputy Judge attributed to the impact of the joinder application upon the case management. Earlier in his decision at [53] the Deputy Judge said this:

> It also proved to be a somewhat tortuous and time-consuming exercise to obtain basic case management information about the ITV claim and the potential impact of combining it with the Betrayal claim. Had the application been made at a case management conference, the court would have at least been provided with the standard information contained in the case management information sheets.

34. I also take the view that case management considerations are of central importance to joinder applications and will weigh heavily in the scales when balancing the factors that come into play when seeking to further the overriding objective.

35. In arriving at my conclusions in this judgement I have considered it prudent to remind myself of the oft-referred to overriding objective. CPR r1. describes the overriding objective in this way:

> *1.1*
>
> *(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.*
>
> *(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable-*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) saving expense;*
>
> *(c) dealing with the case in ways which are proportionate—*
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

36. I will return to a number of these important principles later in this judgment.

THE JOINDER APPLICATION

37. The Joinder Application was heard on the 4 June 2020. Skeleton arguments were filed in advance by both Counsel and I am indebted to them for the assistance that these comprehensive though concise documents have provided to me.

38. The Claimant relied upon Mr Benkel's Affidavit of 2 December 2018, and also his Second and Third Witness Statements of May 2020. The Defendants did not put any evidence before the Court.

39. Mr D was given notice of the application by email and he has doubtless also been made aware of it through his communications with the Defendants' solicitors. As I indicated earlier, Mr D has chosen not to participate in the Joinder Application.

The Claimant's case

40. The Claimant had two principal thrusts to his argument before me: first he says that both the limbs of 19.2 (2) are satisfied, although there was a recognition that 19.2 (2)(b) was perhaps the path of least resistance; and that any prejudice occasioned to the Defendants by the possible loss of the trial day on account of a Joinder Application that it was accepted could have been launched earlier, was more than outweighed by the benefit in having the proceedings and claims involving Mr D resolved before the same tribunal at the same time as the related "Fishman issues".

41. At the time the proceedings were issued in December 2018, Mr Benkel says did not know enough about Mr D to have been expected to have then joined him as a Defendant; but now he asserts, it is plain that Mr D is deeply involved in the sham transactions that have the predominant purpose of concealing Mr Fishman's assets.

42. In his draft Re-Amended Particulars of Claim, Mr Benkel seeks to pleads his case in this way against Mr D:

a) It is also to be inferred from all the circumstances that Mr D held his powers, rights and interest in JURAG as trustee and nominee for Mr Fishman. Accordingly, Mr D now holds those powers, rights and interest in JURAG as trustee and nominee for Mr Benkel as trustee in bankruptcy of Mr Fishman.

b) Alternatively, it is to be inferred from all the circumstances that each of Ms Helbet and E-W UK hold their respective interests in E-W UK and E-W Germany on trust for Mr D, who in turn holds his interests in those trusts on trust for Mr Fishman.

43. The only other new matters pleaded are in essence that Mr D is in a relationship with Ms Helbet; and that Mr D holds 100% of the economic interest of JURAG on account of his appointment as a limited partner in that firm.

44. I will set out here the evidential basis for the second limb of the Claimant's argument.

45. The Court is told that Mr Benkel suspects that Mr D is connected to Mr Fishman because:

a) has acknowledged that Mr Kreider is a friend and business associate;

b) has also confirmed that he is the domestic partner of Ms Helbet and Ms Helbet has referred to Mr D as her life partner;

c) Mr Katz, Mr Fishman's nephew, has told Mr Benkel that Mr D is a close friend of Mr Rese and Mr Kreider and that Mr Katz once attended a party in Ibiza attended by Mr D, Ms Helbet, Mr Rese, Mr Kreider and Mr Fishman;

d) Mr D says that he effectively runs E-W UK with Ms Helbet;

e) Mr D has confirmed that it was he who arranged for the acquisition of E-W Germany by E-W UK through his personal relationship with Mr Kreider;

f) Mr D has said that E-W UK had acquired E-W Germany for no consideration and that it was a mere "shell" with "no assets" but Mr Benkel has learned that E-W Germany had substantial assets, including loan receivables from Mr Kreider, Mr Fishman's children, Mr Steinman and "Waterfront" (presumably Waterfront Appartements GmbH, of which Mr Kreider was the legal owner and Mr D was – and possibly still is – the general manager); and

g) Mr Benkel has received a signed statement by Mr D stating that he holds over €20,000 in cash for E-W Germany.

46. Mr Benkel also points to the extent to which Mr D has been involved in the existing proceedings since their commencement, notably,

a) communicating (on the Defendants' behalf) with English solicitors and with the receivers appointed over E-W UK's shares in E-W Germany in relation to the return date;

b) informing the receivers that since early January 2019 he had been travelling in Germany carrying out an "investigation" relating to this case;

c) telephoning Mr Benkel's solicitors, to tell them that he was authorised to act on behalf of Ms Helbet and E-W UK;

d) providing documents to Mr Hahnenberger, the director of E-W Germany appointed by the receivers of E-W UK's shares in E-W Germany, purporting to show that outstanding debts owed to E-W Germany by Mr Kreider and others had (in October 2016) been postponed by 10 years; and

e) his attorneys (P&B Law, Mr Rese's firm) settling unpaid debts and subsequently paid further debts of E-W Germany.

47. Having taken great care to demonstrate the relevance of Mr D to the proceedings generally, the Claimant explains his case for the necessity of joinder (in other words why he needs to go further than simply having Mr D as a witness or the evidence about him led before the court) in this way: he says the issue between him and Mr D is whether Mr D holds his interest in JURAG on trust for Mr Fishman (I will label this claim the "**JURAG Issue**"). The JURAG

Issue is inextricably connected he says to the matters already in dispute in these proceedings, that is to say, whether the Defendants acquired and hold their interests in JURAG on trust for Mr Fishman. It is on this basis that Mr Benkel says that it is desirable that Mr D be joined to the proceedings so that the Court may resolve this JURAG Issue concerning him.

48. It is apt at this stage to look again at the relief sought by Mr Benkel in his proposed pleading in respect of the JURAG Issue. The declarations sought are that Mr D holds his powers, rights and interest in JURAG as trustee and nominee for Mr Fishman; and also that Mr D now holds those powers, rights and interest in JURAG as trustee and nominee for Mr Benkel as trustee in bankruptcy of Mr Fishman.

49. It will be observed that as matters stand, the JURAG Issue is not before the Court. Whilst there might be good reason for it, though none is offered, it does strike me as curious that the joinder is sought but no attempt is made to amend the pleading on which the claim is based.

50. What must be decided in this action, absent any change to the pleadings, is how the Defendants hold their interest in E-W Germany and for whom. It is E-W Germany that in turn holds an interest as general partner in JURAG. It might be said that to the extent that Mr Benkel succeeds in his claims as currently framed against the Defendants, he will establish the interest he needs to in JURAG. If there is any other interest held for Mr Fishman in JURAG then that is an entirely new and separate matter.

51. The Defendants say that the allegations of Mr D's connection to the alleged asset sheltering structure are flimsy. It is said that whilst Mr D might, in the context of the allegations that I have recited above, be useful in the proceedings, he does not have to be a party to them. I was told that he has agreed to provide a witness statement for the Defendants; and the relevant documents that he has will also be offered up.

52. The crux of their argument as to why it is that Mr D does not have to be joined, turns on the observation that I have already made as to the way in which the proceedings are currently structured. Whilst it might be that Mr Benkel wants to go further than his claims to the interests in E-W UK and E-W Germany, so as to assert directly claims to the interest in JURAG held by Mr D on the basis that those rights are held by Mr D for Mr Fishman (therefore *ipso facto* connected to the already commenced proceedings against the Defendants), that is a separate and discrete claim to the issues already before the court. The JURAG Issue might be factually related, but Mr D's interest in that firm is not a matter in dispute in the proceedings; it is the interests held by Defendants that are in issue.

53. In my judgment this is the correct analysis of the position. The conclusion that I am driven to is that the JURAG Issue is not connected to matters already in dispute in the existing proceedings. It might be factually related but the issue itself is not before the court. What Mr D's interests in JURAG might or might not be is in my view a very different enquiry as to what the Defendants' interests in it might be. It is the latter that is the subject matter of the present litigation.

54. The Claimant has gone to great lengths to demonstrate Mr D's involvement in the background and connection to Mr Fishman and the Defendants. If those were the questions that I had to resolve doubtless they would have persuaded me, but they are not. Although there might be an overlap in some of the factual evidence it is insufficient to persuade me that the necessary connection has been made out.

55. In **Molavi**, during his review of the relevant authorities the Deputy Judge said this:

> "*In other cases, the connection is that the new party is concerned in with the outcome in some way such that it is desirable to have all parties connected to the dispute before the court in one set of proceedings so that they are bound by the outcome. This was the case for the excess insurers proposed to be added as defendants in* ***Dunlop Haywords (DHL) Ltd. v Erinaceous Insurance Services Limited*** *[2009] EWCA Civ 354 at [89]*."

56. Whatever is the finding as against the Defendants of the interest held by E-W Germany in JURAG, Mr D will not obviously be affected. Mr D does not need to be a party to the current proceedings so as to be bound by the outcome of them. As the proceedings are currently conceived, no attempt is being made to, and no Declaration as might ultimately be made by this Court will, interfere with his limited partner position in JURAG.

57. Even if it could be shown that the JURAG Issue establishes the connection necessary for 19.2(2)(b), or 19.2(2)(a) for that matter, as we know from **In Re Pablo Star** and **Molavi**, that is not the end of the enquiry. The question I have to answer in dealing with the joining of a party, asks whether it is desirable. And to answer that question, I have to follow the lodestar of the Overriding Objective.

Overriding Objective

58. It is necessary to answer the desirability question whether the Court is dealing with CPR 19.2(2)(a) or 19.2(2)(b). The pertinent question to pose arises from the second of the lodestars referred to in **Re Pablo Star** by the Master of the Rolls at [60]:

> *In considering whether or not it is desirable to add a new party pursuant to CPR r 19.2(2) two lodestars are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the overriding objective in CPR Pt 1.*

59. Before me, and with disarming candour, Mr O'Leary was prepared to concede that there was ample opportunity for the case against Mr D to have been brought earlier, though not at the commencement of the proceedings. When pressed, there was little genuine resistance to the suggestion that the application could have been made at the CMC before the Deputy Master in February. The "trigger" as he put it as to why the Joinder Application came to be made in May, was a defence averment in regard to the corporate governance rights given to Mr D in respect of JURAG. The strength, or should I say weakness, of this justification was in my judgment quite properly exposed by Mr McWilliams who appeared before me on behalf of the Defendants. The point made in the defence seems on my reading to have been nothing other than an explanation of a general principle of German company law which could easily have been understood by Mr Benkel well before April of this year. It was far from a revelation.

60. Upon my invitation to take the argument to its logical conclusion, Mr O'Leary relied upon the clear submission that even if the Claimant was late in making the application, even very late, it mattered not because at worst the consequence would be a delayed trial. Even if it was delayed a year, although he doubted it would be, better that he argued than denying the Claimant the ability to have all the relevant matters in his claim to the German held assets of Mr Fishman determined in one set of proceedings. The final limb of the point being that a delayed trial visits no real prejudice upon the Defendants.

61. This position was posited on the foundation of the Claimant's CPR 19.2 "factual connection" submissions to which I have already referred.

The Defendant's case on the Joinder Application

62. The basis for the Defendants' objection to the Order being sought had three strands. Having already expressed a view consistent with the first line of defence in the context of the CPR 19.2 connection issue, I will now address the third strand of the arguments because that ground turns on the direct effect in terms of prejudice, that the Defendants say acceding to the Joinder Application might have upon them. The point goes directly to the overriding objective.

63. In essence the Defendants say that to make the joinder order now would lead to the loss of the trial date. This is because Mr D will almost certainly challenge the joinder order and/or this Court's jurisdiction over him (a challenge with a high prospect of success they submit, given that jurisdiction appears founded on the exception to the usual rule under Art 8 of the Brussels Regulations). To the extent that there is a challenge there will be a delay of at least six months to the timetable; and then there will be the need for a further CMC: certainly, if Mr D is retained in the proceedings. Indeed a new CMC will in any case be needed if Mr D is joined. All of this must be viewed against the backdrop of the CMC held in February before Deputy Master Hansen where detailed Directions for trial were agreed and a hearing date fixed for February 2021.

64. The Defendants' case is not simply about the loss of a trial date: the point is not that blunt. Mr McWilliams makes his argument in this way:-

    a) The loss of a trial date, to a date a year or so later is inherently a real prejudice and should be viewed as such. Defendants have a right to see the proceedings brought against them determined at the soonest opportunity reasonably possible.

    b) Moreover Defendants have a right to a trial (and not have date fixed for it interfered with) in circumstances where they are subject to both a proprietary injunction (the E-W shares in E-W Germany) and must deal with court appointed Receivers over the interest in E-W Germany.

    c) The reason lying behind the need to delay the trial for a year or more (because in my judgment, and I believe the parties at the hearing before me accepted, for the reasons I have adumbrated above, it will end up being for not less than that period if the joinder order is made) is relevant. It is only because the Claimant came very late to the realisation that he might want to join Mr D to the proceedings, that the final resolution of Mr Benkel's claims will be substantially delayed.

65. As I have indicated already, the crux of the Claimant's response to this position of the Defendants is that even if the joinder of Mr D did lead to (and Mr O'Leary did not give up all hope that it could be short) postponement of the trial date, in all the circumstances, it would still be more convenient to add Mr D to these proceedings (with a later trial date) than to have the claims dealt with separately in different jurisdictions.

66. In my judgment, weighing the balance as I must, the fact that Mr Benkel will suffer prejudice in the event that Mr D is not joined so as to resolve the discrete, or one might say, extra, JURAG Issue, and that there is a risk for separate proceedings in another jurisdiction on factually related issues (with all that potentially flows from that eventuality), must be viewed in the context of the responsibility he bears for his own misfortune. As Mr McWilliams rightly contends, the consequences should not be laid at the door of the Defendants in circumstances where there is absolutely no reason why Mr Benkel could not have made Mr D a defendant to these proceedings very much earlier than now.

67. It is appropriate to take into account the case pleaded in the Draft Re-Amended Particulars of Claim. It is one based upon the JURAG holding and a connection with Ms Helbet. It seems to me unarguable that both of these matters came to the attention of Mr Benkel well before the hearing conducted by the Deputy Master. Throughout 2019, Mr Benkel was certainly amassing a wealth of evidence to show the connection that he now wants to allege between Mr D and Mr Fishman, as is explained in careful detail in his third Witness Statement at paragraph 15 onwards. He also knew as early as January of 2019, that Ms Helbet was in a relationship with Mr D.

CONCLUSIONS ON THE OVERRIDING OBJECTIVE

68. It seems plain to me in this case that following the lodestar of the overriding objective takes me straight to the important principles of dealing with cases in such a way as to *ensure that they are dealt with expeditiously and fairly* that expense is saved.

69. Having those principles in mind, I look at what is likely to develop in the circumstances before me if I were to make the Order as asked.

70. As I have indicated, Mr D is not a party to this Joinder Application. Based upon email communications exchanged with the Defendants' solicitors, it seems tolerably clear that Mr D will mount a challenge to any joinder order that might be made. This much was accepted by Mr O'Leary. For the reasons I explained earlier in this judgment the likely delay to be occasioned by the grant of the joinder order could easily be one year: it could be more. Having explored with the Listing Office when a case could be re-listed, Mr O'Leary explained that he had been offered June 2021. If such a listing is sought after the Long Vacation, because that is when the challenge to joinder is likely to be resolved, it is not difficult to see how at best, with pleading and case management to be addressed, the period of postponement can be reckoned as at least a year.

71. I do not find myself able to support the submission of Mr O'Leary that having to wait a year longer for a trial is no real prejudice – or something that in the circumstances just has to be stomached; nor is he right in my judgment to say that suffering an injunction and a Receivership Order throughout that period is a merely conceptual problem. The impact of the loss enjoyment of property rights cannot be measured solely by what a party was or was not doing with those property rights prior to act of deprivation or restriction.

72. I understand that there are likely to be eight full months between the disposal of this Application as it is presently formulated, and the commencement of the trial as it is currently listed, but I see the force of Mr McWilliams' point that even if the possibility of a challenge by Mr D to his joinder were ignored altogether or determined in short order, it is still not realistic to believe that the existing trial date will be maintained.

73. I of course accept that any joinder order ever made will have some impact on the progress of a case. The fact that there will be that impact or prejudice to the interests of the defendant (perhaps significant) cannot of itself be an unarguable ground of objection. But it follows that the earlier the application is made, the less likely it is that the interests of the other parties will be prejudiced with the concomitant impact on the pursuit of the overriding objective. If a party leaves it very late, as is the position here (the eight months to trial being irrelevant to this analysis as I have pointed out) then the greater the risk that the application will be refused.

74. Whilst not being his strongest point, I can see some force in Mr McWilliams' submission that one consequence of the Covid pandemic is unlikely to be a prompt relisting of any lost trial date. This I also weight in the balance and it is a factor (though not in any way his fault) that

Mr Benkel has to accept is a consequence of this application not having been ventilated much earlier when there was ample opportunity for that to happen, even as late as February of this year.

75. It seems to me that to make the Order as asked by the Claimant at this juncture would drive the proverbial coach and horses through the Directions Order carefully assembled and agreed before the Deputy Master just three months ago. To now disturb the settled course of these proceedings ought only to be done for very good reason.

76. As the Deputy Judge explained in **Molavi**, the power to add a party to existing proceedings is essentially a case management decision and in my judgment he was right. He was certainly right to assert that an Order will only be made if it would further the overriding objective in the concrete circumstances of the case. So what are the circumstances of this case that must be balanced against the prejudice to the Defendants that I have described? The answer is the introduction of the JURAG Issue. Thus the balance is given a clear complexion: is it really necessary to disturb the course of this case at this late stage in the circumstances that I have set out, all for the benefit of introducing the JURAG Issue? I do not believe that it is.

77. In my judgment the JUGAG Issue might have a factual connection to the existing proceedings, but it is not necessary to dispose of it in order for Mr Benkel to achieve what he needs to in regard to the Defendants. Whilst it might have been beneficial to Mr Benkel and one might even say sensible to determine the JURAG Issue in the same proceedings as those involving the Defendants, that it not the question for me. I must decide whether it would be desirable (whether under CPR 19.2(2) (a) or (b)) to do so in the context of the overriding objective and I find, in the context of the matters to which I have referred, that it is not.

78. For the reasons I have set out, I am not prepared to make the Order for Joinder. Accordingly, the Claimants application under CPR 19.2(2) is dismissed.